THE NEW INEQUALITY, THE GREAT FORGETTING, AND THE LONG ENVIRONMENTAL JUSTICE MOVEMENT

Jed Purdy

CONCLUSION

The incoming Trump administration was welcomed on January 21, 2017, with one of the largest peaceful mobilizations in American history, the "Women's March on Washington," which turned into a nationwide, all-inclusive, all-issues demonstration against the new President's demonstrated character and anticipated policies. Left-of-center and simply constitutionalist individuals and movements widely expect the next four years to be ones of hard-fought opposition, organizing, vigils, even civil disobedience - in a phrase, democracy in the streets. To greater and lesser degrees, this will be a novel experience for progressive Americans, many of whom are accustomed to more decorous forms of political engagement.

For most of the past three decades, environmental politics has been particularly decorous, identified mostly with the litigation, lobbying, and policy design of organizations such as the Natural Resources Defense Council, the Environmental Defense Fund, and Resources for the Future.[1] It has been an ironically domestic middle age for a movement that began with what was then the largest one-day mobilization the country had seen, Earth Day 1970, which brought millions of people to marches and teach-ins.

The last few years, however, have brought a second springtime of radical energy to American environmentalism. In 2016, an unheralded occupation of the route of the controversial Dakota Access Pipeline on the historic tribal lands of the Standing Rock Sioux attracted national attention and ended only when the Army Corps of Engineers refused to approve the route. Earlier in 2016, several years of confrontational activism led to the Obama administration's decision against approving the Keystone XL Pipeline route across the Great Plains. In 2014, after years of mostly technocratic advocacy around climate change, more than 300,000 marched in New York City alone in the activist group 350.org's People's Climate March.[2] This rediscovery of political energy may be only a

[1] [Political-science studies of environmental organizations and politics]
[2] https://fivethirtyeight.com/features/peoples-climate-march-attendance/

shadow of what is to come, as the new administration and its congressional allies are showing clear signs of abandoning the Obama administration's climate agenda, opening public and private lands to expanded drilling and mining, and seeking to revise or eliminate such landmark legislation as the Endangered Species Act.

A revival of oppositional and radical stances within the environmental mainstream has already raised the question of alliance with non-traditional allies, such as the Native American activists at Standing Rock, Black Lives Matters protestors who have called for divestment from fossil fuels (and for whom leaders of mainstream environmental groups have expressed support), and whatever political formation succeeds the "democratic socialist" insurgency of Bernie Sanders, which called for a rapid transition to renewable energy and for leaving fossil fuels "in the ground." All of these developments open the prospect of a changed relationship between the mainstream of environmental law and politics and what might think of as its left wing: the environmental justice movement, which has long criticized the mainstream for demographic narrowness, attachment to elite and professionalized forms of advocacy, lack of interest in economic distribution and power, and insufficient attention to the built environments, such as workplaces and neighborhoods, where people spend most of their time. Another environmentalism may be on its way. This paper argues that for the left wing of the environmental movement to return to center stage would not be so anomalous, but rather a partial restoration of a suite of long-running concerns about power, equality, and the human environment that deserve to be called a long environmental justice movement. This movement was eclipsed in the rise of today's mainstream environmental law, but it fits squarely in a longer view of the field.

INTRODUCTION

Modern environmental law is very substantially the product of a burst of legislation and institution-building that took place between the end of the 1960s and the beginning of the 1980s. President Richard M. Nixon signed the National Environmental Policy Act on January 1, 1970, created the Environmental Protection Agency in December of that year, and signed the Clean Air Act on New Year's Eve.[3] In the ten years that followed, Congress passed, among other statutes, the Clean Water Act, the Endangered Species Act, laws governing the use and disposal of pesticides and other toxic substances, comprehensive reform of federal public-lands management, and the Surface Mining Control and Reclamation Act, to give an incomplete list.[4] This period of

[3] National Environmental Policy Act, Pub. L. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. sec. 4321 et seq; Reorganization Plan No. 3, 35 Fed. Reg. 15623 (July 9, 1970) (establishing Environmental Protection Agency); Clean Air Act, Pub. L. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. sec. 7401 et seq.).

[4] Federal Water Pollution Control Act, Pub. L. 92-500, 86 Stat. 816 (codified at 33 U.S.C. sec. 1251 et seq.) (colloquially, "Clean Water Act"); Endangered Species Act, Pub. L. 93-205, 87 Stat. 884 (codified at 16 U.S.C. sec. 1531 et seq.); Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. 61-152, 36 Stat. 331 (codified at 7 U.S.C. sec. 136 et seq.); Toxic Substances Control Act, Pub. L. 94-469, 90 Stat. 2003 (codified at 15 U.S.C. sec. 2601 et seq.); Resource Conservation and Recovery Act, Pub. L. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. sec. 6901 et seq.); Federal Land

lawmaking closed out with the 1980 adoption of the toxic-waste cleanup law commonly known as Superfund.[5] Congress passed the 1970s statutes by margins that today suggest typographic errors: only one vote against the 1970 Clean Air Act in all of Congress; average votes of 76-5 in the Senate and 331-30 in the House for major environmental statutes.[6] These statutes greatly expanded the federal government's regulation of private industry and land use, from smokestacks and waste disposal to wetlands management and pest control. These statutes also transformed the federal government's management of the land it controls directly, more than a quarter of the country's acreage, by imposing conservation requirements to implement a new awareness of ecological interdependence and a conviction that natural qualities such as biodiversity could be worth preserving for their own sake.[7]

The same years saw the formation of the advocacy organizations and centers of professional expertise that do much to shape the environmental law. The Environmental Law Institute, the key professional clearinghouse for the field, was founded in 1969, and the Natural Resources Defense Council, arguably the touchstone modern environmental group, was created in 1970. The Environmental Defense Fund and the think-tank Resources for the Future already existed but were substantially built up and moved their missions to the emerging field of environmental law, as it was now defined by the post-1970 statutes. Longstanding organizations such as the Sierra Club became mass-membership groups and built up litigation arms that also followed the NRDC's example – in the case of the Sierra Club Legal Defense Fund, eventually spinning off into the free-standing Earthjustice.[8]

The ways that environmental law was institutionalized in this period – in statutes and agencies, but also in professional and advocacy organizations – matter because the precise contours of "environmental" problems have always been contested.[9] The field

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Policy and Management Act, Pub. L. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. sec. 1701 et seq.); National Forest Management Act, Pub. L. 94-588, 90 Stat. 2958 (codified at 16 U.S.C. sec. 1600 et seq.); Surface Mining Control and Reclamation Act, Pub. L. 95-87, 91 Stat. 445 (codified at 30 U.S.C. sec. 1201 et seq.).

[5] Comprehensive Environmental Response, Compensation, and Liability Act, Pub. L. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. sec. 9601 et seq.).

[6] See Richard J. Lazarus, The Making of Environmental Law 69 (2006).

[7] The Endangered Species Act obliges the federal government to avoid "jeopardy" to listed species, while the National Forest Management Act enhances the conservation and ecological elements of federal forest management. The National Environmental Policy Act's application to "major" federal actions proved also required significant new attention to such questions.

[8] These developments are discussed in parts II.C and IV.c, *infra*.

[9] I have developed this argument, which forms the methodological starting point of this paper, in three previous articles. See Jedediah Purdy, Our Place in the World: A New Relationship for Environmental Ethics and Law, 62 Duke L.J. 857 (2012) (arguing that political contests over the scope and purposes of environmental law substantially account for the question which ethical frameworks have application in the field); American Natures: The Shape of Conflict in Environmental Law, 36 Harv. Envl. L. Rev. 169 (2012) (mapping statutes, doctrinal disputes, and political conflicts over environmental questions onto a typology of environmental worldviews that are embodied or exemplified in certain eras of lawmaking in the field); The Politics of Nature: Climate Change, Environmental Law, and Democracy, 119 Yale L.J. 1122 (2012) arguing

lacks the textual basis of constitutional law, the clear topical remit of tax or antitrust, and the doctrinal coherence of contract or tort. Built on a variety of agency-spanning statutes, addressed to practical problems that might be gathered under the slogan "everything is connected," it has always oscillated between a sense of self-evidence – Of *course* these problems are environmental problems! – and a propensity to identity crisis.[10] Do environmental problems centrally include the threat of nuclear conflict and the question of population policy, as a landmark statement by major environmental groups suggested in 1985?[11] Do environmental concerns imply engagement with immigration policy, as many Sierra Club members and leaders argued during a notorious and movement-defining conflict in the 1990s and thereafter?[12] Do they centrally concern the governance of food systems, which did not figure much in early formulations of environmental law, but have attracted a lot of attention in recent years?[13] These questions are not likely to find conceptual or empirical resolution. Answers come instead from the network of laws, public and non-profit institutions, and movements whose efforts and contests form the field of environmental law.

This article offers a reassessment of a defining contest over the scope and priorities of environmental law as it was institutionalized in the 1970s and early 1980s: the critique of a recently formed "mainstream environmentalism" in a series of challenges that, taken together, formed a movement and school of thought called "environmental justice." Environmental justice advocates charged mainstream environmentalism with indifference to the distributive consequences of environmental policy, especially where the burdens of pollution and other harms followed familiar racial and socio-economic lines of vulnerability and marginalization; parochial attachment to a woods-and-waters

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for the primacy of politically achieved definition of scope and priorities of environmental law, in hindsight and prospectively). I also develop this argument in *After Nature: A Politics for the Anthropocene* (2015). This paper falls within the sequence of that earlier work.

[10] Although the EPA administers a great deal of environmental law, significant responsibility also falls to the Department of Interior (the Fish and Wildlife Service administers most of the Endangered Species Act; the Bureau of Land Management and National Parks Service are responsible for much public-lands policy; and the Office of Surface Mining administers the Surface Mining Control and Reclamation Act); the Department of Agriculture (which contains the Forest Service, which is responsible for the national forests, and takes lead responsibility for shaping farmers' land use through subsidies and conservation programs); Commerce (responsible for fisheries management and the application of the Endangered Species Act to marine life); the Army Corps of Engineers (which administers and enforces permits to fill wetlands and waterways, in conjunction with the EPA); and the Food and Drug Administration (overseeing safety in the food system, which, as this paper discusses later, has increasingly entered the circle of environmental concerns). For a reflection on the multifariousness of environmental law, see J.B. Ruhl and James Salzman, Climate Change Meets the Law of the Horse, 62 Duke L.J. 975 (2013).

[11] See An Environmental Agenda for the Future 25-40 (on nuclear threat and population growth) (Jay Cahn, ed. 1985) (agenda-stating volume written by leaders of ten major national environmental groups).

[12] See Felicity Barringer, Bitter Division for Sierra Club on Immigration, N.Y. Times, March 16, 2004 (surveying history of club's divisive debates over the intersections of environmentalism, immigration, and population).

[13] See part V, *infra*.

version of the core problems of environmental law, in which humans, especially socially vulnerable people, were too often secondary; and excessive comfort with elite and professionalized advocacy, in contrast to the popular mobilization and participation that were central to other social movements in the 1960s and 1970s.[14] The environmental-justice account of mainstream environmentalism's narrowness has tended to embrace a cultural explanation of the omissions and oversights that it identifies, to the effect that mainstream environmentalism took its shape from the aesthetic and material concerns of a privileged stratum of American life, and held that shape thereafter.

The first part of my argument is a historically based critique of the Environmental Justice critique itself. The environmental-justice movement made indispensable points about the limitations and blind spots of mainstream environmentalism. At the same time, it tended to miss the historical specificity of that mainstream, the way that it was a product of a quite particular moment in the twentieth century. In this way, the environmental-justice movement was a victim of a "great forgetting," the erasure from mainstream environmental politics of a previous engagement with issues of power and justice in the human environment.[15] The result is a backward projection of the same limitations that environmental justice critiques targeted, ironically elevating those limitations as a kind of persistent cultural essence of "environmentalism." I argue that, to understand the version of environmental law that environmental justice arose by criticizing, we first need to locate it within a two-stage historical process of environmentalism's "great forgetting," a narrowing of scope for forgoing of earlier engagements with labor, the workplace, and the human setting writ large, that was not complete until roughly 1980.

First, in the 1950s and 1960s, key activists and organizations, signally Rachel Carson and the Wilderness Society, distilled what we might call an "old environmentalism," a multifarious set of research, reform, and activist agendas, concerned with urban neighborhoods, industrial health, and economic power, into the powerful but rather narrower definition of "environmental" concerns that flowered in the late 1960s and early 1970s. In the making of the major environmental statutes and institutions, this "new" environmental agenda interacted with a then-leading view of the role of legal advocacy in social reform, an idealistic but also distinctly apolitical stance that I call "legal liberalism," and which the Ford Foundation played a key role in institutionalizing in the new environmental groups. Both of these developments, I argue, must be understood in light of the defining anomaly of the mid-twentieth century: falling inequality of both income and wealth, which fostered the impression that economic

[14] This last has seemed especially ironic because mass mobilization was present at the beginning of modern environmentalism, when more than a million Americans participated in the first Earth Day, in 1970. [Gottlieb argument & Lazarus argument that this was a loss of deep relations with social movements; I'm not sure this is right. Lazarus doesn't show it, for sure.]

[15] With this term, I am indicating the resonance between this argument and the historical interpretation that Joseph Fishkin and William Forbath have advanced in their manuscript on the "great forgetting" of egalitarian constitutional political economy during the period after the New Deal. *See, e.g.*, Fishkin and Forbath, Reclaiming Constitutional Political Economy, 94 Tex. L. Rev. 1287 (2016) (Introduction to Texas Law Review symposium, "The Law and Economic Inequality").

inequality was a problem substantially solved, and fostered a certain complacency about the distributional consequences of environmental law that environmental-justice advocates would later highlight.

The second stage of narrowing and forgetting happened once the new environmental statutes were enacted and environmental advocacy and professional institutions were up and running. Throughout the 1970s, there were opportunities for environmental law and advocacy to join forces with social movements that linked "environmental" questions with racial justice, neighborhood health, workplace organization, and economic power. It was not really until the end of the 1970s or beginning of the 1980s that "mainstream environmentalism" was institutionally consolidated in the form that the Environmental Justice movement criticized. It took lasting form just in time to be criticized as the avatar of a perennial (and parochial) environmentalism.

Why should we care? There is a gain in clarity in understanding the ways that certain institutions and intellectual practices that we take for granted because we were born into them are, in fact, the products of the anomalous twentieth-century period that has been called "the great exception" to the longstanding place of economic inequality in American legal and political contests.[16] But understanding the context in which the contrast between "mainstream environmentalism" and environmental justice arose is only the beginning of a conjoined project of historical recovery and contemporary reorientation. Much as students of law and social movements have increasingly come to appreciate that there is a "long civil rights movement," and have been reminded of the long and multifarious history of the labor movement outside the structure of the National Labor Relations Act, so historical reorientation here reveals a long movement for environmental justice.[17] The value of recognizing the long environmental justice

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[16] See, e.g., Jefferson Cowie, The Great Exception: The New Deal and the Limits of American Politics (2016) (identifying a unique period of working-class empowerment, for which the fact of widely shared growth represented a necessary but not sufficient condition); David Grewal and Jedediah Purdy, "Law and Inequality after the Age of Complacency," forthcoming Theoretical Inquiries in Law (2016) (arguing for seeing the conventional division between public and private law and features of substantive areas such as constitutional law and antitrust as products of the great exception); Purdy, Overcoming the Great Forgetting: A Comment on Fishkin and Forbath, 94 Tex. L. Rev. 1415 (2016) (locating the revival of a left-leaning "constitutional political economy" in the new awareness of long-term trends in economic inequality); Purdy & Grewal, "Introduction: Law and Neoliberalism," 77 Law & Contemp. Problems 1 (2015) (arguing that the critical political economy of law implied in the concept of "neoliberalism" takes fresh relevance from new awareness of economic inequality).

[17] See, e.g., Adriane Lentz-Smith, *Freedom Struggles: African Americans and World War I* (2009) (arguing for the importance of the First World War as a crucible of black activism and resistance); Martha Biondi, *To Stand and Fight: The Struggle for Civil Rights in Postwar New York City* (2006) (describing black resistance to various forms of second-class citizenship in the 1940s and early 1950s as an alternative history of postwar civil rights); Jacquelyn Dowd Hall, "The Long Civil Rights Movement and the Political Uses of the Past," J. Am. Hist. 1233 (March 2005) (describing long black freedom movement, the specific form of it that became the mid-century Civil Rights Movement, and the subsequent hindsight contest over the meaning of that movement). On labor, see Alex Gourevitch, *From Slavery to the Cooperative Commonwealth*

movement is akin to that of other (re)discoveries of "long" histories. It highlights that the familiar form of that movement, and the body of law with which we associate it, is a relatively recent creation, and a selective one, which foregrounds certain themes of the long movement and neglects or obscures others. A long history of a movement may become a source of a usable past: Roads not taken or long overgrown may suggest future paths.

In this case, the value of a broadened view of environmental justice is in helping to overcome certain ways that it has been domesticated in a rapprochement with mainstream environmental law. Inasmuch as it has been folded into conventional legal practice as a procedural requirement that agencies pay attention to the disparate impacts of environmental decisions, and into an institutional commitment by groups such as NRDC to engaging vulnerable communities in a responsive fashion, environmental justice has produced reforms in the grain, more than the contours, of law's engagement with the environmental dimensions of social and economic inequality. The concerns that motivated the long environmental justice movement are broader than the ones that have been institutionalized under the environmental justice rubric. To put this idea to work, I conclude this paper with an environmental justice analysis of issues in the American food system, emphasizing the distributive dimensions of two issues: the Farm Bill's subsidies to commodity producers and the relative tolerant attitude of regulation toward the pollution and public-health effects of concentrated animal feeding operations (CAFOs).

I. THE RISE OF ENVIRONMENTAL JUSTICE

In roughly the last two decades, environmental justice has become an integral aspect of environmental law. A set of premises distinguish environmental justice, as a perspective and as a movement, from the "mainstream" environmentalism that is associated with the shaping and passage of major environmental statutes between 1970 and 1977, and with the advocacy organizations that emerged in that period, such as the Natural Resources Defense Council and Environmental Defense Fund.[18] One premise concerns the scope of problems that should be conceived of as "environmental." As Sheila Foster and the late Luke Cole put it, "the environment is where we live, where we work, where we play, and where we learn" – in other words, neighborhoods, workplaces, and public institutions, in addition and in contrast to traditional environmentalism's focus

(2015) (tracing a long history of "labor republicanism" that linked control of economic life with self-government generally, with special attention to the decades after the Civil War; Michael Kazin, *The Populist Persuasion* 49-78 (on the Knights of Labor and nineteenth-century labor radicalism) (1995); James Gray Pope, "Labor's Constitution of Freedom," 106 Yale L.J. 941 (1997) (on labor activists' conception of the meaning of the Thirteenth Amendment, in particular, for their program);

[18] One might add the Sierra Club, which was founded in 1892 but underwent significant membership growth and expansion of its mission in the late 1960s and early 1970s.

on such "natural" phenomena as waterways, forests, and non-human species.[19] This is a distinctly social and institutional definition of "environment," in which the artificial human habitat figures equally with the natural one. A second defining premise of environmental justice is that environmental policies should be assessed in light of their distributive consequences, particularly where the distribution of environmental harms and benefits tracks other contours of socio-economic inequality, such as race and class.[20] By contrast, Foster and Cole write, "the traditional environmental law community has largely ignored" these questions, partly because of a cultural attachment to a narrow definition of environmental topics, partly owing to "[r]acism and other prejudices."[21] A third premise is that environmental decision-making should be inclusive. Whether this means regarding political participation as a potentially transformative site of community empowerment, or asserting the humbler principle that vulnerable communities "should share fully in making the decisions that affect their environment," it stands in contrast to traditional environmentalism's comfort with specialized advocacy in judicial and administrative forums.[22]

The theoretical commitments that characterize the perspective of environmental justice also express its origins in community activism. More specifically, environmental justice claims have important roots in two developments of the late 1970s and the 1980s: the toxics movement and the rise of civil rights-style mobilization around the concept of "environmental racism." The toxics movement, a loose network of grass-roots and often blue-collar anti-pollution campaigns, had its grim paradigm in the discovery that some 22,000 barrels of discarded toxic waste had entered the soil and water supply of residential neighborhoods and a public school in Love Canal, New York, visiting perceived high rates of leukemia, miscarriages, and chromosome damage on mostly

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[19] Luke W. Cole & Sheila R. Foster, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement 17 (2001). Luke Cole, an environmental-justice lawyer who died in a car accident in Uganda is 2009, is admiringly remembered in the environmental-justice community.

[20] As Michael Gerrard puts it, while there is "no universally accepted definition of environmental justice," a strong candidate for a core overlapping idea is "that minority and low-income individuals, communities, and populations should not be disproportionately exposed to environmental hazards[.]" The Law of Environmental Justice xxxiii (2d. ed., 2008) (Michael B. Gerrard & Sheila R. Foster, ed.).

[21] Cole & Foster at 30. Similarly, Edwardo Lao Rhodes argues that "mainstream environmental organizations have tended to focus on things, rather than people. People have been treated as a homogenous mass: if one benefits, all benefit." Edwardo Lao Rhodes, Environmental Justice in America 30 (2003). Although Rhodes sets aside as "too simplistic" the view that "the mainstream environmental movement is simply racist and too middle-class" (35) to address environmental justice concerns, he argues for a culturally essentializing historical view of the environmental movement as marked by an "antiurban bias" inherited from Romanticism (38), a movement marked by people who "turned their backs on the cities and ran to the woods" (38).

[22] Gerrard at xxxiii. Cole and Foster offer the more ambitious view that "[i]ndividuals are transformed" and "[c]ommunities are transformed" by environmental justice mobilization at 14-15 and identify the "traditional environmental movement" with elite and insider advocacy at 28-30.

working-class residents.[23] Although they eventually drew the support of the Carter Administration and helped to spur the passage of Superfund legislation, Lois Gibbs and her Love Canal neighbors were largely ignored by local officials and the Hooker Chemical Company during several years of shoe-leather investigative work. Love Canal's problems became emblematic as communities around the country confronted the buried, often (conveniently) half-forgotten legacy of several decades of largely unregulated chemical waste disposal that followed World War Two.

The problem was not restricted to legacy pollution. New regimes for dealing with both hazardous waste and ordinary municipal trash seemed to follow familiar lines of least political and economic resistance. Controversy around one siting decision is conventionally credited with raising the political profile of "environmental racism." In 1982, North Carolina's government selected a tract of state-owned land in Warren County, a rural, poor, and majority-black county in the state's coastal plain, for disposal of soil contaminated by the illegal roadside dumping of 31,000 gallons of PCB-contaminated oil. (The oil's owners had deposited it along some 240 miles of state roads rather than dispose of it in an approved facility). County residents did not stop the landfill, but they drew national attention with protests that included blocking dump trucks with their bodies, and in which five hundred and fifty people were arrested.[24] Five years later, the Commission for Racial Justice of the United Church of Christ issued one of the canonical documents of environmental justice, *Toxic Waste and Race in the United States*.[25] The report presented evidence that hazardous waste facilities were disproportionately located in minority communities, and called this pattern "a form of racism."[26] Nearly three decades of subsequent research have split over the existence, degree, and sources of racially disproportionate hazards siting, but more refined methods have generally found correlation, and recent work suggests specific mechanisms of causation.[27]

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[23] Subsequent epidemiological research has called into questions whether these disorders were in fact markedly elevated in Love Canal, but have not diminished the emblematic significance of the place or the events identified with it. See, e.g., Lenore J. Gensburg et al., "Cancer Incidence among Former Love Canal Residents," 117(8) Environmental Health Perspectives 1265 (2009) (finding no significant difference between cancer rates in Love Canal and those for the general population of New York State for most types of cancer, and expressing uncertainty about causation, especially in light of small numbers).

[24] See Cole & Foster, supra n. __ at 21.

[25] *Toxic Wastes and Race in the United States* (report of the Commission for Racial Justice of the United Church of Christ) (1987).

[26] *Id.* at xi.

[27] See Paul Sohai and Robin Saha, "Which Came First, People or Pollution? Assessing the Disparate Siting and post-Siting Demographic Change Hypotheses of Environmental Injustice," 10 *Environmental Research Letters* 115008 (2015) (finding disparities in siting decisions, which they argue are best explained by a combination of racial discrimination and "path of least resistance" political economy, in which neighborhoods already in racial transition are likely to lack political wherewithal to resist undesirable land uses); J.R. Hipp and C.M. Lakon, "Social Disparities in Health: Disproportionate Toxicity Proximity in Minority Communities Over a Decade," 16 *Health Place* 674 (2010) (finding disparities in siting decisions); L.M. Hunter et al., "Environmental Hazards, Migration, and Race," 25 *Population Environment* 23 (2003) (not

Both episodes saw popular mobilization arise outside the arrangements of official decision-making and established advocacy organizations that had emerged from the environmental lawmaking and activism of the 1970s. The movements' working-class and African American makeup sharply distinguished them from what the 1987 UCC report called traditional environmentalism's "white and middle class" constituency.[28] The early environmental justice movements' motives tended to be local, defensive, and immediate: members felt themselves in danger of poisoning, and their requests for official attention had met indifferent response. Environmental justice activists did not appeal mainly to the costs-and-burdens balancing version of social rationality that came to matter so much to the economics-oriented wing of mainstream environmentalism and to agency decision-makers. Their argument was closer to the ground: whatever process had led to the dumping, concealment, or siting decision that immediately jeopardized them, it was suspect because of its fruits: a concretely felt threat that, typically, fit a pattern of social vulnerability and official indifference.[29]

Institutional uptake began in the early 1990s. After a 1990 University of Michigan conference on "Race and the Incidence of Environmental Hazards," a group of environmental-justice activists and scholars met with EPA head William Reilly, who formed an "Environment and Equity" working group at the agency.[30] Two years later the working group filed an equivocal report, finding disparate exposure to pollution burdens among non-white populations, but raising a variety of questions about the sources of exposure and its relation to ultimate health problems.[31] The report raised the ire of environmental-justice critics, and Representative Henry Waxman of California denounced it as a "public-relations ploy."[32] This exchange set up the environmental justice movement for a more satisfactory result two years later, when it won its most

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finding disparities in siting, a conclusion supporting the view that post-siting market dynamics account for disparities in demographics near hazardous sites). The debate over causation is obviously very important both for the issue of intentional discrimination and as a matter of the design of legal responses. It probably did not matter so much to many of the originators of "environmental racism" arguments, as they tended to see disparate impacts as a form of racial wrong, and to see market mediation as the typical form of unjust disparity.

[28] *Toxic Wastes and Race in the United States*, *supra* n. __ at xi.

[29] See Cole and Foster at 12-13 (arguing for the importance for "grassroots experience" in the environmental justice perspective).

[30] See Robert J. Bullard et al., Race and Toxic Wastes at Twenty 38 (2007) (recounting early history of "environmental racism" arguments and scholarship).

[31] See Environmental Equity: Reducing Risk for All Communities, Report of Environmental Protection Agency, Environment and Equity Working Group (1992).

[32] See Richard J. Lazarus, "Pursuing 'Environmental Justice':The Distributional Effects of Environmental Protection," 87 Nw. U. L. Rev. 787, 804-06 (1993). In the same period, January 1990, environmental-justice groups wrote an open letter to the major environmental advocacy groups, documenting their small share of non-white leaders and senior staffers. The letter, which also appeared in the New York Times in early February, prompted quick responses from some environmentalist leaders. Fred Krupp, executive director of EDF, confessed, "environmental groups have done a miserable job of reaching out to minorities." Dorceta E. Taylor, *The State of Diversity in Environmental Organizations* 31-33 (2014). Nonetheless, a follow-up study in 2014 found 88 percent of broadly defined "leadership positions" in environmental organizations still occupied by white people. See id. at 50-52.

prominent formal legal victory: President Clinton's 1994 Executive Order 12898, which directs all federal agencies to "make achieving environmental justice part of [their] mission by identifying and addressing … disproportionately high and adverse human health or environmental effects… on minority… and low-income populations."[33]

EO 12898 is in itself a rather small victory on the stage of federal law. Its requirements are strictly procedural, and unlike other procedural duties that form important parts of environmental law practice, courts have held that the disparate impacts to which it draws agencies' attention do not form the basis of individual causes of action under Title VI of the Civil Rights Act.[34] The idea of environmental justice has, nonetheless, gained a significant foothold across environmental policy and politics. Many states have adopted environmental-justice policies of various degrees of rigor.[35] No environmental group or agency will profess indifference to environmental justice, and groups such as EarthJustice and NRDC have made significant commitments to it.[36] These commitments involve both substantive choice of cases and the procedures of attorney-client relations, which advocates, particularly but not only younger ones, have worked to make more responsive to and collaborative with local communities than an older model that today's attorneys describe in hindsight as "swooping down with an agenda."[37] Environmental-justice claims have entered the lexicon of advocacy, where their uses range from mobilizing constituents to drawing media attention, and anecdotal

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[33] http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf

[34] See Alexander v. Sandoval, 532 U.S. 275 (2001) (disparate-impact regulations promulgated under section 602 of Title VI of the Civil Rights Act do not give rise to individual causes of action). By contrast, enforcement of planning and assessment requirements under the National Environmental Policy Act figures prominently environmental litigation.

[35] California has adopted no fewer than nine statutes directing state agencies to attend to environmental justice concerns in their planning, and these have been enforced in individual suits. See, e.g., Bakersfield Citizens for Local Control v. City of Bakersfield, 124 Cal. App. 4th 1184 (2004).Massachusetts prioritizes environmental justice communities (defined as those with relatively high levels of either minority residents or low-income households) for cleanup funds, inspection, and enforcement under executive policy, and commits itself pointedly to a definition of "equal protection" as the principle that "no group of people, because of race, ethnicity, class, gender, or handicap bears an unfair share of environmental pollution … or have [sic] limited access to natural resources, including greenspace (open space) and water resources." See "Environmental Justice Policy of the Executive Office of Environmental Affairs," (executed Oct. 9, 2002), available at http://www.mass.gov/eea/docs/eea/ej/ej-policy-english.pdf. Many states' policies roughly track the directive of EO 12898.

[36] See, e.g., http://www.sierraclub.org/environmental-justice (Sierra Club environmental justice program); https://www.nrdc.org/about/environmental-justice (NRDC environmental justice program, which includes dedicated attorneys); https://www.edf.org/news/environmental-justice-data-now-online-every-us-community (EDF program to accumulate and distribute data on geographic disparities in environmental hazards). While there are differences, and my subjective impression is that the NRDC stands out in this respect, more than twenty years of being in and out of environmental movement spaces and among environmental law students tend to persuade me that heartfelt commitment to environmental justice is widespread.

[37] Email correspondence with Mitchell Bernard, litigation director, NRDC (July 2015).

evidence suggests that such claims have made a difference in more siting and funding disputes than a review of the *Federal Register* would reveal.[38]

Environmental justice is now a part of environmental law and politics. Its practical consequences, however, have been somewhat uncertain and slow-moving, while its import for the field as a whole remains ambiguous: is it a supplemental consideration mainly relevant to implementing familiar goals, or a continuing challenge to the identity and priorities of environmental law and politics?

The argument that follows is that the importance of environmental justice in environmental law is not all it might be, and that examining the circumstances in which it emerged can illuminate why that is so.

II. WHY WAS ENVIRONMENTAL JUSTICE NECESSARY?

Environmental justice challenged mainstream environmentalism along several dimensions. It insisted on the importance of the distribution of benefits and burdens under the pollution-control statutes and other laws passed in the early 1970s at the opening of the modern era of environmental law. It criticized traditional environmentalism for taking "natural" places and systems as the paradigms of environmental concern, leaving at the periphery Cole and Foster's places "where we live … work … play, and … learn." Environmental-justice advocates also criticized environmental organizations for their focus on and comfort with elite forms of advocacy driven by professional expertise, in contrast to popular participation and grassroots mobilization. Many of these critics regarded traditional environmentalism as both parochial and privileged, the inheritor of a woods-and-waters political aesthetic that led the Sierra Club in 1972 to describe incipient environmental justice concerns as "the problems of special groups such as the urban poor and ethnic minorities."[39]

This conventional story is important but incomplete. The "traditional environmentalism" that served as the defining foil for environmental justice was neither timeless nor inevitable. It was the product of several distinctive features of American political economy, legal culture, and the environmental movement in the second half of the twentieth century.

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[38] Already in 1994, pioneering environmental-justice litigator Luke Cole argued that, because "the struggles in the environmental justice movement are primarlily political and economic struggles, not legal ones," even suits with poor prospects of technically prevailing could be worth bringing for purposes of mobilizing communities, attracting publicity, and framing structural disparities in environmental benefits and burdens as civil-rights issues, notwithstanding that the Supreme Court declined to treat them as denials of equal protection within the sense of the Fourteenth Amendment. See Luke W. Cole, "Environmental Justice Litigation: Another Stone in David's Sling, 21 Fordham L.J. 523, 541-44 (1994).

[39] Cole and Foster at 30. The phrasing appeared in a survey of members, 58 percent of whom responded that they opposed or strongly opposed the club's concerning itself with such questions. See also Rhodes, supra n. __. [Also, Morton, Cronon?]

A. THE POST-WAR ANOMALY AND THE FORGETTING OF ECONOMIC INEQUALITY

In the period of roughly 1946-1973, high levels of economic growth coincided with a relatively egalitarian distribution of income and wealth, producing the widely shared impression that economic inequality was a problem substantially solved.[40] In this generation-long experience (and somewhat longer-lasting perception) of inclusive growth, political elites characterized the remaining economi problems as ones of exclusion, not inequality: Certain marginalized populations, signally African Americans and Appalachian whites, were understood to have suffered exclusion from a system of general benefit on account of structural injustice and explicit discrimination; but those who were dealt into the system could expect to share in its benefits.[41] From this perspective, economic participation, once purged of its exclusionary elements, should be expected to overcome, not reproduce, historical inequality. Thus even in a time of great reformist energy, public-interested policy-making could plausibly set aside distributive considerations in confidence that these would, so to speak, take care of themselves in a properly functioning economy.

As environmental-justice critics have charged, the major environmental statutes do not address the prospect that their benefits and burdens might turn out to be unequally distributed in ways that add to cumulative disadvantage. They do not provide measures to avert disparate impact, whether from siting hazardous activities in poor or non-white localities, from market-mediated migration as people with money avoid environmental hazards and the poor end up clustered near them, or from accumulation as today's permissible levels of hazards interact with high baselines of toxicity or other dangers among vulnerable populations.

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[40] See Thomas Piketty, Capital in the Twenty-first Century 304-76 (Arthur Goldhammer trans., 2013) (advancing this finding).

[41] See, e.g., John Kenneth Galbraith, *The Affluent Society* 429 ("as an economic and social concern, inequality has been declining in urgency [because of] increased production [which is] an alternative to redistribution or even to the reduction of inequality. The oldest and most agitated of social issues, if not resolved, is at least largely in abeyance"); 577-80 (nonetheless, "poverty does survive," especially in the form of "insular poverty" characterized by an "island [where] everyone or nearly everyone is poor," exemplified by black and white Southerners, "slums," and Appalachia) in Galbraith, The Affluent Society and Other Writings (Library of America: James K. Galbraith, ed., 2010). As on piece of evidence for the persistence of this impression, Galbraith in the original 1958 edition of *The Affluent Society* flatly asserted that economic inequality was declining, and hung a great deal of his analysis on that fact. In subsequent revisions through 1984, he acknowledged that his analysis could no longer be attributed to falling inequality, as it was in fact growing, and responded by amplifying the role of ancillary cultural and psychological considerations in his argument. See also Lyndon Baines Johnson, "The Great Society" (speech at Ann Arbor, MI, May 22, 1964) (arguing that, after fifty years of "unbounded invention and untiring industry to create an order of plenty for all our people," the challenge was now "to use that wealth to enrich and advance our national life, and to advance the quality of our American civilization"); Johnson, State of the Union (Washington, D.C., Jan. 8, 1964) (calling for "war on poverty" "in city slums and small towns, in sharecropper shacks or in migrant worker camps, on Indian Reservations, among whites as well as Negroes" and with special attention to "the chronically distressed areas of Appalachia").

What do these omissions reveal about the statutes and the attitudes of those who wrote them? The statutes' authors were on notice of environmental justice concerns, and they did not ignore them. In the course of working on the Clean Air Act, Senator Muskie, its chief architect, felt compelled to respond to a book-length "Nader Report" that took to task the government's clean air policy and "palliative" solutions.[42] The report, titled *Vanishing Air*, focused on "the environmental violence" (293)suffered by severely polluted blue-collar communities, often in relatively economically marginal states such as West Virginia and Maine, in service of an argument that "air pollution is a new way of looking at an old American problem: concentrated and irresponsible corporate power."[43] Although Muskie's response concentrated on defending the Clean Air Act's ambient air quality standards against the emissions-based standards that Nader favored, elsewhere in spring of 1970 Muskie offered a more expansive picture of the social purpose of anti-pollution laws.[44] On the first Earth Day, speaking in Philadelphia, he argued that, "[M]an's environment includes more than natural resources. It includes the shape of the communities in which he lives: his home, his schools, his places of work[.]"[45] Developing his idea of the "total environment," he struck what can only be called a note of environmental justice, insisting that "the only kind of society that has a chance" is "a society that will not tolerate slums for some and decent houses for others, rats for some and playgrounds for others, clean air for some and filth for others."[46] Muskie linked the environmental crisis rhetorically to the War on Poverty, to the Great Society idea that the country's challenge had changed from achieving prosperity to flourishing within affluence, and to the Civil Rights Movement, concluding, "For Martin Luther King, every day was an Earth Day—a day to work toward his commitment to a whole society."[47] This was presumably the line of argument that Muskie had in mind the previous evening at Harvard's Earth Day teach-in, where he said, "Those who believe that the environmental

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[42] John C. Esposito and Larry J. Silverman, Vanishing Air: The Ralph Nader Study Group Report on Air Pollution (1970), 299-310 (on "pollution and palliatives").

[43] Id. At 293, 299. See also id. at 121-29 (Union Carbide pollution in the Ohio Valley of West Virginia and the ineffectiveness and venality of local and state government's involvement in enforcement efforts); 294-98 (discussing pollution in New Cumberland, West Virginia, and Rumford, Maine, respectively).

[44] News conference of Senator Muskie (May 13, 1970), entered in 116 Cong. Rec. 15607 (May 14, 1970) (entered by Rep. Boland)

[45] Sen. Edmund Muskie, Earth Day speech (April 22, 1970), https://kent.bates.edu/librarynews/node/421.

[46] Id.

[47] Id. Muskie had earlier "war" on "poverty" and "hunger" with "another war" on "the pollution of our environment," then insisted that only creating "a whole society," in King's sense, which he defined as a "healthy total environment," could count as victory. He also argued, in terms closely akin to those of Galbraith's *Affluent Society*, that "Our technology has reached a point where it is producing more kinds of things than we really want, more kinds of things than we really need, and more kinds of things than we can really live with," and that this condition represented "a moral frontier" where material increase must be exchanged for a "society in which all men live in brotherhood … where each member of it knows that he has an opportunity to fulfill his greatest potential." Id.

crisis [is] related to trees and not people are wrong. Those who believe that we are talking about the Grand Canyon and the Catskills, but not Harlem and Watts are wrong."[48]

Does the design of the major environmental statutes give the lie to these sentiments, or do the statutes represent a version of what it might mean to implement these ideas? The Senate Report on the Clean Air Act and Muskie's floor statements in support of the bill suggest the latter. In hearings and in challenges from the Nader organizations, the Senate had heard several kinds of complaints about the distribution of environmental harms. One focused on lack of enforcement under previous anti-pollution legislation, especially in areas that were economically dependent on polluting industries: in line with the arguments of *Vanishing Air*, Representative Ken Hechler of West Virginia had given Muskie's sub-committee a vivid rendition of Union Carbide's evasion of regulatory efforts in the Ohio Valley.[49] Second was the charge, especially emphatic from the Nader groups, that the bill's focus on national ambient air quality standards (NAAQS) left too much room for administrative evasion, and should be replaced by technology-specific emissions standards that would drive down pollution more aggressively.[50] Muskie seems to have understood NAAQS as providing an answer to both challenges. By setting a national standard, it would, in effect, create a universal right to clean air, not dependent on the conjunction of pollution sources in any particular locality. As Muskie explained in discussing "the philosophy of the bill," the point was to establish a principle that "all citizens have an inherent right to the enjoyment of pure and uncontaminated air and water and soil."[51] The level of protection afforded by this statutory right, the Senate Report on the Clean Air Act emphasized, should be set at a level rigorous enough to protect even especially vulnerable populations, such as those suffering from emphysema or asthma, and the aged or very young.[52] Although the

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[48] Sen. Edmund Muskie, speech at Harvard University (April 21, 1970). Entered into 116 Cong. Rec. 15705 (May 15, 1970) (by Sen. Eagleton). Earlier that year, he made the same argument in a Chicago address: "[M]an's environment includes the shape of the communities in which he lives, his home, his schools, his places of work, his modes of transportation and his society…. [including] The economic imbalance which has caused the population shifts which now so deeply trouble our American cities. The adequacy of housing and services both in urban and rural America. The availability of health services. The conservation of natural resources. The availability of recreational opportunities in and around our cities… none of these can be said to be any less important or basically more important than the crisis of the environment. They are, indeed, a part of the environment." 116 Cong. Rec. 3527 (Feb. 17, 1970) (entered by Sen. Eagleton)

[49] [Readers: I lost my marked-up PDF of this hearing in a recent technological disaster. The research is easily replicated, but not in time for my workshop.]

[50] In his forward to *Vanishing Air*, Nader wrote, "The national ethic against air pollution must be translated into a policy of 'maximum use of technology down to zero profits,' until corporations stop poisoning their neighbors' habitat." Vanishing Air at ix. Muskie quoted this passage in his official reply to the Nader criticisms. See supra n. __.

[51] 116 Cong Rec. 32902-03 (Sept. 21, 1970) (statement of Sen. Muskie). In his own words in introducing the bill, Muskie described its goal as being that "all Americans in all parts of the Nation should have clean air to breathe … that will have no adverse effects on their health." Id. at 32901.

[52] See Senate Report on National Air Quality Standards Act of 1970 at 10-11, 35 (Rep. No. 91-1196, Sept. 17, 1970).

guarantee of healthful air was, in form, a regulatory mandate rather than a right, it was made individually enforceable by the act's citizen-suit provision, which, the bill's supporters argued, resolved questions about enforcement by empowering individuals affected by NAAQS violations to backstop agency enforcement with individual actions.[53] A different approach, Muskie argued, would be "Russian Roulette … with the trapped inhabitants of urban America."[54]

Of course one does not have to take such political talk at face value, but a deliberately charitable interpretation in this case helps to reveal the lines of a worldview in which the Clean Air Act, as written, was *already* an environmental justice statute. Anti-pollution laws, in this view, formed part of a comprehensive approach to regulating what John Kenneth Galbraith had influentially called "the affluent society."[55] (Muskie used the term in setting out the program of the Clean Air Act on the Senate floor, calling it a response to "the wasteful practices of an affluent society.")[56] In this view, the anti-pollution statutes were part of a comprehensive renovation of the human "total environment," alongside other programs of the Great Society and War on Poverty. The common goal was to overcome social and economic isolation, especially clusters of persistent poverty, and build up institutions that promoted learning and development.[57] Establishing individually enforceable national standards for healthful air and water played a key part in this program, as did controlling toxins. But those measures could rely on others in the larger program when it came to distributing the hazards that would still have to be allocated, from hazardous waste facilities to persistent air and water pollution. The basic insight of environmental justice – that absent specific protections, these persistent burdens will be distributed along familiar lines of race and poverty – is weighty in proportion to the intensity of those other forms of inequality, and to their propensity to reproduce or amplify themselves. Reformers in 1970 expected those forms of inequality to give way to a combination of egalitarian macroeconomic tendencies and inclusive and redistributive policies. Although it may seem clear in hindsight that Nixon-era retrenchment had already begun as the major environmental laws were passed, Muskie took the view of Joseph Califano, President Johnson's principal aid for domestic policy, who argued in 1968 that the Johnson years had "cleared the liberal agenda"; that conservatives, too, were now interventionists and redistributionists in matters ranging from affirmative action and day care to proposals for a basic income; and that the important question was how to carry forward, not just piecemeal legislation, but what

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[53] The Senate report explained that the objective character of the NAAQS standards would make citizen suits tractable for courts, and thus enforce consistent policy across the country. Senate Report at 36-39. Muskie made the same point in floor debate at 116 Cong. Rec. 32902-03 and at 32926-27 in answering to a challenge to the citizen-suit provision (arguing that the bounds of a citizen suit were made objective by the NAAQS standards, and that such suits would form an essential complement to agency enforcement in creating a consistent national policy). Strictly speaking, citizen suits do not directly enforce NAAQS, but rather demand enforcement action against polluters in violation of emissions permits that are, in turn, keyed to the NAAQS.

[54] 116 Cong. 32906 (Sept. 21, 1970) (statement of Sen. Muskie).

[55] See discussion and citations, supra n. __.

[56] See 116 Cong. Rec. 32900 (Sept. 21, 1970) (statement of Sen. Muskie).

[57] See n.__ supra (discussing Great Society and War on Poverty progams).

Muskie called "a reshaping of our basic political institutions, and … a reshaping of our thinking about them."[58] In this view, the challenge of the time was to follow the lead of events, both macroeconomic and political, in the direction of greater economic and social equality.

Soon the political turn against the regulatory and redistributionist state would become more apparent. Moreover, at roughly the time the major environmental laws were passing through Congress with huge majorities, economic inequality began its forty-year increase.[59] In their time, though, the major environmental statutes incorporated their architects' expectations that the laws would operate within a general movement toward greater equality.

B. Disparate Impact and the Problem of Constitutional Remedies

Second, the period between the passage of many of the major environmental laws in 1970-1977 and the rise of a self-conscious environmental-justice movement in the 1980s coincided with the Supreme Court's rejection of disparate-impact claims under the Equal Protection Clause and establishment of the requirement that equal-protection plaintiffs demonstrate "discriminatory purpose" by an official actor.[60] Several early environmental-justice suits were turned away by courts precisely for their failure to show discriminatory intent, even in cases of dramatically disparate distribution of environmental harms.[61] Thus, those who wrote the environmental laws of 1970-1977 had

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[58] See 1968 Cong. Rec. 11158 (May 1, 2008) (statement of Sen. Muskie) (inserting into record a speech of Joseph A. Califano before the Nieman Fellows of Harvard University, April 23, 1968). Muskie repeatedly sounded this note about the environmental statutes, describing them as paradigm-shifting changes in the duties as well as the rights of citizenship. See, e.g., 118 Cong. Rec. 36874 (1972) (statement of Sen. Muskie) ("The whole intent of [Clean Water Act] is to make a national commitment…. Can we afford clean water?... Can we afford life itself?... Those questions were never asked as we destroyed the waters of our Nation, and they deserve no answers as we finally move to restore and renew them. These questions answer themselves. And those who say that raising the amounts of money called for in this legislation may require higher taxes, or … contribute to inflation simply do not understand the language of this crisis"); 116 Cong. Rec. 42392 (1970) (statement of Sen. Muskie) ("There has to be a commitment to [clean air] by every citizen, not only with respect to the activities of others, but with respect to each citizen himself.").

[59] See Piketty, supra n. __ at 291 (showing income inequality in the US, 1910-2010, with sharp increase beginning in mid-to-late 1970s); 349 (same for inequality in wealth, in this case for a timeline spanning 1810-2010).

[60] See Washington v. Davis, 426 U.S. 229 (1976) (finding no equal protection claim from a showing of disparate racial impact by an exam given to prospective employees of the Washington, D.C. police department in the absence of evidence of purposeful discrimination by an official actor); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 266 (1979) (holding that where a law has a foreseeable disparate impact, it must have been passed because of, not despite, that impact, i.e., must have been motivated by or aimed at the impact).

[61] See R.I.S.E., Inc. v. Kay, 768 F.Supp. 1144 (E.D. Va. 1991) (challenging siting of municipal waste facility on Equal Protection grounds); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 896 F.2d 1264 (11th Cir. 1989) (same); Bean v.

some reason to believe that, where the statutes failed to achieve a reasonably equitable distribution of burdens, litigants could call on courts to review policies with racially disparate effects.

The doctrinal change worked by *Davis* and *Feeney* altered the remedial landscape for plaintiffs whose disparate burdens arose from the interaction of facially neutral statutes with background conditions of economic and racial inequality. At the inception of what became the environmental justice movement, in cases such as *Bean v. Southwestern Waste Management* in 1979, plaintiffs and their attorneys were entering a new world defined by a rigid requirement to show purposeful discrimination or leave the constitutional domain in search of statutory solutions. Even at the time of *Washington v. Davis*, which announced the requirement of purposeful discrimination and declined to base a finding of such discrimination on disparate impact alone, it was not clear that the courts would give the doctrine the rigid formulation that it later received: the lead opinion by Justice White focused on the institutional particulars of the District of Columbia police department, and Justice Stevens, concurring, argued that "the common-law presumption" that actors are responsible for the foreseeable effects of their actions should govern disparate-impact claims.[62] It was because of this doctrinal development that environmental-justice plaintiffs were thrown on the environmental statutes as their primary source of remedies, and so were confronted with those statutes' facial indifference to the economic and racial distribution of whatever hazards they did not ban outright.

I have not found explicit forecasts by legislators or others that constitutional litigation could mitigate the distributional consequences of environmental law (although the fact that a number of civil-rights lawyers continued to make environmental-justice claims in this form well into the 1980s says something about the appeal of the proposition). I do not doubt, moreover, that if architects of this legislation had been in more substantial contact with the civil-rights and poverty-law communities, they would have been pressed to consider the distributional question explicitly and to weigh in its light the adequacy of the mandates and remedies they were creating. In that respect, their silence goes some distance toward confirming the claims of their critics, that a narrow conception of the problem they confronted led them to design a too-narrow regime in response. Nonetheless, emphasizing that line of interpretation can obscure another, complementary one: how abruptly the world the environmental reformers took for granted was stripped from them, as the growth of economic inequality returned, political support for Great Society-style programs collapsed, and the constitutional means for addressing the natural effects of this situation, the disparate effects of facially neutral policies, disappeared from the *United States Reports*.

This intersection between the environmental and racial-justice areas, in the domains of both law and movements, suggests a larger point about the emergence of environmental justice. Already in 1970 the radical black scholar Nathan Hare articulated

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Southwestern Waste Management, 482 F.Supp. 673 (S.D. Tex. 1979), aff'd without op., 782 F.2d 1038 (5th Cir. 1986) (same).

[62] See 426 U.S. at 246-48 (opinion of Justice White, discussing D.C. Police Department's recruitment practices); 252-69 (concurrence of Justice Stevens).

the later-canonical arguments of environmental justice in a polemical essay in *The Black Scholar*.[63] Hare argued that "the reformist solutions tendered by the current ecology movement" were "somewhat ludicrous from the black perspective" but that nonetheless "[t]he emergence of the concept of ecology in American life is potentially of momentous relevance to the ultimate liberation of black people."[64] Hare argued that the key was to understand that "ecology" for many black people meant a residential and workplace environment with disproportionate concentrations of conventional pollution but also, and just as important, intolerable levels of crowding, noise, vermin, exposure to workplace accidents, and risk of violent crime.[65] While the "white ecology" of mainstream environmentalism was indifferent to these problems in Hare's telling, a more thoroughgoing ecological analysis would show that "[n]o solution to the ecology crisis can come without a fundamental change in the economics of American particularly with reference to blacks," and, indeed, "The real solution to the environmental crisis is the decolonization of the black race."[66] I have not found evidence that Hare's formulation reached more mainstream and legally consequential debates. Nonetheless, Hare's argument is a reminder that the environmental justice movement arose in conversation with an argument in the long civil rights movement (or, as it is often called, the long black freedom struggle) about what kind of equality might suffice as redress for the situation of black Americans. Five years before Hare wrote, Bayard Rustin, a close ally of Martin Luther King, Jr. and an organizer of the 1963 March on Washington, had already called the drive for formal equality of the desegregation period the "classical" phase of the civil rights movement, a term historian Jacqueline Hall would adopt forty years later in writing of the "long" movement.[67] Rustin went on to argue that to succeed the movement would have to move on to economic reconstruction, from "equal opportunity" to substantive "equality."[68] The environmental justice movement carried Rustin's case for economic reconstruction into the domain of environmental law. Much as the idea of constitutional equality has been caught for thirty years between a political and expressive meaning that encompasses ambitions to social and economic reconstruction and a doctrinal meaning that has hewn to a narrow and formal prohibition on purposeful racial discrimination, so the idea of environmental justice carries both the expressive charge of the broader ambition and the concrete limitations of the mostly procedural ways in which it has been implemented.[69] The major environmental statutes

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[63] Nathan Hare, "Black Ecology," The Black Scholar 2-8 (April 1970).

[64] Id. at 7, 2.

[65] See id., passim. Besides arguing for treating all of these as vectors of ecological harm, Hare adapted conventional studies of urban poverty to an environmental vocabulary, quoting accounts of malnutrition from the iconic proposal for a national basic income, *Poverty amid Plenty*, and characterizing these as a "form of pollution." Id. at 6. See *Poverty amid Plenty: The American Paradox* (President's Comm'n on Income Maintenance Programs, 1969).

[66] Hare, "Black Ecology" at 7, 8.

[67] Bayard Rustin, "From Protest to Politics," Commentary (Feb. 1965); for the use of "classical," see Hall, "The Long Civil Rights Movement," supra n. __.

[68] Rustin, "From Protest to Politics," Commentary (Feb. 1965).

[69] See, e.g., Pamela Karlan, "What Can Brown® Do for You? Neutral Principles and the Struggle over the Equal Protection Clause," 58 Duke. L.J. 1049 (2009) (surveying arguments over the meaning of equal protection and the legacy of the classical civil rights movement in the

were written in the climate of a political and intellectual mainstream in which the contradictions between formally neutral principles of protection, on the one hand, and substantively unequal social and economic conditions and outcomes, on the other, seemed less acute and inescapable than Rustin argued at the time and environmental justice advocates have argued since, for reasons rooted in the subsequent development of both legal doctrine and economic inequality.[70]

C. Legal Liberalism and the Institutionalization of Environmental Law

Both the environmental statutes and the environmental movement that took form in the 1970s and early 1980s bore the stamp of a conception of law's role in legal and social reform that was regnant among elite reformers in the 1960s and 1970s. Steven Teles has termed this view "legal liberalism" and linked it with a more general view of the law's role in a democratic society. [71] Legal liberalism was defined by its emphasis on the use of litigation and adjudication-like procedures to protect individuals against arbitrary discrimination with respect to their basic interests – that is, to ensure the formal preconditions of their full participation in political, economic, and social institutions. It implied a central but also quite specifically delimited role for legal advocacy, focused on securing formal rights and procedural attention for those who lacked organized voice backed by money or institutional heft, such as the disorganized poor and consumers.[72]

Legal liberalism took plausibility from the distributional optimism of the mid-twentieth century: its procedural emphases made sense on the view that economic

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aftermath of *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007)).

[70] For an argument that these should be viewed together, not as distinct developments, see David Singh Grewal, "The Laws of Capitalism" (reviewing Thomas Piketty, *Capital in the Twenty-first Century*), 128 Harv. L. Rev. 626 (2014) (arguing for the legally constructed character of the bases of economic inequality); Jedediah Purdy, "To Have and Have Not" (reviewing Piketty), Los Angeles Review of Books, April 24, 2014 (same).

[71] See Steven M. Teles, *The Rise of the Conservative Legal Movement* 22-57 (2008) (describing "the rise of the liberal legal network. The term is also associated with Laura Kalman's *The Strange Career of Legal Liberalism* (2008). Kalman uses the term to refer to a series of scholarly and institutional developments in which legal scholars sought to justify, preserve, and expand the reformist jurisprudence of the Warren Court (and to some extent the early Burger Court, in cases such as *Roe v. Wade*). Teles refers to a different phenomenon, the central place that legal institutions, practice, and concepts achieved in the institutional and intellectual life of center-left reform movements between the late 1950s and the late 1970s, which he calls "the legalization of reform" (52, internal quotation marks omitted).

[72] As I read it, this set of connections is only hinted at, not developed, in Teles's account, which contains a great deal of valuable institutional detail. I am building on his reconstruction of the view of the legal profession that legal liberalism took to connect it with a larger idea of the legitimate forms of state power, dissent, and reform that it seems to me to echo. This formulation owes to Katrina Forrester's manuscript in process on the history of post-World War Two political and legal philosophy and the interaction with the salient events and dramas of the period (unpublished, partial manuscript on file with author).

participation tended to overcome rather than reinforce embedded inequality.[73] But legal liberalism was by no means determined by economic optimism alone. Rather, it formed a key part of what is often termed the "consensus liberalism" of the Cold War period in US history.[74] Procedural guarantees promised to bring neglected interests into decision-making processes within a pluralist democracy that otherwise seemed to have solved the problem of self-government by exchanging both the populist ideal of a virtuous, mobilized People and the corresponding specter of the tyranny of the majority for rule by rotating coalitions of minorities.[75] It discarded ambitious visions of collective self-rule and also recast class conflict as interest-group politics. In light of its picture of politics as the rotation of ever-shifting alliances of groups in and out of transient majorities, pluralist-democratic thought adopted a political version of the concern with exclusion that also preoccupied the thinking of the time on economic policy. John Hart Ely's conception of constitutional review as filling persistent structural gaps in political decision-makers' consideration of the interests of disadvantaged or disorganized groups represents the elevation of legal liberalism to constitutional theory, explicitly portraying judges' remit as the procedural defense of those disadvantaged by an otherwise legitimate democratic pluralism.[76]

The institutional trajectory of mainstream environmentalism in the early and mid-1970s took much of its shape from the legal-liberal conception of advocacy. These years shaped environmental politics for decades thereafter in the form of the litigation and elite advocacy that the environmental justice movement critiqued. The key events were a series of pivotal institutional investments in nascent environmental groups by the Ford Foundation, which had already been at the center of building up clinical programs in law schools and developing pro bono expectations for the bar, two key sites of implementation for the legal-liberal ideal of representation as advocacy.[77] In the early and mid-1970s, the Ford Foundation made major grants to the Environmental Defense Fund and the Natural Resources Defense Council. Ford guidance helped to build up EDF from a grassroots coalition of scientists, lawyers, and citizens on Long Island and effectively founded NRDC by brokering the merger of a band of young, liberal, well-connected Yale

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73 Teles doesn't make this argument, but David Grewal and I have, drawing on his version of "legal liberalism," in Grewal and Purdy, "After the Age of Complacency, *supra* n. __.

74 See, e.g., Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (1955). Although Hartz is often invoked as a consensus-school thinker, he is somewhat peculiar in that he took consensus as historical fact and sought to understand it, not uncritically. This puts him in a rather different light from, say, Daniel Boorstin, whose work is more emblematic of the political cast of the consensus school. See, e.g., Boorstin, *The Genius of American Politics* (1953).

75 It wasn't quite as neat as this: Teles, for instance, observes signs of anxiety about riots and social discontent in the motives of legal elites promoting legal liberalism. Teles, Rise of the Conservative Legal Movement at 58-63.

76 Ely, Democracy & Distrust; Fiss on strong view of procedural justice? Kalman on consensus school. Hartz, Dahl, as emblematic of it.

77 As Teles details, the Ford Foundation made very substantial early grants in indigent defense and poverty law more generally, coming in advance of and helping to lay the ideological and institutional ground for publicly funded institutions that followed. Ford also played a key role in supporting the development of clinical education in law schools. See Teles at 30-41.

Law School graduates with a Republican director of old-line conservationist impulses, the Simpson Thacher lawyer John Adams.[78] Ford made some of its largest cumulative environmental and natural resources grants of the 1970s to these groups: $2,995,000 to NRDC, $1,114,500 to EDF, and, in addition, $1,584,000 to the Center for Law in the Public Interest (based in Los Angeles) and $688,000 to the Sierra Club Legal Defense Fund, which later became EarthJustice.[79] Ford's account of the reasons for these investments exemplifies the legal-liberal conception of advocacy: "The Foundation has been assisting the environmental law movement since 1970 in the belief that in a pluralistic society the views and interests of all segments of opinion should have their *day in court*."[80] The ideal was to bring all "views and interests" before an impartial decision-maker, not to engage in political contests to form views and challenge or reshape interests.

The deliberately bipartisan NRDC answered, like EDF, to a litigation review board carefully stocked with law-firm partners and sympathetic figures from the business world.[81] Although this has been interpreted as evidence of elite control of these organizations, that view hardly comports with the controversial and radical cases that the young lawyers brought, particularly in their first decade.[82] It is more convincing to see NRDC and EDF as instances of a general pattern in the institutions of legal liberalism: collaboration between senior professionals whose politics were often cast in a New Deal/Great Society mold and young activists, frequently with moderate New Left sympathies, who saw in the law an institutional path to very basic changes, including welfare rights, death-penalty and criminal-justice reform, and revolutions in sex and gender.[83] Legal liberalism was not a straightforwardly narrowing or moderating strategy in its effect on the substantive scope of environmental politics. It did, however, imply a persistent tilt toward professionalized and elite advocacy that was less likely to engage ordinary people as active constituents than as donors or clients. The legal-liberal model of

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[78] See Robert Gottlieb, Forcing the Spring: The Transformation of the American Environmental Movement 194-96 (2005) (recounting the story of NRDC's founding).

[79] See Ford Foundation Grants in the 1970s (report of the Ford Foundation). Ford also made a cumulative grant $15.5 million to Resources for the Future, a research-oriented organization that remains a key resource for informed policy-making. See Ford Grants in the 1970s. In the same years, Ford developed a proposal to fund Earth Action, the advocacy and organizing group proposed by the creators of the original 1970 Earth Day, but abandoned it in late stages. Gottlieb, Forcing the Spring. The pattern of Ford's field-shaping investments was decisively in favor of expert knowledge and advocacy, not grassroots political organizing.

[80] Ford Foundation Grants in the 1970s, p. 14 (emphasis added).

[81] See Gottlieb, supra n. __ at 190-93 (discussing structure of Ford-funded environmental groups).

[82] For instance, NRDC forced EPA to develop water quality criteria and effluent standards for sixty-five toxic chemicals and families of chemicals. See NRDC v. Train (Flannery Decree), Civ. A. No. 2153-73 (D.D.C. June 9, 1976) (consent decree so requiring). EDF pressed EPA toward a stringent policy on vinyl chloride emissions. See NRDC v. EPA, 824 F.2d 1146 (1987) (recounting history of vinyl chloride litigation in a subsequent action filed upon EPA's withdrawal of the rule that had resulted from earlier EDF litigation). One might give many more examples.

[83] See Teles at 46-57.

reform also meant that legally oriented activism followed the ideological peregrinations of the federal courts, not because the advocates became personally more moderate in their goals (whether or not they in fact did so), but as a matter of the scope of possibility that their chosen strategy entailed. An advocate who started out with visions of enforcing a progressive conception of the public interest through public-trust or substantive National Environmental Policy Act suits in a green 1970s soon modified her expectations, much as reproductive-rights and poverty lawyers did as the Burger Court and its successors took hold of legal interpretation.

The shaping influence of legal liberalism on environmental law may also have contributed to a lack of dynamism in ideas about the scope of environmental problems – whose problems they were, as environmental-justice critics might have put it. The Ford Foundation expressed confidence that its grantees' carefully calibrated litigation, in which clients were often well established groups, ensured that these environmental advocates were responsive to what the foundation seems to have regarded as an uncontroversial public interest in environmental matters. A 1976 Ford report on the foundation's involvement in public-interest law posed the question, "Are there substantial interests in the community that do not get represented adequately because of the way in which public interest law firms tend to choose their clientele?" and responded, "[M]ost of the time public interest law firms represent established and well-informed groups or organizations. The environmental … cases are the best examples of this."[84]

Those who built the flagship organizations of mainstream environmentalism, knew, or so they believed, which problems were "environmental issues" and what was the public interest in them. This self-confidence was partly owing to a view about the empirical character of the natural world. The influential "climax" theory of ecology described ecosystems as tending toward stable equilibriums with high levels of biological energy and diversity. This in turn seemed to imply natural baselines of health and flourishing - the climax condition - that policymakers could aim to respect.[85] This self-confidence also expressed the unchallenged dominance of a network of elite reformers who shared a substantially overlapping set of ideas about "the environment" and the public interest in it. Homogeneity among decision-makers allowed their view of the scope and valence of "environmental" issues to feel, so to speak, natural. This invisible uniformity was a key support for the melding of traditional environmentalism with legal liberalism.

The image of litigation in the name of nature fit perfectly within the legal-liberal idea that procedural advocacy can complete a pluralist scheme of political representation by inserting the voices of the under-represented into official decision-making processes – here, the virtual voices of literally voiceless natural entities. But, of course, the thought

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[84] Sanford M. Jaffe, *Public Interest Law – Five Years Later*, 62 A.B.A. J. 982, 985 (1976). [Ford's transitions: 1962 is technocratic, democratic, sounds conservationist, and is oriented to the problems that would be the crucible of mainstream environmentalism; 1970-75 is taking the new skepticism, radicalism, and resistance into the body of these ideas, and seeing public-interest law as tending to become governance; by 1978, there is somewhat more awareness of deep pluralism]

[85] Worster, Odum, "Nature knows best" as a lesson in Carson and Leopold.

makes sense only if one knows what, so to speak, the voiceless – in this case, natural entities and systems – would wish to say if they could only speak. Reformers in the early period of modern environmental law thought they did know. Their views, mostly unchallenged at the time, were worked into the institutional design and priorities of cornerstones of modern environmental law, often to the exclusion of the competing interests and priorities that environmental-justice advocates would soon bring forward.

D. SUMMARY

The mainstream environmentalism that emerged in the 1970s was shaped by the premises of the time. The anti-pollution statutes were, as the environmental justice critique later emphasized, designed without attention to the prospect of their benefits and regulated harms being channeled along lines of economic inequality and persistent racial disadvantage. With economic inequality seemingly in decline, explicit distributive concerns seemed dispensable in writing environmental statutes. With other egalitarian policies in place and expected to grow, and disparate-impact protection as a backstop, the environmental statutes did not seem to require built-in protections against compounding inequality. Legal liberalism helped to channel the enforcement of these statutes into elite and professionalized institutions that gave less voice to alternative views of environmental problems than they might otherwise have done. The historical irony is that it was precisely at the watershed moment of environmental legislation, 1970-77, that the anomalous period of widely shared growth was coming to an end, succeeded by four decades of increasingly unequal distribution of wealth and income, even as egalitarian political and doctrinal trends receded. The consequences were severe for populations that entered the 1970s burdened by long histories of economic exclusion and now found that formal inclusion did not bring the convergence of economic outcomes that recent decades had encouraged optimistic forecasters to expect.

III. THE NEGLECTED LONG HISTORY OF ENVIRONMENTAL JUSTICE

In this Part, I excavate neglected historical strands of environmental politics that are marked by attention to economic distribution and power; embrace of a broad definition of "environment" that includes neighborhoods and workplaces; and, in some cases, a commitment to public participation and mobilization. The environmentalism of the 1960s and 1970s was moving away from this dimension of its history and toward a narrower conceptualization of the human stakes in the natural world. Recovering these earlier strands contributes to the recognition and potential recovery of a long environmental-justice movement.

A. ENVIRONMENT AND POLITICAL ECONOMY IN THE EARLY WILDERNESS MOVEMENT

"Environment" wrote Benton MacKaye in 1928, "is the influence upon each inner mind of the thing shared by every mind … the filament which binds our separate lives …

the total life which every life must share."[86] What MacKaye meant by "environment" was the braided product of human and non-human systems. His paradigm of an environmental way of thinking was a description of New York City as a nexus of many kinds of "flows": the Hudson River, the Atlantic tides, the weather-bearing wind out of the West; and steel from the Great Lakes, commodities from Europe and South America, and people pulsing daily through the veins and arteries of the highways, subway, and commuter rail.[87] At it came to understand and appreciate that the human environment was a skein of many systems, humanity now faced what MacKaye called "the wilderness of civilization."[88] He meant by "wilderness" something newly encountered and not yet fully understood, something alien – despite being a human creation – and full of potential for both knowledge and wonder.

MacKaye is particularly relevant here because, in contemporaneous work, he contributed to making "wilderness" a key word in the mainstream environmental lexicon of the mid- and later twentieth century, and a key feature of the environmental agenda of that period. MacKaye was a founder in 1935 of the Wilderness Society, which very substantially shaped the Wilderness Act of 1964, a statute that to date has preserved about one hundred and ten million acres of federal land from development, mechanical transportation, and commercial activity – in, that is, something approximating as closely as possible a condition untouched by human action.[89] He is also commonly credited with the creation of the Appalachian Trail, which he substantially designed and long championed. At the risk of getting ahead of the story, MacKaye sits at the center of a standard and somewhat skeptical view of the environmental movement, one that environmental historian William Cronon famously set out in his 1995 essay, "The Trouble with Wilderness." [90] Cronon argued that modern environmentalism is the product of a perennial, and culturally parochial, fixation on the wild and pristine, a fixation that afflicted a relatively limited set of Romantic elites, and with which they have infected environmental politics. The problem with this version of environmentalism, Cronon argued, was that it overlooked and implicitly denigrated all the "fallen" places where people actually live, take most of their pleasure, and do most of their harm – the places where we live, play, work, and learn, as the environmental justice movement put it.[91] Cronon's essay, which has become canonical in environmental- studies circles picks out strands in the history of environmental ideas and politics, much before 1970, that anticipate and seem to help to produce the elite and culturally narrow version of mainstream environmentalism that the environmental-justice movement was critiquing as he wrote.

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[86] MacKaye, "Environment as a Natural Resource," in The New Exploration 134 (1928). It was, he continued, "the last common denominator of our inner selves."
[87] MacKaye, The New Exploration at 5-25.
[88] Id. at 15.
[89] Wilderness Act, Pub. L. 88-577, 78 Stat. 890, codified at 16 U.S.C. sec. 1131 et seq. (1964).
[90] See William Cronon, "The Trouble with Wilderness; or, Getting Back to the Wrong Nature, 69-90 in Uncommon Ground: Rethinking the Human Place in Nature (Cronon, ed., 1995)
[91] See id.

It is ironic, then, that MacKaye was a firm opponent of the binary between natural and artificial, and also opposed pastoral idylls and anti-urban politics. Contrasting his view with the anti-urban aesthetics and politics of Sierra Club founder John Muir, MacKaye professed a defining interest in the quality of experience possible in any setting: the opportunity to understand, admire, be moved by, and be at home in a place.[92] These criteria were, in his mind, equally applicable to appreciating or - his professional interest - planning cities, regions, workplaces, and public recreational lands. The Appalachian Trail, as he envisioned and argued for it, would be not a walk in the woods, but a link among rural settlements of artists, artisans, and farmers, which would in turn be linked by roads to larger towns and cities.[93] The wild portions of the trail, like designated wilderness areas on other public lands, would be dedicated to a certain kind of aesthetic experience – the solitary encounter with "untrammeled" nature; but the larger vision in which these wild places played a central role was not a binary image of wild versus tame, human versus natural, but a picture of a graduated series of engineered environments, summing to a harmonious pattern.

A New Dealer and a leader in the regional planning movement, MacKaye regarded workers' struggles as part of the larger campaign for a humane and stimulating human environment. Writing of the mills near Pittsburgh, he reflected, "The workers dwelling in these steel towns are, as is well known, in profound rebellion against their condition in life." [94] Although all observers understood that strikers "are fighting deliberately and definitely for higher pay and for longer hours of leisure," MacKaye argued that the strikes should also be seen as aiming at "better living conditions," not just "time," but "space" in which to develop and explore their own capacities.[95] Reshaping space to enrich human life for members of all classes was MacKaye's environmental agenda.

MacKaye's Wilderness Society co-founder, and the president of the organization before he died suddenly at 38, was Robert Marshall. Marshall was head of the Washington, D.C. branch of the American Civil Liberties Union; chief of forestry for the Bureau of Indian Affairs under John Collier, who implemented the partial restoration of tribal ownership and self-government that is often termed the "Indian New Deal"; and, on his own account, a socialist who looked forward to the replacement of "the profit system" by administration and cooperation. [96] Marshall formulated the administrative classification of "wilderness" areas for federal forest management, which later became the basis of the statutory classification under the Wilderness Act.[97] He was an unrelenting

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[92] See MacKaye at 215-18.

[93] His treatment of this, in the Wilderness Society bulletin and elsewhere, and secondary sources.

[94] MacKaye, The New Exploration at 143.

[95] Id.

[96] See James M. Glover, A Wilderness Original: The Life of Bob Marshall 149 (1986) (quoting letters that Marshall wrote in 1932-33, saying, "the only eventual solution will be Socialism" and "I wish very sincerely that Socialism could be put into effect right away and profit system eliminated"). For Marshall's leadership in the ACLU, see, e.g., id. at 185; for Marshall service under Collier, see id. at 157-66.

[97] [citations]

advocate for the aesthetic and cultural value of wilderness.[98] But for him, as for MacKaye, wilderness was only an element in a much broader program for the public reshaping of the American landscape. He argued for nationalizing most of the country's commercial timber land (mainly by purchase and tax default), both to impose what he regarded as rational management on a boom-and-bust sector and to break what he called the "whip hand" of the timber industry over both workers and regulators.[99] He also envisioned public forestry management as part of a larger program of "rural reorganization" in which the federal government would facilitate the movement of farmers and other rural residents from regions that had been ecologically and economically damaged by mismanagement of natural resources to more viable settlements "concentrated in those areas best adapted for agriculture instead of [rural people] being scattered all over the outdoors."[100]

However one regards Marshall's statist program for forest management and rural reorganization, or MacKaye's agenda for comprehensive regional landscape planning, this account makes clear that the wilderness movement was conceived as part of a much larger reconstruction of American landscapes, residential patterns, resource use, and the boundaries between state and market. That reconstructive program did not, to be sure, present an environmental-justice program *avant la lettre* adequate to all of the concerns that actuated the later environmental justice movement: like much Progressive and New Deal thinking and practice, it was inadequate on or uninterested in the African American freedom struggle and tended to favor expert administration over popular participation. Figures such as MacKaye and Marshall were, nonetheless, keenly interested in the broad shape of American political economy, the distributive contests over economic and political power that they saw in the fields of both politics and labor, and the qualitative shape that lawmaking gave to the places where people live, work, play, and learn. They were, in those respects, members of a long environmental justice movement

B. The Industrial Hygiene Roots of Pollution Politics

The publication in 1942 of Wilhelm Hueper's *Occupational Tumors and Allied Diseases* presented "the first major survey of the international literature on occupational causes of cancer and a hard-hitting assessment of the proliferation of hazards associated

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[98] See, e.g., Robert Marshall, "The Problem of the Wilderness," 30 Sci. Monthly 141 (1930) (arguing, rather eccentrically but with great intensity, that the pleasure wilderness devotees took in the unspoiled outdoors with so qualitatively distinct from other satisfactions that it swamped the utilitarian calculus that was otherwise appropriate in management decisions for public lands).

[99] See Robert Marshall, *The People's Forests* (1933) 89-97 (attacking private ownership and management of commercial forests), 123-40 (advocating public ownership for both conservation and worker-welfare reasons), 141-58 (advocating public acquisition of forests by transfer, as "the fact is inescapable that with the country functioning on a capitalistic basis it is out of the question to consider confiscation as a feasible means of acquiring public forests," id. at 141-42).

[100] Id. at 165-70, 166. Marshall wrote in the same vein, "Many towns and even counties should be abandoned to the forests." Id.

with new synthetic chemicals in the workplace."[101] Hueper's work consolidated a professional, lab-based version of the "industrial hygiene" movements of previous decades.[102] When Hueper argued that "the new artificial environment" of industrial chemicals created a new front in the imperative for government to secure "the fundamental requirements for a healthful living, not merely for a small, select, and socially privileged class, but for the entirety of its citizens … by suitable laws adequately enforced," he was working in a decades-long tradition of reformist public-health research, but also confirming its turn from fieldwork to lab work, from narrative to risk measurement.[103] The previous generation of this work had been defined by the pioneering industrial-health researcher (and the first woman on the Harvard faculty) Alice Hamilton, who studied the health of factory workers intensively between 1908 (her appointment to the Illinois Commission on Occupational Diseases and 1935 (her retirement from Harvard), including major investigations of the health effects of lead and phosphorous.[104] Hamilton had previously studied the epidemiology of typhoid in neighborhoods surrounding Chicago's Progressive enclave Hull House, where she was a resident, and her industrial work was an application of that style of fieldwork to the factory.

A sympathetic observer of the Lawrence, Massachusetts textile strike of 1931-32, Hamilton regarded the political power of manufacturers as a key impediment to reforming industrial conditions, and unions as playing an essential role in bringing about better conditions.[105] In her support for organized labor as a necessary part of the governance of industrial conditions, Hamilton reflected not just the pitched conflicts over union organizing in the early decades of the twentieth century, but the more specific engagement of unions in workplace health. Between 1921 and 1928, the Workers' Health Bureau, which began as a project of the labor and public-health reformers Grace Burnham and Harriet Silverman, established a beachhead as a labor-based institution for

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[101] William C. Boyd, Genealogies of Risk, 39 Ecology L. Q. 895, 923 (2012).

[102] See id.

[103] Wilhelm C. Hueper, *Occupational Tumors and Allied Diseases* 3-5, 848 (quoted in Boyd, "Genealogies" at 924).

[104] See Alice Hamilton, *Exploring the Dangerous Trades* 114-26 (1943) (recounting work on lead and phosphorous exposure), 138-60 (lead, silica, and solvents).

[105] See id. at 357-58 (on the "industrial feudalism" of the Lawrence mills, in which low wages combined with denial of "self-respect and a sense of human dignity" to inspire conflict; 12 ("the National Association of Manufacturers has fought the passage of occupational-disease compensation as it has fought laws against child labor, laws establishing a minimum wage for women and a maximum working day"); 6, 13 (contrasting the "hot, dirty, and dangerous work [and] contempt from more fortunate Americans" that plagued the unorganized workers whom she observed at the beginning of her career with structure negotiation among trade unions, industry representatives, and experts). Boyd claims that Hamilton saw responsibility for factory conditions as residing mostly with supervisors, and argues that this represents a pre-New Deal view of the limits of the regulatory state. *See* Boyd, "Genealogies" at 924, n. 111. This claim strikes me as exaggerating the contrast between Hamilton and later reformers, although it is true that in (one version of) classic Progressive style, she had many warm words for individual managers who took responsibility for factory conditions.

research and advocacy on industrial health.[106] With an independent relationship with union locals, the Bureau by 1927 received dues from 190 member locals in twenty-four states and collaborated with leading public-health researchers.[107] Burnham insisted on setting research agendas "FROM THE STANDPOINT OF THE WORKER," the "individual … caught and bound fast in the great web of machine industry as the fly is caught in the thousand-strand web of the spider."[108] The roots of industrial toxicology were thus thoroughly enmeshed with movements for reform and efforts to build both workers' power and systems of industrial governance in the early part of the twentieth century. Their concern was the democratic and humanitarian management of the "artificial environment" that the industrial economy produced.

Rachel Carson's *Silent Spring*, an eloquent brief against reckless pesticide use, builds on Hueper's work in its treatment of contaminated drinking water, DDT, cancer in wild fish, and the imperative of eliminating carcinogenic agents from the environment as a public-health prophylactic, among other topics.[109] Carson, however, put the tradition of industrial toxicology to a new use. Like the larger environmental movement of the 1960s and 1970s, which she contributed importantly to shaping, Carson at once expanded the scope of environmental questions by thematizing the human relationship to the natural world as a whole, rather than specific places and resources, and narrowed environmental discourse by treating the social world as populated by an undifferentiated humanity, whose emblematic middle-class members lived almost exclusively in small towns and suburbs. It was an effective rhetorical switch that effectively uprooted the tradition of industrial toxicology from its constitutive engagement in social and economic reform.

C. The Narrowing Agenda of the 1950s and 1960s

As we have seen, the political program of wilderness preservation began as part of a New Deal vision of public ownership, planning for quality of life, and, above all, an integration among different kinds of human environment, with wilderness just one type of managed environment, prized for offering solitude and sustained encounter with the non-human world. This solitude was figured as one note in a larger legal composition of sociability, and as a political goal connected with workers' struggles for more livable workplaces and communities. By the middle of the 1950s, the vision had narrowed. The Wilderness Society formed a strategic alliance with the Sierra Club, whose longtime head, David Brower, had recently won an attention-getting battle to stop a dam that would have flooded Dinosaur Monument, on the Utah-Colorado line, and was looking for a new flagship issue. Exploring whether wilderness might fill the role, he offered a back-page essay in the influential *Sierra Bulletin* to Howard Zahniser, the Wilderness Society's longtime secretary and the editor of its journal, *Living Wilderness*. In that essay,

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[106] See David Rosner & Gerald Markowitz, "Safety and Health as a Class Issue: The Workers' Health Bureau of America during the 1920s," in Rosner & Markowitz, eds., *Dying for Work: Workers' Safety and Health in Twentieth-Century America* (1989) 53, 53-64 (1989).
[107] See id. at 55-57.
[108] Grace Burnham, "A Health Program for Organized Labor" (pamphlet, Oct. 1922).
[109] See Rachel Carson, Silent Spring 18, 50, 221-25, 235, 239, 240-43 (1962).

Zahniser argued that time spent in the wilderness could induce a special kind of ecological and ethical insight, arising from "areas of the earth wherein we stand without our mechanisms that make us immediate masters over our environment – areas of wild nature in which we sense ourselves to be, what in fact I believe we are, dependent members of an interdependent community of living creatures that together derive their existence from the sun."[110] For the rest of its successful eight-year push for passage of the Wilderness Act (which became law in 1964), the Wilderness Society, its congressional supporters, and its movement allies would focus on this line of argument: that wilderness offered unique spiritual insight and renewal, thus serving as a natural cathedral for the weekend pilgrim. In a speech that the Wilderness Act's Senate sponsor, Hubert Humphrey, entered into the *Congressional Record* in 1961 as an account of the philosophy of the legislation, Zahniser again argued that, in wilderness, Americans were "keeping ourselves in touch with true reality" and "our primeval origin, our natural home" while also finding "relief from the stress and strain of our civilized living."[111] This was precisely the line of argument that the Sierra Club had long used in advocating for preservation of scenic and recreational land: a combination of aesthetic uplift, ethical instruction, and middle-class vacation.[112] Brower was at this time building the Sierra Club's political strategy around the marketing of scenic lands in the form of sumptuous and expensive coffee-table books, one of which, *This Is Dinosaur*, had been the central document in the club's successful defense of Dinosaur Monument.[113] The Sierra Club had long been apolitical outside of its advocacy for preserving public lands; the *Sierra Club Bulletin* managed to avoid discussion of World War One other than an occasional note from a soldier recalling a favorite hike at home, and Muir avoided the Civil War and said nothing about the racial, labor, or other conflicts of a long life lived in interesting times.[114] The Wilderness Society, in its alliance with the Sierra Club, perfected its own version of single-issue advocacy, in which wilderness was the singular goal, its values readily translatable to a professional's vacation schedule.

Meanwhile, Rachel Carson's *Silent Spring* was published in 1962. Carson's book, which gets well-deserved credit for formulating the sense of threat that informed so much of environmental politics in the ensuing fifteen years, followed on the public-minded studies of industrial toxins that Alice Hamilton and others had pioneered. And Carson,

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110 Howard Zahniser, "What's Behind the Wilderness Idea?" Sierra Club Bulletin (January 1956) (32).

111 107 Cong. Rec. 18,356 (1961).

112 For instance, John Muir, the charismatic devotee of the outdoors who founded the Sierra Club in 1892 and was its public face until his death in 1914, had promised his readers that, thanks to the Great Northern Railroad's lines from San Francisco to the Sierras, they could step off a train platform and "in a few minutes you will find yourself in the midst of … the best care-killing scenery on the continent." John Muir, Our National Parks 17 (1901).

113 John McPhee offers a wry portrait of Brower's political strategy as a merchant of aesthetics in *Encounters with the Archdruid* (1971).

114 I once went through all *Sierra Club Bulletin* issues from the relatively short period of U.S. involvement in World War One, wondering whether Muir's high-country Transcendentalism had preserved any of its New England antecedents' skepticism of war and nationalism, and found no evidence that it had. Muir's own apolitical attitudes are well discussed in Donald Worster's *A Passion for Nature: The Life of John Muir* (2008).

whose writing was a form of activism and who was pilloried by the chemical industry for her efforts, did note in her first chapter that she wrote in "an age of industry, in which the right to make a dollar at whatever cost is seldom challenged."[115] On the whole, however, Carson crafted an environmental rhetoric that avoided the political and economic engagement of earlier generations and instead centered its attention on threats to small-town and suburban domesticity on the one hand and, on the other, threats to a natural world that Carson portrayed as a treasure-trove of long-established harmonies among species and their settings. Carson opened *Silent Spring* with an image of "a town in the heart of America where all life seemed to live in harmony with its surroundings," which was mysteriously visited by "a strange blight" and "a shadow of death." She described an undisturbed world in which "life reached a state of adjustment and balance with its surroundings," and contrasted it with the world after the application of pesticides, where "the whole closely knit fabric of life has been ripped apart."[116]

I offer these two developments, in the wilderness movement and the tradition of public-minded toxicology, as emblematic of a change in which themes that earlier in the twentieth century seemed closely tied with working conditions, economic power, and the larger question of how to shape American life, were adjusted to fit the constraints of mid-twentieth-century consensus politics. Within those constraints, the basic questions about how Americans were to live seemed settled: they would live in suburbs, modeled on idyllic small towns, separated from their workplaces spatially but also by the distance between an ethics of commerce and an ethics of domesticity.[117] Carson did not portray these spheres as involved in disputes either over the rules that should prevail within them or over their boundaries and relations with one another – the kinds of disputes that feminism, labor politics, and the civil rights movement had launched and would soon amplify. The only break in the harmony came, on this account, from failing to respect the perennial balance of nature.

Carson, to repeat, was a courageous activist and, it bears mentioning, a feminist who faced misogynistic attacks from the industries that her writing threatened. No part of this argument is directed personally at her or, for that matter, at the strategists of the Wilderness Society. The point is rather that the successes for which we remember them are symptomatic of the scope of political economy and political imagination in their time. The logic of the ecological threat that they identified, which soon became a general formula in surging environmental mobilization and legislation, was simultaneously that everything must change, in the form of collective correction and self-restraint to respect and restore natural harmonies; and that nothing in particular must change, that is, the environmental crisis was not linked to calls for other changes in the legal or social order. This environmentalism was a defense of society, imagined as a whole, against an exogenous ecological crisis. That formula led *Time* and President Nixon, among others,

[115] Rachel Carson, *Silent Spring* 13 (1962).
[116] Id. at 1-2, 6, 67.
[117] Haven in a Heartless World, Feminine Mystique, etc.

to identify the environment as a unifying issue for the 1970s, in explicit contrast to conflicts over race.[118]

The availability of this environmentalist formula for national unification in the face of other divisive political and social conflicts was what, in turn, suggested to left-wing critics that it was a covert form of pastoral conservatism in radical costume.[119] The same appeal to a certain blend of urgency and complacency, the complacency residing in a disinclination to ask which America was to be saved, and for whom, would later draw the attention of the environmental justice movement. But this complacency was a recent development in the mainstream environmentalism of the 1960s and very early 1970s, not a perennial feature of environmental politics. Nor, as we shall see in the next Part, was it ever the whole story.

IV. WHICH MOVEMENT? WHOSE ENVIRONMENT? OPEN QUESTIONS, 1968-81

Despite the narrowing just described, there were active strands of environmental politics in the late 1960s and early-to-mid-1970s that continued to represent a broad, justice-oriented political economy, which might have contributed to the institutionalization of a different version of environmentalism. Key examples here are two very different labor institutions, the insurgent Miners for Democracy and the United Auto Workers, the established union that represented "the left wing of the possible."[120] A combination of contingent events and structural trends took these movements off the table as defining allies for an environmental law community that was, in the same years, taking the institutional form that the environmental justice movement soon arose to criticize.

A. MINERS FOR DEMOCRACY: AN APPALACHIAN LABOR ENVIRONMENTALISM?

Miners for Democracy (MFD) was at once a throwback to the self-organized and confrontational labor mobilization of the pre-NLRA era and a social movement of the late 1960s and early 1970s. In its most effective period, MFD toppled the longstanding leadership of the United Mineworkers of America (UMWA) and brought rank-and-file miners into active union governance in a way that the coalfields, and indeed most of

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[118] See, e.g., Richard M. Nixon, 1970 State of the Union Address (Washington, D.C., Jan. 22, 1970) (arguing that answering the environmental crisis could unite Americans otherwise divided over war and race); "Issue of the Year: The Environment," Time, January 21, 1971 (environmental crisis a "problem which American skills … might actually solve, unlike the immensely more elusive problems of race prejudice or the war in Vietnam.

[119] See, e.g., John H. Schaar and Shedon S. Wolin, "Where Are We Now?" N.Y. Rev. of Books (May 7, 1970) (describing environmental as "[t]he kind of issue which … permits a full catharsis of moral indignation without seriously altering the structure of power or the logic of the system").

[120] The phrase comes from the socialist writer Michael Harrington. See Maurice Isserman, "Michael Harrington," in 1 *Encyclopedia of U.S. Labor and Working-Class History* 569, 569 (Eric Arnesen, ed., 2007). Jefferson Cowie applies the phrase to Reuther. See Cowie, Stayin' Alive: The 1970s and the Last Days of the Working Class 38 (2010)

American labor, had not seen for decades.[121] Inspired in part by the 1969 murder of Joseph "Jock" Yablonski, an anti-establishment candidate for the presidency of the UMWA, the MFD is best remembered as an anti-corruption movement for clean union elections and accountable leadership.[122] It is also widely recognized that the MFD drew power from a surge of coalfield discontent around workplace safety and health: On November 20, 1968, an explosion of methane and coal dust in the Consol No. 9 mine in Farmington, West Virginia killed 78 miners, and the response of the UMWA's leadership was widely perceived as tepid and accommodating toward the coal companies.[123] In the next year, miners mobilized as never before around another workplace safety issue: pneumoconiosis, or "black lung," the destruction of lung tissue by exposure to fine coal dust. This endemic and often deadly industrial disease had grown more widespread as mechanized mining increased exposure to fine dust in the mines, and miners and their families grew increasingly aware of the etiology of the deadly disorder.[124] More than 40,000 miners walked off the job in strikes in West Virginia in 1969, in coordination with the Black Lung Association, a grassroots advocacy group of miners, their families, and doctors. The strikers demanded a comprehensive, adequately funded system of health benefits for mining retirees, especially victims of black lung. At one point, ninety-five percent of the state's miners walked off the job for twenty-three days, substantially shutting down the region's coal industry.[125]

What is less well recognized is that the MFD's commitment to workplace safety was part of a larger conception of environmental health and justice. Yablonksi's campaign for the UMWA presidency included opposition to strip mining, the predecessor to today's mountaintop removal; strip mining was already recognized as an environmental burden concentrated in poor parts of Appalachia. Yablonski's successor, Arnold Miller, continued the opposition to strip mining in his successful 1972 campaign as MFD candidate for the presidency of the UMWA .[126] Environmental ideas had been disseminated through the UMWA *Journal*, originally in opportunistic opposition to

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[121] See id. at 23-38 (2010) (detailing rise and fall of the MFD). Interestingly, Cowie, who shares some version of my interest in identifying the unrealized potential of insurgent movements such as the MFD, seems to be entirely unaware of the environmental connection, and identifies environmental with the well-educated, high-minded Morris Udall wing of US politics. See id. at __. A somewhat reflexive identification of environmentalism with elite aesthetic and cultural fixations seems, indeed, somewhat typical of those who identify with the defeated left of radical labor and/or the radical civil-rights movement. See, e.g., Alex Gourevitch [several articles in n+1, Jacobin, Public Culture).

[122] See Cowie, supra n. __.

[123] See id. at 30-31.

[124] Cowie refers to company doctors who attributed to heart failure deaths caused by the lungs' inability to transmit oxygen to the blood, as well as oral traditions of miners being officially reassured that coal dust was good for health. He quotes a miner from Harlan County, Kentucky, as recalling, "You was taught, and I believed it, that coal dust was good for you. I'd actually feel proud when I could cough up a mouthful of that black stuff and spit it out." Stayin' Alive at 31.

[125] See Cowie at 32. He calls this action "the largest strike for an occupational health issue in American history."

[126] See Paul J. Nyden, Miners for Democracy: Struggles in the Coal Fields 884 (political science dissertation, 1974).

atomic power, but in a way that seems to have been genuinely taken up in both the insurgents' leadership and their rank and file. In 1972, a miner reflected about strip mining and the acid drainage associated with destructive mining techniques and inadequate reclamation, "The people in the valleys are liable to get washed out one of these days with floods and slides…. Look at the creek in front of my house. You can't even find a minnow in there, with all that silt, mud, and acid in the water. Even a mule couldn't drink that water! After the big companies finish here, a man might as well pack up and leave! The water will be all dried up. The timber will be all cut off…. I think the people ought to have something to say about where our mountain resources go. We need better schools and better roads in Letcher County. We need parks. But the big money men own everything and ship it out."[127]

Declaring his candidacy, Yablonski proposed to expand the frame of occupational health to one of community and landscape health: "What good is a union that reduces coal dust in the mines only to have miners and their families breathe pollutants in the air, drink pollutants in the water, and eat contaminated commodities?"[128] Rachel Carson might have asked the same question: what is remarkable is to find it here. Yablonski's appeal to environmentalism as an integral part of miners' struggles over workplace safety and political power was further elaborated after his murder in the Miners for Democracy's 1972 platform, whose two leading planks were mine safety and the coalfield environment.[129] The MFD platform advocated a national ban on strip-mining and proposed that both this principle and mine safety should be directly enforced through work stoppages.[130] This was a double radicalism, working on the level of substantive goals to tie workplace safety together with environmental responsibility and on the level of governance to make organized workers the enforcers of industry-level principles that they had themselves formulated. If coal could not be mined safely and without lasting environmental damage, the miners argued, it should not be mined at all – and they would not mine it. West Virginia Representative Ken Hechler, whom we have already met as a voice for vulnerable regions in the Clean Air Act debate, called the MFD's platform "a veritable Magna Carta for the coal miners of America."[131]

B. Allies: The Nader Movement and the United Auto Workers

The MFD attracted the attention of progressive activists who hoped to build cross-class alliances. Angela Davis spoke out in support of the MFD during a speech at West Virginia University, and Ralph Nader argued that the miners' effort to build a more democratic union was the only way to achieve their more specific goal of treating and preventing black lung.[132] Defenders of the traditional UMWA leadership, in turn,

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127 Nyden, Miners for Democracy at 751.
128 Quoted in Trish Kahle, "The Graveyard Shift: Energy Industry Reorganization and Rank and File Rebellion in the UMWA, 1963-73 at 34 (unpublished paper, on file with author) .
129 See Kahle at 39 (quoting from and interpreting the MFD's "Miners' Bill of Rights," as the platform was titled.
130 See id. at 41.
131 See id. at 34.
132 See Nyden, [ ] (on Davis); Cowie, Stayin' Alive at 31 (on Nader).

pilloried the MFD for Nader's support.[133] Indeed, Nader's "raiders," young public-interest researchers who sought to lay the informational groundwork for community organizing and democratic reform, understood environmental questions much as the MFD did. In a series of "Nader Reports," they analyzed environmental problems as the joint products of corporate power, workers' economic dependence, and political inequality, which only a deepened democracy could adequately address. As the young James Fallows wrote in a 1971 Nader report on pulp and paper mills outside Savannah, Georgia, "water pollution and 'the environmental crisis' had become … bland and shopworn topics," but the Raiders wanted to further and trace and entire complex of problems to "[t]he same economic and political arrangements that have ruined the river."[134] The report was careful to note that the burden of mill pollution in the Savannah area fell heavily on poor neighborhoods.[135] Three years later, a Nader report on the same industry's air and water pollution in Maine went further in integrating environmental diagnosis with political economy, devoting chapters to industry concentration, political influence, and labor contracts.[136] In fact, *The Paper Plantation* was not so much an environmental report as a synthetic account of the political economy of Maine, with the state's ecological problems diagnosed as symptoms of a highly inequitable distribution of power.

There were, for a moment, also sources of institutional support for organizing along these lines. The United Auto Workers, under that union's longtime leader George Reuther, contributed money and support to the first Earth Day in 1970, and in 1972 argued officially that, "The chief victims of pollution are the urban poor, Blacks and workers who cannot escape their environment. Unless we join together now to stop those who pollute for profit, our cities will become ugly cesspools of poisonous pollutants."[137] Reuther's UAW was long associated with "the left wing of the possible" in post-World War Two American politics: although its 1950 "Treaty of Detroit" with the auto companies exemplified the mid-century American bargain by which unions guaranteed industrial peace and gave up say over enterprise management, in return for generous benefits and guaranteed wage increases, the UAW was also a leading American practitioner of "social unionism," pressing for generous social provision, desegregation, and other progressive goals beyond its own workplaces.[138] In 1970, the year that he died in a plane crash, Reuther distributed an environmental questionnaire to union members to prepare the UAW's executive board to consider making "the problem of pollution … a

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133 See Nyden at [ ].

134 James Fallows, Introduction, The Water Lords xix (1971).

135 See Fallows, the Water Lords at 245 ("All five of Savannah's housing projects are located in areas where air pollution is unusually high. As with so many other issues, the poor suffer most and … can do the least about it."); see also 166-70 (examining the extent of poverty in a larger region dominated by pulp-and-paper production).

136 See William C. Osborn, The Paper Plantation (1974).

137 "Richard Hatcher Says: Pollution is Not a 'White Thing.'" United Auto Workers Conservation and Resource Dev't Dep't (pamphlet) (1972) (quoting UAW vice-president and department head Olga Madar).

138 As Cowie points out, under Reuther the UAW failed to practice at home what it urged in policy, tolerating effective segregation and racism in the factory. See Stayin' Alive at [ ].

matter for collective bargaining in the 1970 negotiations" with General Motors. In one of his last official addresses, Reuther offered his own view of the question: "the environmental crisis has reached such catastrophic proportions that … the labor movement is now obligated to raise this question at the bargaining table in any industry that is in a measurable way contributing to man's deteriorating living environment."[139] This was less than two years before UAW workers revived disputes over enterprise management in a strike at the Chevrolet Vega plant in Lordstown, Ohio, where ninety-seven percent of members voted to walk off the job to protest assembly speed and hyper-Taylorist task fragmentation. That is to say, the relatively left-leaning UAW and the insurgent MFD were both willing to revisit the terms of the "Treaty of Detroit" and put enterprise management and society-wide economic policy back on the bargaining table, precisely at the moment when a class-and-labor version of environmentalism seemed to be taking form.[140]

This moment was so different from what followed that recovering a sense of its potential can be difficult. By 1974, the MFD was finished as a vital organization, having elected a charismatic UMWA head, Arnold Miller, whose presidency was soon undermined by opposition from old-line union operatives and, at least as much, his own emerging paranoia and isolation.[141] In 1977, not quite seven years after Reuther's death, the UAW opposed amendments to strengthen the Clean Air Act.[142] In their time, however, the MFD's insurgency, the Nader-led activists, and the UAW's activity from the mid-1960s (when it began cooperating with the Sierra Club on water-quality issues) are evidence that there were versions of environmental politics afoot in the late 1960s and early 1970s other than those that were institutionalized in the mainstream environmental groups with the guidance and assistance of the Ford Foundation. These and other movements and institutions suggest that there was potential for an environmentalism that would have been intensely concerned with equity, the distribution of environmental burdens among communities and regions, and the health of landscapes. This alternative environmentalism would have taken working people and the poor as among its natural constituencies and concerned itself centrally with the conditions of labor and workplace hazards. Although some work along these lines has always been part of mainstream environmental advocacy, these themes were not central to the environmentalism that emerged from the struggles of the 1970s.

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[139] Andrew D. Van Alstyne, "The United Auto Workers and the Emergence of Labor Environmentalism" (unpublished paper, on file with author) at 17-19.

[140] Trish Kahle argues that rank-and-file MFD members and certain union locals were engaged in arguments about the role that coal should play in the national energy economy, and that this change in self-identification, from "coal" to "energy workers" both engaged the miners in a vision of energy policy as a relatively plastic field in which there were many potentially democratic choices to be made, and presented an opportunity for them to think about the comparative environmental effects of competing modes of fuel extraction and energy production. See Kahle, Rank-and-File Environmentalism, supra n. __.

[141] See Cowie at 35-38.

[142] See Van Alstyne, supra n. __.

C. Institutional Agenda Consolidation in the Early 1980s

In 1985, a coalition of ten influential environmental groups marked four years of close collaboration on priorities and strategy with the publication of *An Environmental Agenda for the Future*.[143] This small book devoted many of its pages to woods-and-waters issues, characteristic 1980s worries about nuclear waste disposal and nuclear conflict, and the effect of pollution on public health in general. It paid no real attention, however, to distribution of environmental burdens along lines of race or class (the exception proving the rule being a brief, favorable reference to fresh-air-fund camps for city youth), let alone to the systemic issues of economic structure and political power that had preoccupied the MFD and the Nader groups.[144] *An Environmental Agenda*, then, represented the consolidation of the environmental movement into particular version of itself: white, upper-middle class, and concerned with a set of issues that effectively integrated the post-1970 pollution laws (the special concern of NRDC and EDF) with the older agendas of public-lands preservation (the Wilderness Society, the National Parks Conservation Association) and biodiversity maintenance – at least for those aspects of biodiversity with recreational and aesthetic benefits (Audubon, the Izaak Walton League). Prominently omitted were the concerns with working conditions, economic power, and political accountability that had been important to the more radical strands of environmental politics in the 1960s and 1970s. Absent, too, were institutional bearers of those radical strands: labor, Naderite research-and-organizing groups, and the grassroots outfits that were already (or still) fighting toxic-waste, garbage disposal, and mining battles across the country.

To seize on the example of surface mining for a moment: the practice continued after the MFD disputes, mostly outside the major environmental groups' priorities.[145] The Surface Mining Control and Reclamation Act of 1977, a legislative compromise between the coal industry and surface-mining abolitionists, required that mining sites be restored to their "approximate original contour[s]."[146] The Clean Water Act's restrictions on the discharge of pollutants into waterways also offered a potential limit on the practice, essential to mountaintop-removal mining, of depositing post-mining rubble, or "overburden," into nearby valleys, burying headwater streams in as much as six hundred

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[143] Participants included the NRDC, EDF, the Sierra Club, the National Wildlife Federation, the Audubon Society, Friends of the Earth, the Environmental Policy Center, the Wilderness Society, the National Parks Conservation Association, and the Izaak Walton League.

[144] See supra n. __. It is also notable, that in a favorable discussion of birth-control policies, the report did not acknowledge the political ambivalence around this discourse that arises from the long history of coerced or semi-coerced sterilization of poor women and women of color, or the broader tendency in this discourse to portray the poor and dark in terms of Gothic fecundity and crowding, as Paul Ehrlich had done in *The Population Bomb*. For an essential discussion of these themes, see generally Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty (1997). For Paul Ehrlich's famous passage, see Ehrlich, The Population Bomb __ (1968).

[145] Cf. Friends of the Earth publishing Mark Squillace's The Strip Mining Handbook (1990).

[146] See Matthew R.V. Ross, Bryan L. McGlynn, & Emily S. Bernhardt, "Deep Impact: Effects of Mountaintop Mining on Surface Topography, Bedrock Structure, and Downstream Waters," Environmental Science and Technology (accepted paper, 2016, on file with author).

feet of broken rock.[147] State regulators in coal-producing central Appalachia largely worked around (or ignored) these restraints, issuing mining permits under which, according to an Environmental Protection Agency estimate, more than seven hundred miles of headwater streams had been buried by 2001.[148] Yet surface mining was not really on the agenda of the national environmental groups until around 2000: it fell to investigative journalists and local advocacy groups to monitor state permitting practices and eventually bring the suits that called mountaintop removal into question.[149] Only then did Earthjustice (the former Sierra Club Legal Defense Fund) enter the legal fray.[150] Today a practice that the mainstream environmental-law agenda was arguably decades late in incorporating has produced what is probably the largest topographic, hydrological, and ecological transformation of a North American landscape in at least fifty years.[151] The relative omission of this issue in a decisive pair of decades is just one consequence of the form that mainstream environmentalism took in the early and mid-1980s.

What accounts for the form in which the environmental movement consolidated itself in the 1980s? There is contingency: Reuther's death and the self-immolation of Arnold Miller's UMWA presidency cost environmentalists potential allies; the Ford Foundation's decision not to make a substantial grant to Environmental Action, the non-profit that organized Earth Day, reflected Ford's preference for expert and professional advocacy, but Ford's effort in developing the grant proposal indicates openness to more activism-oriented environmentalism.[152]

But there were also tectonic shifts in politics and political economy that helped to close the window that had seemed to open in the early days of post-1970 environmental politics. At least part of the failure of the more justice-oriented efforts to take institutional root seems to be owing to the political economy of available funders and allies. The role of labor changed in a way that restricted its potential as an environmental ally. As noted

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147 See id.

148 See id.

149 See, e.g., Penny Loeb, "Shear Madness," U.S. News & World Rep. (Aug. 3, 1997) (first national coverage of mountaintop removal in the mid-1990s); Bragg v. Robertson, 72 F. Supp. 2d 642 (S.D. W. Va. 1999), rev'd sub nom. Bragg v. W. Va. Coal Ass'n, 248 F.3d 275 (4th Cir. 2001) (district court invalidating mountain removal stream-filling, court of appeals reversing); Kentuckians for the Commonwealth v. Rivenburgh, 204 F. Supp. 2d 927 (S.D. W. Va. 2002), rev'd 317 F.3d 425 (4th Cir. 2003) (same sequence).

150 Based on personal conversations with Steve Roady of Earthjustice and West Virginia environmental litigator Joe Lovett, this has been a productive collaboration. Mountaintop removal remains in public view today, despite the courtroom losses.

151 According to a 2016 study, significant parts of Central Appalachia have been transformed from a mix of steep slopes and narrow but flat valley floors and ridgelines to a blend of nearly flat post-mining plateaus and modest slopes. This terrain is the product of removing up to six hundred vertical feet of hill and mountain and, in turn, burying valleys in as many vertical feet of overburden. The characteristic hardwood forests of the region do not generally return, and overburden-filled valleys retain about ten times more water than the pre-mining landforms did. [Cite to study.] According to Appalachian Voices, an advocacy group, mountaintop removal has eliminated more than five hundred distinct mountains from the region's terrain. See Ross, et al., "Deep Impact," supra n. __.

152 See Gottlieb, Forcing the Spring, supra n. __ at 186-87.

earlier, the bread-and-butter labor movement that the corporatist NLRA model of collective bargaining nurtured within the terms of the Treaty of Detroit had already reduced most unions' engagement with broader questions of power, distribution, and social provision; Reuther's UAW and, more markedly, the Miners for Democracy were exceptions to this pattern. After the mid-1970s, however, labor fell increasingly into a defensive position as blue-collar wages stagnated and a decline in industrial employment set in; both of these trends were accelerated by the deflationary monetary policy of the late 1970s and early 1980s. Reuther's social unionism had reflected a role that organized labor played for some decades as the left wing of a set of civic, economic, and political institutions that sat at the center of the country's more or less corporatist mutual accommodation of economic interests. With Jimmy Carter's 1976 election to the presidency and Democratic congressional majorities, many labor leaders and activists imagined an expansion and consolidation of New Deal and Great Society commitments.[153] When this agenda was shredded, signally in the ill-fated Humphrey-Hawkins Full Employment bill, labor was served notice that its settled place in American political economy was in question, a notice that announced the beginning of a long, receding struggle for survival.[154] Whether one interprets these events as consequences of a more or less agency-free shift in the distributional dynamics of capitalism, or as the product of a deliberate political revolt of capital against the constraints of the post-World War Two accommodation, the result was the same: to put labor in a defensive posture in which a zero-sum logic of "jobs versus environment" named an urgently felt reality.[155] Particularly after the failure on either side to build deep or enduring labor-environmental alliances in the 1970s, when those might have contributed to defining the scope and priorities of environmental law rather than simply expressing occasional tactical overlap, labor by the 1980s was no longer even a potential source of money or political muscle for mainstream environmentalism. With no real prospect of labor allies, it was all the easier for environmental groups to turn to the wealthy donors who remain critical to their flourishing, and who, as a group, are not great enthusiasts for class antagonism.[156]

The shape of the post-1970 statutes played a role as well: Clean Water Act enforcement litigation, which brings attorneys' fees, became a staple of environmental activism in the 1980s, when environmentalists substituted their own enforcement efforts for the deliberate inactivity of the Reagan administration's Environmental Protection Agency.[157] Neither donor not statutory funding sources, then, drove environmental groups to cultivate the strands of work that would have made environmental justice commitments central.

There was, then, a two-stage creation of the "traditional" or mainstream environmentalism that environmental justice has helpfully criticized. The first stage was

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[153] See Cowie at 261-312 (discussing in some political detail the aspirations and demise of "the New Deal that never happened").

[154] Geoghegan, Cowie.

[155] Piketty for the first, more or less, and Wolfgang Streeck's Buying Time: The Delayed Crisis of Capitalist Democracy for the second.

[156] [citations]

[157] Late pages of Richard N. Andrews, Managing the Environment, Managing Ourselves, for

in the decline in attention to distributive politics, the workplace, and economic order in the period when post-1960 environmentalism and post-1970 environmental law were taking form, a decline that I have traced in part to the political economy of the post-War period. The second stage came in the 1970s and early 1980s, when mainstream environmentalism mostly failed to take up the more justice-oriented themes that had never disappeared from grassroots activism.

The environmental law that the environmental justice movement first defined itself by criticizing deserved much of the criticism. That version of environmental law, however, was a product of more recent events than either its enthusiasts or its critics entirely recognized. A forgetfulness shared between the mainstream and its critics has diminished attention to the long environmental justice movement, which persisted from the early twentieth century through the ferment of the 1970s. That forgetfulness may have contributed, also, to a too-ready acceptance of a rather specialized and supplemental role for environmental justice considerations within the larger body of environmental law: as a procedurally obligatory consideration among others and a tactical device in fighting siting decisions for hazardous facilities. These roles matter, but they are narrower than the invitation that environmental justice makes: to take seriously the question of inequality in the human environments that law pervasively shapes. They are narrower, too, than the interest in economic power, the workplace, and landscape-shaping that animated the long history of environmental justice. The next Part argues that an expansive view of the meaning of environmental justice – in both its recent and its long versions – can help to identify the justice dimensions of issues outside today's core legal operation of environmental justice considerations. It also argues that thinking about these less conventional environmental-justice questions helps to clarify more generally environmental law's relation to questions of inequality.

V. An Environmental Justice Approach to Food Systems

Although agricultural issues received intensive legal attention throughout the twentieth century, from food-safety regulation to farming subsidies, they never became central to environmental law. Their marginality was overdetermined: much early environmental discourse was indifferent to agriculture, institutionalized movement-building long followed suit, and agricultural industries won exemptions from much post-1970 environmental regulation. Those exemptions, in turn, limited the opportunity of environmental advocacy groups and enforcement agencies to orient themselves toward agricultural questions.

This Part addresses two aspects of the American food system: first the air and water pollution connected with concentrated animal feeding operations (CAFOs) and, second, the allocation of productive resources to corn-and-soybean-based calories through statutory crop supports. It argues that understanding these as environmental justice issues is illuminating in a pair of ways. First, concentration of weakly regulated air and water pollution from CAFOs in regions with vulnerable populations compromises the original environmental justice commitment of the anti-pollution statutes: setting a limit on exposure to air and water pollution as a kind of right for all, regardless of who or where one is. For agencies to develop aggressive and enforceable regulation in this area

would vindicate an environmental justice commitment that already exists in the statutes, though it is not conventionally articulated as such. Second, the food environment that agricultural law shapes is, like air and water, a bearer of disparate health hazards. The fact that these hazards are further mediated by individual consumer decisions about what food to buy and eat does not diminish their significance as environmental justice considerations, but rather helps to specify why it is important to think of them as such.

A. Pollution Risk from Food Production

In roughly the past forty years, with a sharp acceleration in the 1980s, commercial meat production has moved from relatively small-scale, mixed grain-and-livestock operations to a smaller number of much larger and specialized operations.[158] Central to the new meat economy are the industrial-scale enterprises that the Environmental Protection Agency designates Concentrated Animal Feeding Operations (CAFOs).[159] A CAFO generally houses 1,000-2,500 hogs in a building (typically in a cluster of similarly-sized buildings), many thousands of chickens in a similar facility, or at least 1,000 cattle in a feedlot.

Like the rest of the food system, CAFOs are deeply shaped by the law. It is widely understood that the anti-pollution statutes substantially exempted most farming activity from regulation, and that such "non-point-source" pollution as fertilizer runoff remains a major barrier to statutory clean-water goals; agricultural greenhouse-gas emissions now turn out to pose similar problems for climate-change policy.[160] Although the Clean Water Act applies to CAFOs explicitly and the Clean Air Act reaches them in principle, enforcement has persistently lagged CAFO growth.[161] Regulatory foot-

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[158] For an overview of the state of animal production in the pork industry, which has seen especially dramatic concentration, see USDA, Nat'l Agric. Statistics Serv. (NASS), Overview of the U.S. Hog Industry (2009). Large feeding operations have grown in number, small operations fallen, and 98 percent of US pork production takes place in CAFOs with more than 1,000 hogs, which the Clean Water Act defines as a "large" CAFO.

[159] https://www3.epa.gov/npdes/pubs/sector_table.pdf (giving CAFO definition for a variety of meat-producing species). A CAFO is defined as a point source of water pollution in the Clean Water Act. See 33 U.S.C. sec. 1362(14).

[160] See id. ("This term ['point source'] does not include agricultural stormwater discharges and return flows from irrigated agriculture."); estimates of the contribution of agriculture to climate change range from a U.S. EPA ascription of 7.4 percent of U.S. greenhouse gases to agriculture, see U.S. EPA, Inventory of the U.S. Greenhouse Gas Emissions and Sinks: 1990-2005 at 393 (2007), to a Pew estimate that puts industrial agriculture at 18 percent of global greenhouse gas emissions, see R.U. Halden & K.J. Schwab, Pew Commission on Industrial Farm Animal Production, Environmental Impact of Industrial Animal Farm Production 22 (2006).

[161] See id. (listing CAFOs under the Clean Water Act's definition of a "point source" of water pollution). EPA did not develop a comprehensive regulatory program for CAFO pollutants until required to do so under a consent decree. See Natural Res. Def. Council v. Reilly, No. 89-2980, 1991 U.S. Dist. Lexis 5334 (D.D.C. Apr. 23, 1991) (resulting in consent decree). In the meantime, Congress in 1987 exempted "agricultural stormwater runoff" and "irrigation return flows" from the statutory definition of "point source." See Act of Feb. 4, 1987, Pub. L. No. 100-4, 101 Stat. 503. These exemptions have been interpreted to limit the scope of EPA's authority to regulate

dragging and exemptions, the difficulty of monitoring agricultural emissions even in concentrated operations, and the political power of agriculture have interacted to limit effective regulatory attention to CAFO pollution.[162] CAFOs also gain competitive advantage from subsidies to corn and soybeans, which press the cost of CAFO feed stock below market levels.[163]

CAFOs also depend on the use of sub-therapeutic doses of antibiotics as a prophylaxis against epidemics among their closely confined populations.[164] Food and Drug Administration approval is necessary for use of antibiotics in commercial livestock operations, and has become increasingly controversial in light of growing awareness that pervasive, low-level antibiotics use increases the likelihood of antibiotic-resistant bacterial strains' emerging. The Centers for Disease Control in 2013 called the threat from antibiotic-resistant bacterial strains "potentially catastrophic" (not with specific reference to livestock administration) and urged "immediate action."[165] The problem of

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CAFOs. See Waterkeeper Alliance, Inc. v. E.P.A., 399 F.3d 486, 502 (2d Cir. 2005) (discussing the statutory limits on EPA's CAFO regulation). Similarly, EPA has generally declined to develop Clean Air Act standards for CAFOs, despite their being significant sources of hydrogen sulfide, ammonia, particulate matter, volatile organic compounds, and greenhouse gases. See Teresa B. Clemmer, "Agriculture and the Clean Air Act, 163, 164-69, in Food, Agriculture, and Environmental Law (Mary Jane Angelo, Jason J. Czarnecki, and William S. Eubanks III, eds. 2013).

[162] For instance, in North Carolina, waste lagoons were not required to include anti-seepage lining or to observe a minimum setback from streams and rivers before 1997, when the state adopted its first Clean Water Act permitting requirements for CAFOs. Many of those lagoons remain in use. Current regulations require a minimum setback of 100 feet from perennial streams. See 15A N.C. Admin. Code 2T.0505 (2013).

[163] The structure and effect of these subsidies is discussed in V.B, below. For a treatment of their contribution to the competitiveness of CAFOs, see Elanor Starmer, and Timothy A. Wise. "Feeding at the Trough: Industrial Livestock Firms Saved $35 Billion from Low Feed Prices," Global Development and Environment Policy Brief No. 07-03 (December 2007), http://www.ase.tufts.edu/gdae/Pubs/rp/PB07-03FeedingAtTroughDec07.pdf.

[164] Sub-therapeutic doses are aimed at "increased rate of [weight] gain, disease prevention[,] etc," but are not intended to treat disease. 21 C.F.R. s.558.15(a).

[165] Centers for Disease Control and Prevention, Antibiotic Resistance Threats in the United States, 2013, at 6 (2013). The CDC report goes on to urge caution in livestock administration of antibiotics, recommending in particular that antibiotics be used under veterinary supervision and only for disease control (not weight gain, another traditional use). See id. at 34-36. At that time, the FDA had nominally been studying the issue since 1970, when it first instituted a task force, which, in 1972, recommended withdrawing approval of all sub-therapeutic antibiotic administration to protect public health. See Natural Resources Defense Council v. FDA, Case 12-2106 (C.A. 2, July 24, 2014). Hearings on a proposed withdrawal of approval were announced in 1977 but never held, and the question was dormant until a spate of suits in the last decade sought to re-start the process. See, e.g., id. (reversing a district court ruling that had sided with NRDC in holding that FDA acted arbitrarily and capriciously in ending the withdrawal process after an initial finding by the director that livestock administration of antibiotics had not been shown to be safe for public health). The suits ended in defeat for the environmentalist plaintiffs, and the FDA has issued only non-binding recommendations to discipline livestock antibiotics administration. See id. For the FDA policy, see Food and Drug Administration, Guidance for Industry No. 213, New Animal Drugs and New Animal Drug Combination Products Administered in or on Medicated Feed or Drinking Water of Food-Producing Animals: Recommendations for

antibiotic-resistant bacteria that might be bred inadvertently in the food system itself deserves attention as an environmental threat; the NRDC recognized as much in bringing the recent suit that helped to force the FDA's attention to the issue.[166] For this discussion's purposes, though, the regulatory tolerance of sub-therapeutic antibiotics represents another way that the prominence of CAFOs in meat production results from legal tolerance of CAFO risks and thus arguably amount to a regulatory subsidy that shapes the country's food system toward concentrated, industrial-style production and in turn entails a further specific distribution of environmental risk and harm.

The distribution of environmental burdens from CAFOs creates something approaching a series of regional exceptions to the strong egalitarian policy of the anti-pollution statutes. Because those statutes created strong nationwide standards for air quality and water pollution, their architects understood them as connected with the larger agenda of racial and economic justice and as creating, in effect if not in form, a right to clean air and clean water.[167] Permissive regulation of the regionally concentrated CAFO industry produces economically and racially disparate vulnerability that violates the anti-pollution statutes' animating expectation of a nationally shared baseline of clean water and air. That expectation, recall, was the primary response of the statutes' architects to criticism from Nader-led environmental justice advocates.

CAFOs produce an enormous amount of animal waste, and although some of it is applied to farmland for its fertilizing properties, much of it contains more nitrogen and phosphorous than available soil can absorb, and so turns a potentially beneficial substance into a waste-disposal problem.[168] Regions where CAFOs have flourished are also those where the USDA reports high incidence of the biologically excessive nutrient levels that make agriculture the main contributor to American waterways' remaining out of compliance with the Clean Water Act.[169] Although animal waste from those CAFOs that are designated Clean Water Act point sources is generally required to be stored in a manner that isolates it from surface and groundwater, the lagoons that serve this purpose spill, leak, and mingle surface water during floods.[170] Fish kills, algae blooms,

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Drug Sponsors for Voluntarily Aligning Product Use Conditions with GFI #209 (Dec. 2013). California in 2015 passed a statute prohibiting use of antibiotics for livestock weight gain and requiring other uses to be subject to veterinary supervision; whether this change will be consequential remains to be seen. See California Senate Bill 27 (Div. 7 of Food and Agricultural Code, chapter 4.5, secs. 14400-14408) (signed Oct. 10, 2015).

166 See NRDC v. FDA, *supra* n. __.

167 See supra nn. __ - __ and accompanying text (Muskie on this topic).

168 A very large CAFO, with 800,000 hogs, would produce 1.6 million tons of waste per year, as much as the City of Philadelphia. Congressional Research Service, Understanding Concentrated Animal Feeding Operations and Their Impact on Communities 9 (2010). More than 115 million hogs are raised for slaughter in the U.S. each year. U.S. Dep't of Agriculture, Agricultural Statistics Service.

169 Congressional Research Service, Animal Waste and Water Quality: EPA Regulation of Concentrated Animal Feeding Operations (CAFOs) (2011) (1-3) (reporting significant increase in number of U.S. counties with nutrient imbalances and their prevalence in CAFO-rich regions).

170 For instance, in North Carolina, waste lagoons were not required to include anti-seepage lining or to observe a minimum setback from streams and rivers before 1997, when the state adopted its first Clean Water Act permitting requirements for CAFOs. Many of those lagoons

contamination of downstream shellfish, and human exposure to bacteria, pathogens, and toxic levels of nitrates all follow.[171]

CAFOs also produce air pollution. Although agriculture has become mildly notorious for the share of greenhouse-gas emissions that is traceable to animal production, CAFOs also emit fine particulates as well as hydrogen sulfide and other volatile organic compounds (VOCs), which have significant effects on health and quality of life in the local area.[172] CAFOs also house airborne biological agents, including bacteria and mold spores, as well as various allergens.[173]

These local and regional environmental burdens of animal agriculture are distributed unevenly with respect to poverty and race. Researchers have found different degrees of correlation - some negligible, some significant - between the location of CAFOs and the percentage of low-income and non-white populations in otherwise comparable areas, with especially strong correlations for poultry CAFOs and for low-income and Latino populations.[174] A broader-brush description, while it comes at the cost of some precision, captures a larger pattern that is important here. The regions where CAFOs have expanded rapidly are resistant to fine-grained intra-regional contrasts precisely because, like the North Carolina coastal plain, the Delmarva Peninsula, and other rural regions of the low-country South, they are pervasively poor and, in many cases, heavily nonwhite. There is no need to rely on racial or other targeting, such as was often claimed in early environmental justice cases and has been much investigated in the empirical literature on toxins, nor on the alternative explanation, rearrangement of intra-regional populations by market dynamics after CAFOs have been cited, to appreciate that

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remain in use. Current regulations require a minimum setback of 100 feet from perennial streams. See 15A N.C. Admin. Code 2T.0505 (2013).

171 See Animal Waste (CRS), supra n. __ at 4-5; M.E. Anderson & M.D. Sobsey, "Detection and Occurrence of antimicrobially resistant E. Coli in groundwater on or near swine farm in eastern north Carolina," 54 Water Science & Tech. 211, 218 (2006) (finding contamination of groundwater near lagoons with high levels of antibiotic-resistant E. coli). For a vivid portrayal of the effects of recent flooding in the Carolinas on the widespread CAFOs of those states' coastal regions, see http://www.motherjones.com/environment/2016/10/hurricane-matthew-killed-animals-hog-poop.

172 Congressional Research Service, Air Quality Issues and Animal Agriculture: A Primer (2014) 3-5.

173 See id.

174 See S.M. Rafael Harun & Yelena Ogneva-Himmelberger, Distribution of Industrial Farms in the United States and Socioeconomic, Health, and Environmental Characteristics, Geography Journal 2013 (finding significant correlations for chicken CAFOs at the county level); S.M. Wilson et al., Environmental Injustice and the Mississippi Hog Industry, 110(2) Environmental Health Perspectives 195 (2002) (finding race and income correlations for hog CAFOs); K.J. Dunham et al., Community Health and Socioeconomic Issues Surrounding Concentrated Animal Feeding Operations, 115(2) Environmental Health Perspectives 317 (2007) (same); cf. Jen Hinton, The Siting of Industrial Hog Farming Operations in Eastern North Carolina: A Case of Environmental Injustice (master's degree thesis, 2012) (comparing areas within one- and three-mile radii of hog CAFOs with random areas in the same regions and little correlation with race, somewhat more with educational level, and growing disparities in home values between the two sets of samples).

these facilities are pervasive in parts of the country where there are many non-white people and relatively few wealthy or highly-educated individuals - not just near the CAFOs, but anywhere in shouting distance. Taking one swipe at this issue, Steve Wing and Jill Johnston estimated that, when they examined a broad swath of North Carolina to compare CAFO and non-CAFO localities (but excluded dense urban areas and western mountain counties, which have no hog CAFOs), the proportion of African Americans and Latinos within three miles of hog CAFOs was respectively 1.54 and 1.39 times that of non-Hispanic whites. They found that in census blocks with at least 80 percent people of color, the share of the population living within three miles of a hog CAFO was twice as high as in other census blocks. As they rather vividly put it, for every ten percentage-point increase in the share of people of color in a North Carolina census block, the weight of hog waste produced annually within three miles of that block grows by fifty tons.[175]

It is hard to find research that is either precise or comprehensive on the magnitude of the regional environmental effects of CAFOs and the demographic distribution of those effects. In the absence of such evidence, the strength of the claim I am making here must remain conditional. Having said that, there is at least real cause for concern that the anti-pollution statutes are not doing their work, and the neglect is having precisely the disparate impact that these statutes were meant to avert in their capacity as environmental justice laws. Remedying this situation would not require statutory amendment, like eliminating the Clean Water Act's exemption for "non-point source" agricultural pollution, nor changing Supreme Court doctrine, like reviving disparate-impact claims after *Washington v. Davis* and *Alexander v. Sandoval*. It would only mean doing the equality-securing work that the statutes were written to do.

B. Food, health risk, and economic inequality

Since the New Deal, the American food economy has been pervasively shaped by federal regulation well beyond the farm. The modern era of agricultural law began with New Deal federal crop insurance and the production controls of the Agricultural Adjustment Act (best recalled in legal circles for having been upheld in *Wickard v. Filburn*).[176] In recent decades, the Farm Bill, which is reauthorized roughly every five years, has directed hundreds of billions of dollars to farmers in direct payments to commodity producers (growers of corn, soybeans, and certain other relatively imperishable "commodity crops") and in subsidized insurance for shortfalls in production or revenue (the latter on account of either low production or low prices). The 2014 Farm Bill directed $21 billion over five years to commodity-support programs and $44 billion to general crop insurance subsidies, for which a broader range of crops is eligible.[177]

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[175] Steve Wing & Jill Johnston, Industrial Hog Operations in North Carolina Disproportionately Impact African-Americans, Hispanics and American Indians (available at http://www.ncpolicywatch.com/wp-content/uploads/2014/09/UNC-Report.pdf).

[176] Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (1938); Wickard v. Filburn, 317 U.S. 111 (1942). [Also Food Safety Act of 1906, etc.]

[177] Agricultural Act of 2014, Pub. L. 113-79. For budgetary breakdown, see Congressional Research Service, What Is the Farm Bill? (2014). Over the decades, including in the early twenty-

Farm supports contribute to what public-health scholars call an "obesogenic" food environment, one tending to produce obesity by presenting people with abundant, inexpensive, calorie-rich foods heavy in sugars and fats, while keeping fruits and vegetables relatively expensive.[178] According to the Centers for Disease Control, 36.5 percent of American adults are obese, with rates reaching 48 percent among African Americans and 42.5 percent among Latinos.[179] In 2007, US Department of Agriculture (USDA) researchers reported that the average American's daily calorie intake had increased by 400 calories since 1985, and by 600 calories since 1970.[180] Most of these calories came from increased consumption of grains, sugars, and fats (the last mostly vegetable oils).[181] The increase in caloric intake drew most heavily on the most intensively subsidized food sources. Among grains, corn calories rose 191 percent.[182] Corn sweetener calories, chiefly high-fructose corn syrup, rose 359 percent to 246 daily calories for the average American; they represent in themselves a very significant share of the total caloric increase.[183] Calories from salads and cooking oils increased by 260 percent; seventy percent of these calories come from heavily subsidized soybeans.[184]

The social cost of diet-related health problems is considerable. Obesity and follow-on ailments cost the US health system as much as $190 billion annually.[185] The annual cost of diabetes alone (not restricted to the share attributable to diet) has been estimated at $176 billion in medical care and an additional $69 billion in lost productivity.[186] As noted earlier, these medical burdens are distributed in patterns that track other dimensions of disadvantage: obesity rates are significantly higher in African American and Latino populations than among whites; among women, obesity is greater among those with less education.[187] Rates of diagnosed diabetes are under eight percent

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first century, these subsidies have often taken the form of direct payments to farmers on the basis of historical levels of production on their acreage, or of "top-off" price subsidies to bring farmers' per-unit income to a floor that was often above market level. At present, commodity-support spending takes the form of subsidized insurance policies that pay out in the event of either low production or low prices.

178 See David Wallinga, Agricultural Policy and Childhood Obesity, 29 Health Affairs No. 3 (2010) 405-410. Cf. Julie Guthner, Weighing In: Obesity, Food Justice, and the Limits of Capitalism 116-39(2011) (arguing that the "cheap calories" argument is too simple to account for obesity, and assigning responsibility to concentrated market power and low pay for workers).

179 https://www.cdc.gov/obesity/data/adult.html

180 Wallinga at 405-06.

181 See Wallinga at 405.

182 See Wallinga at 406.

183 See id. See also Alicia Harvie and Timothy A. Wise, "Sweetening the Pot: Implicit Subsidies to Corn Sweeteners and the U.S. Obesity Epidemic," *Global Development and Environment Policy Brief 09-01* (Feb. 2009), http://www.ase.tufts.edu/gdae/Pubs/rp/PB09-01SweeteningPotFeb09.pdf.

184 See id.

185 See John Cawley & Chad Meyerhoefer, The Medical Care Costs of Obesity: An Instrumental Variables Approach, 31(1) J. Health Econ. 219, 230 (2012).

186 See Wenya Yang et al., Economic Costs of Diabetes Care in the U.S. in 2012, Diabetes Care (2013), available at http://care.diabetesjournals.org/content/early/2013/03/05/dc12-2625.full.pdf+html.

187 See supra n. [CDC obesity overview].

for non-Hispanic whites, nearly thirteen percent for Latinos, and over thirteen percent for non-Hispanic African Americans.[188] And diabetes takes a greater toll among the poor and uneducated: both having dropped out of high school and living in poverty are correlated, after correcting for confounding variables, with risks of dying from diabetes twice as high as for those who hold a college degree or live in a high-income household, respectively.[189]

The contribution of an environmental justice analysis here is to propose seeing the food system as an environmental medium that distributes exposure to health risk. The medium of exposure is food prices. Subsidized corn-and-soybean production, combined with a near-absence of policy support for fruit-and-vegetable production, produces a vast stockpile of potential calories from the subsidized goods, driving down the relative prices of foods derived from them. Between 1985 and 2000, for instance, the inflation-adjusted price of carbonated soft drinks fell by nearly 24 percent, while the price of fresh fruits and vegetables rose by 39 percent.[190]

Of course there is a vivid difference between traditional environmental risks, paradigmatically pollution, and the risks produced and distributed through the food system. Exposure to pollution is generally involuntary and widely shared, which contributed to Rachel Carson's rhetorical comparison of toxins to nuclear fallout in *Silent Spring*. The risks under discussion here always rely on the individual choice to purchase and consume food, meaning they are neither generally shared nor involuntary. Can such risks be said to be environmental, let alone concerns of environmental justice?

Here the intellectual resources of the environmental-justice tradition cast light on the question. The reason that the roots of pollution politics and science lie partly in workplace safety issues, including unions' struggles around working conditions, is precisely the recognition that there are layers of choice and determination in any decision. The Workers' Health Bureau of the 1920s, for instance, operated in a political and legal environment in which the paradigm case of voluntary action was the labor contract.[191] But as labor and Legal Realist critics argued, while workers and employers chose the terms of their contracts, they did not choose the conditions in which they contracted, and these did much to constitute the scope of their effective options.[192] Likewise, consumers choose their meals, but not the background of food prices and consequent tradeoffs that

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188 http://www.diabetes.org/diabetes-basics/statistics/

189 See Sharon Saydah & Kimberly Lochner, Socioeconomic Status and Risk of Diabetes-Related Mortality in the U.S.,125(3) Pub. Health Rep. 377 (2010). High school dropouts are more than sixty percent more likely to have diabetes than people with some college education; a 2007 National Bureau of Economic Research study concluded that education made a significant difference in risk even accounting for correlated risk factors. See James B. Smith, Diabetes and the Rise of the SES Health Gradient, NBER Working Paper 12905, available at http://www.nber.org/bah/summer07/w12905.html.

190 See Wallinga at 407 (reporting estimates derived from USDA figures).

191 Lochner v. New York, etc.; Purdy, "Neoliberal Constitutionalism" (on the historical use of the Lochner concept);

192 See, e.g., Robert L. Hale, Freedom Through Law (1952). Sunstein's libertarian paternalism as a rather tepid update of this insight.

they confront when they choose those meals. The exercise of food choice is conditioned by the intersection of price-shaping agricultural policy, on the one hand, and the distribution of income and wealth, on the other.[193] And eating, after all, is no more optional than breathing. The fact that what one eats is always a choice means that every meal is an opportunity for economic inequality to translate into different levels of risk exposure.[194]

What should be the response? The Farm Bill's subsidies are typically revisited every five years, and there have recently been some progressive efforts by environmental and public-health groups to redirect it toward smaller-scale operations and healthier crops.[195] Partly in response to public interest in food issues, environmental organizations have sought legal hooks to engage food production.[196] Here the first line of potential action is almost certainly political, and would involve an effort to join justice-oriented and environmental constituencies around a newly shared sense of a common problem. Although "Congress should change the law" is an unsatisfying prescription nowadays for reasons that need no rehearsing, political circumstances can change. When they do, advocates should be clear on which questions they regard as environmental-justice priorities, and why. The law-shaped food environment belongs among those.

C. Summary

A more complete analysis of the food system's relevance to environmental justice would integrate issues that this discussion has not reached, and that would further test the borders of the topic. These include the disproportionate decline in African American farm ownership under USDA lending policies that effectively facilitated racial exclusion by local lending boards;[197] highly concentrated ownership in the industries that purchase and process farmed goods, which is widely reported to affect prices and contract terms for farmers, especially small and mid-sized ones;[198] and the low pay and high rates of injury

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193 Andrea Freeman makes an argument along these lines in The 2014 Farm Bill: Farm Subsidies and Food Oppression, 38 Seattle U. L. Rev. 1271 (2015).

194 Of course, the ways that economic inequality distributes exposure to unsafe air has long been a concern for environmental justice, and there is considerable opportunity to spend money controlling the kind of water to which one is exposed, whether through living in Westchester rather than Flint or through purchases of drinking water. I do not mean to say that these risks are not structured by inequality-plus-choice, but only that diet-related risks are much more pervasively structured in this manner.

195 For instance, the National Law School Farm Bill Research Consortium has been working for a decade to design such reforms for the Farm Bill. Representatives from the Yale Environmental Protection Clinic, the Harvard Food Law and Policy Clinic, the Resnick Program for Food Law and Policy, and others contribute to this effort.

196 See, e.g., the NRDC litigation on sub-therapeutic antibiotic use in CAFOs, discussed in V.A.

197 See Hossein Ayazi & Elsadig Elsheikh, The U.S. Farm Bill: Corporate Power and Structural Racialization in the United States Food System 52-60 (report of the Haas Institute for a Fair and Inclusive Society at Cal Berkeley).

198 A decade ago, Mary Hendrickson and William Heffernan of the University of Missouri estimated the market share of the largest four firms in the following areas: beef packers, 83% in 2005, up from 72% in 1990; pork packers, 64% in 2005, up from 40% in 1990; flour milling

and toxic exposure that workers experience in many areas of agricultural production and processing, not least because of the substantial exemption of farm labor from the requirements of the National Labor Standards Act.[199] Whether these are questions of environmental justice per se, or simply aspects of the distributional political economy of the food system, is probably not a question with a conceptually required answer, so much as it is a matter of the work that advocates, movements, and officials seek to do with the categories of "environmental problem" and "environmental justice." If they define risks to health from the law-shaped food system as paradigm problems, and demand both the intentional provision of a healthful food environment and the enforcement of basic anti-pollution commitments against industrial-scale agricultural operations in regions whose populations are already socially vulnerable, they will have made the law's role in this field a central question of environmental justice.

VI. WHICH ENVIRONMENT? WHOSE JUSTICE?

The contemporary environmental-justice movement has defined itself by insisting on a pair of complementary insights. On the one hand, questions of distributive justice should matter in areas of environmental law where they are sometimes neglected, such as the use of public lands and the setting and enforcement of pollution limits. On the other hand, the scope of "environmental" questions is not self-defining: the category's boundaries are established by legal and institutional work, from legislation to the creation and definition of the major institutions of environmental advocacy and expertise. This work, in itself and in its interaction with political discourse and social movements, makes and remakes the contested meanings of "environment." Thus Nathan Hare's 1970 argument that "black ecology" pointed to the built environment of poor and unsafe cities as an urgent ecological problem, and the Miners for Democracy campaign's focus on black-lung disease and strip mining as paired threats to the health and safety of Appalachian communities are both exemplary instances of the environmental justice strategy of pressing outward the definitional boundary of environmental questions.

Twenty-first century problems are putting especially intense pressure on the limits of the "environmental" category. Climate change is surely our defining environmental problem; but to address its sources means engaging areas as diverse as infrastructure, energy, agriculture, and transport, while its effects implicate geopolitical conflict, global distributive justice and national historical responsibility for past emissions, and refugee policy, to name a few. Partly because of their entanglement with climate change, but also for independent reasons, agriculture (and food systems more generally) and energy have moved to the forefront of environmental issues. These developments add up to an emerging appreciation that the collective human metabolism with the planet's cycles (hydrological, carbon, nitrogen, etc.), as mediated through our built environments (our fertilized, irrigated, and tiled farmlands; our energy grids; our highways and cities) is

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(from commodity grain) 63%, up from 40% in 1982. See Hendrickson & Heffernan, "Concentration of Agricultural Markets," available at http://www.foodcircles.missouri.edu/07contable.pdf.

[199] Statutory citation & cf. to Migrant & Seasonal Agricultural Worker Protection Act (1983).

environmental if anything is environmental. The boundaries of the category, which has always been a pragmatic and ad hoc one imbued with the air of naturalness, will not stand still, and less today than ever in the past.

Social science research is pressing the boundaries of "environmental" problems on yet another front. Important recent studies focus on what one might call the ecology of unequal life-prospects: the ways that geography shapes life expectancy and prospects for mobility in income and education, holding constant the income or wealth of one's family.[200] Some public health scholars have begun to explore the role of socially induced trauma – exposure to violence, bigotry, and deprivation at an early age, for instance – in producing later behavioral pathologies that, in turn, make physical ailment or injury more likely.[201] Are these ways that people's settings infiltrate their bodies and shape their lives not environmental? Are they not, as much as droughts caused by climate change, a matter of how a place formed from a blend of natural and made elements shapes the health and capabilities of those who inhabit it? If one is inclined to say that these are not environmental problems, what would make the difference? Would it be enough to introduce the question of access to public parks, exposure to lead, or availability of healthy food? Wouldn't this be just making a criterion of a familiar habit of thought – that we know an issue is environmental because of the presence of a well-recognized pollutant, or the role of soil, or a glimpse of a tree somewhere in the problem? Is that really more than a fetish doing double duty as a definition? Have we reached a point where "environmental justice" is another way of saying "public health," and vice-versa? What, then, is the former category doing for us?

Environmental law and politics may be especially susceptible to the temptation to naturalize its definition (as these slightly absurd but also intelligible proposed criteria illustrate) precisely because it deals with iconic "natural" phenomena: woods, waters, soil, and landscapes, and, especially since modern environmentalism emerged in the 1960s and early 1970s, "the natural world" as a whole. These topics have the peculiar quality of tending to obscure their own political character for a pair of opposite but complementary reasons. On the one hand, the management of natural resources, regarded instrumentally as neutral instruments for advancing human aims, has been a paradigmatic object of technocratic management since the rise of technocracy as a modern theory of governance in the Progressive era.[202] This approach laid the institutional groundwork of modern cost-benefit analysis in policy-making and deeply informed the policies of the U.S. Forest Service and, in a later generation, the Environmental Protection Agency.[203] On the other hand, phrases such as "the natural order" have always seemed to imply a source of values independent of human judgment, a trope that environmental advocates and lawmakers have played on for more than a century in advocating for parks, wilderness areas, species preservation, and pollution management as policies that honor

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[200] Chetty, etc.

[201] Trauma studies.

[202] See, e.g., Gifford Pinchot, The Fight for Conservation (1910) (setting out a technocratic theory of natural-resource management as a rationale for building an expert administrative state).

[203] [Citations from The Gospel of Efficiency and Managing the Environment, Managing Ourselves]

"nature."[204] In both respects, the environmental-justice movement has tended not just to unsettle working definitions of environmental law's scope and goals, but specifically to de-naturalize those definitions by asking *whose* environment is being preserved or created at any time, and in line with whose conception of justice or efficiency.[205]

But to say that these are historical and political categories, rather than purely empirical or conceptual ones, is not to say that their meaning is arbitrary. While the scope of "environmental" questions has never been stable or uncontested, it has had a core shared sense, a "family resemblance" among its meanings. Calls to reflect on the "environment," have perennially been attempts to make claims on collective agency over, and responsibility for, the core of material interdependence: the ways that lives are tied together by shared water, air, neighborhoods, and infrastructure, and the ways that these at once sustain life and convey risk and harm. Within this general frame, each of the developments in the long history of environmental justice that I have been describing has amounted to an expansion of the scope of the half-made, half-artificial world for which people seek adequate political and legal means to take collective responsibility.

The themes of environmental justice are perennially important, but they are particularly pertinent today, for reasons of two rather different kinds. First, we now recognize that the period of economic history in which today's "mainstream environmentalism" took shape was an historical anomaly. What we might call a new history of economic inequality has emerged in the last decade-plus, most visibly in Thomas Piketty's *Capital in the Twenty-First Century*.[206] Piketty and his collaborators show that inequality of both income and wealth has been growing in the developed world since the early-to-mid 1970s. They also find that economic inequality generally grew from the late eighteenth century until World War One. Other than the generalized disasters of two global wars, the major exception was the three decades following World War Two, when economic inequality shrank across the North Atlantic democracies and

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[204] [Citations from advocacy and also from Congressional debates.]

[205] The broader themes of the long environmental-justice movement also offer a key to a critical history of American environmental lawmaking, in which the critique of the post-1970 field - whose environment, and to whose interest? - can cast a fresh light on the way that American law has shaped the human interaction with the natural world through U.S. history. Because I have addressed this history elsewhere, though not through the lens of environmental justice, here I only indicate the broadest themes of the analysis: the naturalized exclusion of Native Americans from normative ways of inhabiting land and using resources that deeply informed the legal and political rationalization of indigenous dispossession and the transformation of much of U.S. territory into private property; the deep tie in Progressive reformers' managerial state-building between governance of natural resources and the eugenic and nativist agendas that figured certain classes of people as resource problems to be managed, rather than as sources of the human purposes that (on the Progressive view) resources should serve; and the elite, culturally specific, and sometimes openly racist view of "nature" that informed the movement for national parks and founding of the Sierra Club and other preservationist group. All of this treated in JEDEDIAH PURDY, AFTER NATURE (2015).

[206] C21

remained relatively low until a dramatic resurgence began in the 1970s.[207] This latest era of inequality has been especially marked by the concentration of income and wealth in the very highest echelons of distribution. The new history of inequality opens an opportunity to understand certain inherited patterns of thought and practice as products of an anomalous but massively influential period when economic inequality was widely believed to be a problem of the past.[208] One response is a growing recognition that fields that have recently been indifferent to questions of economic distribution ought to take account of it in new, or revived, ways. This change has expressed itself both in private-law scholars and economists turning from aggregate maximization to a concern with the distributive consequences of the regimes they study and in constitutional scholars expanding their interest in formal and negative rights to embrace substantive conceptions of economic citizenship.[209] This revived alertness to distributive questions should become a general premise of environmental law scholarship and practice, as it is coming to be in other areas. In fact, the environmental regimes that do so much to distribute the preconditions of health, of bodily and intellectual functioning, are as central to basic questions of distributive justice as any other body of law.[210]

Second, the environmental justice commitment to an expansive conception of "environment," including institutions, built settings, and the social allocation of resources, suits a moment when it is clearer than ever that there is no stable or uncontroversial boundary between the social and the natural, nor any creditable way to identify either certain issues as inherently "environmental" or certain environmental goals as inherently authoritative – naturally authoritative, so to speak. Many earth scientists have concluded that we inhabit "the Anthropocene," a portmanteau term for a new geological "age of humanity" in which human beings have become a force – perhaps the dominant force – in shaping the planet. The first implication of the claim that we live in the Anthropocene is that environmental law is a form of world-making, a choice among futures in dimensions ranging from the chemistry of the global atmosphere to the mix of species in existence to the pattern of landscapes.[211] Second, because what we still tend to call "the natural world" is a joint production of human activity and non-human forces, traditional baselines of "wild," "primeval," or "unpolluted" nature are either obsolete or fictional, and the benchmarks of environmental policy must rely on explicit judgments of value.[212] Third, the boundaries of what is "environmental" are not straightforward.

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[207] C21 again

[208] Note my Nomos piece and sources therein.

[209] [New antitrust scholarship; Sabeel Rahman; Larry Tribe; other recent work problematizing the maximize-and-redistribute schema; Ganesh Sitaraman & Fishkin/Forbath; Teachout.]

[210] Might make sense to talk here about Rawls's primary goods, Sen and Nussbaum's functionings.

[211] That last includes, for instance, the Midwestern checkerboard of commodity crops, timber-farm national forests and adjacent wilderness areas, and the coal-producing region of central Appalachia, whose topography and hydrology have been irreversibly transformed by mountaintop-removal mining.

[212] In practice, this is not so much a new fact as a way of foregrounding a fact that has often been obscured by naturalizing ways of describing and imagining law and policy; no good natural-resources lawyer would be unsettled by the fact that "wilderness" is a legal category implementing a cultural and aesthetic ideal.

Because natural systems – from weather to waterways – are partly human creations, and interact with the built environments (neighborhoods, infrastructure, and so forth) that have traditionally belonged to fields such as urban planning and public health, no simple criterion offers to identify environmental questions without controversy.

The "environmental" in environmental justice can be traced to a quite particular moment, roughly the 1960s in the United States, when a set of problems were newly grouped together under the label *environmental*: pesticides and other toxins (but more as they affected "third parties" than in their effects on agricultural workers), nuclear fallout (but not other side-effects of geopolitical conflict, such as the global proliferation of inexpensive automatic weapons), litter (but not the decrepit condition of public institutions in neglected neighborhoods), urban congestion and sprawl (but not the prevalence of asthma – and, if asthma, then not diabetes – in poor communities), biodiversity (but not yet the diversity of crops in agriculture and their relation to larger patterns of ecological health), and the management of public lands (but not the condition of public infrastructure). Although these "environmental" questions exhibit a certain family resemblance and make up a perfectly usable category, it is much less clear that they reflect a classification that would feel coherent outside the historical constellation of concerns in which "the environment" moved to the center of American public concern.

In all of its modern senses, "environment" has implied an idea of collective human agency that is mediated through our interdependent material world. Calls to reflect on the "environment" are acknowledgements that we make the world we inhabit, and that, in making it, we are shaping one another's lives. It is fair to say that this recognition is an intensification and generalization of the founding insight of political modernity generally – that we make our common world, and must choose between shaping it deliberately or letting it shape us willy-nilly. What counts as an environmental question or problem has never been a stable category, and there is no reason it should be: it is a joint product of, on the one hand, the changing technological capacity to measure and describe the common world – cartography to chemistry to big data – and, on the other hand, advocacy and deliberate political organization around certain clusters of questions as the ones that some political "we" must engage to make its setting, its *environ*, more habitable.[213] These questions are always, in part, about environmental justice, once we recognize them as such, and the content of that justice is always itself part of the question, rather than a fixed measure of what is right. Any regime of environmental law, and any cluster of issues and priorities that we call environmental is a way of fixing in tractable form a set of provisional answers to one version of these questions. The most generative consequence of environmental justice activism and thinking recently has been to open these up and ask what other answers we might give, and what other questions we might ask.

CONCLUSION

[213] Boyd on the first; Lazarus on a modest version of the second; After Nature for a somewhat grander version.

Since its emergence as a self-aware movement in the 1980s, environmental justice has shaped environmental law in ways that go well beyond the procedural requirements of EO 12898. In particular, it has infused awareness of disparate impacts and racial inequality into the activity of agencies and professional and advocacy organizations. Both procedural mandates and institutional measures adopted voluntarily in response to justice claims have expanded the range of interests and perspectives represented in environmental decision-making and advocacy, and inserted questions of fairness into every stage and site of deliberation, from goal-setting to administrative enforcement and permitting processes. But there is still more to learn.

The first step is recognizing the historical trajectory of the long environmental justice movement, the circumstances of the mid-twentieth century that narrowed its concerns to more conventionally "environmental" ones, and the events of the 1970s that helped to produce the "mainstream environmentalism" that environmental justice defined itself by criticizing. The limitations in environmental law that environmental justice points out are the products of assumptions that no longer hold: that economic inequality was declining, that legal liberalism was an adequate mode of advocacy, that environmental lawmaking could rely on legal mechanisms outside the environmental statutes to address disparate impact. In the 1970s, as these assumptions were coming under pressure, environmental law took institutional forms that, for all their achievements, continued its relative neglect of distribution, participation, and the total human environment. The repair of these omissions tends to make questions of justice an integral part of the work of environmental law. This re-integration of justice questions reflects two recognitions: that inequality will not decline spontaneously or for exogenous reasons, and that expert officials and advocates should not be certain that they know what justice might require in advance of a political argument over exactly that question. Inasmuch as environmental law grapples with these problems, it is beginning to re-enter the long movement for environmental justice.