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ENVIRONMENTAL PROTECTION IN THE NEXT DECADES: MOVING FROM CLEAN UP TO PREVENTION

*Philip Weinberg**

Environmental regulation at the federal level took off in a cloud of zeal fueled by both the first Earth Day in 1970 and a series of works by Rachel Carson,¹ Garrett Hardin,² and other writers dramatizing our concerns. Congress responded with a series of acts imposing permit systems and mandating advances in technology to control air and water quality, pesticides, solid and hazardous waste, and toxic substances.³ After these enactments joined the tax, labor, securities, and other laws with which industry must cope, the euphoria predictably wore off, and equally predictable resistance asserted itself. After over a decade of reasonably vigorous implementation followed by a similar period of resistance and deregulation, the pendulum is now returning to enforcement. Thus, now is an ideal time to evaluate the effectiveness of federal environmental regulation.

Several points emerge, and this Essay briefly discusses them. First, regulation is needed. The marketplace alone will not end environmental abuses, any more than it will eliminate fraud, the abuse of labor, or other wrongful conduct. But regulation only works where it is grounded in solid public support, and should be coupled with incentives encouraging environmentally benign activity and waste reduction. Second, just as the

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1. RACHEL L. CARSON, *THE SEA AROUND US* (1951); RACHEL CARSON, *SILENT SPRING* (1962).

2. Garrett Hardin, *The Tragedy of the Commons*, 162 *Sci.* 1243 (1968).

3. See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1988 & Supp. IV 1992); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2671 (1988 & Supp. IV 1992); Clean Water Act of 1977, 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1993); Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C.A. §§ 6901-6992k (West 1983 & Supp. 1993); Clean Air Act, 42 U.S.C. §§ 7401-7671q (1988 & Supp. III 1991); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991).

federal legislation of the 1970s was based on the recognition that environmental concerns transcend state borders, it is now clear that international controls are also needed. Transnational corporations; the global traffic in oil, ivory, and whaling; acid rain; and a host of other examples highlight the need for an international body of environmental law.

Next, we must expand the alternatives to litigation and other adversarial means of resolving environmental issues. We have to remove the artificial barriers to standing in environmental litigation, which continue to thwart plaintiffs with genuine concerns. And we must recognize that land use lies at the core of most environmental concerns, so that there is really no substitute for effective land-use controls. Similarly, although the laws generally treat them separately, transportation and environmental concerns are thoroughly interwoven. Environmental advocacy groups themselves are mostly unaware of this interdependency.

Finally, the recent recognition of the concerns of environmental justice is overdue. The goal of avoiding environmental degradation will only succeed if we transcend a "not in my backyard" (NIMBY) view and, as with civil liberties, we all share a commitment to achieving it.

I. THE MYTH OF THE MARKETPLACE

Although environmental regulation has been with us long enough to gain broad public acceptance, the view that market forces, rather than governmental sanctions, will somehow eliminate pollution was promoted during the Reagan and Bush Administrations and continues to be widely touted.⁴ It is past time to shelve it. Tax incentives can certainly play a major role in encouraging our better natures. For example, until their curtailment, the federal income tax credits for rehabilitating landmark buildings⁵ and for solar energy⁶ offered a much faster payback on those investments than the marketplace alone could furnish. And a serious tax on gasoline such as European countries impose, considerably higher than

4. See, e.g., James Paul Kimmel, Jr., *Disclosing the Environmental Impact of Human Activities: How a Federal Pollution Control Program Based on Individual Decision Making and Consumer Demand Might Accomplish the Environmental Goals of the 1970s in the 1990s*, 138 U. PA. L. REV. 505, 506-07 (1989); see also Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039, 2045-51 (1993) (recounting policy debate in United States).

5. Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 960. Rehabilitation benefits were severely reduced by the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2183 (codified as amended at I.R.C. § 46(b)(4) (1988)).

6. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (formerly codified at I.R.C. § 46(f)(9)), *repealed by* Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2857.

the 4.3-cent-per-gallon tax adopted last year,⁷ would surely increase car-pooling and public transportation use. But economic incentives alone will not restore air and water quality or clean up hazardous waste landfills. No substitute for law enforcement has yet been discovered, and penalties must remain a primary weapon in preventing environmental degradation. Though permit programs and fines have not yet brought us to environmental nirvana, neither have criminal penalties ended crime. Yet few would argue that the need to reduce the poverty, drug abuse, and dysfunctional families that contribute to crime would justify closing the police stations and jails. The carrot can replace the stick in soup but not in law enforcement.

Having said that, events have shown that environmental laws are most effective when paired with economic incentives. In countries where poaching has decimated endangered species, for example, experience has demonstrated the need to enlist local residents as allies in conservation efforts by promoting tourism and by allowing them to share in the revenues from the meat and hides of animals that die naturally or are legally culled. Similarly, efforts to protect tropical rain forests work best when the locals can profit from ecotourism and sustainable forestry.⁸ Tony Hiss and other enlightened scholars have recognized that safeguarding our landscape from the ravages of suburban sprawl not only protects the land and water but also leads to more fulfilling communities and, in the long term, higher property values.⁹

Environmental enforcement will always be needed to deal with the recalcitrant. But the real difference of the past two decades, and what offers hope for the future, is the widespread change in attitude toward environmental protection. Most people now accept that we must make an essential commitment to protecting the environment. Even anti-environmental groups show their respect by imitating the titles and grass-roots techniques of environmental organizations.

In legislating to safeguard environmental values, experience has shown the wisdom of congressional decisions to encourage, rather than preempt, the states in most areas. While some states have lagged behind, many have pioneered environmental legislation in advance of the federal

7. Fuel Floor Stocks Taxes Under the Omnibus Budget Reconciliation Act of 1993, 58 Fed. Reg. 62,526 (1993) (to be codified at 26 C.F.R. pt. 47).

8. Shirley Christian, *There's a Bonanza in Nature for Costa Rica, but Its Forests Too Are Besieged*, N.Y. TIMES, May 29, 1992, at A6; Julie Vorman, *'Eco-Tourism' Protects Resources in Caribbean*, L.A. TIMES, June 16, 1991, at A29.

9. See, e.g., TONY HISS, *THE EXPERIENCE OF PLACE* (1990).

government. Examples include beverage container laws,¹⁰ restrictions on sales of products made from endangered wildlife,¹¹ and enlightened land use controls.¹² Many years ago, Justice Brandeis observed that state legislative enactments served as laboratories to test imaginative economic measures as yet untried at the national level.¹³ The same is surely true in environmental protection.

II. TIME TO TURN TO WASTE REDUCTION

Environmental controls began, naturally enough, with an emphasis on curbing emissions and cleaning up waste. Virtually all major regulatory statutes embody these approaches, and they are plainly still needed. However, the emphasis must shift to reducing the volume and toxicity of waste before it enters the air, water, or land. This is the proverbial ounce of prevention, and it is overdue.

Some statutes explicitly call for waste reduction as a strategy preferable to disposal. New York, for example, has legislated solid and hazardous waste management hierarchies listing, in order of preference, reduction, reuse, detoxification, and landfill disposal.¹⁴ Yet little has been done to effectuate this policy. Whether through legislative mandate or tax incentives, reducing waste at its source and reusing waste materials must be encouraged. In this regard, Germany and other countries have forged far ahead of the United States, requiring manufacturers and retailers to take back packaging materials, for example.¹⁵ It is time for Congress to address these issues.

III. INTERNATIONAL CONCERNS

When I began teaching, and before that practicing environmental law, the issues were—or seemed to be—local or, at most, regional. The advent of comprehensive national legislation dealing with air, water, and toxic substances appeared to be a mighty step forward. Today, the international dimensions of a host of environmental concerns are evident.

10. *See, e.g.*, ALASKA STAT. § 46.06.090 (1991) (prohibiting nonglass beverage containers with detachable metal rings).

11. *See, e.g.*, CAL. FISH & GAME CODE § 2080 (West Supp. 1994) (prohibiting import and sale of endangered species, or any part or product thereof).

12. *See, e.g.*, VT. STAT. ANN. tit. 24, §§ 4301-4495 (1992) (requiring state approval for large-scale land development).

13. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

14. N.Y. ENVTL. CONSERV. LAW §§ 27-0105 to -0106 (McKinney Supp. 1994).

15. *See Packing Waste: Environment Ministers Reach Consensus on Waste Preparation*, EUR. ENV'T, July 6, 1993, at 413, available in LEXIS, News Library, Curnws File.

The Rio de Janeiro conference, the Law of the Sea treaty,¹⁶ the Montreal protocol on fluorocarbons,¹⁷ the Convention on International Trade in Endangered Species (CITES),¹⁸ and agreements to curtail whaling¹⁹ all dramatize the importance of international cooperation in environmental problem solving.

Far more, however, must be done to further global environmental protection. The current jockeying over environmental provisions of the North American Free Trade Agreement (NAFTA) highlights these concerns. As industry moves to less developed countries, an international mechanism must be created to ensure reasonable levels of environmental protection and enforcement. Developing countries simply cannot cavalierly destroy rain forest to produce cash crops for export while their own people go hungry. In this regard political and environmental reform in the third world are interwoven.²⁰ We in the developed nations must recognize that we can no more colonize with loans or business policies than we can with gunboats. This will mandate a rethinking of our relationships with developing countries, which are presently perceived all too often as sources of raw materials and repositories for our waste. Perhaps they will sooner cease to be banana republics when we cease to treat them primarily as suppliers of bananas.

These problems are not, however, confined to developing nations. In Eastern Europe, Russia, and the other former Soviet lands—wherever economic and political systems are volatile—the dangers of environmental colonization exist. Polluting industries and hazardous waste should not be exported to these poorer countries any more than they should be diverted to the poorer communities within our states.

The difficulty is how to develop a body of law to deal with these issues. The Rio Conference began to focus on some of them. Regrettably, the United States balked at signing some of its most significant provisions. That should be quickly remedied, as indeed the Clinton Ad-

16. *Draft Final Act of the Third United Nations Conference on the Law of the Sea*, U.N. Doc. A/CONF.62/121 (Oct. 21, 1982), reprinted in 21 I.L.M. 1245 (1982) (Final draft opened for signature Dec. 10, 1982).

17. *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature Sept. 16, 1987, 26 I.L.M. 1541, 1543 (1987) (entered into force Jan. 1, 1989).

18. *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975).

19. *E.g.*, *International Convention for the Regulation of Whaling*, opened for signature Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (entered into force July, 1950).

20. See BILL WEINBERG, *WAR ON THE LAND: ECOLOGY AND POLITICS IN CENTRAL AMERICA* (1991).

ministration has begun to do.²¹ Beyond that, machinery must be created to somehow enforce international standards of air and water quality and hazardous waste disposal, much as the General Agreement on Tariffs and Trade (GATT) does for trade and CITES does for traffic in endangered species. These standards, embodied in treaties, should explicitly provide that national environmental requirements do not constitute discriminatory trade restrictions in violation of GATT, as some tribunals have recently ruled.²²

Perhaps it is difficult to be optimistic regarding international environmental measures in a world where the end of the cold war has led to Bosnia, Somalia, and other seemingly insoluble conflicts. But the risks of unchecked environmental degradation are so great that we must try. Much has already been accomplished.

IV. FROM LITIGATION TO NEGOTIATION

If we can speak of achieving peaceful resolution of disputes among nations, we surely should be able to reduce our own courts' increasing tide of litigation. Litigation, after all, to paraphrase Clausewitz on war, is negotiation carried on by other means. The past few years have seen valiant attempts to move from environmental litigation, with all its attendant costs, delays, and adversarial attitudes, to negotiation.²³ Two natural areas for negotiation are challenges to complex Environmental Protection Agency (EPA) and state regulations and resolution of liability controversies under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).²⁴ Now that a general consensus seems to exist as to environmental goals, at least among governments, major corporations, and the mainstream environmental advocacy groups, it makes good sense to try to curtail the prodigious transactional costs of litigating every new regulation and every newly unearthed CERCLA site. These Wagnerian litigations consume huge amounts of judicial, legal, and consulting time, often while contributing little to environmental goals.

21. See *Instruments of Ratification Filed by 21 Countries for Climate Change Treaty*, 16 Int'l Env'tl. Rep. (BNA) 430 (June 16, 1993) (reporting U.S. ratification of U.N. Convention on Climate Change).

22. See *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991), reprinted in "THE DUNKEL DRAFT" FROM THE GATT SECRETARIAT (Institute for Int'l Legal Info. ed., 1992).

23. See, e.g., David Beasley, *Rives Paves Way for Negotiation on Parkway Project*, ATLANTA CONST., Feb. 12, 1991, at F1; Ruth Simon, *U.S. Tries Alternatives to Litigation*, NAT'L L.J., June 27, 1983, at 1.

24. 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991).

Though negotiation probably cannot be mandated, it can be encouraged by creating state-sponsored mechanisms for this purpose. We should be striving to do so. I hope five or ten years from now to see a field in which negotiation of disputed environmental issues is as commonplace as labor-management negotiation, and litigation as infrequent as strikes or lockouts. As discussed above, we will always need enforcement to deal with the recalcitrant and litigation to resolve genuine and otherwise irreconcilable disputes. Still, there remains an enormous volume of environmental litigation capable of quicker, less costly resolution.

V. REMOVING JUDICIAL BARRIERS TO STANDING

Much of the early environmental litigation turned on contests over plaintiffs' standing to challenge agency determinations. A hard-fought series of decisions finally seemed to establish some reasonably clear rules enabling litigants to reach the merits in cases dealing with serious environmental issues.²⁵ Additionally, in much of its environmental legislation, Congress sought to provide standing to any citizen seeking to challenge permit violations as well as some agency actions—typically ministerial, or nondiscretionary, decisions.²⁶ Yet the current Supreme Court, hostile to environmental protection and extremely deferential to executive agency decisions, has in two major cases regressed to an archaic, narrow, and grudging view of standing. In *Lujan v. National Wildlife Federation*,²⁷ the Court rebuffed a respected nationwide conservation group seeking to challenge an Interior Department land reclassification program, even though the group's members asserted that they used the lands at issue, a claim sufficient to furnish standing under previous decisions. And in *Lujan v. Defenders of Wildlife*,²⁸ the Court found no standing, even under a citizen-suit statute, to review a regulation excluding from the Endangered Species Act's habitat protection provision actions funded by the United States in foreign nations. Though that decision was based in part on the requirement of Article III of the Constitution that federal courts decide cases or controversies,²⁹ it still should be correctable by Congress. In any event Congress should promptly add citizen-suit provisions to existing legislation and end these interminable

25. See *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

26. *E.g.*, Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (1988); RCRA, 42 U.S.C.A. § 6972 (West 1983 & Supp. 1993); Clean Air Act, 42 U.S.C. § 7604 (1988 & Supp. III 1991).

27. 497 U.S. 871 (1990).

28. 112 S. Ct. 2130 (1992).

29. U.S. CONST. art. III, § 2.

skirmishes over standing in federal land cases. Likewise, when standing issues remain an unwarranted barrier to environmental litigation in state courts,³⁰ those states should enact citizen-suit legislation, as a few have done.³¹ Trees need not have standing—as an article once facetiously suggested³²—but people with genuine concerns should.

VI. LAND USE AND IMPACT REVIEW

Another lesson of past decades is the need to recognize that environmental issues are largely land use issues. Land development patterns, by creating urban sprawl and rendering mass transit less effective, fuel our excessive dependence on highways, with disastrous impacts on air quality and energy use. Safeguarding water supply is far easier when farms are given incentives to continue to operate, instead of allowing developers to subdivide former farmland. For decades water quality was dealt with in large measure by regulating point sources of effluent, while even larger quantities of pollutants, such as pesticides, irrigation runoff, and the like, entered our waterways from nonpoint sources. Only belatedly have the Clean Water Act and the EPA addressed the need to control nonpoint sources, which are far more directly related to land use.³³

The states have varied greatly in their willingness to address land use issues. Vermont, as noted, has adopted statewide controls on large-scale development for the past two decades,³⁴ but few other states have followed its lead. In recent years some states have acted to protect particular areas critical to water supply, such as New Jersey's pine barrens,³⁵ and just last year, New York's Long Island pine barrens.³⁶ Statewide planning and land use controls, however, still seem light years away in most states. One of these days the recognition that most environmental problems are, at bottom, land use problems will perhaps overcome the antipathy masked as individualism that prevents cities as large as Houston from enacting even basic zoning.

30. See, e.g., *Otsego 2000, Inc. v. Planning Bd.*, 575 N.Y.S.2d 584 (App. Div. 1991), *appeal denied*, 589 N.E.2d 1263 (N.Y. 1992); *Energy Research Found. v. Waddell*, 367 S.E.2d 419 (S.C. 1988).

31. E.g., MICH. COMP. LAWS ANN. § 691.1201 (West 1987 & Supp. 1993).

32. Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

33. See 33 U.S.C. § 1329 (1988 & Supp. IV 1992). Section 1329, enacted on February 4, 1987, amended the Clean Water Act and gave the EPA enforcement rights over nonpoint sources.

34. See *supra* note 12 and accompanying text.

35. See N.J. STAT. ANN. §§ 13:18A-1 to -49 (West 1991 & Supp. 1993).

36. See N.Y. ENVTL. CONSERV. LAW §§ 57-0101 to -0137 (McKinney Supp. 1994).

For the foreseeable future municipal zoning will continue to be the main venue for land use decisions. I anticipate that localities in the next decades will become far more cognizant of environmental concerns and willing to use sophisticated techniques to deal with them, including conservation easements, purchase of development rights to preserve farms, and overlay zoning districts in flood plain, mountainous, and other environmentally sensitive areas. In the cities there will almost certainly be a greater number of landmark districts as people increasingly recognize the need to safeguard our architectural and historic heritage.

The litigation of the previous decades has established that land-use controls, as long as they do not deprive the landowner of all reasonable, investment-based expectations, are valid exercises of the police power and impregnable to a takings challenge.³⁷ Similarly, the courts have shown that they will not tolerate exclusionary zoning to bar moderate-income residents,³⁸ but will accept phased-development ordinances, not aimed at the poor, but designed to avoid suburban sprawl and safeguard open space and water supply.³⁹ I expect more localities to employ these techniques as environmental awareness increases.

A similar need to focus on preventing environmental impasses, instead of trying to cure them after the fact, has spurred the adoption of state environmental impact review statutes, patterned on the National Environmental Policy Act (NEPA).⁴⁰ So far, more than twenty states have enacted laws or regulations of this sort. Some of these statutes, including California's⁴¹ and New York's,⁴² are substantive, requiring state and local government agencies not only to weigh environmental impacts and alternatives, but to choose those alternatives that mitigate environmental harm. Regrettably, the Supreme Court has construed NEPA to be procedural only, and not to require federal agencies to actually mitigate the impact of actions they take, fund, or approve.⁴³ The Court so held despite statutory language, lower court decisions, and legislative

37. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

38. *Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986); *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 808 (1975).

39. *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *Golden v. Planning Bd.*, 285 N.E.2d 291 (N.Y. 1972).

40. 42 U.S.C.A. §§ 4321-4370d (West 1985 & Supp. 1993).

41. CAL. PUB. RES. CODE §§ 21000-21178.1 (West 1986 & Supp. 1994).

42. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 1984 & Supp. 1994).

43. See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (per curiam) (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)).

history all pointing toward a substantive dimension to NEPA.⁴⁴ NEPA would be far more effective if, like the state statutes that are its progeny, it were substantive. Congress should remedy this as soon as possible.

VII. PUBLIC TRANSPORTATION: AN INVISIBLE ENVIRONMENTAL ISSUE

In the twenty-four years since the adoption of the bulk of the Clean Air Act,⁴⁵ emissions from stationary sources such as factories and incinerators have been significantly reduced. In contrast, the quantity of most pollutants from motor vehicles has continued to rise despite increasingly stringent measures to decrease the emissions from each individual vehicle.⁴⁶ The reason is the steady increase in vehicle miles traveled from year to year, especially in and around major cities, virtually all of which are nonattainment areas under the Clean Air Act for photochemical oxidants and other vehicle-related pollutants injurious to health.

As I suggested earlier, the absence of serious, environmentally oriented planning in metropolitan areas has spurred this undue reliance on highways. The older suburbs, built along rail lines, have been eclipsed by sprawl along expressways and freeways. Residential, commercial, and office building developments now routinely spring up in areas accessible only by automobile.

Another prime cause of this burden on air quality, and one much more easily remedied, is our national neglect of public transportation, and railways in particular. It has been well documented that both passengers and freight move far more efficiently by rail, and other countries—notably in Western Europe and Japan—have wisely invested in high-speed trains. All the Clean Air Act amendments and state implementation plans will not substitute for a substantial national investment in improving and expanding passenger and freight rail service, especially in and around metropolitan areas. Experience has shown that people will commute and travel by train when those trains take them where they want to go. Yet few American cities have rail lines for commuters, and even fewer run those trains throughout the metropolitan area to serve the office complexes, airports, and shopping malls people need to reach.

44. See Philip Weinberg, *It's Time to Put NEPA Back on Course*, 3 N.Y.U. ENVTL. L.J. (forthcoming Spring 1994); Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 ENVTL. L. 533 (1990).

45. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.).

46. The sole exception to this increase is in lead emissions, which have been curtailed by the EPA's phase out of lead as a gasoline additive.

Most commuter rail routes were designed decades ago to transport people to downtown, not from suburb to suburb as work patterns now demand. Likewise, modern rail freight yards and terminals, with access for trailer-on-flat-car and other containerized equipment, must be made available to cities like New York, which lack them and thus are compelled to rely almost exclusively on trucks.

I have earlier urged that those in government and the private sector working to further environmental goals should focus on improving public transportation and ally themselves with public transit operators and advocates.⁴⁷ Until this occurs, and until the state-of-the-art rail service taken for granted throughout most of the developed world exists in the United States, our air quality and traffic problems will persist. Thus far, both in and out of government, air quality and transportation concerns have hardly been addressed in unison. Attempts in the 1970s and early 1980s to address these concerns foundered in the courts, which were understandably reluctant to order the EPA and other agencies to take comprehensive steps not mandated by existing statutes.⁴⁸ Forging this alliance will require leadership in government and imaginative sharing of resources by environmental and mass transit advocacy groups that are still largely engaged in a dialogue of the deaf.

VIII. ENVIRONMENTAL JUSTICE

Finally, what all of us knew yet few spoke of—that landfills, incinerators, and the like tend to be disproportionately clustered in poor and predominantly minority communities—has finally surfaced as a topic for serious discussion.⁴⁹ In the past year or two, environmental justice has emerged on the agendas of civil rights groups and civic organizations, in the curricula of law schools, and as the subject of studies by the EPA.

47. See Philip Weinberg, *Public Transportation and Clean Air: Natural Allies*, 21 ENVTL. L. 1527 (1991).

48. See, e.g., *Council of Commuter Orgs. v. Thomas*, 799 F.2d 879 (2d Cir. 1986) (upholding approval of state implementation plan despite limited funds for public transit improvements); *Council of Commuter Orgs. v. Gorsuch*, 683 F.2d 648 (2d Cir. 1982) (same); *Friends of the Earth v. Carey*, 535 F.2d 165 (2d Cir. 1976) (holding New York subway fare increase was not part of state implementation plan and thus not enjoined), *cert. denied*, 434 U.S. 902 (1977).

49. See Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993); Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 KAN. L. REV. 271 (1992); *A Place at the Table*, SERRA, May-June 1993, at 50.

The reasons for the inequity are complex and have to do with pervasive and long-standing social and political patterns. Neighborhoods whose residents lack political strength and access to the media are easier to victimize. Civil rights groups have historically concentrated on issues like voting, employment, and housing discrimination and have seen environmental concerns as peripheral. Further, the notion has persisted that environmental issues are elitist issues, and indeed this notion has been fostered by opponents of environmental regulation. Happily, these barriers are falling. It will surely be an important part of the business of environmental protection, both inside and outside of government, to address these fundamental concerns.

How this is to be done raises serious questions. Many toxic landfills and similar facilities are already in place, and moving them is usually impractical and costly. Low-income and minority communities are often in or near areas zoned for industrial uses, and are often objectively appropriate for these uses—near highways and rail lines, for example. The placement of these facilities, then, can become self-perpetuating, as other communities successfully fend them off. Moreover, sometimes the very communities that might otherwise object to landfills or incinerators, such as Native American reservations, welcome them for economic reasons. And some project sponsors are not above sweetening their proposals with offers of funding for schools, recreational facilities, and other community benefits. This phenomenon is not confined to private developers. The City of New York sugar-coated its North River sewage treatment plant, built on the western edge of Harlem, with park-like facilities, including tennis and basketball courts, on the roof of the plant.

It will not be easy for government agencies constructing or licensing facilities to foster environmental justice. Political influence from wealthier communities will likely continue to capitalize on NIMBY attitudes. And legitimate environmental concerns may sometimes favor sites in existing industrial areas even though these are often low-income neighborhoods. Nonetheless, we have to make a start. Not only does simple justice demand it, but the march toward these goals will help cement a now-fragile alliance between the environmental and civil rights movements, and help free the former of the ancient canard of elitism. For in the end the enemies of both are the same—those catalogued nearly a century ago by Rostand in *Cyrano de Bergerac*: falsehood, prejudice, cowardice, and folly.⁵⁰

50. EDMOND ROSTAND, *CYRANO DE BERGERAC* act 5, at 195 (Brian Hooker trans., Bantam Books 1959) (1897).