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The Environmental Justice Misfit: Public Participation and the Paradigm Paradox

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I. INTRODUCTION

Public outrage often provides the catalytic spark for the passage of federal environmental legislation; environmental catastrophes and reports invoking visions of impending disaster create intense collective anxiety, assuaged only by seemingly "tough" legislation.[1] While heated public indignation can affect environmental protection in extraordinary ways,[2] it is usually short-lived, even though the public may remain interested in and committed to the objectives that motivated the legislation.

After public outrage dissipates, environmental agencies are left to translate broad[3] and ambiguous legislative mandates into hypertechnical regulations and to apply the regulations to discrete actions. Without encouragement, the public sentiment that gave rise to such mandates can neither shape nor support environmental law beyond legislative enactment.[4] But within the existing environ-

1. *See* Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59 (1992) (explaining how environmental demand gets translated into legislation despite free rider and other organizational problems); *see also* Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS. 249, 252 (1991); Zygmunt J.B. Plater, *From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981, 1002 (1994); Sidney M. Wolf, *Fear and Loathing About the Public Right to Know, The Surprising Success of the Emergency Planning and Community Right-to-Know Act*, 11 J. LAND USE & ENVTL. L. 217, 218 (1996) (discussing passage of the Emergency Planning and Community Right-to-Know Act after 2500 people had died and over 200,000 were injured in Bhopal, India on December 4, 1994).

2. *See* John Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233 (1990) (discussing the impact of public concern on § 112 of the Clean Air Act). *But cf.* Farber, *supra* note 1, at 69-70 (describing incentives for production of non-symbolic legislation). Some commentators have explained the enactment of stringent federal environmental legislation as the result of a complicated dynamic involving the threat to industrial interests at state and local levels and unrestrained competition among presidential aspirants to establish environmental credentials, rather than the result of the efforts of national environmental organizations. *See* E. Donald Elliott et al., *Toward A Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326-29. However, this explanation presupposes at least a perception (by industry and politicians) of the public's strong environmental sentiment. For other surprising twists brought about by perceived environmental sentiment, see Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1653 (1995) (stating that where regulatory goals are inconsistent, "the only way to pacify the public and ensure political survival is to conceal the underlying social compromise between protection of public health and the loss of jobs under the veneer of scientific truth").

3. Generally, the earlier statutes had broader delegations of authority. *See* Glicksman & Schroeder, *supra* note 1, at 253.

4. That is, assuming one believes the legislative process accurately captures existing public preferences in coherent policy and that those preferences should be respected. *See, e.g.*, Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative*

mental protection system, effective implementation requires active public participation in agency and judicial fora as well.[5]

This Article argues that current administrative processes fail to effectively incorporate an important form of public participation in decision-making—the participation by communities bearing the greatest environmental risks. The environmental justice movement has stung the environmental community, including the Environmental Protection Agency (EPA), in its demand for comprehensive public participation, and in its critique of the trade-offs negotiated between industry and environmental advocates as racist, classist, and fundamentally unjust.

This critique has in fact challenged environmental regulation at its ideological core. The EPA and other environmental agencies have been unable to incorporate environmental justice principles into the regulatory process. Consequently, despite a decade of continual challenges and increasing attention to environmental justice concerns, these agencies have failed to achieve equity in environmental protection. This failure stems in part from the limitations imposed by traditional public participation avenues, and the inability of the decision-making process to accommodate the unique ethical imperatives and inclusive methods of the movement. This Article advocates an "environmental justice style" public participation model as a more promising approach because it calls for a recasting of the role of community participation in environmental decision-making—a recasting which transcends traditional, modern, and proposed decision-making paradigms.

Part II of this Article provides a brief history of the environmental justice movement. Part III addresses the role of the public under three models of administrative policy and decision-making: the traditional expertise-oriented model, the modern pluralistic model, and the recently proposed civic republican model. In particular, Part III examines the foundational beliefs and regulatory ideals that dominate each model. Part IV explores environmental justice advocacy under each model and concludes that such advocacy defies the structure of all models, rendering the environmental justice position a "misfit" within the current system. This "misfit" in turn reveals a paradox inherent in the decision-making

Risk Analysis, 92 COLUM. L. REV. 562, 608-10 (1992) (discussing insights of cognitive psychologists and their argument that the public tends to misperceive risk).

5. *See infra* part III.B (discussing the implications of a pluralistic model of administrative decision-making).

paradigms. Part IV addresses the misfit status and advances an alternative approach that might prove more successful in integrating environmental justice into environmental regulation. Part V contemplates this alternative approach and the limitations of traditional approaches in the context of three conventional public participation avenues in agency proceedings: advisory groups, notice and comment, and informal participation. Last, the Article suggests that taking the environmental justice challenge seriously and confronting the paradigm paradox could mark a fundamental shift in environmental regulation.

II. BACKGROUND

The environmental justice movement has evolved into a campaign at odds with the traditional environmental movement.[6] Financed largely by dues-paying members,[7] national environmental organizations acquired formal expertise[8] in the many disciplines that inform pollution control and resource use.[9] These organizations then used this expertise and their growing influence to lobby for important changes to environmental legislation,[10] to negotiate

6. Robert Gottlieb & Helen Ingram, *The New Environmentalists*, THE PROGRESSIVE, Aug. 1988, at 14.

7. Farber, *supra* note 1, at 73; *see also* Gottlieb & Ingram, *supra* note 6, at 14-15.

8. *See* ROBERT GOTTLIEB, FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT 117-61 (1993) (describing professionalization and institutionalization of traditional environmental groups).

9. In the environmental justice context, the focus thus far has been on pollution control, due to its obvious link to environmental hazards. *See, e.g.*, OFFICE OF POLICY, PLANNING AND EVALUATION, U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, EPA230-R-92-008 (1992) [hereinafter WORKGROUP REPORT]; OFFICE OF POLICY, PLANNING AND EVALUATION, U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, EPA230-R-92-008A (1992) [hereinafter SUPPORTING DOCUMENT] (discussing environmental hazards from contaminated soil, air pollution, water pollution). These two documents are collectively referred to as the 1992 EPA Report. Similarly, this Article will focus primarily upon pollution control. It is important to note, however, that natural resource use is an important issue in some environmental justice campaigns, particularly in the Southwest. *See, e.g.*, SOUTHWEST ORGANIZING PROJECT, INTEL INSIDE NEW MEXICO: A CASE STUDY OF ENVIRONMENTAL AND ECONOMIC INJUSTICE 55-62 (1995) (examining a case in which facility siting raises water use in the arid Southwest) (on file with the *Stanford Environmental Law Journal*); SOUTHWEST NETWORK FOR ENVIRONMENTAL AND ECONOMIC JUSTICE & CAMPAIGN FOR RESPONSIBLE TECHNOLOGY, SACRED WATERS: LIFE-BLOOD OF MOTHER EARTH (1997) (describing four case studies of high-technology water resource exploitation and corporate welfare in the Southwest) (on file with the *Stanford Environmental Law Journal*).

10. For example, the 1990 Amendments to the Clean Air Act were described as a "special interest feeding frenzy." Glicksman & Schroeder, *supra* note 1, at 285 (quoting Richard Ayres, Natural Resources Defense Council (NRDC) attorney); *see also* Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721 (1991).

environmentally favorable regulations, and to legally challenge unfavorable ones.[11] Environmental groups further wielded their newfound expertise by taking advantage of private citizen suit provisions to force agency action and enforce environmental laws.[12] These efforts, supported by extensive economic and political resources, have rendered national environmental organizations influential players and have significantly facilitated the widespread assumption that they are the sole expression of popular environmental sentiment.

Because private trade organizations had an even longer history of aggressive interest-group pressure at all levels—lobbying Congress, challenging the agencies, and advocating in court—both the regulated community and conventional environmental organizations helped forge the enormous body of environmental law that exists today. The displacement of public outrage by the cool advocacy of sophisticated environmental organizations promoted a perception of reasoned temperance in environmental lawmaking and a comforting assumption that the forceful advocacy of "environmental interests" and industrial interests would provide balanced implementation,[13] eventually yielding cost-effective yet protective pollution control regulation.

In the late 1980's, poor people of color[14] challenged these fun-

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11. The NRDC and the Sierra Club were especially active. Farber, *supra* note 1, at 72-73.

12. *See, e.g.*, MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS (1991); BUREAU OF NAT'L AFFAIRS, ENVIRONMENTAL CITIZEN SUITS: CONFRONTING THE CORPORATION (1988); JEFFREY G. MILLER, ENVIRONMENTAL LAW INST., CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS (1987); Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833 (1985).

13. *See* Wagner, *supra* note 2, at 1657 (stating that "[a]ny deficit in regulatory participation by the general public is assumed to be offset by the vigorous oversight of dozens of interests groups that span the ideological spectrum"); *see also* Farber, *supra* note 1, at 79. This is not to say that this assumption was uniformly held. Some commentators, in questioning the merit of public interest representation in agency proceedings, have identified judicial supervision of under-representation of important interests as a dilemma in the traditional model of administrative law. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1787 (1975); *see also* Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1049 (1990) (concluding that "public risk litigation is structurally biased against victim access"). Notwithstanding these concerns, the logic of the interest representation model must rest upon the assumption that expanding participation rights to public interest groups is corrective and hence, leads to more optimal results. *See infra* part III.B.

14. I use the term poor people of color to emphasize the problem's multiple dimensions. African-Americans and Hispanic-Americans are on average poorer and less educated and have higher rates of unemployment than whites. *See* SUPPORTING DOCUMENT,

damental assumptions. Environmental justice activists appeared on the environmental protection scene,[15] opposing industrial practices, and criticizing conventional environmental organizations[16] and environmental protection agencies as racist and classist.[17] They argued that privileged white people systematically receive the benefits of environmental protection while poor people of color systematically incur the environmental risk.

Although some continue to debate the charge of "environmental racism,"[18] a close examination of environmental protection nev-

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supra note 9, at 6; *see also* Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. Rev. 787, 795 (1993) (noting that, although whites are poorer in absolute numbers, minorities are disproportionately poorer in terms of population percentages).

15. There are several collected readings on aspects of environmental justice. *See, e.g.*, Confronting Environmental Racism: Voices from the Grassroots (Robert Bullard ed., 1993) [hereinafter Voices From the Grassroots]; Environmental Justice (J. Petrikin ed., 1995); Environmental Justice: Issues, Policies and Solutions (Bunyan Bryant ed., 1995) [hereinafter Issues, Policies and Solutions]; Race and the Incidence of Environmental Hazards: A Time for Discourse (Bunyan Bryant & Paul Mohai eds., 1992) [hereinafter Race and Environmental Hazards]; Toxic Struggles: The Theory and Practice of Environmental Justice (Richard Hofrichter ed., 1993) [hereinafter Toxic Struggles]; Unequal Protection: Environmental Justice and Communities of Color (Robert Bullard ed., 1994); *see also* Defending Mother Earth: Native American Perspectives on Environmental Justice (Jace Weaver ed., 1996); Kenneth A. Manaster, Environmental Protection and Justice: Readings and Commentary on Environmental Law and Practice (1995); Jim Schwab, Deeper Shades of Green (1994) (profiling eight communities' environmental justice campaigns).

For a bibliography of law review articles on environmental justice, see Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 J. Envtl. L. & Litig. 121 (1994). Symposia and collected works on environmental justice postdating Professor Collin's bibliography include *Essays on Environmental Justice*, 96 W. Va. L. Rev. (1994); *Symposium: Environmental Justice*, 5 Md. J. Contemp. Legal Issues (1993-94); *Urban Environmental Issues*, 3 Hastings W.-Nw. J. Envtl. L. & Pol'y (1996); *Urban Environmental Justice, Third Annual Stein Center Symposium on Contemporary Urban Challenges*, 21 Fordham Urb. L.J. (1994).

16. *See* Letter from SouthWest Organizing Project to the "Group of Ten" national environmental organizations (March 16, 1990) (criticizing the organizations' exclusion of people of color from their campaigns) (on file with the *Stanford Environmental Law Journal*); *see also The Letter That Shook a Movement*, Sierra Mag., May-June 1993, at 54; *A Place at the Table, A Sierra Roundtable on Race, Justice and the Environment*, Sierra Mag., May-June 1993, at 50-55.

17. *See* Letter from Southwest Network for Environmental & Economic Justice to William K. Reilly, Administrator, Environmental Protection Agency (July 31, 1991) (charging institutional racism within the EPA) (on file with the *Stanford Environmental Law Journal*).

18. The charge remains controversial on several fronts. First, a "chicken or egg" debate has ensued in the siting context, with commentators questioning whether sufficient evidence exists of racial discrimination at the time of siting, or whether market dynamics are the primary cause of inequities in location of noxious land uses. *See* Robert D. Bullard, *A New "Chicken-or-Egg" Debate: Which Came First—the Neighborhood, or the Toxic Dump?*, The Workbook, Summer 1994, at 60 (on file with the *Stanford Environmental Law Journal*). In

ertheless reveals a disturbing dynamic: as environmental agencies mediated between the competing interests of industry and traditional environmentalists, environmental protection quickly became oriented toward compromise in the form of negotiated trade-offs.[19] Agencies' primary decisions—interpreting statutory provisions, fashioning rules, issuing guidance memoranda, and imposing permit conditions—had to afford some degree of environmental protection. But the protection afforded typically was accepted if it yielded a net environmental benefit that was acceptable to represented environmental interests. At the same time, the decision had to accommodate industrial interests in cost effectiveness, growth, and operational flexibility.[20] Simply stated, the environmental protection machine accepted negotiation and compromise as part of the normal process of obtaining its objectives and pursued the goal of efficiency.

However, in promoting efficiency, the influential players neglected the distributional consequences of environmental regulation,[21] sacrificing the interests of people of color and low-income communities in the quest for maximizing net environmental benefits.[22] Consequently, residents of pristine areas and suburban

addition, at least one commentator has objected to framing the issues as both "environmental" and "racism" because both terms obscure important Native American sovereignty issues. *See* Williamson B.C. Chang, *The "Wasteland" in the Western Exploitation of "Race" and the Environment*, 63 U. COLO. L. REV. 849, 861-68 (1992); *see also* Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & COMM. 597, 604 (1996) (arguing that the term "environmental racism" is inappropriate unless accompanied by an analysis of the relationship of the specific activity to a system of racial subordination, and suggesting instead the use of the more general term "environmental justice").

19. Thomas O. McGarity, *Public Participation in Risk Regulation*, 1 RISK 103, 104-05 (1990).

20. Examples of early trade-offs are described in MARC C. LANDY ET AL., THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS FROM NIXON TO CLINTON (1994). For example, in evaluating the initial proposed rule for ozone, the authors note the proposed standard was the result of internal compromise. *Id.* at 63. Administrator Costle's subsequent proposal of a less stringent standard was followed by involvement of the White House and an unsuccessful court challenge. *Id.* at 72-78. The authors argue that this compromise standard could be seen as both too stringent—given the limitations of the studies and the costs of achieving the standard, and too lax—given scientific uncertainty and the statutory mandate to not consider cost. *Id.* at 78.

21. *See* Lazarus, *supra* note 14. More generally, in an early article on administrative law, Professor Stewart identifies this problem as one inherent in the traditional model of administrative law. He argues that the "expert" model of administrative law is inadequate because the economic growth since World War II has given rise to perplexing distribution questions, which do not turn on technical issues that can be left to experts. *See* Stewart, *supra* note 13, at 1684.

22. *See* A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 U. COLO. L. REV. 871 (1992). Professor Tarlock explains that "both classic

neighborhoods came to enjoy most of the benefits of environmental protection,[23] while poor, racial minority, and ethnic communities located nearest to industrial facilities,[24] hazardous waste sites,[25]

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welfare economics and the new environmental economics come from the same utilitarian tradition which stresses aggregate welfare, often at the expense of identifiable communities within society." *Id.* at 874. Welfare economists see pollution problems as a sign that resources are not being allocated efficiently. According to this view, marginal costs of pollution control and efficient allocation ultimately result in distributional inequity toward undeveloped national and local economies. *Id.* at 873. Modern global environmental economists, rejecting the orientation toward short-term consumption implicit in welfare economists' analyses, argue the present rates of development and accompanying pollution problems are inefficient over the long term, considering that the marginal costs of natural or non-degraded resources will be higher in the future. *Id.* The plea to curb development to save resources for the future raises equity objections by undeveloped economies. *Id.* at 873-74. In this Article, the term "economic efficiency" implies the traditional view of efficiency within the shorter time frame.

Modern global environmental economists essentially advocate a form of sustainable resource use. A potential point of disagreement between these economists and environmental justice advocates is that global economists might be willing to subordinate the goal of social and economic justice for the poor and people of color, as these economists are driven by "scientific and moral imperatives which transcend both individual and national self interest." *Id.* at 872. However, some have persuasively argued that environmental justice leads to sustainable environments over the long run. *See generally* Robin Morris Collin & Robert Collin, *Where Did all the Blue Skies Go? Sustainability and Equity: The New Paradigm*, 9 J. ENVTL. L. & LITIG. 399 (1994).

23. *See* Lazarus, *supra* note 14, at 798-800 (noting that without addressing race, empirical studies suggest that benefits from a reduction in pollution are neutral or even regressive).

24. *See* Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 506-10 (1992) (discussing historical zoning practices, such as exclusionary and expulsive zoning, that resulted in the placement of industrial and commercial facilities in minority neighborhoods). Living near industrial areas also brings environmental risks associated with noncompliance with environmental laws. *See* Marcia Coyle et al., *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1-12 (describing an investigation of EPA enforcement activities indicating that penalties for violating hazardous waste laws in white communities were approximately 500% higher than those in minority communities); *see also* Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 40-79 (1995) (discussing obstacles poor communities of color face in utilizing private citizen suit provisions to address compliance problems). In addition, living near industrial areas brings environmental risks associated with slower site remediation and potentially inadequate site cleanup. *See* Coyle et al., *supra*, at S2.

25. Presently, operating commercial hazardous waste facilities are disproportionately located near communities of color and the poor. *See, e.g.*, COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) [hereinafter TOXIC WASTES AND RACE]; BENJAMIN A. GOLDMAN & LAURA FITTON, TOXIC WASTES AND RACE REVISITED 2-5 (1994) (national study of existing and abandoned hazardous waste sites). *But see* Douglas L. Anderson et al., *Hazardous Waste Facilities: 'Environmental Equity' Issues in Metropolitan Areas*, EVALUATION REV., Apr. 1994, at 18 (asserting that prior studies are not definitive). For critiques of methodology used in siting studies, see Vicki Been, *Analyzing Evidence of Environmental Justice*, 11 J. LAND USE &

and other risk-producing land uses[26] paid the environmental price. Indeed, a complicated dynamic involving ongoing zoning practices and market dynamics resulted in the eventual location of dangerous land use practices near people of color, exposing those communities to significantly higher environmental risks. For example, African-American, Hispanic, and low-income communities presently suffer disproportionately greater exposures to air pollution;[27] ethnic minorities are likely to consume more fish caught from polluted waters;[28] and African-American children have significantly

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ENVTL. L. 1, 21 (1995) [hereinafter Been, *Analyzing Evidence*]; Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1 (1997); Michael Greenberg, *Proving Environmental Inequity in Siting Locally Unwanted Land Uses*, 4 RISK 235 (1993).

Debate and inquiry continue as to whether the disproportionate location is the result of discriminatory siting processes or post-siting market forces at work. *See* Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?* 103 YALE L.J. 1383 (1994) [hereinafter Been, *Disproportionate Siting*]. The inquiry is an important one and may shed some light on the probable effectiveness of remedies over the long term. However, the debate itself illustrates the double bind of environmental justice activism. The initial response to environmental justice claims was that activists lacked evidence that people of color and the poor are disproportionately affected by environmental risk. *See* WORKGROUP REPORT, *supra* note 9, at 11. When disproportionate exposures to environmental risk were documented by studies, additional cautionary responses ensued. The EPA workgroup observed that disproportionate exposure does not necessarily mean disproportionate health effects. WORKGROUP REPORT, *supra* note 9, at 13. Professor Been argued that disproportionate location near hazardous waste sites does not necessarily mean a bad siting process.

Presently, even with the completion of several comprehensive studies on hazardous waste siting, one can easily imagine another response to resist environmental justice claims: evidence of disproportionate siting of hazardous waste facilities does not establish disproportionate siting in other contexts. As a result, environmental justice activists are continually confronted with responses requiring tighter levels of scientific and methodological exactness. Meanwhile, disparate exposures continue, leading one frustrated activist to capture the dilemma of environmental justice activism in his comment that "[we] want protection, not another study. . . . We've studied this issue to death. When you see poor communities that have six times more miscarriages than they should have or clusters of babies born without brains, you don't need another study to tell you that something is wrong." *Community Leaders Angered by EPA Report on Pollution Impact on Poor, Minorities*, Daily Rep. for Executives (BNA) No. 143, at D6 (July 24, 1992) (quoting Richard Moore, Co-Chair, Southwest Network for Environmental and Economic Justice).

26. For example, people of color have disproportionately greater exposure to pesticides because of agricultural work. SUPPORTING DOCUMENT, *supra* note 9, at 10 (indicating that as many as 313,000 farm workers experience pesticide-related illnesses each year); *see also* Peter Marguiles, *Building Communities of Virtue: Political Theory, Land Use Policy, and the "Not in my Backyard" Syndrome*, 43 SYRACUSE L. REV. 945, 962 (1992).

27. *See* SUPPORTING DOCUMENT, *supra* note 9, at 10; *see also* RACE AND ENVIRONMENTAL HAZARDS, *supra* note 15, at 166 (summarizing studies indicating exposure to air pollution disproportionate by race and income).

28. SUPPORTING DOCUMENT, *supra* note 9, at 12.

higher percentages of toxic substances in their blood.[29]

Lacking the political influence, expertise, and money of traditional players in the pollution control debate, people of color and the poor resorted to angry demonstrations[30] and other confrontational methods[31] to object to lopsided environmental protection. Despite a paucity of resources, environmental justice advocates succeeded in making environmental justice a high-profile issue.[32] Since these initial protests, residents from low-income communities and people of color have become increasingly self-organized and vocal in a wide range of environmental law settings. On the local level, they attend public hearings concerning polluting facilities[33] and contaminated properties.[34] They also litigate under civil rights laws to address disparity in environmental protection[35] and

29. *Id.* at 9-20.

30. *See* TOXIC WASTES AND RACE, *supra* note 25, at xi (describing a demonstration in African-American Warren County, North Carolina, protesting siting of a landfill); *see also* Richard Moore & Louis Head, *Acknowledging the Past, Confronting the Present: Environmental Justice in the 1990's, in* TOXIC STRUGGLES, *supra* note 15, at 120-22 (discussing activists' descriptions of demonstrations and press conferences initially needed to force the EPA to respond to environmental justice issues).

31. *See* Robert Verchick, *In a Greener Voice: Feminist Theory and Environmental Justice*, 19 HARV. WOMEN'S L.J. 23, 30-54 (1996) (describing unmasking, contextual reasoning, and other deconstructive techniques used by women of color environmental justice activists).

32. Robert M. Wolcott et al., *Environmental Equity and Economic Policy: Expanding the Agenda of Reform, in* ISSUES, POLICIES AND SOLUTIONS, *supra* note 15, at 115-23.

33. *See* Eileen Gauna, *Major Sources of Criteria Pollutants in Nonattainment Areas, Balancing the Goals of Clean Air, Environmental Justice, and Industrial Development*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 379 (1996); *see also* Luke W. Cole, *The Struggle of Kettleman City: Lessons for the Movement*, 5 MD. J. CONTEMP. LEGAL ISSUES 67 (1993-94) (describing hearing concerning toxic waste incinerator).

34. These might be public meetings under the Comprehensive Environmental Response, Compensation and Liability Act if the site is listed on the National Priorities List, or under state law for other cleanups. *See* Deehon Ferris, *Communities of Color and Hazardous Waste Cleanup: Expanding Public Participation in the Federal Superfund Program*, 21 FORDHAM URB. L.J. 671 (1994); Ellison Folk, *Public Participation in the Superfund Cleanup Process*, 18 ECOLOGY L.Q. 173 (1991); Douglas A. McWilliams, *Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization*, 21 ECOLOGY L.Q. 705 (1994); Melissa Thorme, *Local to Global: Citizen's Legal Rights and Remedies Relating to Toxic Waste Dumps*, 5 TUL. ENVTL. L.J. 100 (1991).

35. Luke Cole, lawyer and environmental justice activist, suggests that lawyers have relied too heavily on constitutional claims that require proof of discriminatory intent and thus are difficult to prove. Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 530-31 (1994) [hereinafter Cole, *Another Stone*]; *see also* Olga L. Moya, *Adopting an Environmental Justice Ethic*, 5 DICK. J. ENVTL. L. & POL'Y 215, 236-40 (1996) (describing § 1983 environmental justice litigation). However, Title VI of the Civil Rights Act of 1964, which prohibits discrimination in programs receiving federal financial assistance, and Title VIII, which prohibits discrimination in the sale or rental of housing, are interesting possibilities because discriminatory effect or impact should be sufficient to establish a claim. *See* Cole, *Another Stone, supra*, at 531-37; *see also* U.S. ENVTL.

have begun to participate in private enforcement efforts through citizen suit provisions.[36] Environmental justice advocacy has expanded into national and international arenas as well. Activists have been appointed to boards of national environmental organizations[37] and to federal advisory committees.[38] They have formed networks[39] and organizations to address national concerns.[40] Environmental justice advocacy has even found its way into shareholders meetings of large, publicly owned corporations.[41]

But visibility is not the same as influence, and a place at the table does not ensure a comparable serving of the environmental protection pie. The inclusion of environmental justice activists among numerous interest groups might not be sufficient to accomplish the formidable task of achieving systematically equitable environmental protection. To some, success appears doubtful. There are obvious reasons for their skepticism. Whether on the demonstration line or in meetings with executives, environmental justice advocates are often viewed, and view themselves, as outsiders ex-

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PROTECTION AGENCY, ENVIRONMENTAL JUSTICE ANNUAL REPORT 6 (1994) (indicating that the Agency recently experienced an increase in Title VI complaints); Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 J. ENVTL. L. & LITIG. 309 (1994) [hereinafter Cole, *Administrative Complaints*]; James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125 (1994); U.S. Envtl. Protection Agency, *In the Matter of the Fifth Meeting of the National Environmental Justice Advisory Council*, 9 ADMIN. L.J. AM. U. 623, 737-46 (1995) (including testimony of EPA official regarding status of Title VI complaints).

36. Cole, *Another Stone*, *supra* note 35, at 526 (1994) (listing suits under traditional environmental law as first in the hierarchy of litigation preferences). *But see* Gauna, *supra* note 24, at 40-79 (suggesting that citizen suit provisions are underutilized in the context of environmental justice).

37. For example, Winona LaDuke of the White Earth Recovery Project was on the board of Greenpeace USA. Deehon Ferris of the Washington Alliance on Environmental Justice and Jeanne Gauna of the SouthWest Organizing Project are on the board of the Coalition for Environmentally Responsible Economies. Telephone Interview with Jeanne Gauna, SouthWest Organizing Project (Nov. 21, 1997).

38. *See infra* part IV.E (discussing the National Environmental Justice Advisory Committee).

39. Examples of environmental justice network organizations include the Southwest Network for Environmental and Economic Justice, the Southern Organizing Conference, the Asian Pacific Environmental Network, the Northeast Environmental Justice Network, and the Indian Environmental Network. *See* ROBERT D. BULLARD, PEOPLE OF COLOR ENVIRONMENTAL GROUPS DIRECTORY (1992).

40. *See, e.g.*, Deehon Ferris, *New Public Policy Tools in the Grassroots Movement: The Washington Office on Environmental Justice*, 14 VA. ENVTL. L.J. 711 (1995).

41. Stephen G. Gréene, *Foundations' Shareholder Activism*, CHRON. PHILANTHROPY, Jan. 1996, at 29-30 (describing how foundations used their stockholder status to persuade Intel to change its policy and share information with local communities).

cluded from spheres of resolution despite inclusion within physical spheres of representation. Allegations of environmental racism left the regulated communities and conventional environmental communities defensive, skeptical, and hostile.[42] The result was a vehement denial[43] and resistance to environmental justice claims that endure in some areas.[44] In addition, disparity in available resources persists: community residents enter the fray with less information and specialized knowledge concerning the legal, technical, and economic issues involved.[45]

There are additional, less obvious reasons for concern about the ultimate success of environmental justice activism. The primary tenet upon which environmental justice proponents rest their argument significantly distinguishes them from traditional environmental advocates. Instead of debating the technical issues presented, activists stand behind the ethical force of their position

42. For an anecdotal account, see Cole, *supra* note 33, at 43 (describing hearing on medical waste incinerator).

43. For example, when environmental racism claims first gained prominence, then-EPA Administrator William K. Reilly commented that talk of environmental racism at EPA infuriated him. William K. Reilly, *Environmental Equity: EPA's Position*, EPA J., Mar.-Apr. 1992, at 18. He believed that failure to achieve equity was probably due to larger patterns of industrial growth and neglect and the legacy of inherited poverty and discrimination. *Id.*

44. *See* Cole, *Another Stone*, *supra* note 35 (describing several cases involving resistance to environmental justice issues by state officials, culminating in administrative complaints with the EPA).

For an illustration of judicial resistance to environmental justice claims in the permitting context, see *In Re* Puerto Elec. Power Auth. (Cambalanche Combustion Turbine Project), PSD Appeal No. 95-2, 1995 PSD LEXIS 1, 4 (Dec. 11, 1995) (denying review of environmental justice claim for failure to find adverse health impacts). For a critique of this case, see Gauna, *supra* note 33, at 394 (explaining that proof of adverse health impact is too heavy a burden because of lack of available studies on health effects); *see also In Re* Genessee Power Station Limited Partnership, PSD Appeal Nos. 93-1 through 93-7, 1993 PSD LEXIS 3 (Sept. 8, 1993) (holding that decision to locate in an African-American community was a local land use or zoning decision that could not be disturbed under the Clean Air Act). In a subsequent opinion, issued upon a Motion for Clarification, the Appeals Board decided that the motion had raised issues of national importance and reissued an opinion, nunc pro tunc. *Id.* at 3. The new opinion assumed without deciding that the environmental racism argument was appropriate to consider. *Id.* at 20. However, the Board ultimately held that there was not support for the proposition that the Commission acted with a racially discriminatory intent. *Id.* at 7.

For a more favorable judicial treatment of an environmental justice claim, see *In Re* Chemical Waste Management of Ind., Inc., RCRA Appeal Nos. 95-2 and 95-3, 1995 WL 395962 (E.A.B. June 29, 1995).

45. Conner Bailey et al., *Environmental Justice and the Professional*, *in* ISSUES, POLICIES AND SOLUTIONS, *supra* note 15, at 38 (quoting activist Wilfred M. Green as stating that "[w]e could organize and meet all we wanted, but we only really started moving things when we got expertise on our side").

that environmental protection should be fair.[46] They insist that environmental justice is inextricably linked to social and economic justice.[47] This injection of fairness into a discourse oriented toward the negotiated trade-off of technical requirements is profoundly disruptive, challenging the fundamental assumptions that support the current process. For example, if the trade-off is to concentrate hazardous waste or pollution-generating activities in particular locations to yield a net environmental benefit over a larger geographical area, and the communities most affected by the locations object to the *quid pro quo* on ideological grounds, then the basis of the trade-off must be rejected. Thus, the ideological position that environmental justice advocates must maintain, prioritizing justice above efficiency,[48] places them at odds with those who

46. Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993) (exploring different conceptions of fairness in siting issues).

47. *See* RACE AND ENVIRONMENTAL HAZARDS, *supra* note 15, at 5-6.

48. The ideological position is best reflected in the Principles of Environmental Justice, set forth by the People of Color Leadership Summit:

> WE THE PEOPLE OF COLOR, gathered together at this multinational People of Color Environmental Leadership Summit, to begin to build a national and international movement of all peoples of color to fight the destruction and taking of our lands and communities, do hereby re-establish our spiritual interdependence to the sacredness of our Mother Earth; to respect and celebrate each of our cultures, languages and beliefs about the natural world and our roles in healing ourselves; to insure environmental justice; to promote economic alternatives which would contribute to the development of environmentally safe livelihoods; and, to secure our political, economic and cultural liberation that has been denied for over 500 years of colonization and oppression, resulting in the poisoning of our communities and land and the genocide of our peoples, do affirm and adopt these Principles of Environmental Justice:
>
> 1. Environmental justice affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction.
>
> 2. Environmental justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.
>
> 3. Environmental justice mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things.
>
> 4. Environmental justice calls for universal protection from nuclear testing, extraction, production and disposal of toxic/hazardous wastes and poisons and nuclear testing that threaten the fundamental right to clean air, land, water, and food.
>
> 5. Environmental justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.
>
> 6. Environmental justice demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production.

pursue traditional utilitarian interests.

Consequently, although environmental justice activists are given a place at the policy-making table and environmental justice is now a recognized interest in a range of agency contexts, systematically equitable environmental protection remains far from reality. An examination of the prevailing models of agency decisionmaking explains in part the difficulty that environmental justice advocates confront in their struggle to attain environmental parity. Nevertheless, close study reveals that these relative newcomers, with few resources and a fundamentally different perspective, have the potential to change and enrich the course of environmental regulation.

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7. Environmental justice demands the right to participate as equal partners at every level of decisionmaking including needs assessment, planning, implementation, enforcement and evaluation.

8. Environmental justice affirms the right of all workers to a safe and healthy work environment, without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards.

9. Environmental justice protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care.

10. Environmental justice considers governmental acts of environmental injustice a violation of international law, the Universal Declaration On Human Rights, and the United Nations Convention on Genocide.

11. Environmental justice must recognize a special legal and natural relationship of Native Peoples to the U.S. government through treaties, agreements, compacts, and covenants affirming sovereignty and self-determination.

12. Environmental justice affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and providing fair access for all to the full range of resources.

13. Environmental justice calls for the strict enforcement of principles of informed consent, and a halt to the testing of experimental reproductive and medical procedures and vaccinations on people of color.

14. Environmental justice opposes the destructive operations of multi-national corporations.

15. Environmental justice opposes military occupation, repression and exploitation of lands, peoples and cultures, and other life forms.

16. Environmental justice calls for the education of present and future generations which emphasizes social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives.

17. Environmental justice requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to insure the health of the natural world for present and future generations.

PROCEEDINGS OF THE FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT xiii (1991) (on file with the *Stanford Environmental Law Journal*).

III. The Role of the Public in Agency Proceedings

In theory, the public always has played a central role in the legislative process,[49] yet the idea of the public pursuing an agenda in agency proceedings and in court is more recent. Such a notion has gained acceptance steadily over the last four decades and appears to have become an enduring tradition in administrative law.

Scholars have proposed several different models to prescribe the way in which administrative decisions should be made and the public's role within each model. These scholars also describe how regulatory ideals operate with varying degrees of influence in the models. The expertise model, a decision-making structure heavily reliant upon the regulatory ideal of formal expertise, ultimately rests upon empiricism and faith in the ability of science and technology to solve environmental problems. The pluralist model, with predominant regulatory ideals of interest group inclusion and agency neutrality, rests on a foundation of utilitarianism. The recently proposed civic republican model rejects utilitarianism in favor of a belief in true civic virtue. Under this model, citizen inclusion is a regulatory ideal but is employed to achieve a form of deliberation focusing on true public good solutions rather than utility maximization. The form and efficacy of citizen participation may vary depending upon which model predominates in agency proceedings and the institutional mechanisms that might favor one approach over another.

A. *The Ideal of Expertise and the Traditional Administrative System*

One could look at agency decision-making as requiring no public input. Agency officials could regulate according to clear legislative mandate; in absence of such clarity, officials could use their expertise to fill in the detail. An extreme form of this view,[50] sup-

49. *See* Robert A. Dahl, Democracy and Its Critics (1989).

50. This view might be described as a comprehensive rationality or "synoptic" model. *See* Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 Harv. L. Rev. 393, 396-99 (1981); *see also* Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 Envtl. L. 53, 57 (1996). However, the comprehensive rationality model described by Professor Diver is in conceptual opposition not to a pluralistic model but to an earlier model characterized by an incremental, fine-tuning approach to policymaking. Diver, *supra*, at 399. The incremental approach, not suited for expansive policy making, relied heavily on the adjudicative function for modest policy shifts with remedial focus. *Id.* at 403-406. The incremental model coincided temporally with Stewart's traditional administrative law model, characterized by an ideal of expertise operating in a bipolar backdrop. *See* Stewart, *supra* note 13, at 1675 (explaining that under the traditional model of administrative law, the agency is seen as a "transmission belt" for

ported by a strong belief in the ideal of formal expertise,[51] could justify the rejection of public participation entirely.[52]

However, the broad grants of authority delegated to agencies in the New Deal era gave rise to a judicial concern about the potential consequences of unfettered administrative discretion. The fear was that the agencies—uncomfortably legislative in function[53] but not directly subject to the corrective wrath of the vote—would run roughshod over the liberty and property interests of those regulated.[54] Regulatory agencies had to compensate for this infirmity by keeping clearly within the bounds of legislative directive, or else the courts would see to it that they did.[55]

These agency limitations opened the door for participation by the regulated community.[56] Professor Stewart characterized the shift in administrative decision-making from an emphasis on agency expertise to inclusion of the regulated community as a bi-

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implementing legislative directions in particular cases). The comprehensive rationality model temporally corresponded to Stewart's interest representation (pluralistic) model. Both of Diver's policymaking models (incremental and comprehensive rationality) have pluralistic features. *See* Diver, *supra*, at 407-08, 410, 415. However, the comprehensive rationality model relies heavily upon specialized analytical techniques performed by experts, such as benefit-cost analysis, risk assessments and systems analysis, albeit within a pluralistic structure. *Id.* at 410, 415-16. As Professor Diver observes, synopticism and public participation are distinct values, and "[strict] adherence to the synoptic paradigm and distrust of participatory process go hand in hand." *Id.* at 424.

51. In the environmental context this belief is coupled with an optimism about the ability of science and technology to solve environmental problems.

52. Under the traditional model of administrative law, the agency is seen as a "transmission belt" for implementing legislative directions in particular cases. Stewart, *supra* note 13, at 1675. The courts' function is to contain discretion within legislative bounds. *Id.* In the face of broad delegations of authority cast in general terms by New Deal legislation, the legitimacy of administrative discretion was rationalized by viewing the agency as expert planner or manager of the (ascertainable) legislative goal. *Id.* at 1677-78.

53. The traditional model of American administrative law, shaped by the courts during the first half of the twentieth century, sought to prohibit government intrusion on private liberty or property unless legislatively authorized. *Id.* at 1669-70; *see also* BERNARD SCHWARTZ, ADMINISTRATIVE LAW §1.5 (3d ed. 1991) (noting that the proliferation of administrative agencies strained the Framers' pristine notion of separation of powers (quoting Handlon v. Town of Belleville, 71 A.2d 624, 626 (N.J. 1950)).

54. The roots of this concern are grounded in political theory: the consent of the people is considered the only legitimate basis for the government's exercise of coercive regulatory power. *See* Stewart, *supra* note 13, at 1669-70, 1675.

55. The judicial hand was set to work sculpting doctrines which would confine administrative discretion within statutory directives. *Id.* at 1672.

56. This could be said to be the first form of public participation, although calling it public is somewhat of a misnomer. The participation is public in the sense that the person or association is not another agency or branch of government, but the interests sought to be protected were not the public welfare interests generally underlying legislation but rather the private economic interests of the regulated community.

polar struggle between private rights of the regulated and the public welfare protected by the agency.[57] Under this traditional view, the primary inquiry posed by legislation is the permissible extent of governmental intrusion into the sphere of private autonomy; it is the private interests that are at risk, not the public interest. Accordingly, there is no role for the general public in agency proceedings. Despite a concern about agency discretion, the ideal of formal expertise appears to dominate this bipolar structure. The regulated community's participation is allowed only to keep agency expertise within the consensual boundary of the legislation in question.[58]

B. *The Ideals of Pluralism and the Modern Administrative System*

While agencies must be mindful of their non-representational footing and of their place in political theory, they also must perform their duties by implementing legislation. Viewed in this light, just as the regulated are protected from exuberant regulation, the public in general must be protected against inadequate regulation. The regulated community's entry into agency proceedings gave rise to a second concern: as they matured, regulatory agencies might develop a bias in favor of the organized interests of the regulated[59] and might come to have a stake in the well-being of the industries they regulate.[60] Consequently, agency officials might fail to discharge their respective mandates.

In order to protect against this new risk, the then-expertise-oriented traditional system had to change in order to accommodate

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57. Stewart, *supra* note 13, at 1671-81.

58. Professor Stewart describes the judiciary's complementary role as that of containment. *Id.* at 1675.

59. *Id.* at 1670. Professor Stewart offers a generous explanation for agency bias, noting that agencies needed the cooperation of the regulated communities to supply and develop relevant information, and that it would be psychologically and organizationally difficult for an agency to operate in an adversarial posture over an extended period of time, since the regulated industry could drain agency resources by institution of formal proceedings. *Id.* at 1714. In a more biting critique, Professor Plater captures the capture theory in his observation that

> [t]he putative bipolar structure of societal governance, with official governmental watchdogs guarding against market excesses, in practice often evolved into a unipolar, laissez-faire love-nest, as the marketplace co-opted the guardians. The legal profession did its part, developing an expansive body of administrative law on behalf of industry, designed to constrain and cut back the generally highhanded and much-resented potency of New Deal agencies.

Plater, *supra* note 1, at 997 (1994).

60. Glicksman & Schroeder, *supra* note 1, at 265.

interests other than the liberty and property interests of the regulated.[61] The courts responded primarily by extending participation and standing rights. In 1975, Professor Stewart described the process as "working a transformation" from a bipolar to multipolar interest representation model in which agency decision-making is, in essence, a surrogate political process.[62]

The interest representation model relies relatively less upon the regulatory ideal of expertise and more upon ideals associated with pluralism, although expertise is still important.[63] This more recent view has been heavily influenced by the writings of theorists who posit that the behavior of regulators is influenced by inherent reward structures.[64] Agency expertise alone is thus not likely to produce optimal regulation.[65] A decision-making structure which accounts for and minimizes undue influence by the regulated is preferable. Consequently, pluralism, a theory under which all groups have the potential to participate fully, provided an answer to the concern that agency bias would arise from granting access only to the regulated community.

The shift to a pluralist model was more than a corrective mea-

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61. Stewart, *supra* note 13, at 1670.

62. Professor Stewart, deeply concerned about the ultimate efficacy of the interest representation model, contemplated:

> [J]udges have accorded a wide variety of affected interests the right not only to participate in, but to force the initiation of, formal proceedings before the agency. Indeed, this process has gone beyond the mere extension of participation and standing rights, working a fundamental transformation of the traditional model. Increasingly, the function of administrative law is not the protection of private autonomy but the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision. Whether this is a coherent or workable aim is an open issue. But there is no denying the importance of the transformation.

Id.

63. *See* Diver, *supra* note 50, at 396-99 (discussing the comprehensive rationality model). Expertise and pluralism work together in many environmental decisionmaking contexts. *See, e.g.*, Michael C. Blumm & Stephen R. Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. L. REV. 277, 282 (1990) (noting that courts more readily find NEPA violations when agencies with environmental expertise raise questions).

64. This does not necessarily mean that administrators are "bought off" or "bribed" by the regulated parties. It does mean that administrators respond to pressures that might keep them from actively pursuing all statutory goals. *See, e.g.*, Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENVTL. L. 1647, 1653-82 (1991) (describing eight "laws" of administrative behavior, including tendency to be influenced by criticism, negative feedback, and manipulative tactics of the regulated parties).

65. *Id.* at 1682-1718 (demonstrating how incentives and disincentives impeded implementation of the nonattainment program under the Clean Air Act).

sure against the risk of bias; it signaled an ascendant belief in utilitarianism. Grounded in the belief that one group's vision of what is best is not inherently superior to another's,[66] pluralism holds that all participants are equally qualified to participate in decisions.[67] Accordingly, preferences of the participants stand on substantively equal footing. A strong pluralist conception blurs the distinction between private and public interests, as public interests become mere aggregated private preferences.[68] The public interest in very clean air, for example, would simply reflect the aggregated preferences for clean air by most people, a preference not inherently superior to an alternative aggregated preference for unfettered automobile use and industrial activity resulting in severely polluted air.[69]

The product of a well-functioning pluralist process captures, in rough equilibrium, a mix of predominating preferences. Because individual preferences are grounded in self-interested utility[70] instead of a selfless concern for the greater good, aggregated preferences are essentially utilitarian.[71] When an agency implements legislation, it attempts to capture and preserve the utilitarian underpinnings of the legislation.

To illustrate the utilitarian focus of the pluralist view in the environmental agency context, consider a legislative mandate to regulate toxic substances in a manner that is least burdensome but

66. *See* DAHL, *supra* note 49, at 31.

67. *Id.*

68. Under one view of pluralism, there is really no public interest or common good, "just private interests in aggregate forming an overall social utility." Poisner, *supra* note 50, at 57. Michael Levine and Jennifer Forrence note a difference between aggregated private preferences—which are self-regarding general or special interests, and true public interests—which are preferences about "the private or collective behavior or condition of others, including the behavior of the government toward the polity at large or toward some subset of it." Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 175 (1990). These preferences are other-regarding, exist only in a social context and are ideological. *Id.* These public interests would be more akin to the public good of civic republican thought.

69. Assuming that the latter preference is widely shared by the polity, it would be a general interest preference. *See* Levine & Forrence, *supra* note 68, at 176. If the preference is not widely shared, but achieves legislative expression because of the organizational efforts of a self-interested subset of a polity, it would be a special interest. *Id.* In describing aggregated preferences under a well functioning pluralist system, I am describing a general interest preference and not a special interest preference.

70. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542 (1988) (contending that politics consists of a struggle among interest groups for scarce social resources, and pluralism takes existing preferences as exogenous).

71. *Id.* at 1545 (stating that "[m]uch of the appeal of pluralism stems from its connection with utilitarianism").

protects health and the environment against unreasonable risk.[72] The "least burdensome" mandate is a signal for the agency to consider the economic interests of industries using toxic substances in their processes, while the "protects health and environment" mandate is a signal to protect the interests of the general public in health and a safe environment. The utility of toxic substance use must be weighed against the utility of health and a clean environment. Here, environmental values appear to be legislatively expressed as utilitarian. If health and a clean environment were viewed as a greater public good grounded in universal values, or as an ethical imperative, then the agency's authority to protect these values probably would not be curtailed by the prerequisite that the Administrator first find an "unreasonable risk" and the requirement to use only the "least burdensome" regulatory strategies. By force of logic, if only unreasonable risks are unacceptable, then reasonable risks to health and a safe environment become acceptable. Why should society accept any risks to health and environment? It must be because, in doing so, we maximize overall social utility. The utilitarian aspects of health and environment[73] must be balanced against competing utilitarian considerations, such as the benefits of products and work that industry can provide.

In the agency context, pluralism has been described as a "constellation of essentially private interests, instead of competing in the economic market, using political pressure to influence the final decision or vying for interpretive superiority over statutes."[74] Interest group advocacy, as a form of "political pressure" exerted by industrial and environmental interest advocates, is appropriate

72. More precisely, the scope of regulation under the Toxic Substances Control Act requires that

> if the administrator finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture . . . presents or will present an unreasonable risk of injury to health or the environment, the administrator shall by rule apply one or more of the following requirements to such substance or mixture to the extent necessary to protect adequately against such risk using the least burdensome requirements: [followed by control strategies, including prohibitions for particular uses, limitations on manufacture or distribution, labeling requirements, recording requirements, or outright blanket bans of the substance or mixture].

15 U.S.C. § 2605 (1994).

73. This is not to say that environmental values are completely utilitarian. *See* Eric T. Freyfogle, *The Ethical Strands of Environmental Law*, 1994 U. ILL. L. REV. 819 (1994). However, within a pluralist or interest representation paradigm, the utilitarian aspects of environmental sentiment would predominate.

74. Poisner, *supra* note 50, at 67.

because those interests are contained within expression of preferences embodied in legislation. Interest group advocacy is ostensibly acceptable as long as there are neither barriers to participation nor undue influence upon the agency by any particular interest group. Consequently, an agency structure that accommodates pluralist ideals is one that is accessible to representatives of all legitimate interests and one that requires officials to maintain a relative neutrality towards the interest groups and legislatively expressed preferences.[75] Under this conception, the agency is not a preference generator but a preference mediator.[76] In the environmental context, the EPA's mission becomes less that of a "Protector of the Environment," and more a risk broker which manages risk within a legislatively expressed range of options.[77]

The ideals associated with pluralism operated with great force in environmental regulation for several reasons. First was timing. The transformation of administrative law into an interest representation model[78] coincided with the rise of environmental law[79] in

75. *See, e.g.*, Marguiles, *supra* note 26, at 958-59 (discussing the neutrality of the state among competing individual conceptions of the good in liberal thought, but also discussing how affirmative action to redistribute resources might be appropriate to the egalitarian liberal project).

76. *See also* Sunstein, *supra* note 70, at 32 (noting that normatively, the pluralist understanding is to avoid active and self-conscious preference-shaping by public officials).

77. *See* Ann Bray, Comment, *Scientific Decision Making: A Barrier to Citizen Participation in Environmental Decision Making*, 17 WM. MITCHELL L. REV. 1111, 1133 (indicating a notable discrepancy in the perception of the mission of a state environmental agency where only 42% of agency staff believed the agency mission was to "prevent" pollution while 90% of the citizens believed that to be the agency's primary function). This suggests that the public essentially views an environmental agency as a preference-generating protector of the environment, while regulators see themselves as reducing pollution to optimal levels. *Id.*

78. The interest representation model need not rest upon the capture theory. Once the extreme form of synopticism is rejected (the superhuman agency official), then it must be contemplated that agency officials could err on the side of either over-regulation or under-regulation. Once private interests are given a corrective role, it becomes necessary for public interest representation to counterbalance the private interest advocacy before the agency.

79. The first major modern environmental statute was the National Environmental Policy Act in 1969, followed in 1970 by the Clean Air Amendments of 1970 and the creation of the EPA. These were shortly followed by the Federal Water Pollution Control Act Amendments of 1972, the Endangered Species Act of 1973, the Safe Drinking Water Act of 1974, and the Federal Insecticide, Fungicide and Rodenticide Act Amendments of 1975. It took a bit longer for toxic substances to be addressed, mainly by the Toxic Substances Control Act of 1977 (TSCA), the Comprehensive Environmental Response, Compensation and Liability Act of 1980, the Resource Conservation and Recovery Act Amendments of 1984, and the Superfund Amendment and Reauthorization Act of 1986. Although these statutes, as subsequently amended, are the main fare of environmental law survey courses,

the 1970's.[80] Commentators have observed that environmental law, in particular, is pluralist-created and pluralist-driven.[81]

But timing is not the only explanation. Experts increasingly recognize that even technical and scientific solutions to environmental problems involve value judgments.[82] The desired level of environmental protection[83] and corresponding strategies employed to achieve these desired levels[84] are recognized as questions which are inherently political as well as technical.[85] This view supports the position that public participation in agency proceedings is necessary, not only to guard against agency bias toward the regu-

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they comprise a relatively small percentage of environmental laws. Plater, *supra* note 1, at 1002 (describing the "parade of regulatory statutes" since 1970); William H. Rogers, Jr., *The Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology*, 27 LOY. L.A. L. REV. 1009 (1994).

80. *See* Glicksman & Schroeder, *supra* note 1, at 257 (stating that "[b]y the time EPA was established in 1970, the dominant working theory of American Politics was interest group pluralism").

81. It is its pluralistic drive, posits Professor Plater, that gives environmental law its subject matter diversity, its endurance and its ubiquity throughout the legal system. Plater, *supra* note 1, at 1003-1008. Plater observes that environmental law is the result of two important paradigm shifts in the American public. The first paradigm shift was triggered in the early 1960's by Rachel Carson's work, *Silent Spring*, which startled the public into the realization that everything is connected to everything else, and that the "out of sight out of mind" mentality would lead to ecological ruin. The second paradigm shift was

> the shift in the structure of governance from a bipolar, Market/Regulatory Government Paradigm to a multipolar, actively Pluralist Mode. . . . [M]ore than any other area of the modern legal system, environmental law has developed through confrontational, pluralistic citizen activism, operating in every area of governance, but particularly in judicial and administrative litigation.

Plater, *supra* note 1, at 981-82 (citations omitted).

82. *See* Hornstein, *supra* note 4 (discussing literature which reveals the hidden values in asserted neutral application of scientific criteria); Wagner, *supra* note 2, at 1622-23 (stating that "policy considerations must fill the gap that science cannot inform"); *see also* Diver, *supra* note 50, at 397-98 (discussing how values are exogenous to goal setting within a comprehensive rationality model).

83. An example of a level of protection becoming highly politicized is the national ambient air quality standard for ozone under the Clean Air Act. Valle Nazar, *Revising the Ozone Standard*, *in* THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS FROM NIXON TO CLINTON, *supra* note 20, at 49; *see also* Wagner, *supra* note 2, at 1641 (discussing the ozone standard).

84. There is an ongoing debate about the relative merits of different control strategies, such as command and control (technology based or technology forcing) or market-oriented approaches. Two articles are illustrative. *See* Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985); Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine Tuning" Regulatory Reform*, 37 STAN. L. REV. 1267 (1985).

85. Here, the primary difference between the expertise (synoptic or bipolar) vision and the pluralistic (interest representation) vision is that the former believes overall social utility can be achieved best by expert government professionals, while the latter rejects that premise in favor of a surrogate legislative process. *See* Poisner, *supra* note 50, at 57.

lated, but also for the agency to get a clear grasp of the preferences of all interest groups and to successfully mediate among those preferences. To pursue the toxic substance example, since the legislative mandate does not instruct precisely how to regulate highly toxic substances, the "surrogate political process" within the agency becomes not only helpful but necessary to develop a rule that captures the competing utilities (toxic substance use, health, reasonably safe environment) with greater precision. Inclusion and agency neutrality toward interest groups become critical regulatory ideals in the process of implementation: both guard against the risk of distorting the preferences embodied in the legislation. In theory, the agency hits the mark if the regulatory outcome is true to the aggregated preferences of the polity instead of the preferences of any special interest group.

Environmental decision-making today continues to operate within a pluralistic structure, advancing utility maximization by agencies that provide opportunities for representation of recognized interests while maintaining agency neutrality. Public hearings for permits and other discrete environmental decisions, notice and comment requirements for rulemaking proceedings, and citizen advisory groups to the EPA are generic institutional mechanisms intended to promote access and equal footing among, in agency parlance, "stakeholders."[86]

The judicial role in this model differs from that incorporated in the traditional expertise-oriented system, which primarily consisted of containing agency discretion to properly legislated matters. In a pluralistic structure, the judicial role is essentially an examination to determine whether the surrogate political process is contaminated by exclusion or favoritism, resulting in a policy, rule, or decision corrupted by distorted preferences. In the toxic substance example, a complete ban on asbestos might make a court suspicious of a dysfunctional surrogate political process, provoking invalidation even when the agency exercises its considerable expertise and has express statutory authority to impose a ban on toxic substances.[87]

86. In this light, the pluralist agency proceeding might not be a "surrogate" political process, but rather a supplemental political process which refines preferences by allowing an acceptable degree of "preference pushing" by interest groups. The ultimate decision would remain within the boundaries of preferences embodied in the enabling legislation. Public choice theorists remain skeptical.

87. Such a view could explain the result in Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991), where the court invalidated the EPA's rule banning asbestos use

Although presently operating within a pluralistic paradigm, the environmental regulatory apparatus is not static. Professors Glicksman and Schroeder identify what they describe as an emerging "pessimistic pluralism"[88] operating at the judicial level. Pessimistic pluralism is a second-generation pluralism marked by judicial review that is strongly influenced by changing political assumptions. First-generation optimistic pluralism was based upon an assumption that the legislative process yields coherent public policy. Influenced by the insights of public choice theorists,[89] this assumption gave way to a judicial suspicion that statutes reflect more the product of conscious deal-cutting[90] or at least an unconscious but rational response to political circumstances and organizational structures.[91] The former view that environmental values

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despite the fact that the legislation specifically authorized bans, and despite the agency's expertise and consideration of over 100 asbestos studies in the course of a ten-year rule promulgation proceeding. *Id.* at 1207. If the court had operated under the traditional expertise paradigm, it might have been inclined to uphold the ban because EPA officials are recognized experts and because a ban was explicitly authorized by statute. Under this model, the court's role would be containment, keeping the legislation within the conceptual bounds of authority.

However, the court held that EPA failed to give adequate weight to the least burdensome requirement and did not articulate a reasoned basis for its rule. *Id.* at 1215. Significantly, the court rejected the agency's decisions not to calculate intermediate levels of regulation, not to discount benefits measured in human lives saved, and to use a period of unquantified benefits in partial support of its ban, all matters involving expert judgment calls. *Id.* at 1217-18. A pluralist sentiment was tellingly expressed by the Court's admonishment that "the EPA, in its zeal to ban any and all asbestos products, basically ignored the cost side of the TSCA equation. . . . If we were to allow such cavalier treatment of the EPA's duty to consider the economic effects of its decisions, we would have to excise entire sections and phrases from the language of TSCA . . . [and] we decline to do so." *Id.* at 1223. Since industry was in fact represented in the rulemaking proceedings, and since a ban was within EPA's statutory authority, one can conclude that the court, dismayed by what appeared to be overzealous regulation, essentially believed that the EPA did not maintain neutrality toward the legislatively expressed utilities and was instead predisposed to elevate environmental preferences over economic preferences.

88. Glicksman & Schroeder, *supra* note 1, at 276-97.

89. For a discussion of public choice theorists' proposals to respond to rent-seeking legislation, see generally Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646, 650-71 (1988); *see also* Peter Aranson, *Theories of Economic Regulation: From Clarity to Confusion*, 6 J.L. & POL'Y 247 (1990); Elliott et al., *supra* note 2; William Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Farber, *supra* note 1 (questioning conclusions of public choice theorists); Peter Kahn, *The Politics of Unregulation: Public Choice and Limits of Government*, 75 CORNELL L. REV. 280 (1990); Levine & Forrence, *supra* note 68.

90. Glicksman & Schroeder, *supra* note 1, at 321.

91. Elliott, *supra* note 9, at 324-29 (describing legislative behavior in terms of the classic "Prisoner's Dilemma").

were special[92] has been replaced by the view that environmentalism is just another special interest.[93] As environmental values are grounded in utility,[94] environmental concerns are subsumed in an economic benefit-cost model[95] on equal footing with other preferences.[96] Finally, an earlier judicial enchantment with agency capture theories has been replaced by a confidence that agencies are competent to develop sound public policy.[97]

The shift in judicial political assumptions thus identified has important implications for citizen participation at the agency level. Agencies expanded participation avenues in response to early judicial decisions that reflected a suspicion of unfettered agency discretion and agency bias. More recent decisions expressing strong judicial deference toward agencies[98] might foreshadow agency retreat from a commitment to participation to a decision-making approach that enjoys greater reliance on agency expertise. Although many environmental statutes have formal rights of participation that cannot be ignored by the agency, agencies still retain wide discretion in implementing those formal rights.[99] Informal avenues

92. Glicksman & Schroeder, *supra* note 1, at 257-75. What Glicksman and Schroeder describe as this early brand of pluralism might be inconsistent with the civic republican public good as described by Professor Sunstein. Sunstein notes that some political outcomes, including environmental measures, are not limited to Pareto improvements, but reflect values that attest to the republican belief in universalism. Sunstein, *supra* note 70, at 1555. Thus, he views environmental values as universal rather than utilitarian. This could be in part because of the prevalent and strong environmental sentiment that, at least according to earlier opinion polls, supports high environmental standards "regardless of cost." Farber, *supra* note 1, at 64-65 (citations omitted).

93. Glicksman & Schroeder, *supra* note 1, at 280.

94. *See id.* at 321.

95. *See id.* at 282.

96. *See id.* at 283.

97. *See id.* at 286.

98. *See* Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) (holding that agency interpretation of statutory phrases entitled to considerable deference); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L. J. 984 (1990) (discussing post-Chevron decisions). The decision in Corrosion Proof Fittings (see *supra* note 87) appears to contradict this observation. However, as noted *supra*, it might be better explained as a recent case where, despite the tendency toward strong agency deference, the court was influenced by what it perceived as a lack on neutrality.

99. A recent example is EPA's project XL, which authorizes alternative compliance strategies for specific facilities. Professor Rena Steinzor has questioned the impact of the project upon public participation at both the permitting and compliance phases. She argues that meaningful participation is difficult without independent technical support and that site-specific standards are more difficult for citizen groups to monitor. *See* Rena Steinzor, *Regulatory Reinvention and Project XL: Does the Emperor Have Any Clothes?*, 26 ENVTL. L. REP. 10,527 (1996).

of participation are at the greatest risk. Conditions are therefore favorable not for another transformation, but for a retreat to the early traditional model.

C. *The Ideals of Modern Civic Republicanism and the Proposed Administrative System*

In the late 1980's, an interest in an alternative vision that rejected pluralism emerged in constitutional jurisprudence: the revival of more positive aspects of civic republicanism.[100] Although not unanimous in their vision, advocates of modern strains of civic republicanism (neorepublicanism) appear to adopt certain core principles. They believe in the existence of civic virtue and the necessity of distortion-free deliberation and political equality to achieve universal agreement as to the common good.[101]

Different approaches to neorepublican thought appear unified in their critique of pluralism. According to the neorepublican critique, pluralism is inherently flawed because it entails an unreflective response to existing perceptions which equate "public interest" with aggregated preferences.[102] Furthermore, pluralism fails to recognize that perceived preferences might be inaccurate.[103] Even if accurately perceived, existing preferences are the product of the law, argue neorepublicans,[104] and are distorted by the self-interest of the advantaged and the adaptation by the disadvantaged. Distorted preferences undermine the crucial deliberative process central to the neorepublican vision. In addition, pluralist processes

100. *See generally* Frank I. Michelman, *Law's Republic,* 97 YALE L.J. 1505, 1505-07 (1988); Sunstein, *supra* note 70. *But see* Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics,* 97 YALE L.J. 1609 (1988). I draw upon the description of modern civic republicanism from Professor Sunstein, who offers a description of the emerging vision and a model of "liberal republicanism" as a possibility. Sunstein, *supra* note 70; *see also* Cass R. Sunstein, *Interest Groups in American Public Law,* 38 STAN. L. REV. 29 (1985). Other commentators include Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy,* 82 CAL. L. REV. 329 (1994); Poisner, *supra* note 50; Cynthia V. Ward, *The Limits of "Liberal Republicanism": Why Group-Based Remedies and Republican Citizenship Don't Mix,* 91 COLUM. L. REV. 581 (1991).

101. *See* Sunstein, *supra* note 70, at 1547-58.

102. Under a common criticism of pluralism, the central flaw is that there is no orientation toward the public interest or common good, "just private interests in aggregate forming an overall social utility." Poisner, *supra* note 50, at 57.

103. According to Sunstein, public choice theory demonstrates the inaccuracies that may be caused by cycling problems and strategic or manipulative behavior. *See* Sunstein, *supra* note 70, at 1545; *see also* Diver, *supra* note 50, at 398 (stating that "[w]elfare economists have not provided a theoretically defensible way of aggregating individual preferences into a single social welfare function").

104. *See* Diver, *supra* note 50, at 1546.

provide an incentive for strategic and manipulative behavior, intimidation, and other behaviors that take advantage of disparities in political influence to promote private interests.[105]

Neorepublicanism rejects the belief that the public interest is merely aggregated self-interested utility.[106] Rather, the public interest is an expression of a common good grounded in values people pursue not as individuals but as a community.[107] This common good is the product of the deliberative process, not its discovery.[108] This deliberative process does not involve utility-maximizing but instead requires participants to exercise civic virtue by putting aside their self-interested preferences to focus upon the greater, common good. Belief in civic virtue necessitates a correlative belief that proper deliberation can yield agreement upon the common good[109] and substantively correct outcomes. Hence, a foundation of universalism[110] and a rejection of ethical relativism[111] support this approach. The product of a well-functioning deliberative process is not a set of aggregated preferences without intrinsic superiority to any other possible outcome; rather, the product is a universal common good which is substantively superior.

Neorepublicanism mandates no "particular set of institutional arrangements or a particular specification of public and private rights."[112] Instead, institutional mechanisms are evaluated by their ability to encourage civic virtue, deliberation, and a focus on the common good.[113] In the agency context, a system which allows for public participation and input by citizens and interest group representatives would be acceptable if participants would be able to put aside private interests and deliberate upon the greater common good.[114] Under such a system, inclusion would become a regulatory ideal. Agency neutrality toward preferences is not an essential

105. *See id.* at 1550.

106. *See* Poisner, *supra* note 50, at 58.

107. *See id.*

108. *See id.* at 59-60.

109. Apparently, this would occur in a process where "existing desires [are] revisable in light of collective discussion and debate, bringing to bear alternative perspectives and additional information." Sunstein, *supra* note 70, at 1549.

110. *See id.* at 1554.

111. *See id.*

112. *Id.* at 1539.

113. *See* Poisner, *supra* note 50, at 63-64.

114. For elaboration of civic republicanism in environmental and land use decisions, see Poisner, *supra* note 50; *see also* Marguiles, *supra* note 26 (discussing neorepublicanism & feminism in the context of human service facility siting).

regulatory ideal because utility-driven preferences would play a limited role.[115] It would be necessary, however, for the agency to avoid favoritism toward any particular interest group because favoritism could lead to a state of political inequality among groups. It would seem permissible for the agency in the exercise of citizenship or civic virtue to advocate a particular position, as long as that position was reflective of a common good rather than a utility-oriented preference.[116]

To summarize, inclusion and political equality are necessary to achieve distortion-free deliberation under pluralism, and distortion-free aggregated preferences under neorepublicanism. The point of departure is that pluralists are skeptical of the participants' ability to set aside personal preferences. From the pluralist vantage point, deliberation appears to yield under the legitimizing label of the transcendental "public good," a consensus that reflects aggregated preferences at best and "parochial perspectives in the guise of neutrality" at worst.[117]

As Professor Sunstein emphasized, American constitutionalism is a hybrid of pluralism and republicanism, and governmental institutions reflect principles of both political theories.[118] Agencies might preside over proceedings that are accessible to the public, but the discussions could be either pluralist in character[119] or have more of a civic republican flavor.[120] In contrast, there may be other proceedings with very little public participation where an expertise approach dominates.[121] In the agency context, pluralism and modern civic republicanism have been described as "theories

115. As Sunstein explains, it would be too utopian to suggest that private preferences could remain completely outside the processes. Rather, the representatives would be asked to set aside the self-interests of their constituencies to focus upon the greater good. *See* Sunstein, *supra* note 70, at 1547.

116. On the other hand, the political equality of neorepublicanism's political theory could be translated to a regulatory ideal of neutrality at the agency level, not to maintain a well functioning surrogate political process, but to ensure that all visions of the public good are accorded equal consideration.

117. *See* Sunstein, *supra* note 70, at 1574-75.

118. *Id.* at 1561; *see also* Sunstein, *supra* note 100, at 49-58 (tracing republican concepts in American jurisprudence, including court-imposed rationality requirements for legislators, the takings doctrine's public use and police power exceptions, and judicial reasoned analysis for equal protection claims).

119. *See infra* part V.B (proceedings utilizing notice and comment).

120. *See infra* part V.A (advisory group proceedings).

121. *See* McGarity, *supra* note 19, at 113-30 (discussing six models of public participation and identifying areas where an "exclusionary model" might be appropriate, such as proceedings evaluating commercially sensitive information).

of conflict resolution" rather than of political power.[122] Alternatively, they can be conceptualized as decision-making modes characterized by particular foundational and regulatory ideals. Yet substantial problems arise when institutions rely too heavily upon unattainable ideals. Not surprisingly, reality falls short of all ideals. The conditions necessary to ensure that all models work perfectly do not exist. The impediments imposed upon conceptual models by a second-best reality may simply perplex academicians and provide for interesting observations. But the imposition of more idealistic decision-making approaches upon an imperfect society carries consequences of greater import.

IV. ENVIRONMENTAL JUSTICE ADVOCACY IN AGENCY PROCEEDINGS

A. *Environmental Justice and Expertise-ism*

Reliance solely upon formal expertise is unwise. Agency officials cannot be perfect[123] and cannot escape their own interests. They sometimes opt for the path of least resistance[124] in order to avoid pressure and conflict,[125] or pursue a course that allows them to obtain rewards or recognition.[126] Additionally, budget constraints impose limitations upon the full potential of agency expertise.[127] Even the hypothetical selfless, perfectly competent agency official cannot escape the limitations of formal expertise. After all, even the most technical issues involve value judgments and therefore raise political questions[128] beyond the ken of agency expertise.

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122. Glicksman & Schroeder, *supra* note 1, at 269.

123. *See* Diver, *supra* note 50, at 396 (describing the attributes of a hypothetical "superhuman decisionmaker").

124. *See* Latin, *supra* note 64, at 1662 (noting "abundant evidence that administrators frequently chose to 'study' uncertain issues as a way to avoid resolving them").

125. Agencies avoid making regulatory decisions that would create severe social or economic dislocation, are conditioned by criticism, and avoid resolving disputed issues unless they can render scientifically credible judgments and are influenced by disciplinary norms that may conflict with statutory mandates. *See id.* at 1653-82 (describing eight "laws" of administrative behavior).

126. *See* McGarity, *supra* note 19, at 104.

127. *See* Latin, *supra* note 64, at 1666-70 (arguing that agencies will not meet statutory deadlines if budget appropriations, personnel, information or other resources are inadequate); *see also* Donald A. Brown, *EPA's Resolution of the Conflict Between Cleanup Costs and the Law in Setting Cleanup Standards Under Superfund*, 15 COLUM. J. ENVTL. L. 241 (1990) (illustrating influence of cost on scientific determinations of protectiveness in the course of a Superfund cleanup).

128. *See* Hornstein, *supra* note 4, at 572 (discussing the use of inference options in calculating expected losses in risk assessment); Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103, 116 (1996); Wagner,

Moreover, a pure expertise model presumes an objectivity[129] that is increasingly subject to question.[130]

From an environmental justice perspective, the ideal of expertise proves particularly problematic when agency expertise is substituted for the participation of powerless and excluded groups.[131] A possible consequence of promoting expertise as paramount is that the agency will proceed without thinking about the environmental justice implications. Or, to the extent that environmental justice is considered, it might be too easy to conclude that an agency expert knows what is best for poor, uneducated people of color. This attitude is reflected in the statement of a former president of National Academy of Sciences who argued that "most members of the public usually don't know enough about any given complicated technical matter to make meaningful informal judgments," and thus science-policy decisions should be left to the "knowledgeable wise men [of science]."[132]

An environmental justice issue that illustrates this risk is the de-

supra note 2, at 1622-23 (explaining how policy considerations must fill the gaps in knowledge that science cannot inform).

129. This presumed objectivity (and neutrality) of expertise is illustrated by Professor Diver's contrast between pure synoptic values and pluralist values in his observation that "participatory procedures are more consistent with the incrementalist's impulse to accommodate conflicting values than with the policy analyst's penchant for objectivity. It should be remembered that the leading metaphor for comprehensive rationality is not the spirited debate of the town meeting but the scientist's lonely search for truth." Diver, *supra* note 50, at 425.

130. The insights of cognitive psychologists and postmodern theorists both undermine the premise of the objective subject, albeit from different perspectives. Cognitive psychology demonstrates the dynamics of heuristics and other cognitive errors upon the experts' assessment of risk "which may, or may not, be that much better than the lay public's heuristics." Hornstein, *supra* note 4, at 611; *see also* Wagner, *supra* note 2, at 1632. Postmodern theorists also challenge the existence of objectivity and neutrality in the creation and implementation of laws. Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353, 354 (1994) (stating that "[p]ostmodernism signals a movement away from forms of legal modernism premised upon the belief in universal truths, core essences, or foundational theories") [hereinafter Minda, *Legal Thought*]; Gary Minda, *Jurisprudence at Century's End*, 43 J. LEGAL EDUC. 27, 52 (1993) (stating that "[p]ostmoderns assert that there are no principles for grounding law because the subjects who interpret the law are themselves a contingent social, cultural, historical, and linguistic creation").

131. For example, Professor Diver recommends that synoptic treatment is appropriate in those policy regimes involving misallocation of political power among persons most intimately affected, because such intended beneficiaries have little access to political power, legal advice and self-help, and are not able to participate in agency proceedings. *See* Diver, *supra* note 50, at 432.

132. Wagner, *supra* note 2, at 1672 (quoting Philip Handler, *In Science, "No Advances Without Risks"*, U.S. NEWS & WORLD REP., Sept. 15, 1980, at 60).

velopment of water quality standards under the Clean Water Act. Water quality standards are formulated in reference to various uses, such as fishable, swimmable water bodies.[133] Under the act, water bodies are not expected to remain pollution-free, and fish in the water bodies are not expected to be free of pollutants. Rather, the act attempts to keep pollutants below levels that are harmful to people who eat the fish caught from the water body.

Developing the criteria for the water quality standards therefore requires an assumption regarding how much fish people generally eat. One assumption used in the development of standards is that persons potentially consume 6.5 grams per day of fish caught in the same water body over a 70-year period.[134] This assumption was based in part upon surveys of licensed fishers that indicated that the average individual consumed 6.5 grams of estuarine fish per day and 14.3 grams of all types of fish per day.[135] Upon closer examination, it appears that the standards were developed with reference to an occasional fish eater with a varied diet (the licensed angler), a hypothetical person with experiences probably similar to those of the experts who designed the development of the standards.

But what of the experience of residents of rural African-American communities along a 100-mile stretch of Mississippi River where over 125 oil and chemical giants discharge pollutants daily, an area that health and environmental specialists refer to as "Cancer Alley"?[136] These and other poverty-stricken residents rely upon fishing, and thus a diet heavily dependent upon local fish, for subsistence.[137] And what of the experience of certain ethnic minorities, who tend to consume more fish or different fish prepared in ways not contemplated by the experts? The EPA workgroup found that "ethnic minorities are more likely to eat fish with the skin, may be less likely to trim the fat, and are more likely to eat the whole fish."[138] Pollutant-containing, bottom-dwelling fish are consumed

133. *See* 33 U.S.C. § 1313 (1996).

134. *See* SUPPORTING DOCUMENT, *supra* note 9, at 13.

135. *See id.*

136. This is an area between Baton Rouge and New Orleans. *See* Coyle et al., *supra* note 24, at S-5.

137. The EPA Workgroup on Environmental Justice concluded that the studies "may not be accounting for lower-income anglers who do not purchase licenses but continue to catch and consume fish." SUPPORTING DOCUMENT, *supra* note 9, at 12-13. Significantly, there were no adequate studies of urban and rural poor that could elucidate the relationship between poverty and fish consumption. *Id.*

138. *See id.*

more by non-white, low-income populations, and clams and hepatopancreas of crabs are disproportionately consumed by Asians.[139] These patterns of consumption matter because fish with a high-fat content bioaccumulate some pollutants to a higher degree, causing higher exposure to the pollutants in populations that prefer fish with a high-fat content.[140] These behavioral realities defy the assumptions which were central to the development of the standards.[141]

The point is neither to malign experts[142] nor to disparage an agency attempting in some fashion to respond to environmental inequities, but to recognize that everyone, including the expert, is influenced by her own experiences. If experiences of outsiders remain peripheral to the experts' vision, the expert-generated standards might be inadequate to protect excluded groups,[143]

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139. *See id.*

140. *See id.*

141. The Mississippi River residents are not the only persons threatened by inadequate water quality criteria. In a recent rulemaking proceeding for the establishment of numeric criteria, known as the California Toxics Rule, Communities for a Better Environment commented that the criteria do not provide equal protection for people of color in the San Francisco Bay area:

> EPA admits in the proposal that "[t]here may be subpopulations within a state, such as subsistence anglers who as a result of greater exposure to a contaminant, are at greater risk than the hypothetical 70 kilogram person eating 6.5 grams per day of maximally contaminated fish." Indeed, ample data show that some people exercise their fishing rights to "use" Bay waters by eating up to a pound (450 grams) per day of fish from San Francisco Bay, and most of them are people of color. EPA's discussion then goes on to admit that it is proposing to provide less protection for these subsistence anglers. . . . EPA's economic analysis admits people eat 16 times more than the 6.5 grams (1/70th of a pound) of Bay fish per day assumed in EPA's criteria. EPA's own calculations show present cancer threats of nearly 1 in 1,000 for some Bay anglers at these higher consumption levels. Thus, EPA itself predicts that its proposal will result in less, inadequate protection for people of color who rely on Bay-caught fish for food.

Letter from Greg Karras, Senior Scientist, Communities for a Better Environment, to Carol Browner, Administrator, U.S. Environmental Protection Agency, Felicia Marcus, Administrator, Region 9, U.S. Environmental Protection Agency, and Diane E. Frankel, California Toxics Rule Project Manager (September 14, 1997) (on file with the *Stanford Environmental Law Journal*); *see also* Letter from Eileen Gauna to Air Docket Section, U.S. Environmental Protection Agency (September 16, 1996) (questioning failure to consider environmental justice implications of proposed Rule for Prevention of Significant Deterioration and Nonattainment Source Review) (on file with the *Stanford Environmental Law Journal*).

142. For an alternative approach that considers socioeconomic context, see Patrick West et al., *Minorities and Toxic Fish Consumption: Implications for Point Discharge Policy in Michigan, in* ISSUES, POLICIES AND SOLUTIONS, *supra* note 15, at 124.

143. At times, conservative risk analysis methods might offset the risk created by socioeconomically blind regulation. *See* Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431, 447-49 (1994) (discussing an unsuccessful environ-

regardless of the good intentions of regulators.

Experts have recently come under academic scrutiny, resulting in a variety of related criticisms. These include a "professional myopia," an inability to go beyond their area of expertise to other disciplines as well as to social context;[144] a tendency to focus inquiry upon areas where data is already available while avoiding unstudied but more troubling areas;[145] an inclination to incorporate values differently than would be considered appropriate by the general public;[146] and an approach of reducing multiple, complex risks to a series of independent incomplete risks.[147] These charges have contributed to the ongoing debate over the appropriate role of lay perceptions of risk in environmental regulation.[148]

Not surprisingly, environmental justice activists are critical of expertise as it is understood in the traditional sense.[149] They firmly insist that community residents are experts in their own right and should be consulted and respected as such. The recognition of the community resident as expert is a rejection of traditional reliance

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mental justice challenge to a total maximum daily load determination based upon a dioxin water quality standard which reflected the assumption that people consumed 6.5 grams per day; the court determined that, even with a 150 grams per day consumption rate, the cancer risk was acceptable). *But see* Kuehn, *supra* note 128, at 124-26 (arguing that there is no evidence that conservative assumptions make up for the exclusion of increased susceptibility in ethnic and racial subpopulations).

144. *See* Conner Bailey et al., *Environmental Justice and the Professional*, *in* ISSUES, POLICIES AND SOLUTIONS, *supra* note 15, at 37 (discussing how professionals often have a trained incapacity to look beyond their areas of expertise).

145. *See* Kuehn, *supra* note 128, at 117; Wagner, *supra* note 2, at 1682 (discussing the tendency of experts to focus upon substances with more scientifically established health effects over less studied substances).

146. *See* Bray, *supra* note 77, at 1116 (stating that "cultural and political rationality are not readily assimilated into a scientific decisionmaking process which relies upon empirical and theoretical data as the basis for agency action").

147. *See* Kuehn, *supra* note 128, at 118.

148. *See* Frank B. Cross, *Public Role in Risk Control*, 24 ENVTL. L. 887 (1994); Daniel Fiorino, *Environmental Risk and Democratic Process: A Critical Review*, 14 COLUM. J. ENVTL. L. 501, 532-34 (1989); Hornstein, *supra* note 4; Kuehn, *supra* note 128; McGarity, *supra* note 19; Roger Noll & James Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747 (1990); Wagner, *supra* note 2; *see also* James Flynn et al., *Gender, Race and Perception of Environmental Health Risks*, 14 RISK ANALYSIS 1101, 1102-04 (1994) (study concluding that white men perceive risks as much smaller and much more acceptable than white women or people of color).

149. For a critique of legal experts, see Luke Cole, *Lawyers, the Law & Environmental Justice: Dangers for the Movement*, RACE, POVERTY & ENV'T, Fall 1994-Winter 1995, at 3. For a critique of the 1992 EPA Report by environmental justice activists, see SUPPORTING DOCUMENT, *supra* note 9, at 72-78. In part, the agency was criticized for failing to grasp the complex relationships between race, class and environmental decisionmaking. *Id.* at 78.

solely upon formal expertise.[150] Environmental regulation cannot proceed while blind to social realities, and social realities cannot be explored adequately without the assistance of those whose lives are most impacted by environmental risk.[151] In a very real sense, residents from impacted communities are experts in the reality of environmental inequity.[152] Indigenous, cultural, and community expertise arises not from formal study but from intimacy with social and physical environments over time and often over generations. These forms of expertise are exogenous to the agency and are as important as formal expertise in law, science, and technology.[153] A decision-making structure that precludes meaningful participation by community groups cannot hope to achieve systematically equitable environmental protection.

More importantly, reconstruction of the term "expert" to include alternative forms of knowledge destabilizes the position of privilege that formally educated participants enjoy in the environmental policy arena. This reconstruction is necessary when considering that the experts' privileged position unintentionally helped create a status quo of unfair distribution of environmental risk and benefit.[154] The reconstructed term is also consistent with the principles of environmental justice which denounce hierarchies that promote inequity and with the over-arching project for social, economic, and environmental justice.

B. *Environmental Justice and Pluralism*

Undue reliance upon the ideals associated with pluralism is similarly problematic. Preferences are defined by the relative power of

150. *See* Bailey et al., *supra* note 144, at 36-44 (describing alternative roles for professionals and regulatory agencies).

151. *See id.* at 38.

152. *See, e.g.*, Coyle et al., *supra* note 24, at S17-18 (describing a Tucson community resident, Ms. Sosa, giving a tour of her street to Daniel W. McGovern, head of EPA's regional office in San Francisco, and describing several deaths and illnesses of residents).

153. *See* Marguiles, *supra* note 26, at 972 (explaining that the scientific approach excludes elements of context outside its reductive formulae, and discounts concerns about quality of life and equity which elude quantification); Wagner, *supra* note 2, at 1655 (stating that social issues are less understood or capable of express measurement than technical issues). Illustrative is EPA's limitation of the 1992 EPA Report: "The Agency can act on inequities based on scientific data. Evaluating the existence of injustices and racism is more difficult because they take into account socioeconomic factors in addition to the distribution of environmental benefits that are beyond the scope of this report." SUPPORTING DOCUMENT, *supra* note 9, at 2-3.

154. *See, e.g.*, Kuehn, *supra* note 128, at 116-29 (discussing methodological limitations of quantitative risk assessment and their impact on environmental justice).

self-interested subjects. Therefore, they may be distorted by existing inequalities, poorly construed as a result of exclusion and unequal political clout, or prove simply unethical.[155]

In the agency context, distortion might be alleviated to some extent, at least in theory. An agency has an opportunity to correct distortion to a limited degree as long as the preferences are legislatively expressed in general terms. For example, an overly aspirational statute passed in the heat of public outrage might be tempered, during implementation, by the reality of economic and technological limitations.[156] Or perhaps a statute distorted by excessive special interest group influence[157] might be corrected at the agency level if, during implementation, the agency correctly identified and sought input from other interested groups.

The use of advisory groups with a diverse constituency to advise the EPA on major rule-making packages would be one means to correct for disparate influence.[158] Optimistically then, despite the problem of interest-induced and adaptive preferences, at least a well functioning agency "surrogate political process" carries the potential to help correct distortions caused by undue political pressure at the legislative level. It should be acknowledged that interest-induced and adaptive preferences will be present to some extent even at the agency level.[159] But at least theoretically, agencies can correct for distortions occurring from intensive lobbying at the legislative level.

Unfortunately, other problems remain. Viewing some values, such as a clean environment, as a utilitarian preference presents special problems. An illustration is helpful. An ecosystem could be protected because it would be economically efficient to do so.[160]

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155. *See supra* note 103 and accompanying text (critique of pluralism); Sunstein, *supra* note 70, at 1546 (pluralism's preferences are seen as prepolitical).

156. Attainment of air quality standards under the Clean Air Act is one example. *See* Gauna, *supra* note 33, at 381-84 (describing unattainable statutory deadlines under the Clean Air Act).

157. In the environmental context, commentators have argued that strict federal legislation is less attributable to environmental sentiment and more to industry groups. *See* E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985) (discussing federal law as preempting industry-contemplated strict state laws); *see also* Glicksman & Schroeder, *supra* note 1, at 285.

158. *See infra* part V.A.

159. *See, e.g.*, Wagner, *supra* note 2, at 1634-36 (discussing scientists serving as policy makers).

160. To a welfare economist, environmental protection is justified on economic grounds as the achievement of an efficient level of environmental degradation. Tarlock, *supra* note 22, at 872 n.4.

Alternatively, an ecosystem could be protected because it would maximize our overall happiness when taking into consideration our sentiment towards the environment.[161] A third alternative is that an ecosystem could be protected because it is ethically, "the right thing to do."[162] Regulation will differ in kind and degree depending upon the reason for protecting the ecosystem. Herein lies the dilemma.

Using a utilitarian approach to decision-making, a cost-benefit analysis could reveal the point at which resources are allocated to their highest economic value. It is more difficult, but still possible, to determine the point at which environmental protection maximizes our overall happiness or, in other words, is consistent with our preferences, including non-economic sentiment. One approach, utilized in the resource context, is to "shadow price," i.e., to place a value on consumptive and non-consumptive uses which are associated with an environmental resource.[163] Sometimes the existence value of a resource is calculated.[164] The loss of this resource is valued against the gains sought to be achieved by virtue of the loss. If the value of degrading the resource outweighs the value of saving it (or keeping it pristine), then it would be inappropriate to save it.[165]

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161. I am alluding here to the distinction between value as the expected cost of a benefit and its worth in terms of willingness to pay. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, 12-13 (4th ed. 1996).

162. Professor Sagoff has argued that there are overriding ethical and health concerns. *See* Mark Sagoff, *The Principles of Federal Pollution Control Law*, 71 MINN. L. REV. 19, 71 (1986). Similarly, Professor Freyfogle argues that even if long term harms are considered, the primary issue for environmentalists is ecology and ethics. Freyfogle, *supra* note 73, at 828. The environmentalist objection to a utilitarian focus in making environmental decisions is that the only utilities that apparently count are the utilities of presently living consumers with dollars to spend. *Id.* at 829.

163. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 56-57 (1992).

164. Generally, the existence value is calculated by surveys which attempt to capture the true value, in dollars, that the average person would be willing to pay for the resource. *See generally*, Katherine K. Baker, *Consorting with Forests: Rethinking Our Relationship to Natural Resources and How We Should Value Their Loss*, 22 ECOLOGY L.Q. 677 (1995) (responding to critiques of contingent valuation methodology).

165. This approach is criticized because it does not account for the long-term ecological consequences of resource use. *See supra* note 22 and accompanying text (discussion of global environmental economists). Some have suggested, however, that although surrogates do not reflect the true value of the resource, environmental values are able to fit within an economic benefit-cost calculus if resource loss is considered within a much larger time frame than the one presently employed, and if all externalities are identified. *Id.*

Others have rejected the economic approach altogether and argue that it is more appropriate to look at non-economic environmental values in roughly the same way as

Another approach, utilized especially in the pollution context, is to project the costs and benefits of a safety measure, discount them to present value, and then compare the anticipated cost outlay with the benefits obtained. Benefits are usually expressed in terms of an avoided mortality or illness induced by environmental pollutants. In the asbestos example discussed earlier, the cost to industry of a complete ban on asbestos is projected into the future, then discounted to present value. The cost is then compared to the benefits (lives saved), which have also been projected into the future and discounted to present value. This enables the agency to calculate the cost per life saved (or illness avoided) of the safety measure, which is then compared to some notion of an acceptable price to pay for a life saved or an illness avoided.[166] In response to the obvious ethical problem presented by this method, a utilitarian might reason that the public risks generated by industry outweigh the aggregate of private risks which would arise from living in a non-industrial society, thus making everyone better off in the long run.[167]

Although the benefit-cost approach is plagued by the methodological problem of measuring the utility of a pristine or safe environment against the benefits generated by development, the central point is that traditional environmental values can fit, albeit uncomfortably, within a utilitarian framework that accounts for non-economic preferences. Environmental justice, however, adds a different level of complexity to this analysis. What is the utility of environmental justice, and how do we measure its value in economic terms?[168] What is a good shadow price surrogate for jus-

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constitutionally protected interests. *See* PLATER ET AL., *supra* note 163, at 358-65 (exploring environmental quality as a fundamental right). This approach elevates environmental values and arguably does not fit within a pure pluralist model which places all preferences on substantively equal ground.

166. *See* PLATER ET AL., *supra* note 163, at 54-66 (discussing benefit-cost analysis).

167. *See* Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277 (1985).

168. It is tempting to view environmental justice as just a self-interested movement of low-income communities. But environmental justice is not about distributional politics, rent-seeking from a currently powerless group, or NIMBY-ism. Environmental justice activists are not seeking to grab as many environmental amenities as they can while shifting environmental risk without concern for others. To view it as such would misconstrue the primary ethical challenge. *See* Environmental Justice Principle 2, *supra* note 48 (calling for justice for all peoples, free from any form of discrimination or bias); *see also* Rev. Benjamin F. Chavis, Jr., *Foreword* to VOICES FROM THE GRASSROOTS, *supra* note 15, at 5 ("Environmental justice advocates are not saying, 'Take the poisons out of our community and put them in a white community.' They are saying that *no* community should have to live with these

tice? Application of a benefit-cost analysis to environmental justice is even more perplexing given that the challenge is linked to social and economic justice.

Consider the difficulties with such an approach. Some writers have argued that our general preferences are closely tied to wealth maximization.[169] The implication that follows from this assumption is that environmental justice is not included in a more general mix of aggregated preferences.[170] If what we want is environmental protection on the cheap, then the best way to achieve it is through injustice. It is more economical to place environmental risk-generating activities in areas where land is cheaper and where the residents, lacking political influence, are less likely to successfully oppose the siting.[171] After siting, fines for noncompliance are likely to be lower in low income communities and communities of

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poisons."); *see also* Cole, *Administrative Complaints, supra* note 35, at 391 (discussing philosophical agreement with a white activist who claims that no one should have to live near polluting facilities, but noting that "it would be a troubling development if it turned out that white communities were trying to use Title VI to their own ends—especially when communities of color continue to have their Title VI claims rejected by the EPA"). Mr. Cole's comment illustrates that there is an important difference between a demand for fairness in environmental protection and a NIMBY challenge, regardless of who is the challenger.

169. Judge Posner, in discussing the ethical basis for the Kaldor-Hicks concept (as an alternative to Pareto superiority), notes that the concept has a legitimate ethical basis if one assumes that the things that make wealth possible are major ingredients of most people's happiness, "so that wealth maximization is instrumental to utility maximization." *See* POSNER, *supra* note 161, at 15-16.

170. Optimistic pluralists would similarly assume that interest groups normally form and press legislative responses for social disturbances. Eskridge, *supra* note 89, at 285 (discussing dysfunctional interest group market for legislation). Therefore, the absence of express legislative reference to environmental justice would suggest that the issue is not sufficiently compelling to become part of the legislative deal. This view presumes that there are no free-rider or other organizational impediments to effective legislative impact.

171. The utility of shifting environmental risk to vulnerable groups has been expressed in both the domestic and international contexts. A 1984 report prepared for the California Waste Management Board observed that all socioeconomic groupings tend to resent the nearby siting of major facilities, but the middle and upper socioeconomic strata possess better resources to successfully oppose the siting. The report then advised that hazardous facilities should be sited more than five miles from middle and high socioeconomic strata neighborhoods. J. STEPHEN POWELL, CERRELL ASSOCS., POLITICAL DIFFICULTIES FACING WASTE TO ENERGY CONVERSION PLANT SITING: REPORT TO THE CALIFORNIA WASTE MANAGEMENT BOARD 42-43 (1984) (on file with the *Stanford Environmental Law Journal*). The report noted that "[i]deally . . . officials and companies should look for lower socioeconomic neighborhoods" to site the facility. *Id.* Similarly, Lawrence Summers, World Bank Vice President and Chief Economist, expressed the utility of environmental injustice in his observation that "the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that." *World Bank Dumps on Third World Again*, RACE, POVERTY & ENV'T, Fall 1991-Winter 1992, at 12.

color.[172] Moreover, if the area is subsequently contaminated, listing on the National Priorities List (NPL) takes longer and clean-up requirements are likely to be less stringent in poor, racial minority, and ethnic communities.[173] It appears, then, that environmental inequity is economically efficient,[174] at least over the short run. As such, inequity could be viewed as a preference inherent in utilitarianism.

Once this proposition is established, poverty-related environmental inequities might be within the realm of acceptable preferences.[175] Race-related environmental inequities receive potential redress only as constitutional or civil rights claims, a shield of rights protecting racial and ethnic minorities from majoritarian preferences.[176] Unfortunately, traditional civil rights claims have been unsuccessful because of the inability to prove discriminatory intent and the presence of non-racial (economic) explanations for siting decisions suspected of being racially motivated.[177] Consequently, unless legislation is enacted that imposes consideration of environmental justice concerns,[178] so as to confer on environmental justice the status of a collective preference, environmental justice will not be a legitimate stakeholder interest because it is inconsistent with an economically optimal distribution of benefits and burdens.

In direct contradiction to this position, most would agree upon the existence of a collective desire for systematically equitable environmental protection for all[179] despite its short-term economic inefficiency. Under this view, environmental justice concerns are legitimate interests. This forces the question of how a preference

172. *See* Coyle et al., *supra* note 24, at S4, S7.

173. *See id.* at S2.

174. *See* Tarlock, *supra* note 22; POSNER, *supra* note 161, at 10 ("resources tend to gravitate toward their most valuable uses if . . . a market is permitted").

175. Income is not a suspect classification under the Equal Protection Clause. A rational basis standard of review would be utilized, resulting in few, if any, invalidations of actions causing inequity among income groups. Indeed, in race discrimination claims, economic disparities are often used to explain the disparate impact of the challenged action. *See supra* note 35.

176. *See* Sunstein, *supra* note 100, at 56.

177. *See* Been, *supra* note 46.

178. This would be similar to other legislatively expressed "inefficient" environmental protections, such as endangered species regulation. The irony of this has not escaped some environmental justice activists who have demonstrated with signs that state: "People of color are an endangered species."

179. This could be because of the psychic value to the majority of persons of knowing certain minorities (people of color and the poor) are not subject to unfair environmental risks. *See* Moya, *supra* note 35, at 218 (arguing for development of an "environmental justice ethic" similar to Aldo Leopold's "land ethic").

for a fair distribution of environmental benefits and risks (utility of fairness) is to be weighed against the benefits derived from an unfair distribution, including competing unequal environmental protection benefits (pristine areas, for example), and competing industrial interests in cost effectiveness, operational flexibility, and expansion. The exercise of attempting to place the utility of economically inefficient but equitable distribution within a model whose primary goal is efficiency[180] appears oxymoronic and perhaps moronic as well.[181] But before concluding that a preference for environmental equity cannot be reconciled within a utilitarian approach, such an analysis should be attempted.

Professor Michelman has devised a conceptual method to examine the ethical dimensions of an analogous area, Fifth Amendment takings, within a utilitarian framework.[182] Takings involve collective action which results in perceived loss or detriment to individuals or groups of individuals from the knowledge that property can be forcibly taken without compensation. Similarly, environmental justice involves perceived loss from the knowledge that groups of individuals systematically incur disproportionate risks.

To account for the costs of unfairness, Michelman introduces the concept of "demoralization costs," which are disutilities, such as social unrest and impaired incentives, stemming from the perceived unfairness.[183] He concludes that a taking of property is improper whenever settlement costs for the property right[184] or

180. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214-15 (1967) (stating that "[a] measure attended by positive efficiency gains is, under utilitarian ethics, prima facie desirable").

181. The exercise is reasonable, however, if we assume that economic efficiency is a value to be weighed against other values rather than a primary normative imperative. *See* POSNER, *supra* note 161, at 27 (stating that "[e]conomics can provide value clarification by showing the society what it must give up to achieve a noneconomic ideal of justice").

182. *See* Michelman, *supra* note 180.

183. These include

> the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.

Id. at 1214.

184. These costs would include "the dollar value of the time, effort, and resources

demoralization costs exceed efficiency gains.[185]

Using Michelman's concept of demoralization costs, we can attempt to determine whether it would be efficient to take steps to satisfy our collective preference for environmental justice. An efficiency gain would occur if prospective gainers from environmental justice would be willing to pay more to achieve environmental justice than the amount prospective losers would insist on as compensation for promoting environmental justice goals.[186]

It is fair to conclude that those who presently benefit from environmental inequity derive no psychic benefit from the unfairness of the existing state of affairs. Presumably, beneficiaries of the status quo would agree to collective measures to achieve environmental equity if they could recoup the costs of achieving and maintaining equity.[187]

Unfortunately, a serious commitment to achieve environmental justice will be expensive over the short-term. Although environmental justice is not concerned exclusively with distributional consequences,[188] addressing that aspect of the problem alone is serious business. Ideally, alleviating disparate exposure would first entail risk elimination measures, such as product-substitution, a change in consumer patterns,[189] and tighter controls on polluters (to the extent technologically feasible). For risks that cannot be eliminated within the foreseeable future, measures to reduce disparity would include prospective distribution of risk-generating activities to non-disparately impacted areas, and even re-distribution of risk-generating activities from disparately impacted areas to non-

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which would be required in order to reach compensation settlements adequate to avoid demoralization costs." *Id.* at 1214.

185. Otherwise, compensation should be due when demoralization costs exceed settlement costs. *Id.* at 1215.

186. If collectively we are willing to pay more for environmental equity than the lost benefits from environmental inequity, then we potentially have an "efficiency gain." The efficiency gain must then be greater than settlement costs or the demoralization costs.

187. Framing the issue as giving up an existing entitlement presents its own problems. *See generally* Richard L. Hasen, Comment, *Efficiency Under Informal Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391, 394 (1990).

188. Environmental justice involves process as much as it involves result. A "process challenge" could include demands such as the right to participate as full partners in proceedings or the right to self-determination. *See* Environmental Justice Principles 5 and 7, *supra* note 48. "Result challenges" include the right to protection from environmental risks and the right to a safe and healthy environment. *See id.* at Principles 4 and 8. But achieving the result of safety, until it is technologically possible to reduce risk altogether, necessarily includes redistribution measures to alleviate disparity in exposure to environmental risk.

189. *See id.* at Principles 3, 4, and 6.

disparately impacted areas.[190] Other measures would include parity in enforcement of environmental laws— ideally to the level of protection afforded wealthier, predominantly white communities[191]—and in expenditures for cleanup of contaminated areas.[192] Overall, the costs of alleviating inequities are relatively easy to conceptualize, albeit difficult to measure with precision because of the diversity of strategies that might be employed and the overall effect on the economy.

More perplexing is the task of measuring the benefits of environmental equity. Assuming a regulatory strategy of risk elimination instead of risk redistribution, one value would include hard economic benefits, such as medical costs saved, lost wages saved, and curtailed property devaluations.[193] Another type of monetary benefit includes the dollar value of a mortality or avoided illness, as in the asbestos example. These benefits alone probably do not exceed the benefits of the current system of unequal protection once one accepts the premise that market dynamics tend to move toward economic efficiency.[194] Therefore, we should add to the calculus a figure based upon demoralization costs saved, i.e., the disutility (including impaired incentives and social unrest) stemming from our collective knowledge of environmental unfairness.

The problem here is that demoralization costs, as defined by Professor Michelman, include costs occasioned by those "disturbed

190. Redistribution is not a strategy which environmental justice advocates advance, preferring instead risk elimination. *See supra* note 168. However, the goal of systematic equity would require at least prospective distribution to non-impacted areas for risks that cannot be eliminated over the foreseeable future. *See* Lazarus, *supra* note 14, at 843-46 (describing a variety of federal laws that provide substantive distributional standards). This could mean prospective distribution of risk-generating activities to pristine areas and wealthy neighborhoods. Wilderness protection laws may preclude the former. Siting in wealthy neighborhoods is admittedly problematic, unless socioeconomic factors cease to influence market dynamics.

191. *See* Coyle et al., *supra* note 24, at S2-S3.

192. This strategy has the potential to curtail brownfield redevelopment. *See* McWilliams, *supra* note 34, at 706-07. However, urban revitalization can occur with protective cleanup standards. *Id.* at 766-82; *see also* WASTE AND FACILITY SITING SUBCOMM., NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, ENVIRONMENTAL JUSTICE, URBAN REVITALIZATION AND BROWNFIELDS: THE SEARCH FOR AUTHENTIC SIGNS OF HOPE, EPA500-R-96-002 (1996) (on file with the *Stanford Environmental Law Journal*).

193. If risk redistribution measures are undertaken, property devaluation might be greater than under the existing system.

194. *See* POSNER, *supra* note 161, at 10-12. However, maldistribution can also be caused by the ability of industry to organize, in contrast to the impediments to collective action on the grassroots level. *See* Elliott et al., *supra* note 2, at 322 (discussing organizational problems of large numbers of citizens).

by the thought that they themselves may be subjected to similar treatment on some other occasion."[195] Thus, impaired incentives and social unrest in the environmental context are not comparable to demoralization costs stemming from capricious non-compensation in the Fifth Amendment context. The distribution of environmental burdens is not unpredictable because the burdens systematically fall on the same groups of people. White, upper-middle class citizens probably have fewer demoralization costs related to environmental inequities because they know that they are unlikely to be capriciously subjected to similar burdens. Although some individuals in this group sympathize with the environmental justice position, their incentives to invest in and use their resources are not impaired. This leaves only the impaired incentives and social unrest of the poor and communities of color, which are already deemed insufficient to reverse market movement toward disparate exposure.

Alternatively, we could attempt to value the psychic benefit of an ethical (but more expensive) distribution under the traditional willingness to pay approach.[196] It would be extraordinarily difficult, however, to devise a survey that could adequately capture the true willingness of individuals to pay for environmental justice, especially since "payment" could potentially include forcing lifestyle changes on those being surveyed who live in wealthier, predominantly white neighborhoods.[197]

Following yet another alternative, the costs of collective remedial action could be measured by the willingness of the hypothetical person who inhabits the utilitarian model to pay for the remedial action. This person is none other than *homo economicus*, the "rational utility maximizer."[198] The rational utility maximizer also would have to contemplate sacrifices in life-style. Moreover, the achievement of environmental justice also involves other sacrifices by those privileged by the current system. Environmental parity necessitates the abdication of privileged positions by those with

195. *See* Michelman, *supra* note 180, at 1214.

196. *See* POSNER, *supra* note 161, at 12.

197. Since there is no consumptive or non-consumptive use for environmental justice, the existence value would have to be determined. *See supra* note 164 and accompanying text (contingent valuation of resource loss). It would be difficult to measure the existence value of environmental justice, however, because it could potentially include the monetized value of necessary risk redistribution (increased environmental contaminants in communities presently receiving less than their fair share of unavoidable risk) and life style changes (if changes in product use and consumer patterns are required).

198. Hornstein, *supra* note 4, at 605.

decision-making authority, formal expertise, and political and economic leverage. Assuming some risk redistribution, environmental justice also could include indirect wealth transfers. It is difficult to believe that a "rational" person in the utilitarian sense would give up these benefits for the psychic benefit of a more just society. The analytic tool of utilitarianism, based upon the assumption that wealth and utility are closely related, cannot assimilate these considerations without great difficulty.

In short, utilitarian inquiry is incomplete. Collectively, we are more than aggregated self-interest and conduct our affairs within a context of shared ethical values. Thus, although equitable environmental protection is a bona fide collective value, it is not a preference grounded in utilitarian "rational" self-interest. Unlike environmental amenities, it does not have a utilitarian component (use value) which can be measured.[199] Environmental justice challenges reside in an ethical dimension beyond utility, and this is a central reason why environmental justice cannot be fully integrated into environmental regulation as it currently exists. When utilitarianism is the operating principle behind a pluralist approach, the framework is not equipped to respond to purely ethical claims.[200] When traditional stakeholders engage in utility-maximizing and environmental justice advocates pursue justice-maximizing, a dissonance ensues in which neither short-term efficiency nor fairness can emerge without doing violence to the principle behind the competing goal.

Environmental justice's incompatibility with a utilitarian framework is even more acute when one considers the potential for the ethical mandate to destabilize existing resolutions of conflicting utilities.[201] For example, the regulation of hazardous waste facili-

199. By this statement, I am not suggesting that a benefit-cost approach adequately serves environmental values. Rather, I intend to point out that even those who are optimistic that environmental values can be incorporated into an economic model by shadow pricing cannot extend that optimism to the incorporation of environmental justice values by the same methods.

200. The inability of an economic analysis to respond to ethical values is discussed by proponents of the law and economics movement. Judge Posner notes, for example, that "efficiency [denoting] allocation of resources in which value is maximized, has limitations as an ethical criterion of social decisionmaking. Utility in the utilitarian sense also has grave limitations [in part] because it is difficult to measure when willingness to pay is jettisoned as a metric." POSNER, *supra* note 161, at 13.

201. In part, this is because once standards are adopted, there is typically no incentive for an agency to reopen discussions of inference options and assumptions which supported its decision. Bray, *supra* note 77, at 1117-24.

ties results in extraordinary costs to the waste industry, which are then passed on to disposers[202] and ultimately to consumers. These costs already have been weighed against our collective concern about the disposal of hazardous waste and the risks involved in their disposal. In other words, the utility of generating hazardous waste has been balanced against the utility of reasonable safety. The result is a substantial increase in the costs of disposal in exchange for better (although not risk-free) hazardous waste management.

Unfortunately, the resulting trade-off has also resulted in the eventual disproportionate location of hazardous waste facilities and abandoned waste sites in communities of color.[203] Eliminating the inequity would require either the elimination or clean-up of hazardous waste sites or their redistribution, all exceedingly costly measures. Thus, vigorously pursuing equity disrupts the previously resolved benefit-cost calculus. Not only is environmental justice a clear misfit within the pluralist model, if considered a stakeholder interest, it surely would disrupt the status quo, a result that industries and the agencies that regulate them would not receive well.

C. *Environmental Justice and Modern Civic Republicanism.*

In light of the difficulties in addressing environmental injustice under expertise- and pluralist-oriented approaches, one might expect that neorepublicanism could provide a better response. The civic virtue approach appears attractive because it seems intuitively better equipped to respond to the ethical claim of environmental justice advocates.[204]

Indeed, an approach that focuses upon the public good is more consistent, not only with an environmental justice ethic, but also with ecological ethics that demand more holistic responses to sustaining natural systems.[205] A deliberative approach could facilitate environmental justice activists' insistence on the right to partici-

202. In 1984, the total national cost for disposal was 2.4 billion dollars. PLATER ET AL., *supra* note 163, at 936-37.

203. *See supra* note 25.

204. One of the virtues of republicanism is its recognition of the importance of community. *See* Marguiles, *supra* note 26, at 966.

205. Professor Freyfogle argues that such an approach challenges our dominant philosophies aimed at enhancing private happiness rather than conceptions of the public good. *See* Freyfogle, *supra* note 73, at 831; *see also* Environmental Justice Principle 1, *supra* note 48.

pate as equal partners in policy-making.[206] The relative smallness of the community of participants in the agency context is an additional reason for optimism for a well-functioning civic republican process. The potential for deliberation to be distorted by political inequality and exclusion could be overcome by the agency's commitment to include all interested participants, afford no one undue influence, and create mechanisms that further the deliberative process.

Unfortunately, undue reliance upon the ideals associated with modern civic republicanism also proves problematic. Some views of civic republicanism insist that participants set aside self-interest for the greater good.[207] The existence of environmental inequities belies the existence of this critical precondition.[208] Although one could attribute environmental inequities to pluralist mechanisms that promote self- interest, the troubling fact remains that in environmental regulation, the economic stakes are extraordinarily high.[209] It is unrealistic to assume that stakeholder trade organizations, comprised of members who are profit-driven corporations, will routinely subordinate economic self-interest to the greater common good.[210] Similarly, stakeholder groups representing private land owners presumably would resist public-regarding approaches that appear incompatible with the liberal tradition of individualism.[211]

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206. *See* Environmental Justice Principle 7, *supra* note 48.

207. Professor Marguiles distinguishes between "aspirational republicanism," in which self interest is subordinated, and "educative republicanism" which is an "educative process which bridges private and public concerns." Marguiles, *supra* note 26, at 965.

208. It would be hard to imagine that environmental inequity is for the public good, as those beset by environmental risk are also part of the community. Utilizing the analytical technique of Rawls's "original position," environmental inequities are, by definition, unfair because no one would vote for a world with environmental inequities if the voter risks awakening as the recipient of toxic hazards. John Rawls, *A Theory of Justice, in* PERSPECTIVES ON PROPERTY LAW 105-06 (Ellickson et al. eds., 2d ed. 1995).

209. *See generally* JOEL MINTZ, HIGH STAKES AND HARD CHOICES (1995) (describing difficulties in the environmental enforcement area).

210. An argument can be made that pursuing overly civic minded options at the expense of shareholder profit might be a breach of fiduciary duty. The problem becomes more acute for international corporations. How might one expect a profit driven multinational corporation to exercise "citizenship," as that concept is generally understood, in the context of nationalism? Some argue, however, that since corporations respond to laws, not ethics, it is possible to effect a legal re-engineering to curb corporate misdeeds. *See* PAUL HAWKEN, THE ECOLOGY OF COMMERCE 120-21 (1993).

211. *See* Freyfogle, *supra* note 73, at 821, 842 (discussing 19th century ideology and stating that, "[o]ur society strongly resists when government tells us to be virtuous, when it prescribes a definition of the good life," and that "in a liberal democracy it is the province

Assuming optimistically that an initial resistance to a civic republican approach could be overcome, exactly how an unwavering focus on the public good could occur in the context of environmental regulation is unclear. Environmental legislation often mandates consideration of cost, and particularly, cost to industry. One possibility is to reason that because costs to industry are passed on to consumers, cost containment is the legitimate public good behind the legislative mandate to consider cost. Thus, cost containment should be considered, but profit motive (which is more a special interest than a general interest) arguably should not. Clearly, allowing industry groups to participate to promote cost containment but not profit motives might be too fine a distinction to be useful in practice.

Alternatively, profit motive might also be considered in the common good. Profit motive drives stock prices higher, which promotes investment and overall economic growth. Yet, if both cost containment and profit motive are legitimate public goods, then there appears to be no defensible distinction between the consideration of pluralist economic self-interest and neorepublican conceptions of civic virtue.

Once industrial interests become public goods, we see a familiar problem. How does one resolve the basic incompatibility between environmental protection, cost containment, profit motive (if allowed), and environmental justice? The same sorts of tradeoffs that appear under a pluralist model are inevitable. The neorepublican approach gives no specific guidance as to the relative weight to be given to competing public goods, other than to suggest the relative weighing is the charge of the deliberative process. Without such guidance, there is a strong possibility that easily quantified economic interests will be more readily taken into account than non-economic environmental and fairness values. The labels will change, but the same interests could be promoted to the same degree.

An uncompromising civic republican process, one that insists that discussion of private interests has no place in the deliberative process, also carries a troubling potential to obscure not only the private interests really at issue, but the disparities in resources, power, and influence that attend those interests. For example, it is not difficult to characterize the placement of a hazardous waste

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of each individual to decide what it means to be good"); *see also* Terry W. Frazier, *The Green Alternative to Classical Liberal Property Theory*, 20 VT. L. REV. 299 (1995).

facility in a low-income community as an achievement of the common good. Hazardous waste industry participants can ensure that profit motive masquerades as civic virtue. It benefits the public at large to place hazardous waste in proper disposal facilities in order to avoid contaminated Superfund sites resulting from imprudent dumping. The siting can be said to benefit the residents in the low-income community because the facility will provide jobs, tax revenue, and perhaps other benefits advanced by compensatory siting schemes.[212] If the siting decision is in fact the product of a deliberative process where no one is deliberately excluded, then the ultimate decision takes on the unassailable mantle of a common good, a substantively "correct" outcome.

The scenario just described illustrates the risk of deliberating upon the common good in a vacuum. If deliberating participants lack a broader historical and sociological perspective,[213] what emerges as the common good differs significantly from what emerges as the common good from reflection upon social context. Meanwhile, power disparities and unfair private benefits remain unexamined; more sustainable alternatives are ignored;[214] and environmental injustice is perpetuated.

A neorepublican agency decision-making approach also complicates judicial review. How are judges to decide whether deliberation was sufficiently distortion-free so as to produce a common good?[215] When interests are cloaked in expressions of public good, it will be harder for courts to determine if agencies are responding to undue political pressure.[216] The "hard look" doctrine is em-

212. Sometimes money is donated by the host facility to improve emergency response infrastructure, or for schools or other public goods. Some siting schemes rely heavily upon economic incentives.

213. Professor Marguiles points out that the aspirationalist civic republican view does not adequately address distortions in individual cognition and collective action, distortions created by the bureaucracy and market. Marguiles, *supra* note 26, at 967.

214. *See generally* Collin & Collin, *supra* note 22, at 399 (examining the link between environmental justice and sustainability); *see also* Torres, *supra* note 18, at 619-21.

215. Professor Sunstein admits that ascertaining the extent of factional control over legislative processes requires "unmanageable inquir[y] into legislative motivation and the drafting process." Sunstein, *supra* note 100, at 77.

216. *See id.* (stating that the task is nearly "[insurmountable] . . . when [concerning] 'motivation' of multimember decisionmaking bodies"). However, Professor Sunstein believes this task to be no more difficult than ascertaining racially discriminatory motives, and points out that "the concept of legislative motivation is as much a judicial construct as it is an inquiry into some actual state of mind." *Id.* at 79. The basic evidentiary problems cannot be as neatly dismissed in the agency context, however, because agencies are not representative bodies whose ultimate consensus is entitled to some deference.

ployed, under pluralist conceptions, to ensure that powerful private groups do not dominate the agency process.[217] However, judicial hard look review of a deliberative proceeding framed in civic republican dialogue is less predictable. Relying upon assumptions of agency competence, a court can easily uphold the hazardous waste facility decision as a product of a fair deliberative process. Just as easily, however, a judicial review suspicious of the agency can block the agency decision as the product of deliberation distorted by lack of political equality or corrupted by profit-motive.[218] Either way, the outcome is indeterminate,[219] and universality an unstable presumption.

D. *The Environmental Justice Misfit and the Self-Conscious Approach*

Environmental justice activism exists as a misfit in models of agency decision-making. Raising political questions, it is inconsistent with an expertise-oriented approach.[220] The ethical claims of environmental justice are not capable of resolution in the preference-driven showdown among economically defined utilities under the pluralist model. And the civic virtue discourse of neorepublicanism might obscure social context and power disparity, and it could lead participants to avoid the hard economic choices that must be made in order to achieve environmental justice.

Environmental justice illuminates the conundrum inherent in environmental decision-making. The expertise approach is helpful to address scientific and technical questions, but it is inappropriate to resolve conflicting preferences and distributional issues in particular. Because of its focus on the public good, a neorepublican approach might be helpful in resolving ethical conflicts, but it is not well-suited to resolve technical issues and, by definition, would

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217. *See id.* at 63.

218. Professor Sunstein suggests that the hard look doctrine should be utilized in considering agency action and inaction to ensure that powerful private groups have not dominated the agency process. Sunstein, *supra* note 100, at 74-75; *see also* Stewart, *supra* note 13, at 1682-83 (describing concern about agency bias). Sunstein suggests that one method might be to ensure that the deliberative process remains focused on permissible statutory purposes. Sunstein, *supra* note 100, at 78. However, when dialogue is cloaked in expressions of public good, it is harder for courts to ensure that agencies are not responding to political pressure.

219. *See* Stewart, *supra* note 13, at 1776-81 (indeterminacy of interest representation model); Gary Minda, *The Jurisprudential Movements of the 1980's*, 5 OHIO ST. L.J. 599, 614-22 (describing the critique of indeterminacy).

220. This could be described as the inability of the expert oriented process to accommodate "cultural and political rationality." Bray, *supra* note 77, at 1116.

not address conflicting utilitarian preferences. The pluralist model does address competing preferences, but when it contemplates an optimal distribution of environmental benefits and burdens, it breaks down. This occurs regardless of what one concludes is an "optimal" distribution. A fair distribution is not only difficult to value in economic terms, it is hard to legitimate using a short-term economic conception of rationality. An unfair distribution, although optimal in terms of economic efficiency, is an unethical preference. As a result, utilitarianism is unable to address the ethical dimension of distributional issues. This explains why the present approach of environmental regulation, which leans heavily towards utilitarian pluralism, is marked by persistent resistance to environmental justice claims.

A better approach would be for government agencies to resist the allure of paradigmatic foundations. Agencies could attempt to steer a hybrid course, selectively resisting the demanding empiricism of the expertise approach, the self-interested utility maximizing of pluralism, and the assumption of universality of neorepublicanism. Paradoxically, this non-foundational approach, partially postmodern in flavor, could itself be termed a paradigm.[221] This is not to suggest that these models are useless, nor is it to reject completely the regulatory ideals associated with each approach. It is to suggest a healthy skepticism toward the foundational beliefs and a self-conscious contemplation of the limits of the paradigm under which the agency is operating.[222]

Agency expertise should be recognized, but unrelenting insistence upon scientific proof and a myopic technological focus should be curbed to make way for alternative forms of knowledge which can inform environmental regulation. Agencies should discard the pretense of objectivity in quantifying, comparing, and managing risk and instead consider normative concerns to inform

221. *See* Minda, *Legal Thought*, *supra* note 130, at 354.

222. This approach is consistent with the philosophy of reconstructive jurisprudence theorists which require the subject to use disenchantment as a method, to live in the tension between enlightenment ideals and postmodern deconstructive projects. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994). However, there are inherent limitations when focusing potential reform on the agency officials, "in essence requiring them to interrogate their own positions" within the expertise and pluralist approaches. *See* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering in Post-Civil Rights America*, 95 MICH. L. REV. 821, 872 (1997) (discussing the limitation of critical race theory's focus of transformative anti-subordination practice on judges, lawyers, legal analysis, and methods of proof). However, as discussed above, the aim of this introspection is an attempt to remove structural obstacles and promote participation.

regulation.[223] Self-interested preferences and private economic interests should be considered to a degree, but agencies should recognize that health and healthy ecosystems have an ethical dimension that cannot be addressed adequately within a benefit-cost approach.

Additionally, agencies should view environmental justice advocates not as merely members of another special interest group but as representatives who present a claim that is fundamentally different. A deliberative approach which pursues civic virtue and elevates the public good could be a potent means to addressing environmental justice issues, but agencies should ensure that deliberation is not perverted into pretextual expressions of public good. The belief that the product of the deliberative process is necessarily a transcendental, universal public good should be tempered, but agencies should also recognize that non-economic and ethical values are easily overshadowed by utilitarian interests.

To be sure, agencies have already adopted a hybrid approach that considers environmental justice to some extent, alongside utilitarian values. Different ideals appear to predominate in different participation avenues.[224] One distinction between existing agency practices and the approach proposed in this Article is that the existing approach is not self-conscious or deliberate; it is a series of *ad hoc* agency responses to external and internal pressures.[225] This leaves environmental justice mired in the demands of expertise-ism and the quest for efficient maximization of resources. An alternative strategy is the only way to avoid this trap.

E. *The NEJAC Approach to Public Participation*

One innovative model for public participation bears the potential to reform the present expertise and pluralist-inspired process precisely at the point where it fails to address environmental inequities.[226] The Public Participation and Accountability Subcommittee[227] of the National Environmental Justice Advisory Council

223. Hornstein, *supra* note 4; *see also* Flynn et al., *supra* note 148.

224. Compare subparts III.A, III.B and III.C, *supra*.

225. *See* Latin, *supra* note 64.

226. This approach does not explicitly call for the agency to consider the limitations of expertise or pluralist approaches and does not adopt as a methodology a "self-conscious" approach. However, items on the checklist, as explained, may lead to the same corrective steps a self-conscious approach might promote.

227. The NEJAC Public Participation and Accountability Subcommittee had its first meeting on August 4, 1994. Meeting Notice, 59 Fed. Reg. 36,435, 36,436 (1994).

(NEJAC)[228] developed and submitted a public participation checklist to the EPA as part of its model plan for public participation.[229] This project was part of the EPA's development of an environmental justice strategy to comply with President Clinton's executive order on environmental justice, signed on February 11, 1994. The order requires federal agencies to make fair treatment of minority communities a factor in decision-making.[230] The checklist, which appears to have been adopted by the Office of Environmental Justice at the EPA,[231] illustrates an alternative way to implement environmental justice principles through methods that enhance community participation.

The checklist contains thirty-five specific recommendations to help the EPA use public participation to better integrate environmental justice.[232] Included, for example, are recommendations for environmental agencies to "recognize community and indigenous knowledge,"[233] create an atmosphere of equal participation, and "avoid a panel of experts or head table."[234] Co-sponsoring and co-planning relationships, along with site-specific community advisory boards, are preferred, as is a recognition of environmental justice stakeholders as full partners and agency customers.[235]

These recommendations respond to the inability of the expertise-oriented approach to capture the experience of living with en-

228. The NEJAC was established on September 30, 1993, pursuant to the Federal Advisory Committee Act. Meeting Notice, 59 Fed. Reg. 17,526 (1994) (giving notice of the first NEJAC meeting). Between 1994 and 1997, NEJAC had nine meetings in various parts of the country. For recent activities and a list of recent members of the NEJAC and its subcommittees, see <http://www.prcemi.com:80/nejac> (NEJAC's webpage).

NEJAC includes representatives from conventional environmental organizations, environmental justice organizations, industry, academia, and residents from low income and people of color communities. 5 U.S.C. §§ 1-10 (1994). Membership must be balanced in terms of the points of view of representatives. *Id.*

229. *See* NEJAC Public Participation & Accountability Subcommittee, *Model Plan for Public Participation* (last modified Dec. 4, 1997) <http://www.prcemi.com:80/nejac/publicat.html>.

230. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

231. U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL JUSTICE STRATEGY: EXECUTIVE ORDER 12,898, EPA/200-R-95-00 (1995) [hereinafter ENVIRONMENTAL JUSTICE STRATEGY].

232. *See id.*

233. *See id.* at Recommendation 3. This would entail a commitment to consider language/cultural barriers, technical background, literacy, access to respondent, privacy issues and preferred types of communication. *See id.* at Recommendation 5. It could also include provisions for translators for limited English-speaking communities, and the utilization of cross-cultural formats and exchanges. *See id.* at Recommendation 13.

234. *See id.* at Recommendation 13; *see also* Environmental Justice Principle 13, *supra* note 48.

235. ENVIRONMENTAL JUSTICE STRATEGY, *supra* note 231, at Recommendation 12.

vironmental hazards. This alternative avenue seeks to distance agency officials from the comfortable jargon of legal, scientific, and technical abstraction and involve them in a discourse that will enable them to better see the real life consequences of their decisions. The approach also has the potential to help officials understand and address the normative issues that lie hidden in purportedly neutral, scientific, and technical analysis. To recognize community residents as experts and full partners in environmental protection is an anti-hierarchical idea that employs the contribution of agency expertise while reducing the risk that those with formal expertise will dominate the process.

Some participation recommendations appear to fit comfortably within a pluralist model. For example, the subcommittee recommended that the agency take specific measures to make information accessible and understandable[236] and devise outreach efforts to increase participation of environmental justice stakeholders.[237] These recommendations further pluralist principles because they alleviate the problem of preferences distorted by lack of access and unequal resources.

There are also recommendations that are not consistent with the pluralist surrogate political process approach and the ideal of agency as neutral mediator among preference holders. These include recommendations that the EPA: (1) hold public fora in communities and establish procedures to follow up with concrete actions to address communities' concerns;[238] (2) promote interagency coordination to ensure timely and effective response to environmental justice issues;[239] and (3) provide communities with information about the government's role pertaining to short-term and long-term economic and environmental needs and health effects. Additionally, the Subcommittee encouraged EPA to hold workshops, seminars, and other meetings to develop partnerships between agencies, workers and communities and to link environmental issues to local economic issues.

These recommendations, along with a recommendation that the EPA establish advisory groups and promote cooperative agreements (presumably between communities and industry) are more

236. *Id.* at Recommendation 9.

237. *Id.* at Recommendation 14.

238. *Id.* at Recommendation 17; *see also* Environmental Justice Principle 17, *supra* note 48.

239. ENVIRONMENTAL JUSTICE STRATEGY, *supra* note 231, at Recommendation 18.

than level-playing-field recommendations.[240] They are more consistent with the view of the EPA as a promoter of environmental justice, which would not be proper if environmental justice were considered a special interest on equal footing with other preferences. Here, environmental justice is more akin to the public good of neorepublican thought or to a constitutional right shielded from impairment by economic considerations and majoritarian preferences. This approach to public participation mitigates, to some extent, pluralism's inability to respond to the ethical dimension of environmental justice.

This environmental justice perspective of public participation would involve public participation in private decision-making as well. Site-specific advisory boards and good neighbor agreements with industry transcend the public/private distinction and the traditional sphere of landowner autonomy. It is not only agencies that must change in order to respond to distributional inequities; private entities must abdicate autonomy in favor of other private citizens. In this sense, community oversight and participation arrangements begin to resemble private land use controls, like servitudes or homeowners' associations. Industry consent to these controls could reflect, to a limited degree, an emerging recognition that more than utilitarian preferences are at stake.[241]

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240. Recommendations which find expression in race based affirmative programs, however, would be subject to strict judicial scrutiny if challenged. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (applying strict scrutiny to minority set-aside program).

241. For example, a representative from the waste industry describes a shift in his industry's response to environmental justice:

> Following up on the discussion about the EPA and industry meeting half-way . . . there are several initiatives underway, both individually and collectively, to do just that . . . our company adopted a series of provisions that will obligate us to do certain things in siting, community outreach, use of vendors, et cetera. But also the Business Network for Environmental Justice which was created in the last year has over 100 industry members and trade associations. The spirit of that organization is to find areas of agreement, mutual concern, and opportunities in which we can all work together—government, community groups, and industry. A lot has happened in the last twelve to sixteen months in terms of attitudes in industry from getting away from a reflexive reaction in some circles to a more interested and cooperative point of view.

U.S. ENVTL. PROTECTION AGENCY, *supra* note 35, at 669-70.

However, from a utilitarian perspective, there is an explanation for industry concessions. It could be that the "social unrest" caused by community opposition and adverse publicity drive inequity costs up to such an extent as to result in an efficiency gain from measures to alleviate inefficiencies. *See, e.g.*, Communities for a Better Environment, *CBE Wins Historic Good Neighbor Agreement with General Chemical*, CBE ENVTL. REV., Summer 1996, at 1 (explaining that the good neighbor agreement, following six administrative appeals by CBE, is the first to contain a community safety audit) (on file with the *Stanford Environmen-*

The expanded participation mechanisms developed by the NEJAC subcommittee (if faithfully followed), contemplation of the limits of existing decision-making paradigms, and the allocation of resources reflecting a serious commitment to environmental justice could begin to pave the way for just environmental protection.

V. PARTICIPATION AVENUES

In order to assess the potential of an expanded approach to participation, as well as to identify the limitations inherent in participation fora on a more contextual level, three avenues of public participation in the agency context are briefly examined. Following the examination is a discussion of how proposed alternative regulatory ideals might be more effective.

A. *Advisory Committees*

Advisory groups formed under the Federal Advisory Committee Act (FACA) advise agencies on a wide range of matters. Although they provide a cost-effective means for the government to access and utilize the expertise of the private sector,[242] they are not without controversy.[243] The use of advisory groups by agencies has an unfortunate history of industry domination and public exclusion.[244] Even with the protections of the FACA, closed proceedings[245] and noncompliance remain a problem.[246] The FACA

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tal Law Journal). However, survey results suggest different corporate responses to environmental justice activism. Marianne Lavelle, *Community Activists Can Push Companies To Take Extra Steps*, NAT'L L.J., Aug. 30, 1993, at S1, S5 (stating that more than 50% of corporate counsels surveyed said community activism had some impact on their actions, but generally their response was to build a relationship with the neighborhood rather than reduce polluting activity, and that only 15% reported that they responded to community activism by additional compliance evaluation or pollution-reducing features, while 11.8% said the presence of community activists had no impact whatsoever). Industry concessions could also be explained as a response to a combination of factors, including social unrest, recognition of the ethical claim, and a perception that environmental agencies are increasingly sympathetic to the environmental justice position.

242. *See* Laurie Aurelia, *The Federal Advisory Committee Act and its Failure to Work Effectively in the Environmental Context*, 23 B.C. ENVTL. AFF. L. REV. 87, 91 (1995).

243. *See generally id.*; *see also* Michelle Nuszkiewicz, *Twenty Years of the Federal Advisory Committee Act: It's Time for Some Changes*, 65 S. CAL. L. REV. 957 (1992); Sidney Shapiro, *Public Accountability of Advisory Committees*, 1 RISK 189 (1990).

244. *See* Aurelia, *supra* note 242, at 91-97 (describing historical background leading to passage of the Federal Advisory Committee Act).

245. *Id.* at 113 (discussing 1993 report of General Services Administration which reported 2225 closed or partially closed meetings to the 2162 open meetings).

requires membership on committees that is balanced in terms of viewpoint and function, but agencies have considerable discretion in appointing members.[247] Notwithstanding these concerns, advisory committees have promise for meaningful participation primarily because of the roles some committees enjoy in the formation of agency policy[248] and because the committee proceedings are deliberative in nature.

Transcripts of advisory committee meetings illustrate the potential of an alternative approach to participation. This section will first examine a few meetings of the New Source Review (NSR) Subcommittee[249] of the Clean Air Act Advisory Committee (CAAAC),[250] which helped the EPA develop a rule package for permitting major sources of criteria air pollutants.[251] This committee serves as a good example because of its highly influential role in the agency's attempt to reform a very technical regulatory program

246. *Id.* at 114 (discussing the failure of the Federal Advisory Committee Act to provide compliance incentives and deterrence for noncompliance).

247. Professor Shapiro has pointed out that balance can be obtained by diversity in subject matter expertise, education and training. Shapiro, *supra* note 243, at 195. Shapiro makes a convincing argument for the inclusion of non-experts in technical or peer review advisory committees in order to increase accountability. *Id.* at 197-99.

248. This would depend upon the questions submitted to the particular advisory committee by the agency. *Id.* at 200-01 (suggesting that agencies refrain from submitting policy questions to scientific advisory boards, but noting the difficulty of separating policy and scientific issues).

249. In 1992, EPA began an effort to reform the major new source review program. On March 17-18, and June 4, 1993, the EPA held New Source Review Simplification Workshops. A New Source Review Subcommittee was subsequently established on July 7, 1993. Meeting Notice, 58 Fed. Reg. 36,407 (1993). The subcommittee met on several occasions to discuss reform of new source review. *See, e.g.*, U.S. ENVTL. PROTECTION AGENCY, TRANSCRIPT OF MAR. 17-18, 1993 SIMPLIFICATION WORKSHOP (1993) [hereinafter SIMPLIFICATION WORKSHOP] (on file with the *Stanford Environmental Law Journal*); NEW SOURCE REVIEW REFORM SUBCOMM., U.S. ENVTL. PROTECTION AGENCY, TRANSCRIPT OF NOV. 8, 1993 MEETING (1993) [hereinafter TRANSCRIPT OF NOV. 8, 1993 MEETING] (on file with the *Stanford Environmental Law Journal*); NEW SOURCE REVIEW REFORM SUBCOMM., U.S. ENVTL. PROTECTION AGENCY, TRANSCRIPT OF NOV. 9, 1993 MEETING (1993) [hereinafter TRANSCRIPT OF NOV. 9, 1993 MEETING] (on file with the *Stanford Environmental Law Journal*); NEW SOURCE REVIEW REFORM SUBCOMM., U.S. ENVTL. PROTECTION AGENCY, TRANSCRIPT OF JAN. 20-21, 1994 MEETING (1994); NEW SOURCE REVIEW REFORM SUBCOMM., U.S. ENVTL. PROTECTION AGENCY, TRANSCRIPT OF JULY 19-20, 1994 MEETING (1994).

250. The CAAAC is to advise the EPA on the implementation of the 1990 Amendments to the Clean Air Act. *See* Clean Air Act Advisory Committee and Request for Candidates, 55 Fed. Reg. 46,992, 46,993 (1990).

251. Prevention of Significant Deterioration and Nonattainment New Source Review, 61 Fed. Reg. 38,250 (1996) (to be codified at 40 C.F.R. pt. 51, 52) [hereinafter Prevention of Significant Deterioration] (indicating that proposed changes "are largely drawn from the discussions and recommendations of the Clean Air Act Advisory Committee's (CAAAC's) Subcommittee on [New Source Review] Reform").

and because changes to the New Source Review program could have environmental justice consequences. The second set of advisory committee meetings this section will examine are those of NEJAC, which is included specifically because of its deliberations upon environmental justice concerns.[252]

In comparing the two proceedings, it is important to consider two points. First, examination of selected transcripts is not intended to be a representative and exhaustive review of the entire proceedings, which span several years, or as a critique of the merit of the ultimate recommendations. Rather, transcript excerpts are included to illustrate the tenor of committee deliberations.[253] Secondly, the New Source Review Subcommittee's focus on reform of a regulatory program differs significantly from NEJAC's focus on environmental justice. The comparison of the two is not intended to suggest that the New Source Review Subcommittee should have focused upon environmental justice to the same extent as NEJAC, as their advisory capacities were different. Rather, comparison provides insight into the potential to address environmental justice concerns in deliberations involving the implementation of technical requirements.

Largely because of the committee's focus on environmental justice, representatives of community groups are an important constituency in the NEJAC membership.[254] Two characteristics of NEJAC proceedings mark its departure from a pluralist paradigm. The participants, including those from industry, appeared to adopt a form of deliberation focused more upon public good and less upon self-interested utility maximization.[255] In addition, EPA officials at times expressed a strong commitment to environmental jus-

252. The purpose here, however, is not to single out any one federal advisory subcommittee. The same sorts of problems arise in proceedings which are technical and scientific in focus. For a sampling of commentators discussing public participation in proceedings involving scientific issues, see Hornstein, *supra* note 4.

253. One limitation of the transcripts is that deliberations of subcommittees (and subgroups of subcommittees) are alluded to in the proceedings but are not set forth with specificity. Thus, reports to committees reflect a level of deliberation that is not contained within the transcript. However, sometimes the reports back to the committee give insight as to the tenor of the subgroup deliberations.

254. Of course, representatives of community organizations need not be limited to serving on committees dedicated to environmental justice concerns.

255. *See* U.S. ENVTL. PROTECTION AGENCY, *supra* note 35, at 669-70 (describing a shift in industry's response to environmental justice). Although the impetus for such a change in position is likely to be old-fashioned utility maximizing, the tenor of the deliberations appears to move away from a utilitarian framework and toward a framework that has the potential to more effectively address environmental justice claims.

tice education within the agency,[256] in essence moving away from the agency's role as neutral facilitator toward a role as preference generator. However, the consideration of private economic interests did not appear totally foreclosed as it might have been under a pure form of civic republican deliberation.[257]

Various departments within the EPA reported to NEJAC the steps they were taking to address environmental justice issues.[258] Since these actions were taken to comply with President Clinton's executive order on environmental justice rather than as a direct result of NEJAC deliberations, it is unclear to what extent the advisory committee recommendations alone directly influence agency policy. At this point, it is speculative as to what NEJAC could accomplish if the Executive Order had not been issued. However, it does appear that a shift from a focus on utilitarian interests or a preoccupation with technical or scientific expertise allows for better communication and is a first step toward effective participation.

The New Source Review Subcommittee participants were assembled from diverse stakeholder groups and had formal expertise in air-pollution control. For example, there were representatives from conventional environmental organizations, industry, and other governmental agencies interested in air quality.[259] Representatives from potentially impacted communities, however, were notably absent.[260]

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256. In discussing the EPA's commitment to environmental justice, one staff person made the following comments to the NEJAC:

> It is true that we have made a great deal of progress . . . [but] we have a long way to go. In particular as we get into the implementation phase and as we make a fundamental shift in how we do business, we must become more customer oriented; we must take the blinders off and not have tunnel vision; and we must recognize that there is a community and a population that we need to be serving. The challenge is that we still have technical types that simply do not get it. It is going to require some additional training for our staff. It is going to require continued leadership and commitment if we are going to make this change.

Id. at 755.

257. Interestingly, one participant did note the civic republican aspects. *See id.* at 721-22 ("This process offers a model by which we will reinvigorate civic dialogue in this country. I think it is long past due, but the seeds of it are well-represented here.").

258. *Id.* at 661-708.

259. *See, e.g.*, U.S. ENVTL. PROTECTION AGENCY, NSR SIMPLIFICATION WORKSHOP PARTICIPANT LIST, MAR. 17-18, 1993 (1993) (including participants from industry trade associations, large industries, mainstream environmental groups, U.S. Park Service, U.S. Forest Service, state environmental agencies, and EPA personnel) (on file with the *Stanford Environmental Law Journal*).

260. In a participant's summary of the issues presented, community perspectives were absent:

> We really, I think, even if we don't agree on all the directions in which we are or

The CAAAC Subcommittee focused, appropriately, upon the technical requirements of major sources of criteria pollutants and the determination of when a source should be required to undergo major new source review.[261] Major new source review is a complicated air pollution permitting program in which baselines, netting transactions, and offset requirements are high-stakes issues for industry.[262] Unfortunately, as people of color and low-income communities are often clustered in industrial areas where major sources are sometimes located, changes in requirements, which potentially result in an increase in air emissions, can exacerbate inequities.

What is significant about the NSR proceedings is that the method of deliberation was primarily utilitarian in character. The private economic interests of industrial interests were forthrightly asserted.[263] According to this perspective, proceedings centered upon the need to streamline and "shrink new source review,"[264] i.e., to have fewer sources subject to the stringent major source requirements. Some federal agency stakeholders were concerned with air quality around pristine areas under their management.[265]

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the specific solutions, we all agree what the problems are, and we all understand what the difficulties are that the Federal Land Manager has, that the State permitting authorities have, and that the permit applicants have, and everybody was very considerate of the concerns others had. Where you came out when you had to weigh the concerns might be different.

TRANSCRIPT OF NOV. 8, 1993 MEETING, *supra* note 249, at 79.

261. A review of the transcripts reveals very technical discussions. *See, e.g.*, the statement of one lawyer:

> Our group spent about six, seven hours together by phone. In the beginning, it was very contentious. We found ourselves rolling into what is an adverse impact, what is an air quality related value, what is the geographic proximity of the Class I area to the source, and those sorts of issues which pervade this subject and which are, in fact, the issues that our subgroups were considering.

TRANSCRIPT OF NOV. 8, 1993 MEETING, *supra* note 249, at 12.

262. *See* Gauna, *supra* note 33 (explaining the major source air permitting program); Prevention of Significant Deterioration, *supra* note 251.

263. *See, e.g.*, TRANSCRIPT OF NOV. 8, 1993 MEETING, *supra* note 249, at 56-57, 181, 257, 336 (discussing the cost of control technology).

264. One of the participants explained:

> [W]e have been talking about ways to shrink applicability. I think, as a general concept, it is very important to pursue these regardless of the fact that we always get lost in the details when we try to implement them. We are not going to streamline New Source Review if we do not shrink applicability in some kind of significant way.

SIMPLIFICATION WORKSHOP, *supra* note 249, at 209. The participant was a representative of Nixon, Hargrave, Devons & Doyle, and was also a former director of EPA's regulatory reform staff from 1979 to 1988. *Id.* at 27-28.

265. *See, e.g.*, TRANSCRIPT OF NOV. 8, 1993 MEETING, *supra* note 249, at 54 (discussing

State air quality regulators were concerned with the complexity of the federal permit program and wanted a permitting program that was easier to administer.[266] Conventional environmental group representatives were concerned with overall attainment of air quality standards.[267] Presiding EPA officials adopted a characteristically neutral position among the various stakeholders.[268] Although there was an expressed need to reach a consensus, the group concentrated on reaching acceptable trade-offs rather than the public good that is the objective of the traditional civic republican tradition. Significantly, at two points when participants raised environmental justice issues, the discussion quickly shifted to other

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issues from Park Service standpoint); *see also id.* at 65, 281 (describing subgroup members' work on Class I area issues and national parks concerns).

266. In discussing Oregon's development of a permitting approach using plantwide applicability limits, one participant noted:

> I think I might go back and look at why Oregon did it, wanted it. They wanted to simplify the PSD and new source review rules. Oregon is a smaller state. They did not want to have baselines being triggered at all sorts of different places and different counties and different times. . . . Also they wanted to simplify the new source review rules which were becoming a mess and depending on which legal decision came out on what month. . . . Finally, they wanted to establish a baseline for tracking the PSD increments. How are we going to keep track of all these increments and basically I think that was one of the major reasons they went into the rule.

TRANSCRIPT OF NOV. 9, 1993 MEETING, *supra* note 249, at 44-45.

267. In discussing nonattainment areas, traditional environmentalists were concerned that preclusion of new source review would mean that the source owners would be making investments in equipment that could—but would not—be controlled by LAER, and would not be required to obtain offsets, thus foregoing emission reduction which could help bring an area in to attainment. According to an NRDC representative:

> the principal competing interest is that a government agency is being asked to authorize construction of a facility that may have an operating life of 50 or more years, and each and every day of its operating life, it is going to be putting a certain amount of pollution into the air, and the amount that it puts into the air for each and every day of those next 50 years is going to be determined by what is put into it by way of control technology in the first instance.

Id. at 258. In an earlier response to the observation that the use of prior shutdowns as offsets are needed for industrialization, the NRDC representative observed:

> If that is correct [that prior shutdowns must be used to allow for reindustrialization], what it means is that there simply aren't any offsets out there. That is, there are simply no ways of getting additional emission reduction which means that what Mike is saying is that these places aren't going to attain the standards, because if there aren't any ways of finding emission reductions sufficient to accommodate well-controlled new sources for offset purposes, how, in Heaven's sake, are the regulating agencies going to find the much greater emission reductions needed to attain the standards?

SIMPLIFICATION WORKSHOP, *supra* note 249, at 154.

268. *See, e.g.*, TRANSCRIPT OF NOV. 9, 1993 MEETING, *supra* note 249, at 76 (emphasizing that the agency is not proposing a particular plantwide applicability system).

matters.[269]

After four years of deliberation, the EPA published a packet of proposed new source review rules that filled ninety-four dense pages in the Federal Register.[270] The net result of the rules was to change the criteria to enable more major sources to escape the applicability of new source review in the course of plant expansions.[271] This change would entail avoidance of some of the legislative requirements for new sources, such as the need to obtain offsets, certification of statewide source-owned facility compliance, and an analysis of alternatives, environmental costs, and social costs of the project.[272] Although the proposed rules might be judged by many as a successful attempt to reform a complicated regulatory program, the initial proposal was developed without meaningful input from an important constituency.[273] The proposed rules nowhere mentioned environmental justice. Unfortunately, the environmental justice implications of the ability of some sources to expand operations without undergoing new source review was left unaddressed.[274]

From an environmental justice perspective, important strategies to promote meaningful participation were absent from the new source review subcommittee proceedings. The most glaring omission was the lack of representation on the subcommittee by community residents and other affected stakeholders.[275] Most likely,

269. For example, one participant informed the group of the environmental justice issue in the Genessee decision. TRANSCRIPT OF NOV. 8, 1993 MEETING, *supra* note 249, at 61-64. Another brought up particulate matter concerns in urban areas. *Id.* There was no discussion of environmental justice following these comments.

270. Prevention of Significant Deterioration, *supra* note 251.

271. The proposed rule indicates that there would be 20% fewer sources undergoing new source review because of the proposed change in baseline determinations, six percent fewer sources because of the clean unit and clean facility exemption, and 25% fewer sources because of replacement of "actual to potential" test with an "actual to projected future actual" test. Prevention of Significant Deterioration, *supra* note 251, at 38,319.

272. 42 U.S.C. § 7503 (1994).

273. Even if the proposed rules resulted in alleviating disparate risks to people of color and the poor, environmental justice is not just about distributional consequences. Equally important is an inclusive process that respects the contributions of all people.

274. Elsewhere, the EPA has indicated its willingness to include environmental justice as an issue for inclusion in alternative site analysis. ENVIRONMENTAL JUSTICE STRATEGY, *supra* note 231, at 31. However, a site analysis is undertaken only after new source review is deemed to apply. One of the major thrusts of the new rules was to make new source review applicable in fewer cases. *See* Prevention of Significant Deterioration, *supra* note 251.

275. On a theoretical level, lack of access in the "surrogate political process" suggests that, even under a pluralist conception, the implementation of legislatively expressed preferences embodied in new source review protections could have been distorted.

this was a result of the technical orientation of the subcommittee. However, community-based organizations in locales nearest major air pollution sources might have provided a different perspective on the subcommittee. Community groups involved in a recent environmental justice challenge to a Clean Air Act permit[276] would have been a logical place to look to find potential subcommittee members that are familiar with air permitting issues.[277]

Inclusion alone, however, would not have removed all the impediments to effective participation. Community residents and other environmental justice advocates would have been at a distinct disadvantage in the technical discussions that ensued during the subcommittee meetings. Workshops or seminars to help participants understand the technical issues would be a necessary component of meaningful participation.[278]

In addition, it appears that the subcommittee's complete reliance upon formal expertise obscured important normative issues, such as value-laden distributional questions. The dominance by experts in air pollution control on the subcommittee might have overshadowed issues that those experts were unable to address. These issues included the increase in possible cumulative and synergistic effects of pollutants that might occur if the overall pollutant load increased or altered composition due to the changes in control requirements and altered applicability criteria.[279]

The inclusion of well-informed environmental justice stakeholders might have been sufficient to shift the tenor of the deliberations and re-focus the proceedings. For example, if the ethical questions concerning distributional results had been raised by environmental justice advocates, the deliberations could have been shifted away from utility maximizing. Additionally, participants could have raised questions about contributing sources of pollution in areas where major sources are located. The subcommittee, including industry participants, would have been encouraged to contemplate the effect of regulatory reform upon disparately im-

276. *See supra* note 44; *see also* Cole, *Administrative Complaints*, *supra* note 35, at 382 (discussing a variety of opponents, which include community residents, in the nine appeal petitions filed in the Genessee air permit proceedings).

277. The Environmental Justice Public Participation Checklist recommends that the Agency identify external environmental justice stakeholders and provide them opportunity to offer input. *See* NEJAC Public Participation & Accountability Subcommittee, *supra* note 229, at No. 4.

278. *Id.* at No. 25.

279. *See supra* note 145 and accompanying text.

pacted communities. This discussion could have resulted in additional safeguards for these communities, just as the subcommittee contemplated safeguards for the protection of nearby pristine areas. Similarly, the participants would have contemplated the effect of those safeguards upon the regulated community and state permitting authorities. At the very least, we might have had an indication of how environmental justice concerns fare against economic considerations when deliberation concerns not only general policy but also the technical details of implementation.

Advisory committees have substantial potential to address environmental justice concerns, not only because deliberation is the primary method employed, but also because the committees influence agency policy and implementation. However, if the members of these committees retreat into an unreflective obeisance to expertise or utilitarian modes of decision-making, advisory committees will be ineffective partners in the environmental justice mission.

B. *Notice and Comment Public Participation Avenues*

Citizens have the right to be notified of, attend, and comment upon a wide variety of hearings, including local permit hearings, rule-making proceedings, and advisory group meetings. Although in all proceedings there is a potential for dialogue, the "step up to the microphone and have your say in less than fifteen minutes" approach of many such meetings resembles more of a crude preference tally rather than meaningful deliberation. One advocate of a civic republican approach to environmental regulation expressed dismay at the ineffectiveness of notice and comment to promote deliberation.[280] Although question-and-answer exchanges between the decision-making body and the commentator do occur at public hearings,[281] more often the commentator has her say and sits down without any indication that the decision-maker has seriously considered the position.

On a local level, the barriers to effective participation are more problematic because the rules and standards under consideration have already been promulgated, and the "facts, inferences and assumptions marshaled by an agency in support of its decision" are

280. *See* Poisner, *supra* note 50, at 86-92 (NEPA citizen participation described as anti-deliberative).

281. *See* U.S. ENVTL. PROTECTION AGENCY, *supra* note 35, at 652 (including Administrator Browner's response to commentator's question).

difficult for citizens to challenge because of a lack of technical resources.[282] Because notice and comment take place in an hierarchical structure, power disparities potentially remain unexamined.[283] This structure also allows the decision-maker to give great weight to commentators who have formal expertise while ignoring community residents or dismissing them as hysterical.[284] Ironically, if the disrespect is blatant and the power disparities are made too obvious, the community residents may feel an impetus to seek alternative means of redress, which might prove more successful.[285]

When notice and comment procedures move from a local decision-making level to a national policy-making level, the limitations are even more severe. Many community residents and environmental justice organizations are busy addressing local problems, usually on shoestring budgets, and have little time or resources to peruse the Federal Register for proposed rules and statements interpreting legislative provisions.[286] Here, the potential for unintentional exclusion is probably the greatest. Even if individuals or organizations undertake to comment upon the environmental justice implications at the stage where rules are proposed, there is no assurance that such comments will be given due weight.[287] Agency officials are likely to be skeptical of citizen-generated data and are

282. *See* Bray, *supra* note 77, at 1122.

283. The recommendations of the NEJAC subcommittee could help overcome the limitations. Particularly important is the recommendation to identify potential participants early, consider cultural and language barriers, provide information in an understandable format (perhaps in a pre-meeting workshop) and avoid the panel of experts approach. *See* NEJAC Public Participation & Accountability Subcommittee, *supra* note 229.

284. *See* Bray, *supra* note 77, at 1129 (in emotionally charged public meetings, agency staff is likely to perceive citizen scientific data as irrational and less accurate). For an anecdotal account of communities undertaking their own research, see Verchick, *supra* note 31, at 72-73.

285. *See* Cole, *supra* note 33, at 75 (describing a permit hearing where the disrespect was blatant). The community eventually filed suit under the California Environmental Quality Act to challenge the adequacy of the proceedings because the Environmental Impact Statement had not been translated into Spanish although the environmental effects at issue would affect a predominantly monolingual Spanish-speaking community. *Id.* at 77. In addition to court challenges, a community group might use the public hearing in connection with a media campaign to educate and mobilize opposition. This strategy, although significant, is beyond the scope of this Article.

286. There are a few organizations that attempt to address environmental justice concerns on a national level. *See* Ferris, *supra* note 40. Given the number of relevant rulemaking proceedings in the environmental and employment context, the available resources are wholly inadequate.

287. The agency must, however, respond to comments it deems significant. Bray, *supra* note 77, at 1134.

likely to give more weight to industry-generated data.[288] By the time proposed rules are published, stakeholder interests have usually been considered and the trade-offs have already been made.[289]

Notice and comment proceedings thus appear to be more vulnerable to limitations inherent in expertise- and pluralist-oriented approaches. Because a commentator is in a subordinate position to the body that is soliciting the comments and because of the lack of opportunities for deliberation, there is little chance to effect a shift in the focus of the decision-making group. Without this shift in focus, the values of community groups have little chance to compete with expert-supported trade-offs that perpetuate environmental inequities.

C. *Informal Public Participation Avenues*

Another means of participation can be achieved through the informal agency processes in which regulatory officials meet with interest groups or members of the public to address their concerns. Just as plant managers can meet with officials to discuss the applicability of statutory provisions to their operations, community residents should be able to meet with officials to discuss existing risks and potential non-compliance by facilities located within their community. Because of the unstructured, casual nature of this mode of participation, there is potential for communication and education in a reciprocal manner and for the development of common-sense solutions that help preempt expensive litigation.

Unfortunately, this means of participation also has its hidden traps, especially for relatively disempowered groups. Studies of unregulated and informal processes reveal substantial gender and race discrimination. A study of retail car sales is an example.[290] A study on small claims adjudication and mediation is another.[291] Ironically, the mediation study found that although people of color

288. *Id.* at 1129 (survey indicating that industry data deemed more accurate than citizen generated data). Although the agency is required to respond to comments deemed "significant," this does not necessarily mean that the agency must give equal weight to all commentators' positions.

289. *See supra* note 251 and accompanying text.

290. *See* Ian Ayres, *Fair Driving, Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

291. *See* MICHELLE HERMAN ET AL., THE METROCOURT PROJECT FINAL REPORT: A STUDY OF THE EFFECTS OF ETHNICITY AND GENDER IN MEDIATED AND ADJUDICATED SMALL CLAIMS CASES x-xi (1993) (documenting a study of 603 cases that revealed that ethnic minority claimants consistently received less money than non-minorities) (on file with the *Stanford Environmental Law Journal*).

systematically lose, they report higher levels of satisfaction with the mediation process.[292] A Minnesota study found a similar attitude in the environmental context, reporting that the majority of citizens felt positive that meetings with environmental agency officials were the best way to inform decision-makers but at the same time believed that public meetings did little to influence the outcome.[293] These studies collectively suggest that informal participation processes might have a deceptive appeal.

Informal processes have come under scrutiny for other types of biases as well. Mediation has been criticized for systematically working against women in divorce, custody, and domestic abuse cases.[294] Arbitration has been criticized for systematically working against consumers in favor of big businesses.[295] Professor Gunning examines in detail how negative cultural myths and biases permeate mediation and undermine the ability of disempowered groups to compete effectively.[296] Thus, the values "presumed shared will be those values reflected most strongly within the larger society; i.e., the values of the most politically and economically powerful."[297]

The insights of scholars who have studied diversity issues in informal dispute processes are relevant to informal agency processes.[298] The two types of processes are strikingly similar. Mediators are to remain neutral,[299] and agency neutrality is to remain a regulatory ideal. American mediation is individualistic,[300] as is the preference orientation of pluralism. Both look to informal processes as alternatives to the rights-oriented formal forum of

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292. *Id.* at xi-xiii (ethnic minority claimants and respondents were consistently more positive about mediation than adjudication, especially ethnic females).

293. Bray, *supra* note 77, at 1133-34.

294. Isabel R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 61 n.26 (1995). This is in part because "if the two parties have unequal attitudes towards being relational, the person who is more relational, the woman, will likely over-compromise." *Id.* at 63; *see also* Trina Grillo, *The Mediation Alternative Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (describing mediation in custody disputes). Significantly, a large number, possibly a majority, of environmental justice activists are women. Verchick, *supra* note 31, at 24.

295. Richard Reuben, *Are We Creating A Monster? The Dark Side of Alternative Dispute Resolution*, CAL. LAW., Feb. 1994, at 53.

296. Gunning, *supra* note 294, at 68-80.

297. *Id.* at 62.

298. *See generally* Eric K. Yamamoto, *ADR: Where Have All the Critics Gone?*, 36 SANTA CLARA L. REV. 1055 (1996) (describing race and gender critiques of ADR).

299. *Id.* at 80.

300. *Id.* at 85.

court adjudication.[301]

The problems of informal processes identified in other contexts have even more troubling significance when one considers predominant characteristics of environmental protection. First, there is the technical orientation and the overwhelming disparity in resources that could pervade the informal process in an unchecked manner. A traditional reliance upon expertise, such as a scientific insistence upon proof of adverse health effects or a legal insistence upon proof of discriminatory intent, could inhibit an effective response to the community's concerns. A second related concern is that environmental justice advocates do not enter the informal process with independent leverage and substantial technical resources, as do many industrial interests. Third, the agency official, presuming uniformity in values and outlook with other traditional stakeholders, might see an environmental justice claim as a utilitarian claim rather than as an ethical claim. If the agency official lapses into the pluralist mode of neutrality, the "special interest" asserted by the environmental justice advocate will lose when considered against methods of allocating resources (including the agency's own technical and enforcement resources) more efficiently. The unfortunate prediction, then, is that while expertise-ism and pluralism are dominant operating principles, environmental justice activists systematically will lose in informal modes of environmental agency participation as well.

D. *Self-Critique and Non-Neutrality as Regulatory Ideals*

In each participation context—advisory, notice and comment, and informal—a better agency response would be to adopt an introspective critical approach and non-neutral intervention as regulatory ideals. For example, there has been an important change in EPA's initial reflexive angry denial of racism within the agency, to a more reflective mood of "soul-searching to make sure that [the agency] is doing the right thing [and looking at how the agency] target[s] the enforcement machine."[302] A critical approach would require an extension of this trajectory. It would require agency of-

301. Gunning observes that Critical Legal Studies scholars argue that informal adjudication became popular just when disadvantaged groups began using the court system extensively. *Id.* at 61.

302. Marianne Lavelle, *EPA Enforcement to be Probed by Rights Commission*, NAT'L L.J., Apr. 5, 1993, at 3, 34 (quoting Scott Fulton, EPA's then-acting head of enforcement, during a 1993 forum of civil rights and environmental justice activists).

ficials to deliberately contemplate the limitations inherent in formal expertise and in the utility-oriented "stakeholder" approaches to participation when addressing environmental justice issues. The realization of the limitations could in turn enable the agency to utilize alternative forms of knowledge. For example, once community residents and activists are perceived to be on par with representatives who have formal expertise, agency officials can become educated by community experience and hopefully will begin to grasp the full implications of what it means to be exposed to multiple contaminants where people live, work and play.[303]

Perspectives rooted in the affected communities also can serve to challenge predominant misperceptions about the poor, racial minorities, and ethnic minorities, such as the perception that these groups are more interested in jobs than in environmental amenities,[304] and at the other end of the spectrum, that these groups tend to overreact to risk.[305] Community perspective can potentially challenge misinformation about a particular proposal, such as an overstatement of project benefits to the community (economic revitalization, tax revenue or increased availability of jobs), or an understatement of risk. Essentially, the regulatory ideal of self-critique is an implicit recognition of the agency's limited position within a larger cultural, social, and economic context.

The agency as decisionmaker is undoubtedly important, but it is not the pinnacle of environmental protection or environmental justice. The engine that drives environmental justice is empowered communities, not enlightened officials.[306] However, by recognizing that the inaccessible discourse of experts and the short-sighted vision of pluralism serve to disempower and exclude, the agency

303. On one level, "where we live, work and play" is a rhetorical device used by activists as a reminder that environmental problems cannot be compartmentalized and looked at in isolation. On a deeper level, it is reflective of the philosophy of the environmental justice movement and its tie to a larger project for social and economic justice.

304. Dr. Bullard, a noted environmental justice scholar, views this as a prevailing myth, noting that "the struggle for environmental justice was not invented in the 1990's. People of color, individually and collectively, have waged a frontal assault against environmental injustices that predate the first Earth Day in 1970. Many of these struggles, however, were not framed as 'environmental' problems—rather they were seen as addressing 'social' problems." VOICES FROM THE GRASSROOTS, *supra* note 15, at 9.

305. *See* Bray, *supra* note 77.

306. *See generally* Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992) (setting forth a model of environmental poverty law based upon client empowerment and group representation).

official can help the environmental justice vision by promoting the equal status of community participants.

Similarly, the regulatory ideal of non-neutrality and its implicit corollary, responsibility, is necessary because equitable protection is a collective value that is non-utilitarian and therefore does not fit within traditional benefit-cost calculations. Non-neutrality does not mean that the agency will accept uncritically what it perceives to be the environmental justice perspective on all issues and disputes. Non-neutrality is not bias toward environmental justice advocates. Non-neutrality is a working tool, albeit a crude one, within a larger framework that stubbornly perpetuates environmental injustice.

Recognizing that there are structural impediments to environmental justice goals, but also recognizing the agency of community groups, environmental agencies must first concede their complicity in the status quo and proceed to redefine their responsibilities. Their complicity occurs largely when agency officials uncritically lapse into familiar decision-making approaches during regulatory activities, as illustrated earlier in discussions of water quality standards and air pollution regulation. Redefinition of responsibility could be as straightforward as making sure that environmental justice advocates are included in all major deliberative fora. However, non-neutrality does not end at increasing participation avenues; it requires a commitment to equalize resources by outreach efforts to educate community residents about applicable legal requirements and technical issues, and in the promotion of partnerships between industry and communities.

Non-neutrality and responsibility could take more subtle forms as well, such as rigorous probing of cost-benefit or technical analysis to expose the underlying socio-economic factors and cultural assumptions that perpetuate environmental inequities. Non-neutrality would entail careful consideration of community accounts of environmental problems to attempt to determine how the relevant scientific and technical analysis might have missed important areas of inquiry. Although non-neutrality means sensitivity to distributional and process issues, it means more than that. In essence, non-neutrality means that, at the level of implementation as well as at the policy level, the agency is a promoter of environmental justice. In short, environmental justice would become a higher agency priority than short-term efficiency or the compromised trade-off.

VI. CONCLUSION

Decision-making paradigms rest on foundations that promote environmental injustice. The empirical methods of scientific and technical expertise presently have a limited ability to quantify and verify environmental problems, and they are not value-free. In addition, formal expertise cannot capture the knowledge that exists within affected communities. Utilitarianism cannot respond to the ethical imperative that is the heart of the environmental justice challenge. The universality of modern civic republicanism denies the force of self-interest, which appears unavoidable, and could intensify the indeterminacy inherent in decision-making. Its mode of discourse might obscure the power disparity that must be addressed. The regulatory ideal of formal expertise promotes exclusion of those whose lives are most affected by environmental hazards. The regulatory ideal of neutrality allows power disparity to play itself out to its logical conclusion.

As a result, environmental justice is in danger of stalling at the stage of aspirational policy statements served to a limited audience or isolated projects lacking substantial integration into all regulatory programs. Although there is a sincere desire on the part of many regulatory officials to promote environmental justice, systematically equitable environmental protection will require more; it will a require a new approach to regulation.

Decision-making approaches are not static, and change is possible. An agency's healthy skepticism towards traditional approaches could create the opportunity for community participants to contribute important knowledge and take their rightful place as full participants in decision-making. A regulatory ideal of non-neutral intervention would require the agency to help communities maneuver within a restrictive system by allowing the strategic refocusing of deliberation; only then can justice claims surface, survive, and thrive.

A critical agency perspective is premised upon the insight that the environmental justice challenge is not just another special interest claim; it is a challenge to do the right thing. This perspective might pave the way for the hard work that must be undertaken to promote systematically equitable environmental protection. Fundamentally, a meaningful response to the environmental challenge at the agency level will require yet another transformation.