

The Distributive-Justice Model of Environmental Law

David Schorr

Distributive Justice in Environmental Law

- Conventional approach:
“Environmental Justice”

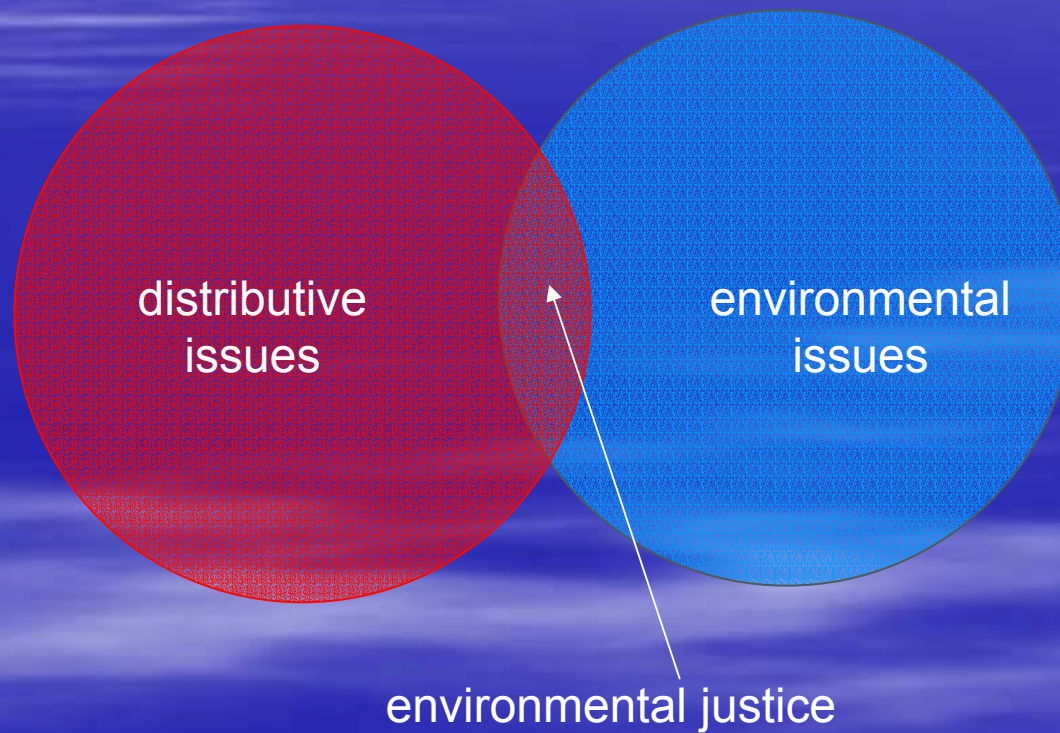
Distributive Justice in Environmental Law

- Conventional approach:
“Environmental Justice”

injustice suffered when environmental law disregards or disserves the interests of the disenfranchised and dispossessed

David H. Getches & David N. Pellow, *Beyond “Traditional” Environmental Justice*, in *Justice and Natural Resources* 3 (Kathryn M. Mutz et al., eds. 2002)

Distributive Justice in Environmental Law



Distributive Justice in Environmental Law

- Conventional approach:
“Environmental Justice”
 - focus on disadvantaged groups

Distributive Justice in Environmental Law

- Conventional approach:
“Environmental Justice”
 - focus on disadvantaged groups
- Aristotelian approach:
any unjust distribution of environmental harms and benefits
(distributive justice = giving to each his/her due)

Distributive Justice in Environmental Law

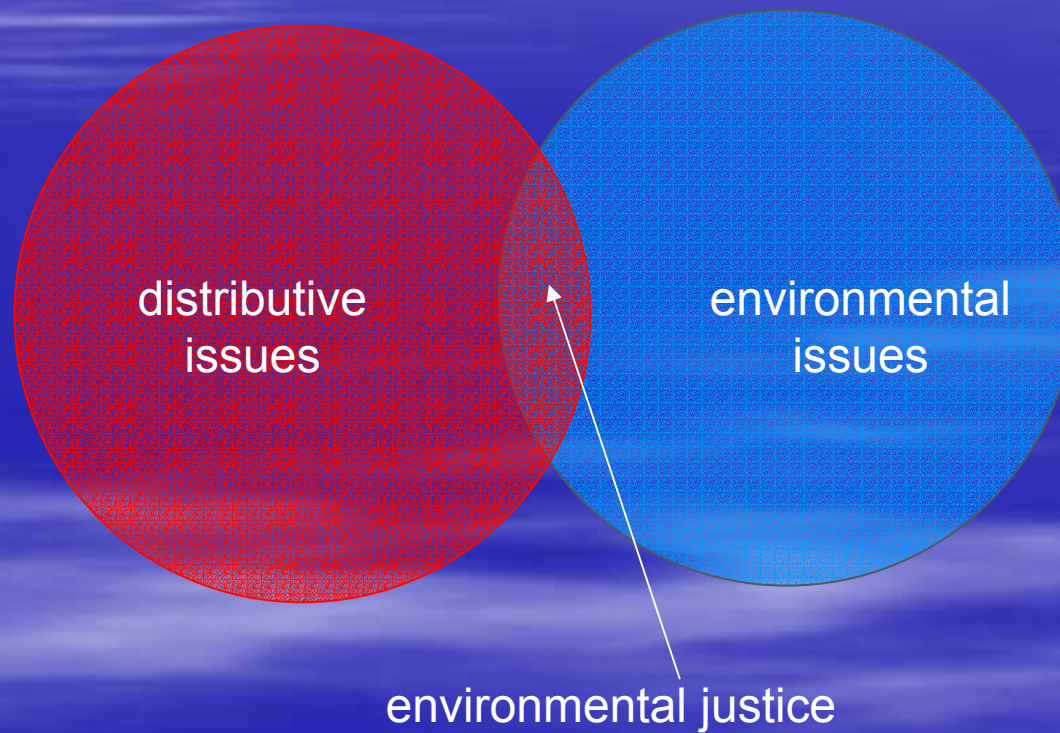
- Aristotelian approach:
any unjust distribution
 - all groups and individuals
(not disadvantaged alone)

Distributive Justice in Environmental Law

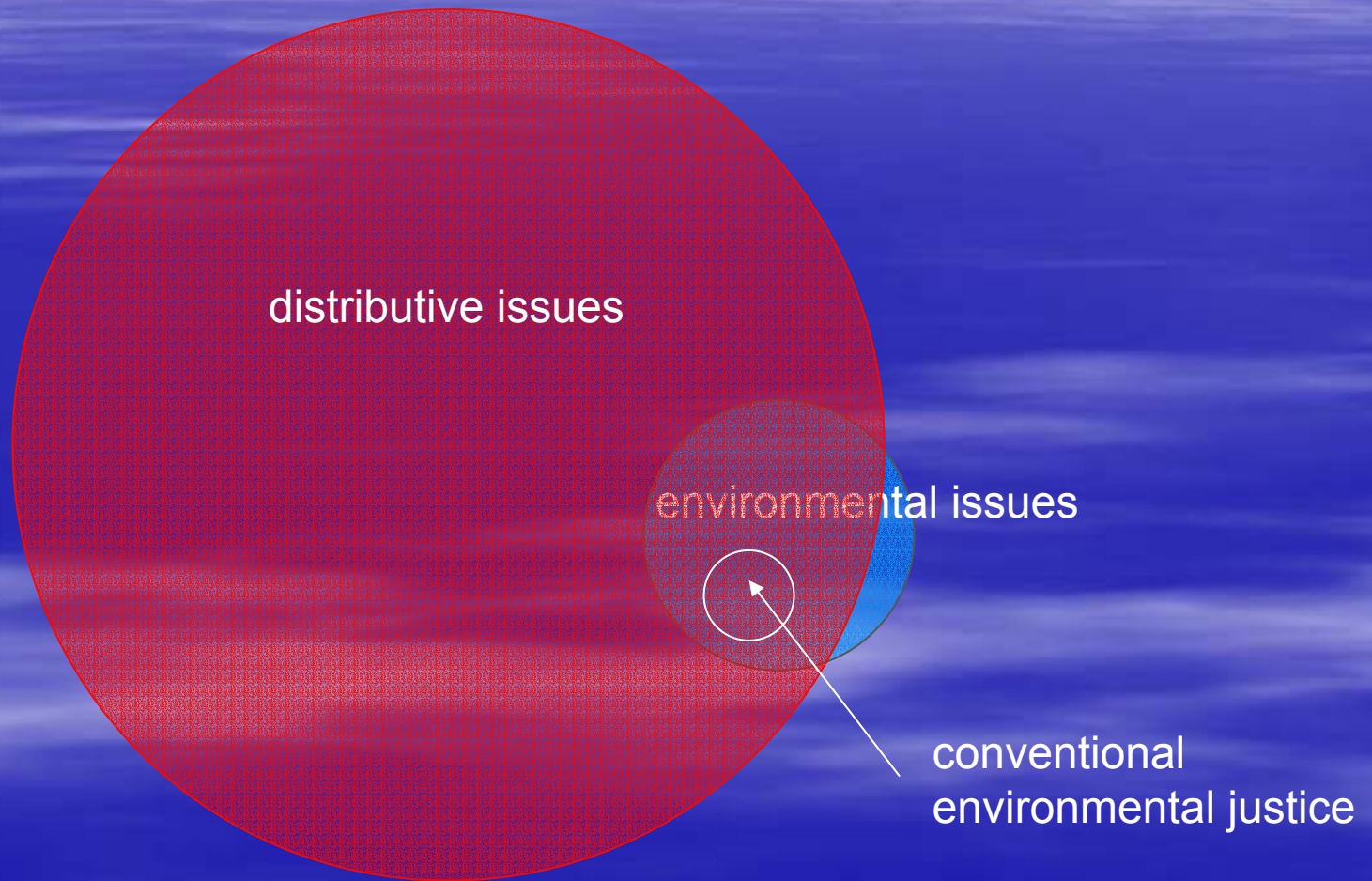
- Aristotelian approach:
any unjust distribution
 - all groups and individuals
(not disadvantaged alone)
 - purely formal

Ernest J. Weinrib, *Aristotle's Forms of Justice*, in *Justice, Law and Method in Plato and Aristotle* 133 (Spiro Panagiotou ed., 1987)

Distributive Justice in Environmental Law



Distributive Justice in Environmental Law



Conceptual Frameworks Compared

- “Aristotelian” Environmental Justice:
any unjust distribution
– *too wide, too formal, to be of any use?*

Conceptual Frameworks Compared

- “Aristotelian” Environmental Justice:
any unjust distribution
 - anthropocentric
 - rights-based

Conceptual Frameworks Compared

- “Aristotelian” Environmental Justice:
any unjust distribution
 - anthropocentric
 - rights-based
 - suited as basis for legal claims

Conceptual Frameworks Compared

Alternative Frameworks

- Ecological:
preservation of nature, ecological integrity

Conceptual Frameworks Compared

Alternative Frameworks

- Ecological:
preservation of nature, ecological integrity
– rights-based

Conceptual Frameworks Compared

Alternative Frameworks

- Ecological:
preservation of nature, ecological integrity
 - rights-based
 - non-anthropocentric

Conceptual Frameworks Compared

Alternative Frameworks

- Ecological:
 - rights-based
 - non-anthropocentric
- Economic:
correcting externalities, market failure

Conceptual Frameworks Compared

Alternative Frameworks

- Ecological:
 - rights-based
 - non-anthropocentric
- Economic:
 - correcting externalities, market failure*
 - anthropocentric

Conceptual Frameworks Compared

Alternative Frameworks

- Ecological:
 - rights-based
 - non-anthropocentric
- Economic:
 - correcting externalities, market failure*
 - anthropocentric
 - not rights-based (utilitarian)

Conceptual Frameworks Compared

- Ecological:
 - rights-based
 - non-anthropocentric
- Economic:
 - anthropocentric
 - utilitarian
- “Aristotelian” Environmental Justice:
 - anthropocentric
 - rights-based

Conceptual Frameworks Compared

Anthropocentric

Rights-Based

Ecological
Model

✓

Economic
Model

✓

Distributive
Model

✓

✓

Conceptual Frameworks Compared

Advantages of the Distributive Model

- Rights-talk suited to legal argument

Conceptual Frameworks Compared

Advantages of the Distributive Model

- Rights-talk suited to legal argument
- Anthropocentrism *crucial* to legal argument

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Advantages of the Distributive Model

- Rights-talk suited to legal argument
- Anthropocentrism *crucial* to legal argument

“Environmental law is, to a greater extent than other areas of law, a product of external values not rooted in the system of human dignity and thus it is difficult to integrate into our legal system.”

A. Dan Tarlock, *The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law*, 27 Loyola L.A. L. Rev. 1121 (1994)

Conceptual Frameworks Compared

Problems with the Ecological Model

Leopold's Land Ethic:

“A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.”

Aldo Leopold, *A Sand County Almanac with Sketches Here and There*
(1949)

Conceptual Frameworks Compared

Problems with the Ecological Model

“Should Trees Have Standing?”

Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972)

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Humans v. Environment

Nat'l Assn. of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997)
(Sentelle, J. *dissenting*)

The Distributive Model of Environmental Law

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“Civil Rights”

Environmental Justice

“Aristotelian”

Environmental Justice

The Distributive Model of Environmental Law

“Civil Rights”

Environmental Justice

- oppression of minority
by majority

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The Distributive Model of Environmental Law

“Civil Rights”

Environmental Justice

- oppression of minority by majority

“Aristotelian”

Environmental Justice

- oppression of minority by majority
- oppression of majority by minority
 - public choice

The Distributive Model of Environmental Law

“Civil Rights”

Environmental Justice

- oppression of minority by majority

“Aristotelian”

Environmental Justice

- oppression of minority by majority
- oppression of majority by minority
 - public choice
 - public trust

The Distributive Model of Environmental Law

“Civil Rights”

Environmental Justice

- oppression of minority by majority

“Aristotelian”

Environmental Justice

- oppression of minority by majority
- oppression of majority by minority
- any unfair environmental burden

Example: Emissions Trading

“Civil Rights”

Environmental Justice

- “disparate impact” (on disadvantaged group)

“Aristotelian”

Environmental Justice

Lily N. Chinn, *Can the Market Be Fair and Efficient? An Environmental Justice Critique of Emissions Trading*, 26 Ecology L.Q. 80 (1999)

Example: Emissions Trading

“Civil Rights”

Environmental Justice

- “disparate impact” (on disadvantaged group)

“Aristotelian”

Environmental Justice

- unfair burden on any group or individual

Example: Emissions Trading

“Civil Rights”

Environmental Justice

- “disparate impact” (on disadvantaged group)

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Environmental Justice

- unfair burden on any group or individual
 - disparate harm to anyone (not necessarily disadvantaged)

Example: Emissions Trading

“Civil Rights”

Environmental Justice

- “disparate impact” (on disadvantaged group)

“Aristotelian”

Environmental Justice

- unfair burden on any group or individual
 - disparate harm to anyone (not necessarily disadvantaged)
 - harm to general population with benefit to minority