September 1993

Race(ial) Matters: The Quest for Environmental Justice

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http://dx.doi.org/https://doi.org/10.15779/Z38C247

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Review Essay

Race(ial) Matters:* The Quest for Environmental Justice

Sheila Foster**

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INTRODUCTION

The essays contained in Race and the Incidence of Environmental Hazards: A Time For Discourse¹ and the recent report by the United States Environmental Protection Agency (EPA), Environmental Equity: Reducing Risk For All Communities² represent what appears to be a re-
markable consensus that low-income and minority communities bear a disproportionate share of environmental exposures and health risks. These two works also reflect the synergy of efforts by various elements of both the traditional civil rights and mainstream environmental movements to address issues of “environmental racism.” Indeed, the current “environmental justice,” or “environmental equity,” movement is a combined effort of grassroots activists, academics, lawyers, bureaucrats, government agencies, and concerned citizens to address allegations of “environmental racism” and other environmental issues relating to communities of color and poor communities.

Current discourse between the two movements exemplifies that each group has placed issues traditionally addressed exclusively by the other group on its agenda: environmental issues have been placed squarely on the agenda of the modern civil rights movement; and social justice issues are being put on the agenda of the modern environmental movement. While the civil rights movement has historically focused on obtaining economic and political rights for people of color, the environmental movement has traditionally concentrated on preserving and conserving our natural habitat as well as halting the proliferation of toxins and other pollutants into the environment. The convergence of these two move-


3. Environmental Equity, supra note 2, at 3 (finding that these populations experience higher than average exposures to selected air pollutants, hazardous waste facilities, contaminated fish, lead, and agricultural pesticides in the workplace); see generally Paul Mohai & Bunyan Bryant, Environmental Racism: Reviewing the Evidence, in Race and the Incidence, supra note 1, at 163 (reviewing studies finding distributional inequities by income and race) [hereinafter Environmental Racism].

4. There is current disagreement as to the appropriate name for the movement. The term “environmental justice” most accurately reflects the grassroots activism that has arisen in the past decade in response to the disproportionate environmental hazard exposure borne by poor and racial minority communities. See Charles Lee, Toxic Waste and Race in the United States, in Race and the Incidence, supra note 1, at 10, 12 (explaining the galvanization of the current movement in Warren County, North Carolina, where community activists staged a nonviolent civil disobedience campaign against the proposed siting of a polychlorinated biphenyl landfill in the primarily African-American county). Government bureaucracies frequently describe the movement as one seeking “environmental equity.” For instance, EPA in its Environmental Equity report noted that the disproportionate environmental risks borne by low-income and racial minority communities and the response of government agencies to that fact “have come to be known today as issues of ‘environmental equity.’” Environmental Equity, supra note 2, at 2. Regardless of the nomenclature used, the movement is a clear response to the disparate environmental problems that poor and racial minority communities face. For purposes of this essay, I will refer to the movement, and its goals, as “environmental justice.”

5. See Lee, supra note 4, at 12 (describing the role of activists, academics, government agencies, and others in shaping the current movement).

6. Illustrative of this fact is the recent elevation of Benjamin Chavis, who is responsible for coining the term “environmental racism,” to the presidency of the NAACP. See Neil A. Lewis, Man in the News: Benjamin Franklin Chavis Jr.: Seasoned by Civil Rights Struggle, N.Y. Times, Apr. 11, 1993, at 20.
ments not only provides a name describing the intersecting concerns of both movements, but also presents challenging and potentially groundbreaking paradigms to address those concerns.

One need not look much beyond these aforementioned works, however, to discover that formidable gaps, tensions, and disagreements exist and will likely continue to plague any resolution of the issues surrounding environmental "justice" or "equity." To that extent, these two works raise more questions than they resolve. Although neither Race and the Incidence nor Environmental Equity explicitly presents itself as representing any particular element of the environmental justice movement, both works reveal the types of responses that traditional civil rights advocates and mainstream environmentalists have utilized in addressing issues of race and environmental exposure. In this essay, I delineate important issues of both agreement and disagreement surrounding the merger of the environmental and civil rights agendas in the quest for environmental justice.

At the beginning of Race and the Incidence, the editors pose the question that frames the challenge from the traditional civil rights perspective: "Will people of color be able to redefine the traditional environmental movement to include issues of social justice?" Within the traditional civil rights paradigm, such redefinition may indicate an effort to obtain equal rights for racial minority communities to clean air, water, and land. It also signals civil rights advocates' embrace of environmental concerns that they traditionally viewed with distrust and hostility.

A coherent theme, if any, to the essays in Race and the Incidence, is the need to educate the public and raise its consciousness about the existence of environmental racism. Apart from this very broad thematic connection, however, this collection of essays does not present any overarching theoretical framework for assessing or addressing questions of race and exposure to environmental hazards. The essays range in scope, from summaries of the current sociological research documenting the disproportionate exposure to environmental hazards in poor and racial minority communities, to civil rights advocates' response to such unfairly distributed exposure in those communities, to historical analyses of the mainstream environmental movement and its failure to address issues involving race and the environment. The shortcoming of this book,
and of the response of the civil rights movement in general, is the failure to look beyond traditional frameworks of addressing racial injustices, especially given the changing nature of racism and the failure of those frameworks to alleviate the causes of racial injustice.

I suggest in this essay that civil rights advocates should look to the environmental law framework in pursuing environmental justice. Given the limitations of civil rights law, the environmental framework is better suited to address the phenomenon of environmental racism. Incorporating social justice and equity issues into the environmental framework will undoubtedly involve challenging implications for environmental law and policy. This review essay will explore some of those implications, and specifically, what the quest for “justice” in environmental law and policy will mean for its current framework.

Drawing from the essays in Race and the Incidence, I describe the development of national consciousness around environmental justice issues in part I, from the first studies released showing a connection between race, class, and exposure to environmental hazards, to increased community activism around the multifaceted issues intertwined with that connection. In part II, I suggest that a fundamental weakness in the evolution of the environmental justice movement is its failure to define and clearly delineate the structural and institutional nature of environmental racism. This failure has led to a misconceptualization of the problem, epitomized by the EPA report, and ultimately a denial of the connection between race and hazardous environmental exposure. In part III, I explore the different models utilized to assess and address the harms from environmental racism under both traditional civil rights and environmental harm paradigms. I conclude that although both models of harm assessment have limitations, the environmental law and policy model is better suited to address the harms arising from environmental

1, and a Summary, at 215, both written by Paul Mohai and Bunyan Bryant. In addition, it has fourteen chapters: Lee, Toxic Waste and Race in the United States, supra note 4, at 10; Dorecta Taylor, Can the Environmental Movement Attract and Maintain the Support of Minorities?, at 28; Henry V. Davis, The Environmental Voting Record of the Congressional Black Caucus, at 55; Michael Gelobter, Toward a Model of “Environmental Discrimination,” supra note 10, at 64; Robert Bullard, Environmental Blackmail in Minority Communities, at 82; Patrick C. West, Invitation to Poison?: Detroit Minorities and Toxic Fish Consumption from the Detroit River, at 96; Patrick C. West et al., Minority Anglers and Toxic Fish Consumption: Evidence from a Statewide Survey of Michigan, at 100 [hereinafter Minority Anglers]; Beverly H. Wright, Effects of Occupational Injury, Illness, and Disease on the Health Status of Black Americans: A Review, at 114; Harvey L. White, Hazardous Waste Incineration and Minority Communities, at 126; Conner Bailey & Charles E. Faupel, Environmentalism and Civil Rights in Sumter County, Alabama, at 140; Wm. Paul Robinson, Uranium Production and Its Effects on Navajo Communities Along the Rio Puerco in Western New Mexico, at 153; Paul Mohai & Bunyan Bryant, Environmental Racism: Reviewing the Evidence, supra note 3, at 163; Ivette Perfecto, Pesticide Exposure of Farm Workers and the International Connection, at 177; Mutombo Mpanya, The Dumping of Toxic Waste in African Countries: A Case of Poverty and Racism, at 204.
racism. Environmental law and policy, because they are preventative in nature, are free from the constraints of strict remedial and causation requirements that characterize civil rights law. In part IV, I critique the distributive focus of efforts to achieve environmental justice to date. I argue that justice in the environmental context must be more focused on the decisionmaking processes that determine distributive outcomes, particularly given the institutional and structural roots of environmental racism. Specifically, this model of justice will empower communities in the decisionmaking process to be able to determine what impacts and risks arising from hazardous environmental exposure they are willing to bear. I also argue that environmental law's process-oriented decisionmaking framework is well suited to accommodate such a model.

I
THE SHAPING OF A MOVEMENT

As many of the essays in the book Race and the Incidence attest to, the environmental justice movement has emerged from a primarily local, grassroots response to the siting of hazardous waste facilities in poor, racial minority communities. Emerging national consciousness about racial disparities in hazardous environmental exposure can be traced to the release of two studies in the mid to late 1980's: a 1983 study by the United States General Accounting Office (GAO) and a 1987 study by the United Church of Christ Commission for Racial Justice (UCC). Similar research documenting the relationship between race, class, and exposure to environmental hazards had preceded these studies. The widespread attention given to these two studies, however, raised the public's level of consciousness about the scope of that relationship to an unprecedented degree.

At the time of its release, the GAO study was one of the few environmental studies that established a correlation between race and proximity to toxic substances. However, since the GAO study was limited in regional scope, the UCC study has become the focus of the current

12. See, e.g., Lee, supra note 4 (describing several communities that are resisting the siting of hazardous landfills in their communities); White, supra note 11 (discussing hazardous waste incineration).


14. See Lee, supra note 4, at 10-11; Environmental Racism, supra note 3, at 163.

15. Lee, supra note 4, at 12.

16. The GAO study investigated the location of hazardous waste sites in the Southeastern region of the United States. It found that three of the four landfills in the Southeast are located in predominantly poor and African-American communities. GAO REPORT, supra note 13, at
environmental justice movement because of "its national scope and because of its strong and unequivocal findings regarding the distribution of commercial hazardous waste facilities." The UCC study documented both racial and socioeconomic demographic patterns associated with the location of hazardous waste sites across the United States. In his essay, *Toxic Waste and Race in the United States*, Charles Lee, the author of the UCC study, summarizes his findings:

Communities with a single hazardous waste facility were found to have twice the percentage of minorities as communities without such a facility (24 percent vs. 12 percent). Communities with two or more facilities have more than three times the minority representation than communities without any such sites (38 percent vs. 12 percent). Although, as expected, communities with hazardous waste sites generally proved to have lower socio-economic status, the economic status of residents was not as good a predictor of a facility's existence as race itself.

While the GAO and UCC studies documented a connection between race, class, and the location of hazardous waste facilities, other studies have provided similar documentation for other environmental hazards ranging from air pollution to the consumption of toxic fish. In their essay, *Environmental Racism: Reviewing the Evidence*, Paul Mohai and Bunyan Bryant summarize the evidence from fifteen studies conducted between 1971 and 1992 that "provide systematic information about the social distribution of environmental hazards." Each of the studies (including the UCC and GAO studies) measured the distribution of environmental hazards by correlating the average median household and family income of the community and the minority percentage of the community with the degree of exposure to the hazard. Most concluded that the distribution of the environmental hazard studied was inequitable by both income and race. The totality of the studies, and specifically the UCC's conclusion that the relationship between race and the location

1. 17. *Environmental Racism, supra* note 3, at 163. Toxic emissions released in the air from hazardous waste facilities have been shown to cause a variety of health problems including cancer, genetic damage, birth defects, reproductive disorders, and nervous system damage. White, *supra* note 11, at 126-28. Moreover, health problems can also stem from stress associated with feelings of helplessness of people chronically exposed to toxic emissions from facilities located in their communities. *Id.* at 129. Stress related illnesses weaken the body's ability to fight off potential diseases and leave those in the community with a heightened sense of fear and anxiety in their everyday lives. *Id.*


19. See *Environmental Racism, supra* note 3, at 165-69 (reviewing studies on air pollution, solid waste, pesticides, and toxic fish consumption); *Minority Anglers, supra* note 11, at 100.


21. See id. at 166. Studies have gone further to conclude that race alone is a more potent factor in measuring which communities are likely to bear a disproportionate share of environmental hazards. In fact, the UCC study is most often cited for its conclusion that race is the most important predictor in the location of hazardous waste facilities, even when socioeconomic-
of hazardous waste facilities could not be explained by chance but rather by race or some factor related to race, cemented into national consciousness a new term in environmental and civil rights activism: "environmental racism." 

That the scope of the current research begs for a further investigation of the relationship among race, class, and exposure to environmental hazards other than toxic waste sites is obvious. As Mohai and Bryant note, most of the studies conducted to date have focused on the exposure of various communities to air pollution and hazardous waste. National, systematic studies on the relationship of race, class, and the exposure to other "environmental hazards," such as water pollution, pesticides, asbestos, lead poisoning, and toxic fish consumption, are noticeably lacking. These honest assessments of the weaknesses in the documentation of the phenomenon of environmental racism should not be seen as an expression of doubt that poor and racial minorities bear the disproportionate burden of environmental hazards. Rather, such assessments should be taken as an indication of the need to conduct more research and to educate the public further about the widespread nature of the phenomenon.

Though the movement for environmental justice existed on a local, grassroots level prior to the release of the GAO and UCC studies, these studies nevertheless became a major catalyst for activists seeking justice in environmental policymaking and in the distributional outcomes of economic factors are taken into account. E.g., id. at 163; Lee, supra note 4, at 14-15.

Mohai and Bryant draw the following conclusions about the aggregate significance of existing research:

[Regardless of the environmental hazard and regardless of the scope of the study, in nearly every case the distribution of pollution has been found to be inequitable by income. And with only one exception, the distribution of pollution has been found to be inequitable by race. Where the distribution of pollution has been analyzed by both income and race (and where it was possible to weigh the relative importance of each), in most cases race has been found to be more strongly related to the incidence of pollution. Environmental Racism, supra note 3, at 167.]

22. The UCC study, and other similar studies, attributed certain race-related factors as playing a significant role in the location of toxic waste facilities. Some of these factors include: "1) the availability of cheap land, often located in minority communities and neighborhoods; 2) the lack of local opposition to the facility, often resulting from minorities' lack of organization and political resources as well as their need for jobs; and 3) the lack of mobility of minorities resulting from poverty and housing discrimination that traps them in neighborhoods where hazardous waste facilities are located." Environmental Racism, supra note 3, at 164 (citations omitted).

23. Lee, supra note 4, at 10 (noting the coining of the term by the then Executive Director of the UCC, Dr. Benjamin Chavis, Jr., after the release of the UCC study).


25. While some studies have documented some connection between exposure to certain hazards, such as pesticide exposure or toxic fish consumption, and race and socioeconomic demographics, these studies have been limited either in geographic scope or inconclusive as to the relative weight of race and class in the exposure rates of these hazards. See Environmental Racism, supra note 3, at 167-69.
vironmental degradation. Armed with this increased consciousness and confirmation from the research documenting racial and socioeconomic disparities in toxic exposures, cadres of concerned citizens, activists, academics, and lawyers around the country continue to mobilize around the environmental threat to poor and minority communities.\textsuperscript{26} They have done so, as Robert Bullard explains, primarily by becoming "'experts' on the toxics issue" and by "adopt[ing] confrontational strategies (e.g., protests, neighborhood demonstrations, picketing, political pressure, litigation, etc.) to reduce and eliminate environmental stressors."\textsuperscript{27} In doing so, environmental justice advocates have uncovered some of the precipitating factors underlying the disparities in environmental hazards exposure.

One of the primary factors that have influenced the disproportionate location of environmental toxins and hazards in communities of color is the "Not In My Backyard" (NIMBY) syndrome. The NIMBY syndrome consists of public opposition from more vocal, and politically powerful, middle and upper income communities to the siting of a toxic facility, or other "Locally Unwanted Land Use" (LULU) in their neighborhoods.\textsuperscript{28} As more affluent communities become increasingly vocal in their opposition, calling for the facilities to be sited "somewhere else," private industries have shifted their siting efforts toward other communities.\textsuperscript{29} As Robert Bullard explains: "'Somewhere Else USA' often ends up being located in poor, powerless, minority communities."\textsuperscript{30} Since "[m]inority communities do not have the resources, or [government and industry] contacts, to initiate or sustain the proactive behavior found in more affluent communities,"\textsuperscript{31} toxic facilities and other environmental hazards end up in those communities.

A practice related to the NIMBY syndrome is "environmental blackmail," whereby "[c]ommunities that agree to host hazardous waste and other noxious facilities are promised compensation in an amount such that the perceived benefits outweigh the risks."\textsuperscript{32} This phenomenon is based on the notion that the existence of noxious facilities and other hazards in minority communities constitutes an "economic tradeoff" for having jobs near "poverty pockets."\textsuperscript{33} Companies offering economic incentives have frequently succeeded in convincing affected communities that reforms in environmental policies, and opposition to toxic facility

\textsuperscript{26} See Lee, supra note 4, at 18 (noting the grassroots activism growing out of increased awareness from the documentation of the impact of toxic hazards in minority communities).
\textsuperscript{27} Bullard, supra note 11, at 87, 90.
\textsuperscript{28} Id. at 85.
\textsuperscript{29} Id. at 85, 91.
\textsuperscript{30} Id. at 85.
\textsuperscript{31} White, supra note 11, at 135.
\textsuperscript{32} Bullard, supra note 11, at 84.
\textsuperscript{33} Id. at 84, 86.
sittings, will result in plant closures, layoffs, and economic dislocation.\textsuperscript{34} Minority communities are often vulnerable to such inducements and minimize their opposition to sitings because they are beset by rising unemployment, extreme poverty, a shrinking tax base, and a decaying business infrastructure.\textsuperscript{35}

Of the factors believed to influence the distributional outcomes of environmental hazards, perhaps the most deceptive to environmental justice advocates is the invocation by private industry of race-neutral grounds in targeting certain communities for hazardous waste facilities. Often no visible smoking gun exists behind the decision to place a toxic facility in a neighborhood composed primarily of racial minorities. The reasons frequently given by companies for siting are that such communities have low-cost land, sparse populations, and desirable geological attributes.\textsuperscript{36} These sites typically also tend to have poorer, politically disenfranchised populations.\textsuperscript{37} In pointing to siting decisions as evidence of "racism," environmental justice advocates have begun to draw a connection between such race-neutral factors and their racial implications. For instance, as Conner Bailey and Charles Faupel explain, although low population density is related to natural resource endowments and economic opportunity, it is all too often a good indicator of poverty in rural areas.\textsuperscript{38} In turn, poverty is often a good indicator of the racial makeup of a community.\textsuperscript{39} Such connections lend credence to claims of environmental racism and, more particularly, to the contention that the distribution of hazardous environmental exposure cannot be understood in isolation from race.\textsuperscript{40}

Ultimately, however, it is the "success" of environmental laws that leads to the racially disparate outcomes in the distribution of environ-

\begin{itemize}
  \item \textsuperscript{34} Id. at 83.
  \item \textsuperscript{35} Id. at 84. Robert Bullard suggests that, aside from adding to the racial disparities in exposure, "environmental blackmail" policies raise a far broader moral issue: "That is, should one part of society (the affluent) pay another part of society (the disadvantaged) to accept the risks that others can afford to escape?" \textit{Id.} These risks are becoming less acceptable to communities of color, in part, because of the realization that negotiated economic benefits may not be sufficient to compensate them for the long-term and life-threatening illnesses that may beset their communities. \textit{Introduction, supra} note 7, at 7. As communities of color become aware of the health risks and siting inequities resulting from environmental hazards, the appeal of economic incentives becomes increasingly diluted. Bullard, \textit{supra} note 11, at 93.
  \item \textsuperscript{36} Joan Bernstein, \textit{The Siting of Commercial Waste Facilities: An Evolution of Community Land Use Decisions}, 1 KAN. J.L. \& PUB. POL'Y 83, 83-84 (1991) (Vice President of Environmental Policy and Ethical Standards at Waste Management describing historical site selection as being governed by economic factors); Bailey \& Faupel, \textit{supra} note 11, at 150.
  \item \textsuperscript{37} Bailey \& Faupel, \textit{supra} note 11, at 150.
  \item \textsuperscript{38} Id. ("Among Alabama's 67 counties, the ten with the lowest population densities also have average per capita incomes well below the state average . . . .").
  \item \textsuperscript{39} Id. (noting that Blacks are a majority in six of ten Alabama counties with the lowest population densities and lower than average per capita incomes).
  \item \textsuperscript{40} Id. at 151.
\end{itemize}
mental hazards.\textsuperscript{41} Although environmental laws promise uniform protection from known environmental hazards, environmental justice advocates believe that governmental intervention aggravates the regressive distribution of such hazards.\textsuperscript{42} For instance, in spite of claims of broad-based protection by federal legislation, laws like the Federal Insecticide, Fungicide, and Rodenticide Act\textsuperscript{43} leave farmworkers unprotected in the interest of economic efficiency and industry preferences.\textsuperscript{44} Moreover, because of the procedural emphasis in many environmental laws, hazardous waste siting decisions are often political decisions, which leave historically excluded people out of the decisionmaking processes.\textsuperscript{45} The result is that while "rich neighborhoods are able to leverage economic and political clout into fending off unwanted uses," poor and minority neighborhoods are left without a choice except to tolerate various unwanted toxic facilities.\textsuperscript{46}

As the essays in \textit{Race and the Incidence} reflect, much of the shaping of the environmental justice movement to date has come from the discovery of the disparate outcomes in exposure to environmental hazards and a fairly in-depth exploration of the multifaceted reasons behind those outcomes. To that extent, the essays constitute a thorough primer for those unfamiliar with the phenomenon now commonly referred to as environmental racism. What is markedly absent from the book of essays, and from the movement in general, is a theoretically sound articulation of the concept of environmental racism and the implications of calls for social justice in environmental policy and decisionmaking. That these weaknesses can lead the concept of environmental racism, and the quest for environmental justice, to an epistemological abyss is made painstakingly evident in EPA's \textit{Environmental Equity} Report. How this is allowed to happen, and possible responses from environmental justice advocates, are the subject of the remainder of this essay.

\begin{itemize}
\item \textsuperscript{41} See Luke W. Cole, \textit{Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law}, 19 ECOLOGY L.Q. 619, 643 (1992) ("Mainstream environmentalists see pollution as the failure of government and industry," whereas "grassroots activists come to view pollution as the success of government and industry . . . ").
\item \textsuperscript{42} Gelobter, \textit{supra} note 10, at 64.
\item \textsuperscript{44} Perfecto, \textit{supra} note 11, at 177, 182-83 (noting that the Act permits registration, for experimental use, of unregistered and untested pesticides and thus allows farmworkers to be used as "guinea pigs"); \textit{see also} Cole, \textit{supra} note 41, at 643.
\item \textsuperscript{45} Bullard, \textit{supra} note 11, at 85; \textit{see also} Cole, \textit{supra} note 41, at 646 ("In the end, it is those with political clout who win in the administrative process or siting decision.").
\item \textsuperscript{46} Bullard, \textit{supra} note 11, at 85.
\end{itemize}
II
UNDERSTANDING AND THEORIZING "ENVIRONMENTAL RACISM"

A. Epistemological Weaknesses

To be sure, the term "environmental racism" has come to be associated with various studies demonstrating that racial minority communities are more likely than their majority counterparts to live near housing with lead-based paint and near freeways, sewer treatment plants, municipal and hazardous waste landfills, air pollution, and other environmental and health hazards. On its face, then, a fair construction of this term could be understood to mean exactly what the research has shown. That is, racial minority communities are disproportionately exposed to a variety of environmental hazards. The racism is deemed inherent in the disparate or inequitable outcomes (i.e., exposure).

To the extent that the construction of the term "environmental racism" relies upon the disparity of outcomes for its normative strength, however, it suffers from formidable weaknesses. Classifying the racial disparities in exposure rates to environmental hazards as environmental racism invites a fundamental theoretical challenge. That is, what do we mean when we call an outcome "racist" or evidence of "racism"? Noting that "environmental" modifies "racism" in the term "environmental racism," Gerald Torres cautions:

[I]n order to make sense of the term [environmental racism] one must have a clear idea of what it means to call a particular activity racist. Racism is one of those terms in contemporary political usage that is highly charged and which has an apparent meaning. The meaning of the term is clouded to the extent that it gets broadly applied to a variety of activities and outcomes. But racism has been and should be a term of special opprobrium. We risk having the term lose its condemnatory force by using it too often or inappropriately. By calling something racist when another term might suffice [sic] risks subjecting the word to a kind of verbal inflation.47

Legally, and even socially, "racism" has been construed to mean intentional or purposeful conduct on the basis of race, or at least some consciousness of race as a factor motivating conduct.48 Moreover, such

construction requires that the intent be attached to an individual actor. Labeling the outcomes that correlate race and exposure to environmental hazards as "racist" invites the demand for evidence of an overt race-conscious impetus and a "single bad actor." Indeed, the term "environmental racism" begs the causation question. Current constructions of racism insist on a neat correlation between the cause of the racial injury and intentional conduct on the basis of race. For instance, in concluding that evidence that toxic waste facilities are located disproportionately in minority communities constitutes environmental racism, does it matter whether communities of color are "targeted" by the government or the industry for siting such facilities because of the racial composition of such communities? Does it matter which came to the neighborhood first, the facility or the poor and/or the minorities? Facts showing that the communities were disproportionately poor and/or minority at the time the facility was sited would provide some evidence that siting decisions may have been racially motivated or that the siting decision has a disproportionate effect on those communities. Without such evidence, the charge of environmental racism is open to the counterargument that if a community was not predominantly minority at the time a siting decision was made, then the result—that the community then became minority—is not racist. Rather, the results

49. See Alan D. Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 63 MINN. L. REV. 1049, 1052-57 (1978) (arguing that antidiscrimination law is based upon a model of discrimination that is focused on individual actors through a "perpetrator" perspective).

50. Lawrence, supra note 48, at 318-19; see also Cole, supra note 41, at 642. Cole describes the legal-scientific environmental movement's law and policy approach as the "single bad actor" approach: pollution occurs only when "a particular actor (such as a polluting corporation) acts outside societal norms; laws are written to punish particular violators of pollution standards." Id.

51. Alan Freeman, Antidiscrimination Law: The View from 1989, 64 TUL. L. REV. 1407, 1418 (1990); Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673, 677 (S.D. Tex. 1979), aff'd without op., 782 F.2d 1038 (5th Cir. 1986). In Bean, the district court held that plaintiffs "must show not just that the decision [to grant a permit to site a solid waste facility] is objectionable or even wrong, but that it is attributable to an intent to discriminate on the basis of race." Id.; see also Vicki Been, What's Fairness Got To Do With It?: Environmental Justice and the Siting of Locally Undesirable Land Uses, 78 CORNELL L. REV. 1001, 1016-17 (1993) (describing the "causation" objection to environmental racism claims as posing the question whether the disproportionate location of LULU's in racial minority communities results from the siting process or from the dynamics of the housing market).

52. But see R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991), aff'd, 977 F.2d 573 (4th Cir. 1992). In R.I.S.E., Inc., the district court found no discriminatory intent in the siting of a landfill in a predominantly Black area of a county despite evidence that, during the past 20 years, the county's three other landfills had been placed within one mile of neighborhoods that were respectively 100%, 95%, and 100% Black. The court concluded that though the placement of landfills has had a disproportionate impact on Black residents, "the Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups." 768 F. Supp. at 1150. Instead, the clause "merely prohibits government officials from intentionally discriminating on the basis of race." Id.

53. See, e.g., Bean, 482 F. Supp. at 677. In refusing to grant a preliminary injunction, the
instead reflect the dynamics of a "free market." Indeed, the invariable judicial response to claims of environmental racism has been a rejection of those claims for failure to prove the requisite discriminatory intent and causation, notwithstanding demonstrations of disparate impact and discriminatory outcomes.

That claims of environmental racism have not fit into the existing legal construction of racism is not surprising given increasingly stringent judicial requirements of intent and causation. There is, however, a more fundamental weakness that leaves the concept of environmental racism penetrable. This weakness is the failure to explicate, and a general lack of understanding of, the structural nature of contemporary racial oppression and subordination. Historically, disparate racial treatment and impacts were easily traceable to overt, racially motivated actions. However, partly as a result of laws that punish and forbid such overt behavior, the nature of racism has become appreciably more subtle and structural. A decisionmaker will often not seek a discriminatory outcome; the decision will reflect, rather, the influence of unconscious cultural and social attitudes. Thus, contemporary racism cannot be understood apart from

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Bean court held that certain factual issues relevant to the establishment of discriminatory purpose needed to be resolved at trial. Among those issues was the question of whether the company proposing to site the facility at issue was informed of the racial composition of the community at the time of the siting. \textit{Id.} at 680-81.

54. \textit{See} \textit{Been, supra} note 51, at 1017 (arguing that "market dynamics" have significantly contributed to the racial disparity in the location of LULU's).

55. Even where there have been clear disparities in the location of such facilities, it has been difficult to provide "statistically significant" evidence of disparate impact because of the fact that relatively few facilities exist. \textit{See Bean, 482 F. Supp.} at 677; East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning and Zoning Comm'n, 706 F. Supp. 880, 885-87 (M.D. Ga.), aff'd, 896 F.2d 1264 (11th Cir.), \textit{opinion replaced by} 846 F.2d 1264 (11th Cir. 1989); \textit{R.L.S.E., Inc.}, 768 F. Supp. at 1149.

56. Noting the increasing social and economic deterioration of the Black working class and lower income communities, the rise of drugs and violence, and the proliferation of single-headed households beginning in the mid-1980's, Manning Marable explains the nature of modern racial subordination in the following terms:

The irony of these new realities was that the latest structures of domination no longer assumed the classical form of "Jim Crow" racial segregation. No [government official] would dare utter the term "niggers." No corporate official, moving his firm's productive resources and jobs out of the inner city, would justify economic divestment in crudely racist terms. Blacks, Hispanics and other people of color were being more thoroughly oppressed in economic, political, social and educational institutions, without being stigmatized specifically in "racial" terms. This paradox of desegregation in the 1980s and early 1990s meant that black oppression was more systematic and sophisticated than before, and that only a fragile elite had been granted opportunities and privileges the white middle class had long taken for granted.


57. Charles Lawrence explains this best when he says:

Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by
the historical and social contexts that influence discriminatory outcomes and create structures and institutions that continually reinforce those outcomes. As Gerald Torres aptly explains, "the term racism draws its contemporary moral strength by being clearly identified with the history of the structural oppression of African-Americans and other people of color in this society."58

Though the totality of the essays in Race and the Incidence can be read as an acknowledgement of the "institutional understanding" of environmental outcomes,59 the essays in general fail to articulate coherently what exactly is at work when we refer to environmental racism. Michael Gelobter's essay60 is the one notable exception. Gelobter explains that discriminatory outcomes in the environmental context rarely result solely from inherently discriminatory environmental rules or the "prejudiced" behavior of individuals within government institutions, such as EPA.61 Instead, Gelobter asserts that "[d]iscriminatory outcomes should . . . be seen as the interaction of internal processes, external structures, and wider ideological and historical contexts and understandings."62

Understanding environmental racism, Gelobter argues, requires a framework that retains a broader structural view of economic and social forces in influencing discriminatory outcomes, while isolating the dynamics within environmental bureaucracies that also contribute to such outcomes.63 Traditional economic theory, Gelobter explains, relies on market dynamics to explain discriminatory environmental outcomes. That theory rationalizes that the poor, less able to buy in cleaner areas, end up living in areas with poor environmental quality.64 A realistic analysis of structural processes, he argues, will include an analysis of social forces that drive markets and bureaucracies. Factors both external to environmental enforcement agencies, such as demographic changes and the locational patterns of polluters, and internal to those agencies, such as patterns of environmental regulation, enforcement, and imple-

Lawrence, supra note 48, at 322.
58. Torres, supra note 47, at 839.
59. Cole, supra note 41, at 643 (explaining that, in contrast to the model that seeks to identify and punish individual bad actors, the institutional model identifies polluters "not as explanations themselves, but merely as part of an overall system centered on maximizing profit"); see also Bullard, supra note 11, at 92 (acknowledging a link between institutional racism's effect on the quality of life in minority communities and exposure to environmental hazards in those communities).
60. Gelobter, supra note 10.
61. Id. at 64, 73.
62. Id. at 74.
63. Id. at 76.
64. Id.
mentation, should undoubtedly inform a concept of environmental racism. To appreciate the meaning of environmental racism, then, one must acknowledge the institutionalization of unconscious biases, exclusionary processes, and normative judgments that influence racially meaningful social structures, which in turn manifest racially disparate outcomes. The historical racism that influences these processes and structures is antecedent to the effects produced by those structures and exposes forces that are already at work. There is no distinct phenomenon of environmental racism, if seen as a manifestation of historical racism and antecedent structural forces influenced by that racism. Environmental racism is thus less prescriptive and more descriptive of forces that manifest themselves in racially disparate outcomes in hazardous environmental exposure. In that sense, "environmental" not only modifies "racism," but ultimately corroborates it.

B. The Resulting Abyss

The failure to provide a cogent theoretical understanding and documentation of the relationship between historical racism, antecedent structural forces influenced by that racism, and racially disparate outcomes in hazardous environmental exposure leads to two consequences. Both consequences are epitomized in EPA's Environmental Equity report. First, the disproportionate environmental burdens borne by people of color are attributed to the very factors that are part and parcel of the phenomenon of environmental racism. A second consequence quickly follows from the first: institutional abdication of responsibility and concomitant claims of innocence.

For instance, EPA concludes that air pollution is "primarily an urban phenomenon, where emission densities tend to be the highest." The Agency acknowledges studies demonstrating that African-Americans are shown to have higher levels of carbon monoxide in their blood than Whites and that poor minorities tend to have higher levels of nitrogen dioxide in their blood. However, it attributes this outcome to the fact that "[a] large proportion of racial minorities reside in metropolitan areas and [therefore] may be systematically exposed to higher levels of certain air pollutants." Similarly, in reviewing one study that concluded that Hispanic mothers had higher levels of certain pesticides in their milk, EPA criticized the study's failure to adjust for "the fact that most Hispanic mothers were from the Southwest, where pesticide use tends to be

65. See id. at 77-80.
66. ENVIRONMENTAL EQUITY, supra note 2, at 13.
67. ENVIRONMENTAL EQUITY SUPPORTING DOCUMENT, supra note 2, at 11.
68. ENVIRONMENTAL EQUITY, supra note 2, at 13.
It concluded that a review of the research indicates that "since racial and ethnic minorities comprise the majority of the documented and undocumented farm workforce, they may experience higher than average risk from agricultural chemicals." Likewise, the report attributes the disparity in exposure to contaminated fish consumption among racial and ethnic groups to the fact that "some populations . . . and some cultural groups consume much more fish than the average population." Higher minority exposure to pollution from toxic waste sites is similarly attributed to the fact that "minorities are more likely to live near a commercial or uncontrolled hazardous waste site" than nonminorities. Thus, according to EPA, "[i]t is becoming increasingly apparent that a person's activity pattern is the single most important determinant of environmental exposures for most pollutants."

EPA's conclusions invite a kind of circular reasoning that suggests that race, historical patterns, and present "choices" of residence, employment, and diet are only coincidentally related. In making the connection between behavior and exposure, EPA is quick to resort to "victim blaming" and to proclaim its relative "innocence" in safeguarding the public from uncontrolled exposure to environmental hazards. In doing so, the Agency shows no appreciation, or acknowledgment, for the social con-

70. Id.
71. Id. at 12; see also Minority Anglers, supra note 11, at 110 (finding that Native Americans consumed 36% more fish and African-Americans 13% more fish than the White population).
73. Id. EPA drew a distinction between "actual" and "potential" exposure from environmental hazards and pollutants. "Potential" exposures represent the "environmental measurements" in air, water, soil, or food. Environmental Equity, supra note 2, at 13. For instance, "the level of outdoor air pollution in a particular community is a measure of the potential exposure for the residents." Id. "Actual" exposure, on the other hand, is said to depend on a multitude of behavioral and societal factors as well as biological susceptibility. Environmental Equity Supporting Document, supra note 2, at 14. EPA concluded that people of color may have greater "potential" exposure to some pollutants because they tend to live in urban areas, are more likely to live near a waste site, or exhibit a greater tendency to rely on subsistence fishing. Environmental Equity, supra note 2, at 12.
74. "Victim blaming" may be defined as attributing to either bad habits or genetics the higher incidence of environmental injuries to minority persons. See Wright, supra note 11, at 118.
75. This victim-blaming response to discriminatory outcomes has been criticized in the employment context. See, e.g., Vicki Shultz, Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 Harv. L. Rev. 1749, 1754 (1990) (criticizing a district court's interpretation of sex segregation in employment in EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), aff'd, 839 F.2d 302 (7th Cir. 1988), as the expression of women's choice). In response to claims of race and sex discrimination, employers have asserted the "lack of interest" defense as an explanation for disparate outcomes in hiring minorities and women in certain jobs. That explanation posits that women and/or minorities lack interest in, or do not choose, certain jobs instead of being excluded from certain jobs because of their sex or race. Id.
text and structural dynamics that influence the choices, mobility, and employment of people of color. By taking the current research at its word, that environmental racism is inherent in the disparate exposure rates, EPA was able to attribute the outcomes to the very social factors that influence those outcomes. In doing so, EPA dissociated itself from the structural and social context in which it exists.

Environmental racism can be said to be a manifestation of the effects of discriminatory housing and real estate policies and practices, residential segregation and limited residential choices influenced by such discrimination, discriminatory zoning regulations and ineffective land use policies, racial disparities in the availability of jobs and municipal services, imbalances in political access and power, and "white flight" from cities that has created racially homogenous suburbs and impoverished cities. Consequently, as Robert Bullard explains, "[a]lthough the effects of pollution have no geographic boundaries, blacks and lower income groups are often 'trapped' in polluted environments" because of the very factors discussed above. This is true even where the demographics of that community were vastly different at the time the neighborhood or geographic area first became polluted. Coupled with government bu-

76. In reviewing early (1967-71) race discrimination cases that rejected the "lack of interest" explanation for the disproportionate number of minorities in the lowest-paid, most menial jobs, Vicki Shultz recounts the federal courts' approach to analyzing the employment "choices" of minorities. That approach presumed that continuing patterns of racial segregation were attributable not to minorities' independent preferences for lower-paying, less-challenging jobs, but rather to historical labor market discrimination that inevitably influenced minority job aspirations and opportunities and created racial disadvantage in the labor market. Shultz, supra note 75, at 1771-75. A core assumption of this approach is that choices do not exist in a vacuum and that institutions do not operate apart from the social forces that influence individual choices: "By acknowledging that people's work aspirations and identities are shaped in the context of what larger institutional and legal environments define as possible, early courts refused to allow employers to escape responsibility for the collective history of labor market discrimination by pinning the blame on its victims." Id. at 1775.

77. See, e.g., Bullard, supra note 11, at 92, 95. Bullard notes that:

The end result of the nation's apartheid-type policies on black households has meant limited mobility, reduced housing options and residential packages, and decreased environmental choices. For example, air pollution in inner-city neighborhoods can be found at levels up to five times greater than those found in suburban areas. Urban areas, in general, have "dirtier air and drinking water, more waste water and solid waste problems, and greater exposure to lead and other heavy metals than non-urban areas."

Id. at 92 (quoting Richard Kazis & Richard L. Grossman, Fear at Work: Job Blackmail, Labor, and the Environment 48 (1982)).

78. Bullard, supra note 11, at 94-95.

79. See, e.g., Regina Austin & Michael Schill, Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice, 1 Kan. J.L. & Pub. Pol'y 69, 69-70 (1991). The authors note that there are typically three patterns giving rise to the disproportionate location of sources of toxic pollution in poor minority enclaves, all attributable to various developmental patterns:

In some cases, the residential communities where poor minorities now live were originally the homes of whites who worked in the facilities that generate toxic emissions. The housing and the industry sprang up roughly simultaneously. Whites vacated the
raucracies' lack of enforcement and compliance with environmental protection laws, environmental racism reflects less the dynamics of a "free" market, and more the institutional and structural forces that contribute to the subordination of people of color.

Existing research and discourse about the phenomenon of environmental racism, however, stop far short of articulating and providing a coherent epistemological understanding of how and why racially disparate environmental outcomes, so well-documented in numerous studies, are a manifestation of the history of the structural oppression of people of color in this society. Indeed, environmental problems are intertwined with, and are simply another manifestation of, other social, economic, and political ills that continue to befall poor people of color in this society. Moving beyond the constraining construction of what is recognizable as racism, primarily molded by shifting judicial concepts of that doctrine, requires bridging the conceptual gap between disparate racial outcomes and the structural forces that virtually dictate those outcomes. Until the discourse and research fill this gap, we will not truly understand "the pervasiveness and persistence of racism despite changes at the institutional and individual levels in the past twenty years."
III
ASSESSING AND ADDRESSING THE HARM OF ENVIRONMENTAL RACISM

Traditionally, the civil rights movement has not embraced environmental degradation issues and their resulting health hazards as a concern. Instead, the civil rights movement has focused on securing for racial minorities the same basic rights to social goods, such as educational and employment opportunities, housing accommodations, economic development, and political participation, as those shared by nonminorities. The environmental movement, in contrast, has focused on the human health and ecological effects of degradation in air and water quality, pesticide use, and degraded landscapes. By focusing on environmental conservation issues to the exclusion of other social concerns such as poverty, the environmental movement has been criticized for “[viewing] problems in racial minority communities as an unwelcome stepchild.”

A. Environmental and Civil Rights Paradigms

Given the traditionally diverging concerns of the two respective movements, the environmental and civil rights paradigms present different approaches and limitations for assessing and addressing the harm of environmental racism. The civil rights paradigm conceptualizes harm as a right’s deprivation or violation. The essence of harm assessment under this paradigm is comparative, determining whether an individual has been denied rights shared by others solely on the basis of group membership. The denial of such rights has been statutorily and judicially constructed as an individual, as opposed to group, deprivation.

83. Lee, supra note 4, at 20; Taylor, supra note 11, at 28.
84. Lee, supra note 4, at 20.
85. See Taylor, supra note 11, at 31.
86. Lee, supra note 4, at 20.
87. Civil rights laws thus prohibit the denial of civil rights, such as jobs or voting, on the basis of race or other impermissible characteristics. See, e.g., Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000a to 2000e-17 (West 1981 & Supp. 1993) (outlawing discrimination in places of public accommodation and in employment on basis of race, color, religion, sex or national origin); Voting Rights Act of 1965, 42 U.S.C. § 1973 (1988) (outlawing denial or abridgement of the right to vote on account of race or color).
88. This “antidiscrimination” approach focuses on individual acts of discrimination, or deprivation of rights, by an alleged perpetrator. See Lawrence H. Tribe, American Constitutional Law § 16-21, at 1515, 1519 (2nd ed. 1988) (“Discrimination is an ‘act based on prejudice,’ and its essential elements are therefore a factor and decision based on invidious rather than rational grounds.”). See generally Freeman, supra note 49 (describing and explaining Supreme Court racial discrimination decisions).
89. For example, Title VII of the Civil Rights Act of 1964 provides that employers must not fail or refuse to hire, or discharge, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of an individual's race, color, sex, or national origin. 42 U.S.C. § 2000(e)-2(a) (1988). An employer is
Another version of harm within the civil rights paradigm is the right not to be subordinated. This theory holds that "[t]he Constitution may be offended not only by individual acts of racial discrimination, but also by government rules, policies or practices that perennially reenforce the subordinate status of any group." Within the civil rights paradigm, then, the harm of environmental racism can be either the denial of a right to a clean environment shared by others or the right not to bear a disproportionate burden of environmental hazards.

Central to assessing a harm in the civil rights paradigm, is the element of causation. The civil rights paradigm will only recognize a right's deprivation where it can be shown that the harm was caused by the alleged perpetrator. As noted in part II, the requirement of causation has proven to be fatal to environmental harm claims within this para-

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further forbidden to classify applicants or employees in any way that would tend to deprive any individual of employment opportunities because of such individual's race, color, sex, or national origin. Id. Likewise, the Equal Protection Clause has been interpreted to prohibit government from allocating societal benefits and burdens to individuals on the basis of "suspect" classifications, such as race, absent a compelling governmental reason. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986). The U.S. Supreme Court has recently reiterated that rights created by the Equal Protection Clause have been held to be guaranteed to the individual. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (citing Shelly v. Kraemer, 334 U.S. 1, 22 (1948)).

90. See Marable, supra note 56, at 187 (civil rights movement's goals were "the elimination of social, political, legal and economic barriers that forced black Americans into a subordinate status"); Tribe, supra note 88, § 16-21 (describing antisubjugation theme in equal protection jurisprudence that aims to break down legally created or legally reinforced systems of subordination that treat some people as second class citizens; the principle is more concerned with the burdens government action imposes on suspect groups than with what prejudices lurk in the hearts and minds of government actors).

91. Tribe, supra note 88, § 16-21 (citing the "group-disadvantaging principle" set forth by Owen M. Fiss in Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 108, 147-56 (1976)). Group-disadvantaging theories of harm, however, have been soundly rejected by the U.S. Supreme Court. See, e.g., City of Richmond, 488 U.S. at 493-94 (holding that the rights established by the Equal Protection Clause are personal rights and are not dependent upon the racial group the individual belongs to).

92. See Introduction, supra note 7, at 6; Bullard, supra note 11, at 91 ("Documentation of civil rights violations has strengthened the move to make environmental quality a basic right of all individuals.").

93. For instance, under Title VII, acts of racial discrimination must be identified with particularity and those acts must be attributable to the fault of the employer. See 42 U.S.C. § 2000e-2(k) (Supp. III 1991); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989). Although the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) shifted the burden of justifying the employment practice established in Wards Cove from the plaintiff to the employer, it retained the requirement of causation. The statute provides that disparate impact is established by a demonstration that the employer uses a particular employment practice that causes a disparate impact and the employer fails to prove that the challenged practice is both "job related" and consistent with "business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i); see also Freeman, supra note 51, at 1409-13 (describing this as the victim/perpetrator approach whereby civil rights laws have been interpreted such that violations occur only where "actions of identifiable perpetrators . . . have purposely and intentionally caused harm to identifiable victims").
Thus, seemingly subordinate social conditions, such as the disproportionate environmental hazard exposure borne by racial minorities, do not constitute presumptive harms within the civil rights paradigm, absent an identifiable link to a responsible perpetrator.  

In the environmental paradigm, harm is the health loss resulting from environmental degradation and contamination. Harm is measured and conceptualized in the environmental paradigm in terms of a scientifically measurable link between exposure to dangerous chemicals and actual health effects. The harm of environmental racism in the environmental paradigm consists of the multiple health problems, including lowered life expectancy rates and increased disease rates, of people of color that result from the disproportionate exposure to environmental hazards. It is within this paradigm that EPA, in its Environmental Equity report, examines the question of environmental "equity."  

Like the civil rights paradigm, the requirement of causation is fatal to a finding of harm in the environmental paradigm. No harm is said to have occurred unless there is a demonstrable link between the exposure of an environmental hazard and a probable loss, assessed solely in terms of health consequences or death. In assessing the existence of harm

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94. See supra notes 51-55 and accompanying text. The requirements of causation and intent have "reduced [antidiscrimination law] to the status of another intentional tort, albeit one with unusually strict intent and causation requirements." Freeman, supra note 51, at 1431. The causation requirement has also been fatal to the compensation of victims in toxic tort litigation:

In considering compensation, ... there are really two causation problems. One is the problem of establishing that the chemical involved is capable of causing the type of harm from which the plaintiff suffers. This is often difficult because the causation of diseases like cancer is so poorly understood. ... Many toxic substances are relatively novel, and, given the long latency periods associated with cancer, sufficient evidence concerning health effects is not likely to be available for the foreseeable future. ... The other problem relating to proof of causation is that of establishing, given that the toxic substance in question can cause harm of the type suffered by the plaintiff, that the plaintiff's harm did in fact result from such exposure. ... The statistical association between exposure and illness may be too weak to justify a finding that a particular plaintiff's disease is causally linked to an exposure to a hazardous substance.

Daniel A. Farber, Toxic Causation, 71 MINN. L. REV. 1219, 1227-28 (1987); see also Robert L. Rabin, Environmental Liability and the Tort System, 24 HOUS. L. REV. 27 (1987) (stating that the tort system is severely tested by toxic tort litigation, because identification of the cause of a toxic harm is a costly enterprise that relies on types of evidence and probability judgements that can be regarded as ill-suited to traditional resolution through the adversary process).

95. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-76 (1986) (rejecting societal race discrimination as too amorphous to remedy; plaintiff must show prior identified discrimination by governmental actor involved); see also City of Richmond, 488 U.S. at 498-99.

96. ENVIRONMENTAL EQUITY SUPPORTING DOCUMENT, supra note 2, at 4.

97. The Agency prefers the term "equity," instead of justice, to refer to the "distribution and effects of environmental problems and the policies and processes to reduce differences in who bears environmental risks." ENVIRONMENTAL EQUITY, supra note 2, at 10. It chose "environmental equity" because "it most readily lends itself to scientific risk analysis." Id.

98. EPA acknowledges the difficulty of establishing a causal connection between hazardous environmental exposures and health effects and that attempts to do so are fraught with uncertainty:
arising from racially disproportionate environmental hazard exposure, EPA effectively concluded that, though there is sufficient evidence that racial minority groups experience disproportionate exposures to various environmental hazards and that there exist clear differences between racial groups in terms of disease and death rates, no harm has occurred to racial minority communities because there has been no demonstrable scientific link between the exposures and the health problems in those communities.99

Unlike civil rights law, however, environmental law regulates well below the level of harm. While the civil rights paradigm is remedial in nature, the environmental paradigm is preventative in nature. Because of its remedial nature, the civil rights paradigm inherently dictates that a harm first occur before redress is available. The remedial nature of the civil rights paradigm thus renders it inadequate to address the multidimensional harms100 of environmental racism. Unlike the loss of employment or educational opportunities, for instance, health losses arising from a polluted environment are not so easily remediable.

Environmental law and policy, by contrast, are primarily geared towards protecting the environment from various pollutants and the prevention of health losses. Environmental law seeks to protect both the physical environment and prevent human health losses by controlling exposure to environmental hazards before harm has occurred. It does so by assessing the risk of harm from a given substance and then setting acceptable levels of risk that provide ample margins of safety to protect human health.101 Thus, unlike the civil rights paradigm, which waits for a harm to occur, the environmental paradigm seeks to prevent harm from occurring.

First, the etiology of many diseases has not been fully elaborated. Second, most diseases to which environmental exposures may contribute have a plethora of possible causes. People are also routinely exposed to a vast array of environmental agents—few of which are quantified. Fourth, the latency period for health effects from long-term, low-level exposures may be 20 years or more. Fifth, environmental pollutants may cause multiple health effects. Finally, a single health effect may result from multiple exposures.

Environmental Equity Supporting Document, supra note 2, at 14.

99. In drawing its conclusion, EPA made a distinction between “exposure” and “health effects.” The Agency was careful to note that “[e]xposure is not the same as actual health effects . . . .” Environmental Equity, supra note 2, at 13. Thus, “exposure” to dangerous chemicals alone is not tantamount to the environmental conception of harm because of “the difficulty of establishing a causal relationship between health effects and environmental exposures . . . .” Environmental Equity Supporting Document, supra note 2, at 14. The one “notable exception” to this finding is harm caused by lead poisoning. The Agency found sufficient data linking disparate exposure to lead, differences in disease and death rates, and adverse health effects. According to the Agency, the data is “unambiguous: a higher percentage of Black children than White children have high [enough] blood lead levels” to cause adverse health effects. Environmental Equity, supra note 2, at 11.

100. See infra note 108 and accompanying text.

In structuring environmental laws' regulatory priorities to prevent future harms arising from environmental hazard exposure, risk is evaluated in two steps. The first step, risk "assessment," "provides an estimate of the probability that human exposure to a chemical agent will result in an adverse health effect to the exposed individual, or an estimate of the incidence of the effect within an exposed population." This assessment is governed almost exclusively by the "scientific understanding of risk." The second step is risk "management": officials make decisions regarding acceptable levels of exposure and risk, as well as the appropriate agency response. It is in the risk management process where factors other than human health risk, such as efficiency and equity, are considered.

Because environmental law regulates well below the level of harm and is preventative, it is better suited to address the multidimensional harms of environmental racism. In theory, its hybrid, scientific policy form of risk evaluation is a recognition that policy decisions play important roles in resolving scientific uncertainties when the ultimate decisions are made about how best to manage environmental harms. However, the practical application of the risk evaluation process exposes its limitations in addressing the harms of environmental racism. These limitations reveal themselves in EPA's reluctance—in its report—to consider harms, other than health losses, arising from environmental racism.

Using the concept of "scientific risk" for the dual purpose of providing "the theoretical basis and the mechanism for achieving equitable environmental protection," EPA rejected considering the very social factors and harms that it claims could be incorporated in its risk manage-

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102. ENVIRONMENTAL EQUITY SUPPORTING DOCUMENT, supra note 2, at 30.
103. The risk assessment process has been criticized for some of the same reasons that EPA found it difficult to establish a causal connection between disproportionate exposure of racial minorities to environmental hazards and their disproportionately low health status. That is, that scientific risk assessments do not, and cannot, reliably calculate expected losses because, in part, "our understanding of causal mechanisms—such as physiological, toxicological or ecological processes—often seems plagued by uncertainties." Donald T. Hornstein, Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis, 92 COLUM. L. REV. 562, 571-73 (1992); see also Mary L. Lyndon, Risk Assessment, Risk Communication and Legitimacy: An Introduction to the Symposium, 14 COLUM. J. ENVTL. L. 289, 291 (1989); Sidney A. Shapiro & Thomas O. McGarity, Not so Paradoxical: The Rationale for Technology-Based Regulation, 1991 DUKE L.J. 729, 731-32 (noting the uncertainties and inconclusiveness of risk assessments); Howard Latin, Good Science, Bad Regulation, and Toxic Risk Assessment, 5 YALE J. ON REG. 89 (1988) (noting arbitrary judgment calls in EPA's risk assessments of airborne benzene).
104. ENVIRONMENTAL EQUITY SUPPORTING DOCUMENT, supra note 2, at 30.
105. As EPA explains: "The factors considered in the risk management phase range from social concerns to economic concerns, from acceptance by the communities affected to technical feasibility. There is an opportunity to consider relevant environmental equity issues during the risk management process." Id.
106. Hornstein, supra note 103, at 579 n.3.
107. ENVIRONMENTAL EQUITY, supra note 2, at 9.
ment process. For instance, aside from health problems, the presence of environmental hazards in communities of color has been documented to cause psychological stress resulting from feelings of disorientation and apprehension about future effects and loss of community cohesion, as well as socioeconomic damage resulting from the loss of businesses, homes, and schools. Because EPA believes that "[t]he distribution of environmental risks is often [scientifically] measurable and quantifiable," it has made clear that it can only "act on inequities based on scientific data." It avoids responsibility for other types of harms, claiming that "[e]valuating the existence of injustices and racism is more difficult because they take into account socioeconomic factors ...".

B. Beyond Myopia

The environmental paradigm of risk assessment and harm prevention leaves the phenomenon of environmental racism in a conceptual predicament. On the one hand, the disproportionate exposure of racial minorities to environmental hazards does not constitute the equivalent of environmental harm, because of the lack of a scientifically measurable link between disproportionate hazards exposure and adverse health effects. On the other hand, the scientific myopia of the environmental paradigm leaves little room to assess the multidimensional harms that can result from environmental racism.

Environmentalists must ultimately accept some guidance from the civil rights paradigm’s assessment of the harms arising from environmental racism. To do this, they must first acknowledge that their current paradigm represents one set of normative values and objectives in measuring environmental harms, such as economic efficiency and utilitarianism, while ignoring others, such as equity and social justice concerns.

108. White, supra note 11, at 129; see also Richard Lewis, Comment, Destruction of Community, 35 BUFF. L. REV. 365, 365-67 (1986) (describing loss of community as the loss of neighbors, homes, schools, churches, and businesses that results in collective trauma to a group’s identity); R. George Wright, Hazardous Waste Disposal and the Problems of Stigmatic and Racial Injury, 23 ARIZ. ST. L.J. 777, 785 (1991) (noting that residents near toxic sites may feel degraded because their community is a dumping ground).

109. ENVIRONMENTAL EQUITY, supra note 2, at 10.

110. Id.

111. For example, the full extent of harmful exposure to pesticides is unknown because, in part, less than 10% of pesticide products in use have been tested for potential health effects by EPA. Perfecto, supra note 11, at 180, 186. It has also been estimated that, of 600 registered pesticide active ingredients, EPA can provide full safety assurance for only six. Id. at 180.

112. See Joseph P. Tomain, Distributional Consequences of Environmental Regulation: Economics, Politics, and Environmental Policymaking, 1 KAN. J.L & PUB. POL’Y 101, 110 (1991) (arguing that cost-benefit analysis is deficient because it obscures sociopolitical norms); Hornstein, supra note 103, at 594-95 (stating that ignoring equity concerns in the risk assessment process not only masks the full dimensions of environmental harms, but also prevents environmental protection decisionmakers from making more complete risk analyses and assessments that take into account our varied social values).
Environmentalists must also recognize that the environmental paradigm is constrained in how it assesses and addresses harm because it focuses on aggregate population harm in an effort to achieve the most economically efficient prevention of that harm.113

The civil rights paradigm’s focus on the comparative status of different populations in assessing harm can inform the environmental risk management process. By considering the group characteristics of communities that bear disproportionate risk, the environmental paradigm could more appropriately balance the delicate social and political decisions in regards to who bears what environmental risks and at what societal costs.114 Incorporating social justice or equity principles could mean that the environmental paradigm’s assessment of harm would “reflect and define our [societal] values, and not simply count how many of us will suffer.”115

Despite the shortcomings of EPA’s assessment of the harms of environmental racism, its recommendations should be encouraging to environmental justice advocates. For instance, it recommends collecting environmental exposure data by race and income, revising its risk assessment process to consider high risk populations, and identifying and targeting opportunities to reduce high concentrations of risk to specific population groups.116 Whether these recommendations will be followed

113. See generally Mark Sagoff, Economic Theory and Environmental Law, 79 MICH. L. REV. 1393 (1981) (discussing the economic efficiency model underlying environmental law and policymaking); Hornstein, supra note 103, at 566 (stating that current risk assessment model arises out of, and reflects, the economic efficiency paradigm by assessing whether the societal costs of some regulatory efforts are worth their relatively small benefits in risk reduction); id. at 594 (noting that the risk assessment model emphasizes one attribute—aggregate effects on an entire population—and views choices based on comparisons of that single attribute as the presumptively “correct” approach).

114. As one commentator suggests, this would mean taking into account the effect of environmental exposure on individual communities. Simply put, the risk management process would have to account for the equities and inequities in risk-bearing. Hornstein, supra note 103, at 593. Hornstein uses the following example to illustrate his point: suppose that exposure to chlorine in public drinking water systems causes an estimated 400 excess cancers nationwide and air and water pollution from active waste sites cause no more than 100 excess cancers annually:

For the “hard” comparative risk analyst, the evaluation of these risks is simple arithmetic: 400 cancers are worse than 100. . . . Yet, after incorporating considerations of equity, a perfectly plausible case can be made that the risks posed by [hazardous waste sites] are ‘worse’ than the risks posed by chlorine by-products in water: the ex ante chances of developing cancer from [hazardous waste sites] are concentrated on relatively few individuals rather than widely shared over the general population; the ex post distribution of actual cancers from [hazardous waste sites] is similarly concentrated, and unlike the case of low-level chlorine use, includes the heightened risk of destroying whole families or neighborhoods; and the cancer risks from [hazardous waste sites] are disproportionate in relation to the (indirect) benefits from hazardous chemical use enjoyed by the few risk-bearers.

Id.

115. Id.

by the Agency remains to be seen. However, such recommendations at least symbolize an effort by environmentalists to move beyond the scientific myopia of current harm assessment.

Likewise, civil rights advocates should heed the limitations of the civil rights paradigm (primarily judicially imposed) and consider the advantages of the environmental paradigm for preventing harm. Because the environmental paradigm lacks the remedial and causation constraints imposed upon the civil rights paradigm, it has greater potential to achieve environmental justice by preventing further harms in communities that are already burdened by multiple injustices, which contribute to their subordinate status in society. The quest for environmental justice will ultimately require that civil rights advocates and environmentalists bridge the differences between the two paradigms by heeding their limitations and embracing their advantages.

IV
THE QUEST FOR ENVIRONMENTAL JUSTICE: BEYOND DISTRIBUTIVE POLITICS

That environmental decisionmaking and regulation are essentially political, rather than exclusively technical or analytical processes, has been persuasively argued by many environmentalists.\(^{117}\) Not surprisingly, much of the response to the phenomenon of environmental racism has been political in nature and at the grassroots level. Environmental justice advocates believe that disproportionate environmental health risks are inextricably linked to the political economy of place, where “[p]olitical power and economic clout are also key factors which influence the spatial distribution of residential amenities and disamenities . . . .”\(^{118}\) Although lawsuits have been brought to challenge the disparate impact of siting decisions, under both constitutional and statutory theories of race discrimination,\(^{119}\) environmental justice advocates increasingly view environmental hazards exposures as inherently political, not legal, problems.\(^{120}\) As Luke Cole has argued, because “someone in the

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117. See, e.g., Mark Sagoff, The Economy of the Earth: Philosophy, Law and the Environment 17, 26-29 (1988); Daniel A. Farber, Environmentalism, Economics and the Public Interest, 41 Stanford L. Rev. 1021, 1043 (1989) (reviewing Sagoff’s book and noting that he correctly concludes that cost-benefit analysis is misused to provide technocratic solutions to fundamentally political questions); Tomain, supra note 112, at 110 (“[P]ublic policy issues, because of their normative content, do not have objectively verifiable and scientifically correct answers. Instead the resolution of [such issues] depends on a legitimate and politically acceptable decision-making process.”).


119. See supra notes 51-55 and accompanying text.

government has decided to allow a company to dump in their neighborhood,” what is required to change that decision is a “political tool.”

The political tool often utilized to affect such change is “a community-based movement to bring pressure on the person or agency making the decision.” Community activism “[empowers] local residents to defend their space and develop a political base to influence [environmental] decision making.”

The grassroots activism that has dominated community-based efforts to seek environmental justice has been primarily outcome-focused. Activists seek to change the outcome of decisions made about the distribution of an environmental hazard through protests and other confrontational strategies. In what has turned out to be strikingly similar to the “NIMBY” syndrome, partially said to blame for the racially disparate exposure rates, racial minority communities have organized nationwide to resist sitings of hazardous waste facilities. This type of response to the phenomenon of environmental racism resonates with the distributive model of justice reflected in the writings of philosophers such as John Rawls. Rawls’ “difference principle,” for example, would allocate social goods so as to result in the greatest benefit (or least burden) to the least advantaged social classes. Recent legislation, such as the proposed Environmental Justice Act of 1992, also echoes this model of justice and Rawls’ difference principle. That Act would limit further siting of toxic chemical facilities in environmental high impact areas if it is shown that adverse human health consequences have resulted from the level of toxic emissions in those areas as compared to other areas.


122. Id.

123. Bullard, supra note 11, at 93. These efforts have also resulted in the creation of coalitions with other mainstream environmental groups as well as the formation of separate minority environmental groups and organizations that deal exclusively with environmental issues pertaining to communities of color. See generally Taylor, supra note 11.

124. In recounting the historical origins of community activism around this issue, Mohai and Bryant describe this model: “One of the first highly visible struggles took place in Warren County, North Carolina, where both blacks and whites strategically placed their bodies in front of trucks to prevent them from carrying soil laced with PCBs to a landfill located in a predominantly black area.” Introduction, supra note 7, at 2. Robert Bullard notes that “[a]lthough the protests were unsuccessful in halting the landfill construction, they marked the first time blacks mobilized a nationally broad-based group to protest environmental inequities.” Bullard, supra note 11, at 91.

125. See supra notes 28-31 and accompanying text.

126. See, e.g., Lee, supra note 4, at 16-18 (describing several examples of successful community activism against the siting of hazardous waste facilities).


128. See id. at 75.


130. Id. § 403. The Act defines “environmental high impact areas” as the “100 counties with the highest total weight of toxic chemicals present during the course of the most recent 5-
core assumption of the distributive model is that fair outcomes are coextensive with justice.

The distributive model of justice, however, is limited in its ability to attain justice in the environmental context, particularly if disparate environmental outcomes are seen as reflecting institutional and structural racism. In other words, if discriminatory environmental outcomes result from, for instance, institutional decisions influenced by unconscious racism, then purely distributive responses will fail to address the roots of environmental racism. As philosopher Iris Marion Young has argued, the distributive model "restricts the scope of justice" in that it focuses on "the end-state pattern of persons and goods that appear on the social field," rather than "decisionmaking power and procedures." It thus fails to "bring social structures and institutional contexts under evaluation." The distributive model would fail if, for instance, toxic chemical facilities were distributed equitably among high and low impact areas, but then racially disparate patterns of exposure were recreated due to discriminatory housing and real estate practices, economic dislocation, and/or voting behavior. Moreover, because distributive justice myopically focuses on particular patterns of distributions at particular moments, it allows the reproduction of a regular distributive pattern over time without ever understanding and evaluating the processes that produce that pattern. Thus, like the oft-criticized economic efficiency and expected utility responses to general environmental problems, distributive political responses to environmental equity problems focus too much on outcomes and not enough on the processes that produce those outcomes.

Proponents of the distributional model of justice have made the argument that this model will expand the "NIMBY" principle to the year period for which data is available." Id. § 101(2).

132. Id. at 20.
133. Such a scenario might look like this:

For example, assume that on a given date, all LULUs then needed were dispersed "fairly" throughout society. Wealthier individuals would respond to the distribution by moving away from LULUs. Consequently, sites located in wealthier areas would eventually be surrounded by a ring of land deserted by wealthier families. The LULU would cause property values in that ring to be lower than in surrounding areas. The ring would then become a ghetto of lower income households. In short, the pattern of disproportionate siting would be re-created.

Been, supra note 51, at 1018-19 (footnotes omitted). Been also notes the arguments and empirical evidence calling into question the likelihood of this particular scenario occurring.
134. YOUNG, supra note 131, at 29.
135. Choices are made, according to expected utility theory, based on an evaluation of the outcomes such choices generate. Hornstein, supra note 103, at 577-78. Expected utility theory underlies much of environmental decisionmaking in that "environmental problems are evaluated according to their expected losses in terms of cancer and noncancer health effects, effects on human welfare . . . and effects on nonhuman species and ecological systems." Id.
“NIABY” principle: “Not in Anybody’s Backyard.”\textsuperscript{136} In other words, the price of toxic waste disposal will rise to prohibitive levels because it will eventually become too difficult to establish new sites for such facilities, thereby forcing industry to replace toxic inputs to their manufacturing processes in order to minimize the production of toxic waste.\textsuperscript{137} By preventing distribution of toxic wastes anywhere, a distributive model of justice could result in justice for all, signaled by a move from pollution “control” to pollution “prevention.”\textsuperscript{138} This argument is shortsighted in that it does not take into account the intangible nature of many environmental hazards. Aside from hazardous waste facilities, the origins of environmental hazards exposure such as air pollution and contaminated fish consumption are not as conducive to distributional solutions because their sources can be so varied, numerous, and often unknown.\textsuperscript{139} Thus, distributive approaches to attaining justice or equity in the environmental context are generally ineffective because of the elusive nature of toxic distribution.

Another aspect of grassroots activism is becoming more prominent and is, I believe, better suited to achieve justice in the environmental context. This type of activism is geared toward ensuring public participation in compiling, and access to, information critical to environmental decisionmaking processes.\textsuperscript{140} By keeping decisionmaking processes con-

\begin{itemize}
\item \textsuperscript{136} Cole, \textit{supra} note 41, at 645 n.86.
\item \textsuperscript{137} \textit{Id.} at 645.
\item \textsuperscript{138} \textit{Id.}
\item \textsuperscript{139} As Robert Rabin explains in discussing the limited capacity of the tort system to address environmental harms:
\begin{quote}
Frequently, environmental harm is a consequence of the aggregate risk created by a considerable number of independently acting enterprises. It may be that the risk generated by any single source is, in fact, inconsequential. . . . Acid rain, chlorofluorocarbons, Agent Orange, and asbestos fibers . . . [n]ot only are . . . potentially the source of widespread harm, but they are frequently produced by a vast number of discrete enterprises . . . . Toxic substances evoke the special apprehensions of unseen risks. They emanate from sources that are hard to identify.
\end{quote}
\textit{Rabin, supra} note 94, at 32.
\item \textsuperscript{140} One recent and prominent example of this is the success of one community in Kettleman City, California, in preventing the siting of a waste incinerator in a predominantly Latino farming community of 1100 people. \textit{See} Cole, \textit{supra} note 41, at 675-77. Faced with a proposal to place a toxic waste incinerator, residents organized a community group to fight the proposal, held demonstrations, and pressured local officials. \textit{Id.} at 674. Central to their opposition, however, was public participation in the planning and decisionmaking process. Specifically, this entailed translating the environmental impact report (EIR) on the proposed incinerator from English to Spanish because most of the residents of the community were Spanish-speaking. \textit{Id.} at 675. Despite the county’s refusal to translate the EIR into Spanish, the community organized with environmental justice advocates to hold meetings and educate themselves about the contents of the EIR. \textit{Id.} The community generated 126 public comments on the EIR, 119 of them in Spanish, and submitted them to the county. \textit{Id.} at 676. Eventually, in the face of rigorous community opposition, the nation’s biggest hazardous waste disposal company eventually withdrew its application to build the incinerator four miles west of the community, two years after the county’s supervisors approved a use permit for the incinerator. Dennis Pfaff, \textit{Enemies of Toxics Incinerator Are Cheered by End of Project, S.F.}
stantly in focus, this model of activism equates fair process with justice. Such a focus on process could mean, as Daniel Farber has argued, that environmental decisionmaking would value the independent significance of the democratic political process in making decisions about environmental harm assessment and decisionmaking. Environmental problems and issues "can only be resolved through a political process which is always imperfect, but which at least aspires to identify the public interest." Such decisionmaking would gain independent legitimacy because the political process "creates the public interest in the process of searching for it" precisely because the process would then possess "the liberal virtues of broad participation, tolerance, and intelligent deliberation."

This "public choice" theory of decisionmaking is arguably incorporated into environmental law through both federal and state environmental impact statement requirements. Such statements are used as a decisionmaking tool by government bodies making decisions about environmental hazard exposure. The impact statement allows public access and participation in the process of analyzing the potential impact of particular proposed environmental hazard exposure on communities. As

DAILY J., Sep. 8, 1993, at 3.

141. Farber, supra note 117, at 1034.
142. Id. at 1043. Thus, for instance, instead of relying upon committees and bodies of experts in setting levels of acceptable risk, attention would be paid to full disclosure and to public participation in making such decisions. Id. at 1034. Though Farber notes that there is good reason to question whether the risk preferences and estimations of risk levels revealed by individuals and industries are reliable. Id. at 1035.
143. Id. at 1042. Thus, as Farber further explains:

After such a political decision has been reached, everyone present can say: "We have decided such and such." The "we" is at once a reference to every member of the group, and a new dramatic persona in its own right. Thus, the democratic process earns the government the right to speak for "the Public."

144. A related theory is that of "republicanism," which embraces the process of collective, deliberative dialogue among a community of citizens toward achieving the common good. See, e.g., Cass R. Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29 (1985). Farber and Frickey, however, note that republicanism is the "antithesis" of public choice theory:

Modern constructions of republicanism stress civic virtue. . . . By participating in public life, citizens rise above their merely private concerns to join in a common enterprise. They put aside their own interests and enter a public-spirited dialogue about the common good . . . . Indeed, one of the most important tasks of government is to make the citizenry more virtuous by changing individual preferences. . . . In public choice, government is merely a mechanism for combining private preferences into a social decision. The preferences themselves remain untouched.

FARBER & FRICKEY, supra note 143, at 8, 44.
146. The federal statute is far less effective than many state statutes in achieving public
one California court has recognized, the public participation and access provisions of environmental impact statutes are “based on a belief that citizens can make important contributions to environmental protection and on notions of democratic decision-making . . . .”\textsuperscript{147}

While such “environmental due process”\textsuperscript{148} opens up the decision-making process to allow more participation from previously excluded and disproportionately affected constituents in resolving environmental policy questions, I suggest that a much stronger mediating principle is needed to address the phenomenon of environmental racism that has resulted, in part, from an already inherently free market political process of environmental decisionmaking. In other words, a “free market” process of political environmental decisionmaking will only result in the most powerful interest groups being able to “bend the ‘public interest’ to their liking”\textsuperscript{149} to affect the outcomes that are ultimately in their self-interest, leaving the burdens of environmental policies to fall on those least able to represent themselves in the political process.

Environmental law’s process-oriented, public access approach to environmental decisionmaking can provide a vehicle to achieve environmental justice. Specifically, an approach to environmental decisionmaking that evaluates institutional and structural decisionmaking according to whether it is free from racial or class domination can answer the call for environmental justice. This would mean that decisionmaking processes would have to include those asked to bear the risks of environmental hazard exposure.\textsuperscript{150} Impact statements, for instance, could be given more weight in the decisionmaking process, and standards could be set to ensure meaningful community participation in the impact statement before it is deemed complete.\textsuperscript{151} Also, clearer standards about
the type of information to be included in impact statements could ensure that the full ranges of impacts on a community would have to be considered before a decision could be made. The strongest version of an antidomination, justice-as-process model would be to allow communities to make the ultimate decision about whether to bear the risks of environmental hazard exposure. This strong version assumes that communities would have access to all relevant information about both the risks (e.g., health) and benefits (e.g., economic) of, for example, a proposed land use.

Emerging voices in the environmental justice movement mirror this process oriented, antidomination model of justice on a more global level in their calls for institutional reforms in environmental and other organizations that influence environmental policy and decisionmaking. These include, explains Robert Bullard, moves toward “diversification of the environmental movement” to “broaden its base to include minority, low income, and working class individuals” and to broaden the narrowly defined agendas of the established environmental organizations to incorporate minority and working class community concerns.\textsuperscript{152} That such institutions and organizations are beginning to heed these calls is both noteworthy and encouraging. For instance, EPA’s recommendations for including minority communities and individuals in its policymaking processes and including considerations of the impact of environmental hazard exposure on “high risk” populations in its risk assessment procedures signal a movement towards environmental justice that transcends interest-group and distributional politics.\textsuperscript{153} That calls for justice are being responded to and heeded in the environmental context signals another step in a slow progression toward full social equality.

**CONCLUSION: THE IMPLICATIONS OF THE QUEST FOR RACIAL JUSTICE IN ENVIRONMENTAL LAW AND POLICY**

Much is at stake in the quest for justice in environmental law and policy. Environmental racism has given new recognition to the fact that the structural oppression of people of color in this society manifests itself requires impact statements, renders it an ineffective way to achieve this justice-as-process model of decisionmaking. For example:

What, then, is a developer to do upon learning that a proposed host community already has a noxious LULU, while an acceptable alternative community has no noxious LULUs but six social services LULUs? Rather than agonizing over the “right” thing to do, developers will seek to minimize their costs, which will usually mean putting the LULU in the community least able to use the impact statement to fight the siting.


\textsuperscript{153} \textit{See} \textit{Environmental Equity}, \textit{supra} note 2, at 26-29.
in more ways than traditional civil rights based paradigms have previously recognized. Formal rights to basic necessities such as employment, voting, and other amenities in modern life are now secure. There remains the nagging reality that, despite calls for a race-neutral consciousness, racial differences continue to exist in the distribution of benefits and burdens borne by individuals in this society. It would be a mistake for social justice advocates to pursue old distributive paradigms of justice in trying to ameliorate racially disparate outcomes in environmental hazard exposure. The essays in *Race and the Incidence of Environmental Hazards* superbly demonstrate that such disproportionate outcomes result not only from the subtle nature of structural racism but also from the nature of environmental policymaking and decisionmaking. The conclusion of this set of essays demonstrates that the time is ripe for new paradigms of justice.

Can the mainstream environmental movement bend to accommodate calls for social justice? EPA's *Environmental Equity* report suggests that there may be initial resistance to changing the old habits and normative assumptions that drive much of environmental law and policy. However, in the end, I believe that the environmental movement will meet the challenge by critically exploring the limitations of its decision-making processes and achieving a safe environment for us all. For now, *Race and the Incidence of Environmental Hazards* and *Environmental Equity* at least signal an effort to mediate the historical tensions that have kept apart two seemingly compatible movements to make this world a better place for us all. That, in and of itself, is an achievement.