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Environmental Justice and Environmental Law

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ENVIRONMENTAL JUSTICE AND ENVIRONMENTAL LAW

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INTRODUCTION

Anniversary editions prompt grand thinking about the past and the future, topped off with grand titles; this Essay is no exception. I thank the editors of the *Fordham Environmental Law Review* for the chance to step back from the fray and consider what the environmental justice movement has accomplished and the contributions it can offer to the future of environmental law.

The environmental justice movement emerged as a self-conscious movement in the 1980s. This Essay assesses the movement's important, but ultimately modest, role in achieving its goals and in influencing environmental law. Ultimately, the environmental justice movement's capacity to affect environmental law has been limited by power politics and by the fundamental tensions between the environmental justice paradigm and the paradigms that structure both traditional and market-based environmental regulations.

In looking forward, I focus on a key contribution the environmental justice movement can offer the environmental movement.¹ As others before me have observed, the environmental justice movement's emphasis on environmental and social interconnectedness and its emphasis on grassroots participation provide important lessons for the environmental movement's political future. The environmental movement is struggling to achieve significant progress on major environmental problems,

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1. This is not to say that specific future environmental justice initiatives that would improve distributional or participatory outcomes are not important. Rather than focusing on such specific and detailed improvements, however, I choose to focus here on the role of environmental justice principles in shaping broader debates about environmental law.

including climate change mitigation and adaptation, a more coherent and sustainable energy path, and intractable challenges like agricultural pollution. The environmental justice movement and its sister movement, environmental sustainability, offer visionary, comprehensive, and inclusive paths forward that could increase the environmental movement's breadth and political strength.

I. WHAT ROLE DOES ENVIRONMENTAL JUSTICE PLAY IN ENVIRONMENTAL LAW?

A. *The Emergence of the Environmental Justice Movement*

Modern, federal environmental law surged into existence in the 1970s, as Congress passed numerous statutes such as the National Environmental Policy Act, the Clean Air Act, the Endangered Species Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Remediation, Compensation, and Liability Act, in the span of a single decade.² These statutes overcame state reluctance to regulate and successfully arrested spiraling environmental degradation.

This impressive array of environmental statutes marked a significant turn from the preceding trajectory of environmental despoliation. But environmental problems did not disappear. Impacted communities – primarily communities of color – questioned continued adverse conditions. Many trace the emergence of the environmental justice movement as a self-conscious movement to a siting dispute over a PCB disposal facility in an African-American community in North Carolina in the early 1980s.³ That conflict was a nationally galvanizing event, sparking widespread attention to distributional, participatory, and social environmental justice.⁴ As a matter of distributive justice, were undesirable land

2. See ROBERT V. PERCIVAL, ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 91-93 (6th ed. 2009).

3. See Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 225-26 (1997) [hereinafter Kaswan, *Bridging the Gap*]. This is not to say that the episode was the first time people of color had organized around environmental problems. Instead, the event brought environmental disparities into broader public view and catalyzed the development of the environmental justice movement as a movement rather than isolated struggles.

4. See *id.*

uses disproportionately located in communities of color and poverty? If so, as a matter of participatory justice, what did that mean about the fairness of decision-making processes? And, from a social justice perspective, how did individual events reflect broader historical and societal inequities?

Public light on distributional justice prompted numerous empirical assessments on the distribution of undesirable facilities and land uses. These studies largely confirmed that undesirable land uses are unevenly distributed.⁵ Racial minorities, particularly African-Americans and Latinos, experience the greatest disproportionate impact.⁶ Income is also correlated with undesirable facilities, but less strongly than race.⁷

The distributional findings also prompted inquiry into the participatory justice question: why the disproportionate outcomes?⁸ Do they reflect discriminatory decision-making by land use decision-makers who provide less protection for disadvantaged neighborhoods? Do they reflect discriminatory decision-making by industries choosing where to locate?⁹ Do they reflect discriminatory decision-making by environmental permitting or enforcement authorities? Or do they *not* reflect discriminatory decision-making at all, but simply the autonomous operation of the housing market, as undesirable land uses lower property values and disadvantaged populations gravitate to cheaper housing opportunities?¹⁰

5. See LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 167-83 (2001) (Appendix: "An Annotated Bibliography of Studies and Articles That Document and Describe the Disproportionate Impact of Environmental Hazards by Race and Income"); see also Alice Kaswan, *Distributive Justice and the Environment*, 81 N. C. L. REV. 1031, 1069-77 (2003) [hereinafter *Distributive Justice and the Environment*] (assessing studies on distributional disparities).

6. See COLE & FOSTER, *supra* note 5, at 1075-76.

7. See *id.* at 1075.

8. See generally Kaswan, *Bridging the Gap*, *supra* note 3, at 233-39 (describing participatory justice claims (there termed "political justice")).

9. See COLE & FOSTER, *supra* note 5, at 71-72 (2001) (describing the "Cerrell Report," a report commissioned by the California Waste Management Board, which suggested that companies and localities siting trash incineration facilities would confront less resistance in rural, poor, less-educated, and small communities (among other characteristics)).

10. See generally Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*,

Fully answering the highly-charged causation question is beyond the scope of this Essay. I note, however, that this last explanation – “it’s just the market” – does not suffice. In a thorough study of housing market dynamics associated with hazardous waste facilities, Professor Vicki Been, who had initially proposed the hypothesis, found little empirical evidence to support the claim that existing demographics reflect post-siting population shifts.¹¹ Although that study does not rule out the role of post-siting housing market dynamics in some instances,¹² the fairness of decision-making processes remains a salient question.

In addition to focusing on the distributional and participatory justice implications of discrete decisions, the environmental justice movement has inevitably confronted and raised broader social justice considerations.¹³ Regardless of whether current decision-making is discriminatory, there is little question that historic land use practices contributed to current disproportionate burdens. Historically, zoning regulations often permitted more undesirable land uses in lower-income and of-color communities.¹⁴ Moreover, pristine suburbs that zoned out undesirable land uses historically excluded people of color, relegating them to urban cores or unincorporated areas that lacked protective zoning.¹⁵ Systemic societal discrimination has created a

24 *ECOLOGY L. Q.* 1 (1997); Lynn E. Blais, *Environmental Racism Reconsidered*, 75 *N.C. L. REV.* 75 (1996).

11. See Been & Gupta, *supra* note 10, at 29.

12. See, e.g., Thomas Lambert & Christopher Boerner, *Environmental Inequity: Economic Causes, Economic Solutions*, 14 *YALE J. ON REG.* 195 (1997) (discussing St. Louis study indicating an increase in poor and minority residents after the siting or identification of hazardous waste sites); see generally Kaswan, *Distributive Justice and the Environment*, *supra* note 5, at 1136-44 (discussing several studies analyzing post-siting housing market dynamics).

13. See COLE & FOSTER, *supra* note 5, at 65-79.

14. See Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 *DENV. U. L. REV.* 1, 76-88 (1998); Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 *MINN. L. REV.* 739 (1993). “Expulsive” zoning presents an extreme form: zoning that promotes undesirable land to “encourage” existing residents to leave. See Kaswan, *supra* note 5, at 1115.

15. See Kaswan, *supra* note 5, at 1114-15. See also Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 *UCLA L. REV.* 1095, 1151-55 (2008) (discussing how counties fail to protect poor and of-color unincorporated areas from undesirable land uses); John R. Nolon, *Shifting Paradigms Transform Environmental and Land Use Law: The Emergence of the*

legacy of inequity and disempowerment that has contributed to environmental injustice. Understanding and addressing that legacy of social injustice is key to addressing its deeper roots.

B. How Environmental Justice Has Influenced Federal Environmental Law: An Important but Modest Role

The environmental justice movement's influence on environmental law takes a number of different forms. The most important is grassroots action, where citizen groups respond to localized environmental challenges through political and legal initiatives. Such initiatives have succeeded and failed; a survey of results is highly contextual and beyond the scope of this Essay. Here, I focus instead on how environmental justice has influenced environmental law itself, and the ways environmental justice principles have been integrated into the operation of environmental law

1. A Survey of Federal Environmental Justice Initiatives

The environmental justice movement has had a modest influence on environmental law and the operation of regulatory agencies. As evidence of distributional disparities emerged, the federal government responded with several initiatives.¹⁶ Without attempting a comprehensive history, I highlight some of the most significant below. In the early 1990s, EPA created an Environmental Equity Workgroup to examine the environmental justice implications of EPA policies.¹⁷ In 1994, the Clinton Administration issued an executive order on environmental justice, Executive Order 12,898.¹⁸

Law of Sustainable Development, 24 FORDHAM ENVTL. L. REV. 242, 245 (2013) (discussing land use plans and zoning that permit the construction of homes in areas targeted as inundation prone to sea level rise that may impact home buyers, tenants, equity investors, mortgagees, and taxpayers).

16. Although this Essay focuses on federal environmental justice initiatives, it should be noted that some states have also adopted environmental justice initiatives. See, e.g., California Environmental Protection Agency, *Environmental Justice Program Home Page*, available at <http://www.calepa.ca.gov/envjustice/> (last updated Dec. 20, 2012) (describing environmental agency's environmental justice strategy).

17. In 1992, the Workgroup produced the federal government's first explicit study of environmental justice, entitled "*Environmental Equity: Reducing Risk for All Communities*." See Alice Kaswan, *Bridging the Gap*, *supra* note 3, at 264.

18. Exec. Order No. 12,898, 3 C.F.R. 859 (1995).

The Executive Order, which continues in force, instructs federal agencies to avoid distributional disparities that adversely affect low-income and of-color communities, and to develop participatory mechanisms that ensure the engagement of all communities.

Moreover, the Executive Order made clear that federal compliance with existing requirements, like the National Environmental Policy Act (NEPA) and Title VI of the Civil Rights Act, would require attention to environmental justice implications. Under NEPA, federal agencies now routinely consider the demographic impacts of proposed federal actions, an exercise that reveals impacts that could otherwise have remained hidden to all but those immediately affected.¹⁹ Title VI of the Civil Rights Act focuses on state and local agencies. The federal control lever is federal financing: Title VI prohibits state and local agencies receiving federal funds from discriminating.²⁰ EPA regulations implementing Title VI have been interpreted to prohibit not only intentional discrimination, but also disparate impacts by state and local environmental permitting agencies.²¹ Under that interpretation, at least in theory, state agencies issuing environmental permits or otherwise administering federal environmental programs could be subject to Title VI liability if their actions caused a disparate impact.

Lisa Jackson, EPA's Administrator during President Obama's first term, has made environmental justice a key agency priority. The agency developed Plan EJ 2014 to guide the agency's achievement of environmental justice.²² The strategy is designed to better protect overburdened communities, empower those communities in environmental decision-making, and to establish stronger partnerships with the many governmental entities that likewise shape environmental outcomes, including tribal, state, and local governments. Substantively, the Plan encourages agencies to further integrate environmental justice in their rulemaking, permitting,

19. See generally Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENVTL. AFF. L. REV. 601 (2006).

20. 42 U.S.C. §§ 2000e-1 to -17 (2006).

21. See EPA, *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs*, 65 Fed. Reg. 39650, 39655 (June 27, 2000), available at http://www.epa.gov/ocr/docs/fm_t6_pub06272000.pdf.

22. See EPA, *PLAN EJ 2014*, available at <http://www.epa.gov/compliance/ej/plan-ej/index.html> (last updated July 23, 2012).

compliance, and support for community-based programs. The Plan also recognizes that achieving environmental justice depends upon improving available tools, encouraging the development of scientific, legal, and information resources to support environmental justice outcomes, and fostering the development of mechanisms to channel those resources to disadvantaged communities. By encouraging all appropriate EPA programs to adopt an environmental justice initiative, the Plan also works to ensure that environmental justice is addressed throughout the agency.

2. Assessing the Procedural and Substantive Impact of Federal Environmental Justice Initiatives

Ultimately, these federal environmental justice initiatives have created procedural mechanisms that have cast light on and drawn attention to environmental disparities. NEPA and the Executive Order have prompted agencies to document and incorporate demographic information and improved outreach to marginalized communities, forcing agency decision-makers to recognize the environmental justice implications of their actions.

The extent to which the Executive Order or NEPA analysis has changed agencies' substantive decisions is, however, less clear. The Executive Order instantiated environmental justice as an important federal policy and prompted important assessment and planning initiatives, but it does not create any new substantive legal authority for achieving environmental justice or legally enforceable requirements.²³ These steps have, no doubt, exposed distributional impacts in ways that have empowered disadvantaged communities and improved outcomes, but they have not placed distributional outcomes or participatory control at the center of environmental decision-making.

More substantive environmental justice dictates, like Title VI's prohibition on state and local agency disparate impacts, have appeared robust in theory but accomplished little in practice due to weak implementation and enforcement. Citizens do not have the right

23. See generally Anhthu Hoang, *Warren County's Legacy for Federal and State Environmental Impact Assessment Laws*, 1 GOLDEN GATE U. L. J. 91, 99-100 (2007); Outka, *supra* note 19.

to file direct citizen suits to enforce the Title VI regulations.²⁴ Instead, citizens alleging that a federally-funded state or local agency has caused disparate impacts under Title VI must file their complaints with EPA, which is then responsible for investigating and addressing the complaints.

EPA's Office of Civil Rights ("OCR"), the program responsible for enforcing Title VI, has been ineffective in enforcing the regulations.²⁵ Multiple factors have likely contributed to the paralysis in processing Title VI complaints. EPA's Office of Civil Rights has been plagued by poor management and an insufficient capacity to address complex technical questions.²⁶ The agency has also been unable to resolve difficult interpretive questions, like what constitutes a "disparate impact." Affected state agencies have been uncertain about their legal authority, under state or federal law, to deny or condition environmental permits based upon disparate impacts,²⁷ and

24. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Supreme Court ruled that the Civil Rights Act's citizen suit provisions apply only to violations of Title VI itself (interpreted to prohibit intentional discrimination) and not to violations of its implementing regulations (which also prohibit disparate impacts).

25. The agency suffers from a significant backlog of unresolved complaints. See DELOITTE CONSULTING LLP, *EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS 25* (2011), available at http://www.epa.gov/epahome/pdf/epa-ocr_20110321_finalreport.pdf. Citizen groups recently sued EPA for its failure to address a complaint filed in 1994. See Carolyn Whetzel, *Federal Court Refuses to Dismiss Lawsuit Alleging Failure to Enforce Civil Rights Act*, 43 ENVTL. REP. (BNA), at 1017 (April 20, 2012).

OCR has found evidence of disparate impact in response to only one complaint. The complaint, filed in 1999, alleged that California's pesticide control department had failed to control pesticide applications near schools, and that pesticides were being applied more heavily near Latino schools. In April 2011, 12 years after the complaint was filed, OCR finally concluded that there was evidence of a disparate impact, and, in August 2011, settled the case through an agreement with the state pesticide agency. See Emily Yehle, *EPA Settles 12-year-old California Case on Exposure to Latino Children*, E&E NEWS PM (Aug. 25, 2011). EPA is struggling to develop more effective enforcement. In 2012, the agency issued a supplement to Plan EJ 2014 addressing Title VI compliance and enforcement. EPA, *PLAN EJ 2014 SUPPLEMENT: ADVANCING ENVIRONMENTAL JUSTICE THROUGH TITLE VI – DRAFT* (2012), available at <http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-civil-rights.pdf>

26. See DELOITTE CONSULTING LLP, *supra* note 25, at 1, 25.

27. See Eileen Gauna, *Environmental Law, Civil Rights and Sustainability: Three Frameworks for Environmental Justice*, 19 J. ENVTL & SUSTAINABILITY L.

may be reluctant to block economically significant development based upon environmental justice concerns.²⁸ EPA may be reluctant to impose available remedies – like withholding federal funding – because of the perception that such remedies are overly draconian or unconstructive. Moreover, EPA may hesitate to interfere with state agency decision-making due to federalism concerns.²⁹ And even if the Title VI process were aggressively implemented by EPA, it has inherent environmental justice defects because EPA, rather than the affected communities, controls the complaint resolution process, potentially closing off the citizen participatory opportunities that are central to environmental justice advocates.³⁰

C. *Paradigm Clash: The Tension between Environmental Justice and Dominant Environmental Law Paradigms*

There are many reasons why environmental justice has had only a modest substantive impact on environmental law. One is a matter of power: the civil rights community has had insufficient power in policy circles relative to both industry interests and traditional environmental groups. Relative powerlessness is not only a function

34, 43 (2012) [hereinafter Gauna, *Three Frameworks*] (observing that “state permitting authorities claim their hands are tied” and that they do not have the legal authority to deny permits based on their distributional impacts). Professor Gauna notes that the question of whether state authorities do or do not have sufficient authority is highly contested. *Id.* at 46-47.

28. See *id.* at 43-44 (noting concerns about the economic and political impacts of denying permits based upon disparate impacts).

29. Cf. David A. Dana, *One Green America: Continuities and Discontinuities in Environmental Federalism in the United States*, 24 *FORDHAM ENVTL. L. REV.* 103, 110 (2013) (discussing federal/state tensions in implementing cooperative federalist environmental statutes).

30. See Yehle, *supra* note 25 (highlighting environmental justice advocates’ frustration with EPA’s “secret settlement” with the state pesticide agency, an agreement made without the advocates’ participation). In January 2013, EPA’s Office of Civil Rights released a draft issue paper proposing several mechanisms for including complainants (and the challenged state agencies) in the dispute resolution process. Although the paper articulates EPA’s interest in integrating complainants, EPA has full discretion to determine when and how to involve complainants and retains ultimate decision making authority. See U.S. EPA, Office of Civil Rights, *Draft: Title VI of the Civil Rights Act of 1964: Role of Complainants and Recipients in the Title VI Complaints and Resolution Process* (Jan. 25, 2013), available at http://www.epa.gov/ocr/docs/pdf/complainants_role_issue_paper.pdf.

of wealth and societal status; it is also impacted by organizational capacity. The environmental justice movement's decentralized, grassroots, character impedes its capacity to be influential in key national decision-making contexts. Environmental justice groups also often lack the technical and financial resources to be influential in complex scientific decision-making processes that are heavily influenced by better-funded stakeholders.³¹

More fundamentally, the environmental justice movement has had limited substantive influence because the environmental justice paradigm is in tension with the structure of the dominant paradigms for environmental regulation, both traditional and market-based.³² The dominant forms of environmental regulation, like Clean Air Act and Clean Water Act standards, as well as market-based mechanisms like cap-and-trade programs, seek to provide general environmental improvement and achieve overarching goals. This utilitarian perspective (greatest good for the greatest number) contrasts with the environmental justice paradigm's emphasis on the rights of minorities rather than the interests of majorities,³³ its focus on holistic and place-based conditions rather than ambient concentrations of single pollutants, and its prioritization of citizen participation in the decisions that affect their communities.³⁴

On their own terms, the traditional federal pollution control statutes do not address the siting of industrial facilities; that issue is left to local government land use decisions. The statutes are generally geared toward improving overall environmental conditions, and do not provide a direct mechanism for controlling immediate impacts based on place-sensitive parameters or protecting particularly vulnerable populations.³⁵ Environmental permitting decisions under

31. See Gauna, *supra* note 27, at 50.

32. See generally Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1 (2002).

33. See Yang, *supra* note 32, at 13, 15, 30; see also Gauna, *supra* note 27, at 42 note 27 and 47-48. As Professor Yang states, "[p]recisely because regulatory standards are intended to achieve the greatest good for the greatest number of people, such standards fail to take into account the special characteristics and vulnerabilities of minority populations and the poor." Yang, *supra* note 32, at 15.

34. See generally Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STANFORD ENVTL. L. J. 3 (1998).

35. See Kaswan, *supra* note 3, at 268-69; see also Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*,

the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act (for municipal and hazardous waste facilities) are predominantly focused on ensuring that a given facility complies with discrete technology-based pollution control standards and, if so, the facility is free to operate pursuant to the permit. This permitting process does not address a community's fundamental concerns: why is this facility going here, and how does it relate to other sources of pollution – similar or not – to which the community is already exposed? The point should not be overstated: both the Clean Air Act and the Clean Water Act do contain measures designed to address concentrations of pollution in general.³⁶ Nonetheless, in the permitting context, the practical reality is that permitting agencies focus largely on compliance with technology-based standards and generalized plans, not immediate and cumulative impacts.³⁷

As a consequence, the environmental justice movement's focus on disparate impacts butts up against an environmental decision-making paradigm that does not easily incorporate such place-based considerations. While there is little question that environmental laws have produced conditions that are far better than they would be otherwise, poor air and water quality nonetheless continues for many

87 NW. U. L. REV. 787, 814-15 (1992); A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 U. COLO. L. REV. 871, 874 (1992).

36. The Clean Air Act places more stringent requirements on areas that have failed to attain air quality standards, 42 U.S.C. §§ 7501-7515 (Part D on nonattainment requirements), and requires local air districts to monitor and improve local air quality through a state implementation planning process for achieving national air quality standards to protect public health and the environment. 42 U.S.C. § 7410. In the water context, environmental agencies have been implementing long-neglected Clean Water Act provisions that address local water quality through the identification of impaired waters and implementation of Total Maximum Daily Load programs designed to limit discharges to achieve water quality standards. 33 U.S.C. § 1313(d).

37. Likewise, ambient environmental standards are often set to protect the "average" person, rather than identifying the contaminant levels necessary to protect sensitive or more-intensively exposed populations. See Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable Risk" to Native Peoples*, 19 STAN. ENVTL. L. J. 3 (2000) (critiquing water quality standards that fail to address Native Americans' higher pollution exposure due to higher-than-average levels of fish consumption).

communities.³⁸ Traditional environmental laws have not addressed the siting of polluting facilities and provide only rough tools to cope with the immediate and contextual consequences of cumulative industrial pollution. Improving overall environmental conditions has not resolved environmental problems in disadvantaged communities.

The tension with environmental justice principles is even greater for the market-based mechanisms that have emerged as a new paradigm for environmental regulation over the last 25 years. Exemplified by the Clean Air Act's Acid Rain Program and recent state programs for controlling greenhouse gases, cap-and-trade programs establish an overarching emissions target – a “cap” – and then distribute or sell allowances equal to the cap to regulated entities. The entities must show that they have enough allowances to cover their emissions. They can either reduce emissions to reduce the number of allowances they need, or maintain or increase emissions and purchase allowances to cover their emissions. Such trading programs have gained currency because they are believed to reduce the overall societal cost of achieving a given level of pollution control. They encourage the entities that can most cheaply and easily reduce emissions to do so (so they can avoid buying and have the chance to sell allowances), while not imposing reduction costs on entities that face high costs (who could purchase allowances rather than investing in expensive pollution controls). They also provide industry with greater flexibility and autonomy to choose how and when to reduce pollution, and relieve the government of the administrative burden of determining standards for individual industries and facilities.

38. On the clean air front, after forty years and notwithstanding substantial improvement, 124 million people reside in counties that have failed to meet air quality standards. *See* EPA, *OUR NATION'S AIR – STATUS AND TRENDS THROUGH 2010* 1 (2011). Moreover, air quality monitoring does not necessarily capture potential hot spots of pollution, so assessments of air quality could underestimate actual air quality. *See* Stephen Siciliano, *NRDC Challenges EPA Approval of Monitoring Plan for Southern California*, 43 *ENVTL. REP. (BNA)* 109 (Jan. 13, 2012) (discussing lawsuit alleging that Los Angeles regulators failed to adequately monitor air quality near highways). In the water context, technology-based controls have significantly controlled water pollution, but many U.S. waters remain impaired. *See* EPA, *National Summary of Impaired Waters and TMDL Information*, available at http://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T#imp_water_by_state (last visited January 22, 2013).

Market-based programs like cap-and-trade are in fundamental tension with the environmental justice paradigm.³⁹ From a distributive justice perspective, they are indifferent to place. In their pure form, cap-and-trade programs do not control where emissions occur; they simply require that facilities have sufficient allowances to account for their emissions – wherever they are.⁴⁰ The environmental justice community fears emission hot spots created by an industry or concentrated group of industries purchasing allowances rather than reducing emissions.

From a participatory justice perspective, the industry flexibility and reduced governmental role a market-based system offers runs counter to the environmental justice movement's pursuit of participatory engagement and democratic empowerment.⁴¹ Under cap-and-trade, there is no public permitting process that determines emissions levels and pollution control decisions; facilities are free to choose emissions levels and control strategies on their own, so long as they purchase sufficient allowances to match their emissions. Unless a cap-and-trade program is modified to control facilities' use of allowances,⁴² the operation of a cap-and-trade program cannot directly achieve the environmental justice movement's substantive distributive and participatory objectives.⁴³

39. See generally Alice Kaswan, *Reconciling Justice and Efficiency: Integrating Environmental Justice into Domestic Cap-and-Trade Programs for Controlling Greenhouse Gases*, in ETHICS AND GLOBAL CLIMATE CHANGE 232 (Denis G. Arnold, ed. 2011) [hereinafter Kaswan, *Reconciling Justice and Efficiency*].

40. See *id.* at 237, 240-42. These potentially adverse distributional consequences are limited for most traditional pollutants because the cap-and-trade programs supplement, rather than replace, minimum requirements imposed by the Clean Air Act. See Alice Kaswan, *Environmental Justice and Domestic Climate Change Policy*, 38 ENVTL. L. REP. 10287, 10298 (2008) [hereinafter, Kaswan, *Environmental Justice and Domestic Climate Change Policy*].

41. See Kaswan, *supra* note 39, at 244-45 (describing tension between participatory justice and cap-and-trade administratively efficient procedures).

42. See Kaswan, *supra* note 39 (proposing mechanisms for improving a cap-and-trade program's distributional results).

43. The tension between the core features of market-based programs and environmental justice principles helps explain why the environmental justice movement has vehemently opposed new cap-and-trade programs. See *The Cap and Trade Charade for Climate Change*, available at <http://www.ejmmatters.org/docs/cap-Trade-FACTSHEET.pdf> (listing environmental justice advocates' reasons for opposing GHG cap-and-trade programs).

The foregoing provides a backdrop on what the environmental justice movement has and has not accomplished to date. It has succeeded in drawing attention to the demographic impacts of environmental harms, but has had only marginal influence in changing substantive outcomes due to power dynamics and inherent tensions with the dominant environmental law paradigms. The remainder of this Essay will look to the future, and consider what the environmental justice movement can offer the environmental movement as it confronts the limits of current approaches and struggles to solve new problems, like climate change, where progress has been halting at best.

II. WHAT INSIGHTS DOES ENVIRONMENTAL JUSTICE PROVIDE FOR FUTURE DIRECTIONS IN ENVIRONMENTAL LAW?

This Essay does not suggest dismantling the existing structure of environmental law and starting over with new control mechanisms that are more compatible with environmental justice principles. Environmental laws have accomplished a great deal, and opening the door to massive redirection could toss the proverbial baby out with the bathwater. That said, environmental justice principles could be further integrated into both traditional and market-based programs, an enterprise attempted through EJ Plan 2014, and such initiatives are an important area for further inquiry.

In looking forward to what environmental justice can offer environmental law, I focus the remainder of this Essay on a more fundamental level. Since its inception, the environmental justice movement has offered insights that could help strengthen and revitalize the environmental movement. The environmental justice movement's emphasis on the human impacts of pollution control, its recognition of the interconnections between environmental, social, and political conditions, and its emphasis on grassroots advocacy could all provide the environmental movement with insights and tools to tackle the major environmental challenges ahead and increase the political viability of transformative initiatives.

Environmental justice groups in California have strongly opposed the adoption of a cap-and-trade program to implement the state's global warming law and have brought several lawsuits challenging its implementation. *See, e.g., Carolyn Whetzel, Appeals Court Rejects Claims that Actions by Air Board Violated Climate Change Law*, 43 ENVTL. REP. (BNA) 1635 (June 22, 2012) (describing lawsuits).

A. Environmental Challenges

The environmental challenges ahead are daunting. The traditional environmental movement is struggling to develop the political capital necessary to accomplish the major transitions in energy and infrastructure that are necessary to address them. Below, I identify several (but by no means all) significant environmental challenges and describe the limited headway we've achieved so far.

Climate change mitigation and adaptation present two of the most obvious challenges. In the mitigation context, greenhouse gas emissions continue to rise. At the federal level, the Environmental Protection Agency is braving controversy by applying the Clean Air Act to automobile and stationary source emissions. Though some progress has been made with new tailpipe standards for automobiles, progress on stationary sources has been more limited. So far, the agency is applying the statute only to new sources,⁴⁴ and has indicated that it will be years before it sets standards for just one type of existing facility – fossil-fuel-fired power plants⁴⁵ – the source of significant current greenhouse gas emissions. As of January 2013, no comprehensive federal climate legislation is on the congressional table.⁴⁶

Many states have attempted to take up the federal slack through a variety of important initiatives, including a comprehensive emissions reduction program in California, a cap-and-trade program for electric utilities in the northeastern and mid-Atlantic states, numerous renewable energy and energy efficiency programs, and other

44. See *Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units*, 77 F.R. 22392 (April 13, 2012) (proposing a GHG new source performance standard for fossil-fuel-based electricity generators); see also EPA, FACT SHEET: CLEAN AIR ACT PERMITTING FOR GREENHOUSE GASES: GUIDANCE AND TECHNICAL INFORMATION, available at <http://www.epa.gov/nsr/ghgdocs/ghgpermittingtoolsfs.pdf> (describing application of stationary source permitting requirements for new sources under the Prevention of Significant Deterioration and Title V programs).

45. See Jessica Coomes, *McCarthy Says any Greenhouse Gas Rule at Existing Plants Several Years Away*, 43 ENVTL. REP. (BNA) 2898 (Nov. 16, 2012).

46. See Center for Climate and Energy Solutions, *Climate Debate in Congress*, available at <http://www.c2es.org/federal/congress> (last visited Feb. 12, 2013).

measures.⁴⁷ But state efforts do not, and likely will not, add up to a comprehensive program to reduce national GHG levels to the extent necessary to avert catastrophic climate change.⁴⁸

Similarly, climate adaptation is a pressing concern receiving insufficient comprehensive attention.⁴⁹ 2012's Hurricane Sandy, following on the heels of Hurricane Katrina, demonstrated the substantial vulnerability we confront from increasing storm intensity and rising sea levels. Inland, more intense storm events and higher precipitation could similarly cause significant damage and displacement. Higher temperatures present public health threats and, like flooding risks, could jeopardize the long-term sustainability of certain parts of the country. Water resources are already coming under significant stresses that existing legal institutions appear ill-prepared to manage.

As in the mitigation context, federal agencies have begun to grapple with future adaptation challenges under existing laws,⁵⁰ but Congress has not enacted any overarching legislation to provide guidance, coordination, and funding. States and local governments, many fearing a variety of immediate and local consequences, are

47. See Center for Climate and Energy Solutions, *U.S. States & Regions: Climate Action*, available at <http://www.c2es.org/us-states-regions> (last visited Jan. 22, 2013).

48. See generally Alice Kaswan, *A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in a Federal System*, 85 *DENV. U. L. REV.* 791, 794-797 (2008) (describing the likely insufficiency of purely state and local action and the need for federal climate legislation). For a detailed inquiry into California's uniquely comprehensive approach to climate mitigation, see Ann E. Carlson, *Regulatory Capacity and State Environmental Leadership: California's Climate Policy*, 24 *FORDHAM. ENVTL. L. REV.* 63, 83-84 (2013) (discussing California's multifaceted and sophisticated GHG reduction strategy).

49. See generally U.S. GLOBAL CHANGE RESEARCH PROGRAM, *GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES (2009)*, available at <http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf> [hereinafter *USGCRP REPORT*] (describing a wide range of anticipated global and national climate change impacts).

50. See generally INTERAGENCY CLIMATE CHANGE ADAPTATION TASK FORCE, *FEDERAL ACTIONS FOR A CLIMATE RESILIENT NATION (2011)*, available at http://www.whitehouse.gov/sites/default/files/microsites/ceq/2011_adaptation_progress_report.pdf.

struggling to develop responses,⁵¹ but often lack information, money, and the ability to coordinate effectively to address impacts that extend beyond their borders.⁵²

Environmental law also fails to grapple effectively with the intersection between energy and environment, an intersection that is insightfully described by Alexandra Klass in this volume.⁵³ Many of the nation's most severe environmental problems stem from our reliance on fossil fuels to power automobiles and create electricity, creating serious and ongoing problems that include not only climate change, but also ozone pollution, particulate pollution, acid rain, and mercury pollution. In the electricity sector, coal-fired power has traditionally contributed significantly greater quantities of most air pollutants than other types of fossil fuels.⁵⁴ New challenges are emerging as fracking creates the potential for inexpensive supplies of natural gas that could reduce national reliance on coal-fired power and reduce the power sector's contribution to GHGs and other pollutants. But whatever the environmental benefits of shifting from coal to natural gas, fracking raises its own set of environmental questions, including potentially substantial air and water pollution risks that are insufficiently regulated.⁵⁵ Moreover, although carbon capture and sequestration of power plant emissions could potentially reduce GHG emissions, this option presents significant co-pollutant consequences.⁵⁶ In the transportation and energy sectors, renewable

51. See generally *State and Local Adaptation Plans*, GEORGETOWN CLIMATE CENTER, available at <http://www.georgetownclimate.org/adaptation/state-and-local-plans> (last visited Jan. 24, 2013).

52. See Vicki Arroyo & Terri Cruce, *State and Local Adaptation*, in *THE LAW OF ADAPTATION TO CLIMATE CHANGE: U.S. AND INTERNATIONAL ASPECTS* 593 (Michael B. Gerrard & Katrina Fischer Kuh, eds., 2012) (observing shortfall between state and local adaptation efforts and adaptation needs).

53. See generally Alexandra B. Klass, *Climate Change and the Convergence of Environmental and Energy Law*, 24 *FORDHAM ENVTL. L. REV.* 180 (2013).

54. See NAT'L RESEARCH COUNCIL, *HIDDEN COSTS OF ENERGY: UNPRICED CONSEQUENCES OF ENERGY PRODUCTION AND USE* 8 (2010).

55. See generally Hannah Wiseman, *Untested Waters, The Rise of Hydraulic Fracturing in Oil and Gas Production and the Need to Revisit Regulation*, 20 *FORDHAM ENVTL. L. REV.* 115 (2009); See generally Inessa Abayev, *Hydraulic Fracturing Wastewater: Making the Case for Treating the Environmentally Condemned*, 24 *FORDHAM ENVTL. L. REV.* 275 (2013) (discussing "wastewater" from hydrofracking and the impact it has on the environment).

56. See Alice Kaswan, *Climate Change, the Clean Air Act, and Industrial Pollution*, 30 *U.C.L.A. J. ENVTL. L. & POL'Y* 51, 84-85 (2012) [hereinafter

biofuels are a new frontier, but present significant environmental and economic implications – both positive and negative.⁵⁷

EPA and environmental groups are working hard to address many of the discrete environmental problems posed by the energy sector.⁵⁸ Nonetheless, the agency has difficulty addressing the intersection between environmental and energy policy directly. That difficulty is not surprising; EPA has no authority to establish energy policy, the Department of Energy and EPA are distinct departments, and, in any case, first-order decisions about energy supply remain with the states, not the federal government.

In the meantime, however, industry and congressional attacks on EPA's initiatives claim that EPA is undermining America's energy future and hurting the economy.⁵⁹ So long as the agency and advocates focus on single-pollutant and single-industry pollution control initiatives, they cannot explicitly link energy and pollution control policies, and cannot effectively respond to the more systemic charges leveled by industry adversaries.

A similar dynamic occurs in the agricultural context. The agricultural sector has very significant environmental consequences that environmental law addresses in a piecemeal fashion. Confined animal feeding operations generate copious quantities of animal waste and have only recently been subject to minimal controls.⁶⁰

Kaswan, *Climate Change, the Clean Air Act, and Industrial Pollution*] (describing how carbon capture and storage would increase co-pollutants because the energy-intensive carbon capture process would require increased energy production).

57. See Kaswan, *supra* note 40, at 10312-15.

58. In recent years, numerous strict rules have been proposed or finalized to address, *inter alia*, ozone and particulate precursors and to control air toxins, like mercury. See Kaswan, *supra* note 56, at 67 (describing recent EPA regulations controlling pollution from power plants). Progress on controlling natural gas fracking is more limited and diverges among states. See generally Alan Kovski, *Federal Agencies, States Keep Moving on Regulations for Hydraulic Fracturing*, 44 ENV'T REP. (BNA) S-10 (Jan. 18, 2013) (describing several initiatives); Jessica Coomes, *EPA to Phase in First Emission Standards for Natural Gas Fracking Operations by 2015*, 43 ENV'T REP. (BNA) 1001 (Apr. 20, 2012) (describing recent new source performance standards for air emissions).

59. See generally Thomas McGarity, *EPA At Helm's Deep: Surviving the Fourth Attack on Environmental Law*, 24 FORDHAM ENVTL. L. REV. 205 (2013) (describing long history of political attacks against EPA).

60. See generally Hannah Connor, *Comprehensive Regulatory Review: Concentrated Animal Feeding Operations under the Clean Water Act from 1972 to the Present*, 12 VT. J. ENVTL. L. 275 (2011).

Agricultural point sources, like irrigation return flows, are exempt from regulation under the Clean Water Act, and very significant nonpoint runoff of pesticides, herbicides, and fertilizers is sometimes, but not systematically and comprehensively, regulated.⁶¹ As in the energy context, efforts to control agriculture's environmental impacts are fragmented and lack an overall framework for addressing systemic impacts. And, as in the energy context, efforts to regulate agriculture are attacked as a threat to the nation's well-being. A more comprehensive vision for sustainable agriculture, one that addresses the needs of the environment, consumers, and agricultural workers, is needed to provide a more sustainable path forward.

B. *What Makes These Challenges Challenging*

Environmental law has accomplished a great deal. Nonetheless, it is worth highlighting a couple of the systemic and persistent obstacles. One is that addressing problems like climate change mitigation, energy infrastructure, and the environmental consequences of our agricultural system requires challenging the power of very firmly vested interests.⁶² Both energy companies and the agricultural lobby are well-organized and well-financed, with ample access to and influence in government. Meanwhile, consumer and environmental groups struggle to represent the more diffuse public interest.

A second obstacle is that addressing remaining environmental problems requires potentially significant impacts on the two sectors that directly impact consumers: energy and agriculture. Substantial initiatives to re-work these sectors create anxiety about adverse consumer impacts. Even if unswayed by the power of vested interests, policymakers are often reluctant to impose measures that negatively impact consumers and create the risk of political backlash.⁶³

61. Nonpoint source runoff is subject only to the controls that states impose under their own laws, pursuant to the Coastal Zone Management Act, or through restrictions that emerge through the Total Maximum Daily Load program.

62. See, e.g., Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1168 (2009) (describing power of entrenched interests).

63. See Eric Biber, *Cultivating a Green Political Landscape: Lessons for Climate Change Policy from the Defeat of California's Proposition 23*, 66 VANDERBILT L. REV. 153-54 (forthcoming 2013) [p. 58-60 of draft] (observing that

Neither of these are new challenges; industry has always been more organized and powerful than the public at large, and politicians have always been fearful of consumer impacts. But in the 1960s, when the problems to be solved were flagrant, like burning rivers or tearing eyes, and the remedies did not fundamentally challenge existing industry structure or directly impact consumers, environmental interests had traction. When the problems are more subtle or remote (climate change; cross-state air pollution; acid rain; far-off dead zones in estuaries) and solving the problems presents a greater threat to the fundamental operation of existing systems, like fossil fuel-based power, change is harder. Moreover, in times of economic insecurity, vested interests can characterize efforts at change as measures that would cause further economic destabilization.

C. What the Environmental Justice Movement Can Contribute to Environmental Law

Notwithstanding the paradigm clashes that have prevented environmental justice from becoming fully instantiated in the implementation of environmental law, the environmental justice movement offers powerful lessons to the broader political movement for environmental protection. As others before me have articulated, the environmental justice movement provides a model for integrating environmental, economic, and social considerations that could help the environmental movement develop the political capital to overcome the environmental challenges ahead.⁶⁴ Environmental initiatives face greater prospects if they are located within a broader vision for change that people embrace rather than fear.⁶⁵

climate change imposes greater impacts on the public than traditional environmental laws that have focused largely on industry, presenting a significant political challenge).

64. See John C. Dernbach, Patricia E. Salkin, & Donald A. Brown, *Sustainability as a Means of Improving Environmental Justice*, 19 J. ENVTL & SUSTAINABILITY L. 1, 29-30 (2012).

65. In suggesting the need for a “broad vision” and “comprehensive approach,” I do not mean to suggest that every concrete policy proposal must embody the universe. Instead, I am referring to the policy debate that launches specific initiatives. Specific proposals should emerge out of and reflect a wide variety of policy concerns, including socioeconomic and distributional implications, impacts on long-term energy trajectories, and the like.

Historically, the environmental movement was criticized for being overly narrow and technocratic.⁶⁶ A decade ago, commentators, in publications like *“The Death of Environmentalism,”* accused the movement of attempting to solve discrete environmental challenges without offering a broad and inclusive vision that could galvanize more fundamental change.⁶⁷

The environmental justice movement’s emphasis on the connections between the physical environment and social and economic forces offers a counterpoint to a technocratic and narrow perspective. In the *“The Soul of Environmentalism, Transformational Politics in the 21st Century,”* Michael Gelobter and his co-authors observed that the environmental justice movement, unlike the traditional environmental movement, has long-recognized the interconnections between the environment and social justice.⁶⁸ Professors Eileen Gauna and Tseming Yang have likewise amplified this message: environmental justice principles can provide the environmental movement with needed breadth and depth.⁶⁹

These themes emerge not only out of the environmental justice movement, but also from the parallel sustainability movement.⁷⁰ In environmentalist circles, “sustainability” is about a more holistic approach to environmental decision-making that integrates environmental, economic, and social well-being.⁷¹ The two

66. See Michael Shellenberger & Ted Nordhaus, *The Death of Environmentalism: Global Warming Politics in a Post-Environmental World* (2004), available at http://www.thebreakthrough.org/images/Death_of_Environmentalism.pdf.

67. See *id.*

68. Michael Gelobter et al, *The Soul of Environmentalism: Rediscovering Transformational Politics in the 21st Century* 8-10 (2005), available at <http://www.community-wealth.org/sites/clone.community-wealth.org/files/downloads/paper-gelobter-et-al.pdf>.

69. See generally Eileen Gauna, *El Dia de los Muertos: The Death and Rebirth of the Environmental Movement*, 38 ENVTL. L. 457, 466 (2008); Yang, *supra* note 32, at 19-20.

70. See generally Dernbach et al., *supra* note 64; see Nolon *supra* note 15 at 262, 271 (discussing sustainable development movement).

71. See John C. Dernbach, *Synthesis*, in STUMBLING TOWARDS SUSTAINABILITY 1, 7 (John C. Dernbach, ed., 2001). The term “sustainability” means many things to many people – a feature that is both a blessing and a curse. Professor Gauna cautions that some uses of the term could limit rather than expand the conversation. For example, in the climate change context, references to “sustainability” could refer to a narrow focus on reducing GHGs, to the exclusion of the more multi-

movements share key goals, but also have distinct and valuable messages. The sustainability movement offers a greater emphasis on long-term collective well-being,⁷² while the environmental justice movement calls attention to issues of power, privilege, and race, and urges continued vigilance over the place-based consequences of more general policies. Both movements guard against the risk of “tunnel vision”: one-dimensional environmental policymaking that fixates on a single goal (like reductions in GHG emissions) without considering or addressing broader implications.⁷³

At least at times and in places, the environmental movement’s rhetoric is beginning to shift. Environmental groups and politicians alike increasingly promote the “green jobs” potential of climate mitigation, and some traditional environmental groups have initiated projects that blend environmental and social objectives.⁷⁴ Government entities at the federal, state, and local level have similarly begun to explore programs that integrate environmental and socioeconomic objectives.⁷⁵ These efforts are key steps toward developing a more comprehensive and broadly compelling agenda.

dimensional analysis that Professor Dernbach and others associate with the term “sustainability.” Gauna, *supra* note 27, at 56.

72. See Dernbach *et al.*, *supra* note 64, at 18.

73. See Gauna, *supra* note 69, at 465-66.

74. See Barack Obama, Second Inaugural Address, (Jan. 21, 2013) (available at <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>) (recognizing challenge and economic opportunity presented by the transition to sustainable energy). For example, the Natural Resources Defense Council, a traditional environmental advocacy organization, partnered with a housing group to help build housing that is both green and affordable. See Alexandra Dapolito Dunn, *Siting Green Infrastructure: Legal and Policy Solutions to Alleviate Urban Poverty and Promote Healthy Communities*, 37 ENVTL. AFFAIRS 41, 49 (2010).

75. At the federal level, EPA, the Department of Housing and Urban Development, and the Department of Transportation have joined forces to create a “Partnership for Sustainable Communities” that provides grants and technical assistance “to help communities improve access to affordable housing and transportation while protecting the environment.” U.S. EPA, *HUD-DOT-EPA Partnership for Sustainable Communities*, <http://www.epa.gov/smartgrowth/partnership/index.html#updates> (last visited March 5, 2013). At the local level, Chicago is a leader in developing an integrated environmental and economic sustainability plan. See City of Chicago, *Sustainable Chicago 2015*,

Why a broad vision rather than a narrow agenda? A broader vision and more comprehensive approach are essential to building a political movement for change. So long as environmental issues remain just another “special interest,” their power is limited.⁷⁶ Given the entrenched power of vested interests, the significant environmental challenges ahead are unlikely to be resolved without broad-based support. A single issue – protecting the environment – can gain only so much traction. A broader vision for a more sustainable future that improves the lives of all could galvanize much broader support.

Developing an inclusive movement is not just about horse-trading with potential allies by, say, conceding a point to “labor” to garner support for a single initiative. Instead, the challenge is to recognize and speak to the role of environmental protection in a much broader context. Environmental policies do not operate in a vacuum and have potentially far-reaching impacts on the economy and on people’s lives. By addressing issues like economic and environmental security, conditions in disadvantaged communities, and creating new opportunities to replace those lost by environmental controls, the environmental movement connects with the broad set of issues that motivate public opinion. As Van Jones has stated, “[w]orking people will have a powerful incentive to support a green-growth agenda as long as green partisans embrace broad opportunity and shared prosperity as key values.”⁷⁷ A comprehensive visionary approach motivates support for change and dulls vested interests’ efforts to maintain the status quo. Moreover, change is threatening unless a given measure is located within a broader vision that provides an appealing and holistic alternative to business as usual. By addressing and integrating economic and human concerns, a broader vision can undermine industry scare tactics about economic collapse.

There are political counter-arguments. If the primary adversary in seeking environmental protection is industry, then a comprehensive visionary approach could be even more threatening to industrial

http://www.cityofchicago.org/city/en/progs/env/sustainable_chicago2015.html (last visited March 5, 2013).

76. See Shellenberger & Nordhaus, *supra* note 66. See also Biber, *supra* note 63, at 154 (observing that climate legislation’s feasibility increases if it is perceived as providing benefits that extend beyond the environment).

77. VAN JONES, *THE GREEN COLLAR ECONOMY: HOW ONE SOLUTION CAN FIX OUR TWO BIGGEST PROBLEMS* 55 (2008).

interests than narrow demands. Negotiations with industry could be easier to manage and resolve by taking narrow approaches that focus on single, clearly defined issues. In addition, environmental groups could fear that their defined issues will get lost in a more generalized inquiry for the common good. Ultimately, however, the issue is not just what creates the cleanest negotiating strategy or the most cleanly defined objectives, it is about the balance of power. If the environmental movement comes to the negotiating table with strong and widespread support, then that could do more to achieve a positive outcome than a narrow and technical negotiating strategy.⁷⁸

A comprehensive, visionary approach is important not only to achieve a broader political consensus behind transformative change, but, on a practical level, to generate better outcomes.⁷⁹ Since environmental policies do not operate in a vacuum and have numerous environmental and socioeconomic consequences, a comprehensive approach helps anticipate and avoid unintended consequences. To name a few: biofuels impact land use and food prices; wind energy impacts birds; nuclear energy impacts long-term safety and national security. A comprehensive approach could not only avoid ill-considered negative impacts, but could maximize positive ancillary environmental and socioeconomic benefits, including job creation, long-term sustainability, or other benefits.⁸⁰

A more comprehensive approach also contributes to more effective policies. Certain environmental policies will be doomed to failure unless the policies integrate broader considerations. For example, efforts to encourage smart growth to reduce the environmental impacts of sprawl are unlikely to succeed unless policymakers address the full range of socioeconomic factors that influence land use in urban settings. One cannot simply zone for “transit-oriented-development” and expect it to happen, without addressing municipal

78. See Alice Kaswan, *Greening the Grid and Climate Justice*, 39 ENVTL. L. 1143, 1157-59 (2009) [hereinafter Kaswan, *Greening the Grid*] (discussing the political ramifications of taking a comprehensive approach in environmental policy debates).

79. See Kaswan, *supra* note 56, at 57, 62.

80. See Kaswan, *supra* note 78, at 1148-50 (discussing environmental benefits of renewable energy) and 1151-54 (discussing economic benefits of renewable energy).

power dynamics, social services, transportation, air pollution, disaster safety, and other critical socioeconomic variables.⁸¹

D. How a Broader Vision Could Inform the Response to Current Challenges

A broader vision impacts essential environmental policy debates. In the climate mitigation context, efforts to reduce GHGs without addressing the larger vision for how we transition to environmental sustainability will continue to flounder politically as vested power interests resist changes to the status quo.⁸² As noted above, environmental groups and political actors have begun to frame their advocacy in more comprehensive and visionary terms,⁸³ and scholars are offering new ideas for integrated approaches to environmental protection and economic well-being.⁸⁴

Recognizing the importance of a broader vision and narrative is not simply a matter of rhetoric. If we take the impact of environmental laws on people's lives seriously, then hard questions about the value of alternative environmental policies emerge.⁸⁵ The desirability of

81. See Alice Kaswan, *Climate Change, Consumption, and Cities*, 36 FORDHAM URB. L. J. 253, 305-09 (2009).

82. See Kaswan, *supra* note 56, at 74.

83. Three examples of organizations that are explicitly comprehensive in approach include "Green for All," a national organization "dedicated to improving the lives of all Americans through a clean energy economy," Green for All, <http://greenforall.org/> (last visited March 5, 2013), PolicyLink, a national organization promoting regional equity efforts that integrate social, economic, and environmental considerations, PolicyLink, http://www.policylink.org/site/c.lkIXLbMNJrE/b.7977453/k.FBB8/PolicyLink_About_Us.htm (last visited March 5, 2013) and Redefining Progress, an organization devoted to "shifting public policy to achieve a sustainable economy, a healthy environment and a just society." <http://rprogress.org/index.htm> (last visited March 6, 2013).

84. See, e.g., Dunn, *supra* note 74 (proposing new investments in green infrastructure to alleviate poverty and improve urban environments); Maxine Burkett, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 BUFF. L. REV. 169 (2008) (proposing that a domestic climate change program be designed to promote green measures in areas needing economic development).

85. See Kaswan, *supra* note 78, at 1148 (observing how broader considerations can alter one's assessment of alternative policy tools); Cf. Alice Kaswan, *supra* note 56, 74-78 (2012) (noting that taking co-pollutant impacts into consideration could affect relative merits of alternative regulatory approaches).

cap-and-trade as a tool for addressing GHGs is a case in point. For a time, at least, cap-and-trade gained currency as a policy that achieved reductions (satisfying environmental interests) at the lowest cost (satisfying at least some industry interests).⁸⁶ But if we consider more than just these two issues (GHG reductions and cost), and consider larger-scale issues like impacts on communities, transformative incentives, and democratic control over industry decision-making, then cap-and-trade presents a more complex set of trade-offs.⁸⁷ This is not to pass judgment on whether cap-and-trade is or is not worth implementing if properly designed. It is simply to note the value of broadening the policy debate about controls over stationary sources to include issues that matter to the people who experience the daily impacts of industrial America.

Thus, environmental justice advocates' lawsuits against California's GHG cap-and-trade program, and their criticism of the state's failure to consider alternatives, can be seen as an effort to broaden the debate.⁸⁸ People may differ on the wisdom of the lawsuits in light of practical politics. But it is nonetheless worth recognizing that the environmental justice community has raised critical issues about the full implications of a cap-and-trade program that deserve attention, and that could signal the kinds of considerations that policymakers would do well to ponder as they struggle to develop a politically acceptable national climate policy.

A more holistic approach to climate policy could also offer insights about energy policy priorities. For example, as the nation confronts the relative role of natural gas from fracking and renewables, the issue is not only reductions in carbon and relative cost, but the broader short- and long-term social welfare implications of each, including pollution implications and long-term sustainability.⁸⁹ Or, to

86. See generally J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1543-58 (2007) (describing why cap-and-trade emerged as a preferred policy instrument for both environmentalists and industry).

87. See Ann Carlson, *Designing Effective Climate Policy: Cap-and-Trade and Complementary Policies*, 49 HARV. J. ON LEGIS. 207 (2012) (suggesting that efforts to achieve ancillary benefits by combining regulatory and market-based mechanisms could compromise the economic benefits of a cap-and-trade program).

88. See Whetzel, *supra* note 43 (discussing lawsuits).

89. See Kaswan, *supra* note 78 (suggesting the importance of a comprehensive assessment of costs and benefits in determining the wisdom of alternative energy options).

take another example, state and federal programs often subsidize energy sources and, in so doing, make critical choices, like their relative support for energy efficiency and renewable energy. These options have distributional consequences: weatherizing low-income homes could help poor people save money and provide local jobs,⁹⁰ while subsidizing solar power could end up serving wealthier consumers and industries. This is not to say that both should not be encouraged and that both could not be designed to serve disadvantaged communities. But a comprehensive approach would explicitly integrate these distributional concerns into the policy debate.

As noted above, a broader policy debate and more holistic approach are not only worthwhile for increasing the political capital behind policy initiatives. In some instances, they may also be necessary to achieve practical success. To elaborate further on the example suggested earlier, smart growth is likely to be an important strategy for reducing GHG emissions. Restructuring land use policies would reduce sprawl and, in turn, reduce automobile use.⁹¹ To succeed, however, smart growth strategies, like any urban planning, must address the full range of socioeconomic factors that influence urban life.⁹² New investment in the urban core could cause gentrification with destabilizing impacts on historic urban communities. Investments will not succeed unless the mix of social services, including schools, shopping, and access to workplaces all line up. Pushing people into urban cores requires policymakers to not just figure out how to concentrate growth, but to address potential increases in local pollution, the urban heat island effect, and vulnerability to disasters. From a political perspective, smart growth requires the input of local communities and is likely to go nowhere if imposed from above. Successful, equitable smart growth requires a holistic and inclusive approach.⁹³

Similarly, climate adaptation is inextricably tied to a web of socioeconomic factors, and climate adaptation strategies must confront the issues explicitly or risk ineffectiveness and failure.⁹⁴ As

90. See Dernbach *et al.*, *supra* note 64, at 22-24.

91. See Nolon, *supra* note 15, at 273.

92. See Kaswan, *supra* note 81, at 306-07.

93. *See id.*

94. Robert R.M. Verchick, *Disaster Justice: The Geography of Human Capability*, 23 DUKE ENV'T'L L. & POL'Y FORUM 23, 38 (2012).

sea levels rise and storms increase in intensity throughout the United States, difficult questions about which areas to protect and which to abandon will arise.⁹⁵ Moreover, resiliency to adverse impacts, whether flooding or heat waves, is closely tied to underlying social vulnerability, and such impacts cannot be addressed without attention to underlying vulnerabilities.⁹⁶ Policymakers increasingly recognize that effective and fair adaptation requires a comprehensive and inclusive approach.

In the energy context – related to but not exclusively focused on climate change – the debate about fracking would be served by a comprehensive discussion. The issue is not just about the virtues of natural gas combustion over coal combustion, although their GHG and pollution consequences are of central importance. Fracking policy should also reflect an assessment of the role of natural gas in the nation’s energy future, the implications of fracking for the development of more sustainable and long-term renewable energy strategies, and the implications of fracking for the communities in which it is located. These issues are not unrelated. As EPA, the states, and local communities contemplate greater controls on the local environmental consequences of fracking, industry responds with arguments about increasing costs and the implications for natural gas as a coal-alternative. A long-term vision about sustainable energy would help resolve these difficult short-term tradeoffs and ensure that local impacts and long-term objectives are not sacrificed by a truncated policy discussion.

Moreover, a broader vision of energy policy could galvanize political power. As Van Jones has stated, clean technology and the transformation of our energy infrastructure are “poised to become *the* next great engines for American innovation, productivity and job growth, and social equity gains,”⁹⁷ and a new energy economy could “reflect our deepest values of inclusion, diversity, and equal opportunity for everyone.”⁹⁸ While gigawatt-counting is essential, a more comprehensive and visionary approach could further political movement.

95. See Nolon, *supra* note 15, at 245 (describing coastal land use challenges created by emerging climate impacts).

96. See generally, Verchick, *supra* note 94; Alice Kaswan, *Domestic Climate Change Adaptation and Equity*, 42 ENVTL. L. REPORTER 11125 (2012).

97. VAN JONES, *supra* note 77, at 180.

98. *Id.* at 11.

The agriculture debate follows the same path. Fighting for controls in a vacuum will run up against the power of industry and confront political fears about rising food costs or the inability of US agriculture to compete in international food markets. Controversial initiatives, like controlling nonpoint source water pollution, addressing erosion, and addressing agriculture's contribution to GHG levels (as both an emissions source and potential sink), will require attention to the socioeconomic realities faced not only by the industry, but also by agricultural workers and consumers.

E. Building a Movement

It is not enough to have a comprehensive top-down agenda emanating from the environmental movement. Ultimately, as many before me have noted, alliances must be built with constituencies outside of traditional environmental circles,⁹⁹ including racial justice groups, social justice groups, labor, and immigrants. The dynamics of such alliance building is not easy. Not only do interests at times diverge; modes of communication, ways of relating to the dominant power structure, and resources to engage and commit can all differ markedly, affecting the dynamic.¹⁰⁰ Ultimately, however, a broader political movement for change cannot be built without broader coalitions and without bridging and connecting the interests the constituent groups raise.¹⁰¹

Avoiding top-down edicts means not only horizontal expansion to other groups, but also vertical expansion: the development of participatory mechanisms for developing bottom-up strategies and ideas.¹⁰² At a recent speech at the University of San Francisco School

99. See Gauna, *supra* note 69, at 471-72; Gelobter et al., *supra* note 68, at 25; Shellenberger & Nordhaus, *supra* note 66.

100. See Kaswan, *supra* note 78, at 1160.

101. When conflicts occur, as they did between the environmental justice community and environmental groups when environmental justice groups sued over California's cap-and-trade program, see Whetzel *supra* note 43, it is critical to attempt to understand differing perspectives, even if views on the appropriate action differ. Otherwise, environmental interests will remain fragmented and dysfunctional, and fail to garner the political momentum necessary to achieve real change.

102. See Dernbach *et al.*, *supra* note 64, at 31 (urging the development of a national bottom-up "sustainability movement"); see also Gauna, *supra* note 69, at 468; Kaswan, *supra* note 78, at 1160.

of Law, Professor Gerald Torres described the Clinton Administration's approach to developing its Executive Order on environmental justice. For several days, staff welcomed a wide range of representatives from environmental justice grassroots organizations to express their views on what federal agencies should do to better serve environmental justice. The resulting order reflected on-the-ground experiences and challenges in a way that a more distanced policy-making process could not achieve. Under the Obama Administration, EPA has similarly worked hard to provide mechanisms for citizen and grassroots input.¹⁰³ Enabling effective participation takes money and resources, and some groups are experimenting with partnerships that bring traditional and grassroots environmental groups together, so that larger-scale mainstream groups provide funding and expertise that serves the on-the-ground needs and priorities of grassroots groups.¹⁰⁴ Academic institutions have also served as meeting grounds for traditional and grassroots groups.¹⁰⁵

CONCLUSION

I conclude with Professor Tseming Yang's wise words on the relationship between environmental justice and environmental law, eloquently stated a decade ago:

[E]nvironmental justice challenges environmental regulators to look up from their desks and

103. See EPA, *Environmental Justice*, <http://www.epa.gov/environmentaljustice/> (last updated Jan. 24, 2013).

104. See Veronica Eady, *Warren County and the Birth of a Movement: The Troubled Marriage Between Environmentalism and Civil Rights*, 1 *GOLDEN GATE ENVTL. L.J.* 41 (2007); Rachel Morello-Frosch, et al., *Community Voice, Vision, and Resilience in Post-Hurricane Katrina Recovery*, 4 *ENVTL. JUSTICE* 71, 76, 78 (2011) (describing productive collaboration between a national mainstream environmental group, the Natural Resources Defense Council, and local environmental justice groups to research post-Katrina toxic sediments); see generally NRDC, *Partnerships for Change*, <http://www.nrdc.org/ej/partnerships/index.asp> (last visited March 5, 2013).

105. For example, the Program for Environmental and Regional Equity at the University of Southern California regularly brings together environmental justice activists, government officials, and academics. See Univ. of S. Cal. <http://dornsife.usc.edu/pere/home/> (last visited Jan. 24, 2013).

environmentalists to come out of the wilderness and to understand how environmental protection efforts are related to broader social agendas. A failure to live up to the challenge will not only leave environmentalism weaker as a compelling ideal, but also poorer as a moral force.¹⁰⁶

The environmental movement has made substantial progress in broadening its agenda. Continuing to integrate principles from the environmental justice and sustainability movements can provide it with a stronger moral force and a more comprehensive and inclusive vision. All this, and more, will be necessary to build the political movement necessary to surmount the environmental challenges ahead.

106. Yang, *supra* note 32, at 32.