



## Environmental Justice: Where Selma and the Cuyahoga River Fire Meet

By Steven F. Hayward

*“Environmental justice” seeks to integrate civil rights concerns with environmental regulation. However, the idea is ill-defined, and much of the research purporting to show racial bias in environmental regulation is slipshod or superficial. A new report from the U.S. Commission on Civil Rights adds to the confusion and misses real opportunities to analyze the distributional effects of regulation on low-income and minority communities.*

With the release of the U.S. Commission on Civil Rights report on “environmental justice,” *Not in My Backyard*, the marriage of the civil rights movement and the environmental movement has been fully consummated.<sup>1</sup> Ostensibly concerned with the implementation of a 1994 Executive Order directing federal agencies to incorporate environmental justice in their regulatory and permitting activities, *Not in My Backyard* goes well beyond a mere review of agency procedures to lay out a general theory of pervasive racial motivation behind siting decisions for industrial facilities that have potentially harmful environmental effects on local populations.

It is tempting to discount any report from the famously fractious and politicized U.S. Commission on Civil Rights, whose dysfunctions are highlighted in a recent General Accounting Office review.<sup>2</sup> Yet the report is helpful in laying bare both the premises of environmental justice as well as the radical expansions of administrative and regulatory law its advocates seek. As such, *Not in My Backyard* is helpful for its directness.

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### An Unlikely Marriage

The incorporation of civil rights into environmental activism addresses a major political weakness of environmentalism, namely, the perception that it is an enthusiasm chiefly of the wealthy elite.<sup>3</sup> Certainly this was the opinion of civil rights leaders at the time of the first Earth Day in 1970, when many voiced strong opposition to the rise of environmentalism as a prominent domestic issue. Richard Hatcher, the black mayor of Gary, Indiana, remarked: “The nation’s concern for the environment has done what George Wallace was unable to do—distract the nation from the human problems of black and brown Americans.”<sup>4</sup> Whitney Young of the National Urban League was equally distressed: “The war on pollution is one that should be waged after the war on poverty is won. Common sense calls for reasonable national priorities and not for inventing new causes whose main appeal seems to be in their potential for coping out and ignoring the most dangerous and pressing of our problems.”<sup>5</sup>

It was perhaps inevitable, though, that the civil rights movement and the environmental movement would converge, given that some leaders among the new wave of environmental activism that arose in the late 1960s modeled themselves explicitly on the civil rights movement of the

1950s and early 1960s.<sup>6</sup> The distributional effects of environmental regulation are a very legitimate concern; land use regulations that are variously described as “exclusionary zoning” and “redlining” are valid examples of abusive regulation that disproportionately constricts the choices and opportunities of low-income households. In practice, however, the amalgam of politicized civil rights groups and politicized environmentalists often summons the worst reflexes of both movements, combining frivolous charges of racism along with unfounded environmental scares. (It is not unusual to hear industrial siting decisions near minority communities labeled “genocide.”) For much of the civil rights movement, it is always the Edmund Pettis Bridge in Selma; for much of the environmental movement, the Cuyahoga River is always burning. Christopher Foreman of the Brookings Institution, author of the best dispassionate study of the issue, notes that “the flexible locution ‘environmental justice’ is inherently provocative and was intended to be so.”<sup>7</sup>

It is not clear which of the two movements has been degraded the most by this unlikely marriage. The environmental justice movement appears to be neither a public health enthusiasm—as is much of contemporary environmentalism—nor a traditional civil-rights agitation aiming at the vestiges of deliberate discrimination. Its main goals seem to be the incongruous combination of “grassroots empowerment” along with more aggressive administrative review processes at the federal level. The spirit of radical egalitarianism can be seen as the core motivating principle behind much of the agitation for environmental justice.<sup>8</sup> As such, environmental justice comes to sight as a repackaging of many long-discredited and rejected ideas. But in its current form the environmental justice movement does a disservice to serious examination of the health and environmental risks facing low-income and minority households.

## **Distinguishing Real Issues from Demagoguery**

Environmental justice, like many popular concepts such as “sustainable development” or the “precautionary principle,” has come to be defined and understood by the extremes rather than through a common sense view.<sup>9</sup> The idea of environmental justice has been implicit in American law and policy for a very long time. It has never been right to dump your trash in your neighbor’s yard or foul the downstream waters of a common

watercourse; common law based on well-developed doctrines of nuisance have supplied protection and remedies against these kinds of environmental abuse, with some notable instances occurring as far back as the nineteenth century.

Complex problems of multiple sources of either uncertain risk or diffused harm to common pool resources such as urban air, for example, are thought not easily manageable through common-law remedies, so a regulatory system has developed to cope with this large class of issues. Although regulatory permit decisions are still susceptible to legal challenge, the administrative permit system circumvents what would surely be an unwieldy mess if adjudicated through countless common-law actions.

The nub of environmental justice is whether classic LULUs (locally undesirable land uses, that is, landfills, chemicals plants and refineries, toxic waste dumps, and so forth) are sited disproportionately and deliberately near minorities, and whether this possibility is taken into account in the permit review process for siting new facilities. At the heart of most environmental permit reviews today is conformity with technical pollution prevention standards or mitigation of local effects. Even though Title VI of the 1964 Civil Rights Act outlaws discrimination “under any program or activity receiving federal financial assistance,” the demographics of the local area have not typically been a factor in the permit process.

President Bill Clinton’s 1993 Executive Order 12898 requires that “each federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low income populations in the United States.” The executive order did not attempt to give substantive definition or policy guidance for environmental justice, but it did create an interagency working group to study the topic and issue policy strategies. The Civil Rights Commission report is ostensibly reviewing the outcome of that effort.

Before very long, *Not in My Backyard* makes clear that its dominant purpose is to provide a tonic for the racial grievance industry. The report credulously conveys the findings of dubious studies purporting to establish disproportionate racial impact in environmental siting decisions, while summarily dismissing contrary evidence. The report is not merely unbalanced; it is unhelpful. This can best be seen in its handling of one

of the marquee environmental justice disputes of the last decade: the Shintech Corporation's proposal to build a \$700 million poly-vinyl chloride (PVC) plastic plant in St. James Parish, Louisiana, in the mid-1990s. This jurisdiction of Louisiana is predominantly black and has a high unemployment rate. Community leaders and the local chapter of the NAACP supported the Shintech plant. National environmental groups, however, decided to make the plant a test case for environmental justice agitation, which makes hash of the theme that environmental justice seeks local participation and empowerment. (One of the national groups that sought to derail Shintech was Greenpeace, whose stated goal is the banning of PVC; their motives in this episode seem less than sincere.)

The case against the Shintech plant, which would have been built to the latest EPA technical specifications for pollution abatement, was based chiefly on the fact that residents of St. James Parish were exposed to seventeen times as much pollution as the average Louisiana resident (though this fact, based on a simple redaction of the Toxics Release Inventory, does not tell us anything about whether the population of the parish experienced a disproportionately higher risk to health). Heeding the petitions of the national groups opposed to the siting of the plant, the EPA dithered so long in reviewing the matter that Shintech decided to build in Iberville Parish instead. Iberville Parish is a predominantly white, middle-class community.<sup>10</sup> (Among other things St. James Parish lost when Shintech switched sites was \$5.8 million for its local public school system.)

The Civil Rights Commission report found it sinister that Shintech's operating costs would be lower in Iberville Parish than St. James Parish—because Iberville was closer to raw material suppliers—and reached the following conclusion: "After Shintech relocated the plant to a more practical location, the move seemed to confirm suspicions that race played a role in the company's original decision to construct the facility in St. James Parish, a minority community already overburdened with environmental pollutants."<sup>11</sup> Aside from the appalling and unfounded charge that racism must be the explanation for Shintech's site selection (besides, if Shintech's executives were racists, surely they could have found another black community to target), this conclusion betrays complete ignorance of site selection decision-making. Most major corporations have a site selection decision matrix of dozens of variables (Intel's site selection matrix for a chip plant has over one

hundred), and the lowest cost site is often not the determining variable. If it were, low-cost southern states like Mississippi and Alabama would be booming, and no one would build anything in California.

The Shintech case is typical of the miscarriage of environmental justice. Beyond the spectacular anecdotal cases like Shintech, what evidence exists of disproportionate minority exposure to the siting of LULUs? Most of the evidence *Not in My Backyard* cites comes from partisan advocacy groups or studies whose serious methodological deficiencies are not acknowledged. The one disinterested piece of research cited in *Not in My Backyard* is a 1983 General Accounting Office study that found hazardous waste sites to be disproportionately sited near low-income communities.<sup>12</sup> But the report ignores entirely a 1995 GAO study that came to the opposite conclusion.<sup>13</sup> (Also, the 1983 GAO study was limited to just eight states.) "Indeed, once contrary findings and thoughtful criticisms are taken adequately into account," Christopher Foreman observes, "even a reasonably generous reading of the foundational empirical research alleging environmental inequity along racial lines must leave room for profound skepticism regarding the reported results."<sup>14</sup> *Not in My Backyard* shows neither skepticism nor restraint in its presentation of research. (Foreman's work and his testimony to the commission are dismissed in a footnote.)

A number of complex factors make it difficult to get at the distributional effects of siting decisions. Common sense will suggest that sites near low-income neighborhoods will sometimes be chosen because land is cheap; in other cases, low-income people will move near a facility for the same reason. Two additional threshold questions must be considered. First, is there any general evidence that minorities and low-income people experience higher rates of exposure to environmental health risks? Second, does proximity to a state-of-the-art waste or industrial facility entail a significant environmental risk to nearby residents?

*Not in My Backyard* recommends in several places that the EPA and other government agencies break out data on exposure to environmental hazards according to race and income. There is one recent national data series, unmentioned in *Not in My Backyard*, that does this: the Centers for Disease Control's *National Report on Human Exposure to Environmental Chemicals*.<sup>15</sup> Now in its second year, the *National Report* tracks levels of 116 chemicals and heavy metals in human blood and urine, and breaks out the data according to race. In

some cases, such as blood lead and phthalates, blacks and Hispanics have higher levels than whites; in other cases, such as cadmium and some polycyclic aromatic hydrocarbons (PAHs), blacks and Hispanics have *lower* levels than whites. (In a few cases, such as cesium, the level detected in whites is twice as high as in blacks or Hispanics.) In still other cases, such as mercury, there is little difference between races. In sum, at the general level there is no evidence in the CDC data that racial minorities experience higher exposure to environmental chemicals than whites.

It is important to note that while we lack thresholds or benchmarks of health risk for many chemicals and metals that the CDC tracks, in no case where a health benchmark does exist does the CDC data find any racial group approaching the threshold of harm. The chief value of the CDC's effort is providing physicians with a reference range so that they can determine whether people have been exposed to higher levels than those found in the general population. The CDC adds, "It is unknown whether differences between ages or races/ethnicities represent differences in exposure, body-size relationships, or metabolism." And even *Not in My Backyard* acknowledges that "there is inadequate literature on the relationship between environmental factors and health status."<sup>16</sup>

The CDC does make special note of a study that found higher levels of some environmental chemicals correlated with low incomes.<sup>17</sup> But a correlation with income is a very different matter than race, and opens on to correlations between low incomes and poor health outcomes on a broad range of risk measures beyond environmental exposures. Christopher Foreman comments: "Environmental justice proponents generally eschew personal behavior (and necessary changes in it) as a primary variable in the health of low-income and minority communities. . . . Telling neighborhood residents that an unfamiliar and unwanted company is fouling the local air or water, and perhaps threatening their children, sets the stage for effective community protest even when the actual health risks as stake are negligible. But reminding residents that they consume too many calories, or the wrong kinds of food, is likely to appear intrusive, insensitive, or simply beside the point."<sup>18</sup>

## The Policy Agenda

The Environmental Protection Agency has been working for several years on guidelines for incorporating

environmental justice into regulatory permit programs, but has delayed doing so probably because it sensibly wishes to avoid adopting a policy that would have the practical effect of banning new sites in or near any minority or low-income community. (This would represent the fruition of the facetious term BANANA, which stands for "Build Absolutely Nothing Anywhere or Near Anyone.") At the root of the entire effort is the attempt to transfer the concept of "disparate impact" in the Civil Rights Act as it applies to employment over to the environment, where it is much less suited. "Disparate impact" has always been the side-door method of establishing a civil rights violation in the absence of any compelling proof of intent to discriminate. If a seemingly race-neutral hiring or siting policy can be shown to be racially disproportionate in its effects, it becomes suspect. Disparate impact is especially problematic when applied to environmental risk because harms are so uncertain or even negligible, as discussed above. In addition, applying disparate impact to site permitting decisions does not take into account the tradeoffs between potential harms and economic benefit from a new facility.

At the present time, deciding whether a site-permit application imposes a discriminatory disparate impact is up to EPA or other permitting agencies. A series of federal court rulings have circumscribed the ability of private parties to bring lawsuits challenging a permit decision based on disparate impact.<sup>19</sup> This is unacceptable to the environmental justice movement and the Civil Rights Commission. *Not in My Backyard* recommends congressional action to establish a private right of action based on disparate impact, which means that firms that run the gantlet of agency permit processes, which often takes years, could then look forward to having the whole matter reviewed for several more years in court. (For environmental justice advocates, full compliance with state-of-the-art pollution reduction regulations is not sufficient to insulate a party from an environmental justice legal complaint.) Since the prospects for such a bill are dim, the commission implores EPA and other federal agencies to apply disparate impact tests more aggressively.

It is unfortunate that the Civil Rights Commission seeks as its principal policy strategy the expansion of administrative aggression and private litigation, for the title of its report, *Not in My Backyard*, ironically points in a more plausible direction that the text of the report largely ignores. Only in passing does *Not in*

*My Backyard* mention the area where much racial division and segregation routinely occurs: zoning and local land-use regulation. The distributional effects of local zoning and other regulations almost certainly affect the well-being of minority and low-income households more than EPA permitting decisions. The Commission on Civil Rights version of *Not in My Backyard* attributes the difficulty minorities face in finding decent affordable housing to unalloyed racism, and as a remedy proposes more regulation rather than less. *Not in My Backyard* was, coincidentally, the title of a 1990 report from the Department of Housing and Urban Development about removing regulatory barriers to affordable housing. Scholars across the political spectrum have long understood that regulatory systems favor the organized and powerful over the unorganized less powerful; some environmental justice advocates understand this.

One wonders how seriously and broadly environmental justice advocates really wish to push the idea of disparate impact. There is a mountain of scholarship showing that land use regulations inflate housing prices by as much as 30 percent, which has obvious distributional implications for low-income groups. The rising popularity of next-generation “smart growth” land use policies on a citywide and regional scale presents large issues of distributional impact; entire regional plans might be stopped by court order under a doctrine of private lawsuits based on disparate impact.<sup>20</sup> The same siting considerations that stop or delay industrial plants and waste sites could apply equally well to the proposed routes for light rail transit lines that would run through low-income neighborhoods. (Indeed, there is a Title VI complaint against a proposed light rail system in San Antonio, and in South Carolina rural black legislators are bringing civil rights complaints against smart growth land use proposals.)

A more robust respect for property rights, combined with a revival of common law remedies for environmental harms, would do more to achieve environmental justice, rightly understood, than another large expansion of the regulatory state.<sup>21</sup> This is not even remotely contemplated in *Not in My Backyard*. It is hard to escape the conclusion that the purpose of *Not in My Backyard* is, in Christopher Foreman’s words, buttressing “selective trolling for governmental and corporate environmental villains” rather than real environmental justice.<sup>22</sup>

## Notes

1. The commission’s report can be found at [www.usccr.gov/pubs/envjust/ej091103.pdf](http://www.usccr.gov/pubs/envjust/ej091103.pdf).

2. See *U.S. Commission on Civil Rights: More Operational and Financial Oversight Needed*, GAO-04-18, October 2003, available at [www.gao.gov](http://www.gao.gov). Among the GAO’s findings are that the commission’s procedures “lack, among other things, a requirement for systematic commissioner input throughout projects. As a result, commissioners lack the opportunity to review many of the reports and other products drafted by Commission staff before products are released to the public, which serves to significantly reduce the opportunity for commissioners to help shape a report’s findings, recommendations, and policy implications of civil rights issues.”

3. The average member of an environmental organization, surveys have found, enjoys a household income more than twice the median national household income, and the membership or most organizations is overwhelmingly white.

4. *Time*, August 3, 1970, p. 42.

5. Cited in Christopher Foreman, Jr., *The Promise and Peril of Environmental Justice* (Brookings Institution, 1998), p. 15.

6. California Sierra Club leader Fred Eissler declared in 1969: “What we need is an environmental rights movement along with a civil rights movement.” (Cited in Ross MacDonald and Robert Easton, “Thou Shalt Not Abuse the Earth,” *New York Times Magazine*, October 12, 1969.)

7. Foreman, *Promise and Peril*, p. 9.

8. The late political scientist Aaron Wildavsky defined radical egalitarianism as “the belief in the moral virtue of diminishing differences among people of varying incomes, genders, races, sexual preferences, and (especially) power.” See Wildavsky, *The Rise of Radical Egalitarianism* (Washington, D.C.: American University Press, 1991), pp. xxvii–xxxvi.

9. For example, one of the seventeen principles of environmental justice adopted at a 1991 conference of “People of Color Environmental Leadership Summit” is “the cessation of the production of all toxins, hazardous waste, and radioactive materials”—a clearly absurd idea, which the conference characterized as a “demand.”

10. For more on the Shintech controversy, see Henry Payne, “Green Redlining,” *Reason*, October 1998, pp. 26–30.

11. *Not in My Backyard*, p. 44.

12. U.S. GAO, *Siting Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*, June 1983.

13. U.S. GAO, *Hazardous and Nonhazardous Waste: Demographics of People Living Near Waste Facilities*, June 1995. Among

the GAO's conclusions: "GAO did not find that minorities or low-income people were overrepresented near a majority of the nonhazardous municipal landfills. According to GAO's nationwide sample of municipal landfills, less than half of such landfills had a percentage of minorities or low-income people living within 1 mile of the facility that was higher than the percentage in the rest of the country."

14. Foreman, *Promise and Peril*, p. 27.

15. The complete 257-page report can be downloaded from the CDC's website, [www.cdc.gov/exposurereport/](http://www.cdc.gov/exposurereport/). For additional background on the CDC report, see Steven F. Hayward, "A Blow to Chemophobia," AEI *Environmental Policy Outlook*, March 2003, available at [www.aei.org/publication16087/](http://www.aei.org/publication16087/).

16. *Not in My Backyard*, p. 153.

17. J. C. Chuang, P. J. Callahan, C. W. Lyu, and N. K. Wilson, "Polycyclic Aromatic Hydrocarbon Exposures of Children in Low-Income Families," *Journal of Exposure*

*Analysis and Environmental Epidemiology* 9, no. 2 (1999): 85–98.

18. Foreman, *Promise and Peril*, pp. 66–67.

19. The key cases are *Alexander v. Sandoval*, 532 U.S. 275 (2001); *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771 (2001); and *Gonzaga v. Doe*, 536 U.S. 273 (2002).

20. See Randall Pozdena, *Smart Growth and Its Effects on Housing Markets: The New Segregation* (Washington, D.C.: National Center for Policy Analysis, 2002), available at [www.nationalcenter.org/NewSegregation.pdf](http://www.nationalcenter.org/NewSegregation.pdf).

21. See Roger E. Meiners and Andrew P. Morriss, eds., *The Common Law and the Environment: Rethinking the Statutory Basis for Modern Environmental Law* (Lanham, Md.: Rowman and Littlefield, 2000); Michael Greve, *The Demise of Environmentalism in American Law* (Washington, D.C.: AEI, 1996).

22. Foreman, *Promise and Peril*, p. 131.