

# ECOFEMINISM AS RESPONSIBLE GOVERNANCE: ANALYZING THE MERCURY REGULATIONS AS A CASE STUDY

*Joshua Lee\**

*Ecofeminism, a concept that links environmentalism and feminism, can help decisionmakers better understand the distributional implications of many environmental policies. Effective environmental policies must account for distributional inequity because the more resourceful party will more likely degrade the environment, and because the less resourceful party will disproportionately experience the harms. A crucial element in assessing how environmental benefits and burdens are unequally distributed is gender. Women may experience environmental harms differently from and disproportionate to men, and environmental harms can easily roll back various feminist causes. This Note analyzes EPA regulations of mercury emissions as a case study. The case study demonstrates that such policies could have been more effective, just, and durable if they had more thoroughly accounted for how mercury emissions harm women. A sound, responsible distributional analysis requires identification of the background law, the stakeholders and their underlying interests, and a policy's surplus value and its distribution. Ecofeminism can help in all three areas.*

Introduction . . . . .	520
I. <i>Ecofeminism as a Distributional Concern</i> . . . . .	522
A. <i>The Importance of Distributional Equity in Environmental Law and Policy</i> . . . . .	523
1. <i>Environmental Footprint</i> . . . . .	523
2. <i>Disproportionate Harms</i> . . . . .	524
B. <i>The Significance of Gender in Distributional Equity</i> . . . . .	525
1. <i>Gendered Environmental Harms: Environmentalism Needs Feminism</i> . . . . .	526
2. <i>Environmental Gendered Harms: Feminism Needs Environmentalism</i> . . . . .	528
II. <i>A Tale of Two Mercury Regulations</i> . . . . .	530
A. <i>Scientific and Historical Background</i> . . . . .	531
B. <i>George W. Bush's Clean Air Mercury Rule ("CAMR")</i> . . . . .	533
1. <i>Implementing the CAMR and Its Implications for HAP Pollution Levels</i> . . . . .	533
2. <i>The Concentration of Mercury Pollution</i> . . . . .	534
3. <i>Bargaining Power</i> . . . . .	536
4. <i>The Ecofeminist Alternative</i> . . . . .	537

---

\* J.D. Candidate, Harvard Law School, Class of 2018. The author would like to thank Professor Janet Halley for her academic guidance and feedback, and the editorial staff of the *Harvard Environmental Law Review* for their invaluable assistance. The author would also like to thank Professors Carolyn Merchant, Greta Gaard, and Ariel Salleh for providing advice on the field's background literature, and the Emmett Environmental Law and Policy Clinic at Harvard Law School for helping him better understand the legal and scientific implications of mercury pollution. Any mistakes or inaccuracies are the author's own.

C.	<i>Obama's Mercury and Air Toxics Standards ("MATS") Rule</i> . . .	537
1.	<i>Promulgation and Remand</i> . . . . .	538
2.	<i>Evaluating EPA's Cost-Benefit Analysis</i> . . . . .	539
3.	<i>Subsequent History and Cautious Optimism</i> . . . . .	542
III.	<i>Toward an Improved Distributional Analysis</i> . . . . .	542
A.	<i>Distributional Analysis: A Brief Introduction and Defense</i> . . . . .	543
B.	<i>An Ecofeminist Distributional Analysis of the Mercury Regulations</i> . . . . .	543
1.	<i>Identifying the Background Law</i> . . . . .	544
2.	<i>Identifying the Stakeholders and Their Underlying Interests</i> . . . . .	545
3.	<i>Identifying the Policy's Surplus Value and Distribution</i> . . . . .	546
	<i>Conclusion</i> . . . . .	546

## INTRODUCTION

In retrospect, the 2016 Presidential election may have marked the beginning of an anti-progressive era in modern American history. One of the most visible setbacks has been women's rights. Not only was gender bias a factor in the election, but, in addition, then-candidate Donald Trump made abusive comments towards women, both privately and in public.<sup>1</sup> The setback has not been purely symbolic.<sup>2</sup> For example, the Trump Administration has undermined protections for equal pay<sup>3</sup> and reproductive rights.<sup>4</sup>

Environmental protections have been hit hard as well.<sup>5</sup> It has been rare for a president to nominate someone so passionately against many of the U.S. Environmental Protection Agency's ("EPA") regulatory mandates as the Agency's head.<sup>6</sup> And while past presidents' policies prioritized economic growth over en-

- 
1. See Carly Wayne, Nicholas Valentino & Marzia Ocen, *How Sexism Drives Support for Donald Trump*, WASH. POST (Oct. 23, 2016), <http://perma.cc/7KCA-8477>.
  2. See Sabrina Siddiqui, *How Has Donald Trump's First Year Affected Women?*, THE GUARDIAN (Jan. 18, 2018), <https://perma.cc/787W-Z2RS>. See generally Sunny Frothingham & Shilpa Phadke, *100 Days, 100 Ways the Trump Administration Is Harming Women and Families*, CTR. FOR AM. PROGRESS (Apr. 25, 2017), <https://perma.cc/HHN3-8R2Q>.
  3. See James F. Peltz, *White House Stops Plan for Companies to Report Worker Pay by Race and Gender*, L.A. TIMES (Aug. 30, 2017), <https://perma.cc/VK32-MKTP>.
  4. See Julia Belluz, *How Women's Reproductive Rights Stalled Under Trump*, VOX (Jan. 30, 2018), <https://perma.cc/3JAU-E93R>.
  5. See generally Michael Greshko, Laura Parker & Brian Clark Howard, *A Running List of How Trump Is Changing the Environment*, NAT'L GEOGRAPHIC (Feb. 28, 2018), <https://perma.cc/53DD-GBYP>.
  6. See Eric Lipton & Coral Davenport, *Scott Pruitt, Trump's E.P.A. Pick, Backed Industry Donors Over Regulators*, N.Y. TIMES (Jan. 14, 2017), <https://perma.cc/YMG6-YLKD>. President Ronald Reagan also nominated an Administrator under an anti-regulatory agenda. However, after massive political controversies, President Reagan took a more moderate stance. See

vironmental preservation, rarely did they question the integrity of science itself.<sup>7</sup> The Trump Administration has questioned the fundamental value that society puts on science via budget cuts,<sup>8</sup> blacklisting,<sup>9</sup> and censorship.<sup>10</sup> These policies undermine the backbone of environmental activism by questioning the scientific conclusions upon which the environmental movement is based.

Ecofeminism, “a movement or theory that applies feminist principles and ideas to ecological issues,”<sup>11</sup> can connect the environmentalist<sup>12</sup> and feminist<sup>13</sup> criticisms against the Trump Presidency. The idea originated in the early 1970s with French writer Françoise d’Eaubonne’s book, *Le féminisme ou la mort* [Feminism or Death] and was more fully developed by the theorist Ynestra King.<sup>14</sup> While perspectives on the nature and degree of the connection between environmentalism and feminism may vary,<sup>15</sup> ecofeminists typically subscribe to

---

Philip Shabecoff, *Reagan and Environment: To Many, a Stalemate*, N.Y. TIMES (Jan. 2, 1989), <https://perma.cc/VRS8-LLAD>.

7. See Lawrence M. Krauss, *Donald Trump’s War on Science*, NEW YORKER (Dec. 13, 2016), <https://perma.cc/X595-LZS8> (describing the Administration’s nominees as “part of a larger effort to undermine the institution of science”).
8. Sara Reardon et al., *Science Under Fire in Trump Spending Plan*, 543 NATURE 471 (2017).
9. See Joel Clement, Opinion, *I’m a Scientist. I’m Blowing the Whistle on the Trump Administration*, WASH. POST (July 19, 2017), <https://perma.cc/G3S3-9SLR>.
10. Michael Biesecker & Seth Borenstein, *EPA Science Under Scrutiny by Trump Political Staff*, ASSOCIATED PRESS (Jan. 26, 2017), <https://perma.cc/NM7T-HZHS>.
11. *Ecofeminism*, MERRIAM-WEBSTER (2017), <https://perma.cc/C478-KLYX>. An alternative definition would attempt to go a step further and claim that ecofeminism must also “create a unified praxis to end all forms of domination.” Kate Sandilands, *Ecofeminism and its Discontents: Notes Toward a Politics of Diversity*, 8 THE TRUMPETER 90, 90 (1991). Because this Note focuses on environmental governance without the attempt to craft a different epistemological infrastructure, cf. *infra* note 63, it does not find the additional mandate necessary.
12. This Note embraces the “advocacy of the preservation, restoration, or improvement of the natural environment.” *Environmentalism*, MERRIAM-WEBSTER DICTIONARY (2017), <https://perma.cc/2Z93-6YXX>. However, this Note finds that the more extreme ethic of promoting the natural environment at the expense of humans is unnecessary for ecological integrity. See, e.g., JOHN BARRY, RETHINKING GREEN POLITICS 24–25 (1999) (rejecting “strong” environmental ethics that disavow anthropocentrism, such as deep ecology).
13. This Note adopts Professor Janet Halley’s three-part definition of feminism: (1) “a distinction between m and f”; (2) describing “some kind of subordination as between m and f”; and (3) normatively opposing “the subordination of f.” JANET HALLEY, SPLIT DECISIONS 17–18 (2006). This definition is used because it is the most inclusive. It can utilize different—often conflicting—theories of feminism depending on the circumstances. For example, this definition even accommodates conservative feminists, who might disagree with other feminists on issues such as abortion.
14. See CAROLYN MERCHANT, RADICAL ECOLOGY 194 (2d ed. 2005); see also GRETA GAARD, ECOLOGICAL POLITICS 13–14 (1998).
15. See generally GAARD, *supra* note 14, at 31–47; MERCHANT, *supra* note 14, at 197–99; NOËL STURGEON, ECOFEMINIST NATURES 169–86 (1997). Given that the Note focuses on incremental reform of the existing environmental law system, it will borrow many ideas from liberal ecofeminism, which considers promoting liberty and equality under a democratic po-

the following four arguments: (1) important connections exist between the oppression of women and the oppression of nature; (2) understanding the character of this connection is crucial to resolving these forms of oppression; (3) feminism must incorporate an environmental perspective; and (4) environmentalism must incorporate a feminist perspective.<sup>16</sup> Ecofeminism can improve how we approach environmental problems, an area that deserves special attention because certain environmental harms might be irreversible on human timescales.<sup>17</sup> Even a future administration or policy may not be able to undo prior damage.

This Note presents how ecofeminism can improve environmental governance. Part I establishes that an effective environmental policy should consider distributional implications, and that gender is an important factor in assessing how environmental harms and benefits are distributed. Part II analyzes different EPA regulations of mercury emissions as a case study. Specifically, the Note analyzes President George W. Bush's Clean Air Mercury Rule ("CAMR") and President Barack Obama's Mercury and Air Toxics Standards ("MATS") through an ecofeminist lens. Finally, Part III presents how ecofeminism improves distributional analysis for a more responsible policy. Ecofeminism can help decisionmakers identify the background law, the stakeholders and their underlying interests, and a policy's surplus value and its distribution.

## I. ECOFEMINISM AS A DISTRIBUTIONAL CONCERN

Understanding how an environmental policy will help some groups at the expense of others is crucial for responsible environmental governance for two reasons. One, typically the more privileged parties disrupt the environment more through greater pollution and resource consumption. Two, the less privileged parties disproportionately experience the effects of such disruption. An important factor in analyzing this distributional dynamic is gender. If financial

---

litical order as the most effective way to accomplish ecofeminism's ideals. See MERCHANT, *supra* note 14, at 200–01. At the same time, Part III demonstrates that liberal ecofeminism does not necessarily need to operate under the neoclassical economics assumption that "free-market exchanges motivated by individual preferences and unhampered by transaction costs leave all players better off." JANET HALLEY ET AL., GOVERNANCE FEMINISM 256 (2018).

16. Karen J. Warren, *Feminism and Ecology: Making Connections*, 9 ENVTL. ETHICS 3, 4–5 (1987).
17. Environmental problems can be irreversible in two ways. First, species extinction and the resulting biodiversity loss are permanent injuries that no human action can undo, which makes them more serious than other events. See RICHARD J. TOBIN, THE EXPENDABLE FUTURE 14 (1990). Second, many environmental systems operate under positive feedback loops; once an ecosystem crosses a certain threshold, the process will run and accelerate by itself, often to the point of no return. A concerning example of a positive feedback would be climate change. See FRED PEARCE, WITH SPEED AND VIOLENCE: WHY SCIENTISTS FEAR TIPPING POINTS IN CLIMATE CHANGE 139–40 (2007).

capability determines the environmental burden on people, then women, typically on the short end of the distribution of power and resources, will suffer more. In addition, women may experience environmental harms differently from men—both qualitatively and quantitatively—due both to biology and to social expectations about women’s role in society. The converse is also true; because the distribution of power and resources includes an environmental component, a comprehensive ecofeminist agenda must consider how women are affected by the environment.

### *A. The Importance of Distributional Equity in Environmental Law and Policy*

As a starting premise, environmental protection entails a value judgment about what kind of natural environment humans want to inhabit because the Earth itself is apathetic as to how it operates—nature simply responds to forces of change.<sup>18</sup> For example, species extinction is considered a tragedy because many people consider the phenomenon to be something undesirable, whether that rationale be utilitarian or deontological. The value judgments we make about which ecosystems are desirable should account for distributional implications for two reasons. One, parties with greater political and economic privilege typically have larger environmental footprints; even if they have the capacity to reverse such conditions, the solution might either come too late or come at the expense of marginalized parties. Two, parties with fewer resources and less political influence will disproportionately experience the environmental harms.

#### *1. Environmental Footprint*

The parties with more power and resources contribute more to environmental degradation, both via greater pollution and resource consumption. Developed, industrialized nations are the major culprits of pressure on the environment,<sup>19</sup> and wealthier individuals typically have larger ecological footprints.<sup>20</sup> It is true that these powerful parties have capabilities to reverse environmental degradation as well.<sup>21</sup> However, there are two reasons why those in

- 
18. Oftentimes, these forces of change are much greater than human activities. See GREGG EASTERBROOK, *A MOMENT ON THE EARTH* 25 (1995) (“Earth has survived . . . reversals of the planet’s magnetic poles; the rearrangement of continents; transformation of plains into mountain ranges and of seas into plains.”).
  19. See Jan Weinzettel et al., *Affluence Drives the Global Displacement of Land Use*, 23 *GLOBAL ENVTL. CHANGE* 433, 433 (2013).
  20. See, e.g., Jared Diamond, Opinion, *What’s Your Consumption Factor?*, *N.Y. TIMES* (Jan. 2, 2008), <https://perma.cc/F7AF-Y9KU>.
  21. See, e.g., John Gelissen, *Explaining Popular Support for Environmental Protection: A Multilevel Analysis of 50 Nations*, 39 *ENV’T & BEHAV.* 392, 395–96 (2007) (describing environmental quality as a luxury good, in which demand for a cleaner environment increases as income rises); John Bellamy Foster, *Capitalism’s Environmental Crisis: Is Technology the An-*

power by themselves may not improve conditions, and may even make things worse.<sup>22</sup> First, for some environmental harms, the powerful parties' capabilities alone will simply be insufficient because the remedy might come too late.<sup>23</sup> Second, powerful parties may have an incentive to externalize the environmental concern to someone else.<sup>24</sup> Locally, this could mean wealthy suburbs holding NIMBY, or "Not in My Backyard," protests against landfills in their neighborhood. Nationally, this could mean embracing nuclear power while dumping nuclear waste in native lands,<sup>25</sup> or installing incinerators in areas with less political clout.<sup>26</sup> Finally, at the global scale, this could mean exporting electronic waste,<sup>27</sup> or blocking patents that help developing countries adopt renewable energy technology.<sup>28</sup>

## 2. *Disproportionate Harms*

The fact that resourceful parties can almost always outsource environmental burdens to someone else leads to another reason why distributional implica-

*swer?*, 33 HITOTSUBASHI J. SOC. STUD. 143, 143 (2001) (discussing how capitalism promotes technology, which mitigates environmental impacts); Theodore Panayotou, *Chapter 2: Economic Growth and the Environment*, 2 ECON. SURV. EUR. 45, 52 (2003), <https://perma.cc/3CBB-XAF9> (discussing how transition in economic structure from an industrial to service economy mitigates environmental degradation); Anja Kollmuss & Julian Agyeman, *Mind the Gap: Why Do People Act Environmentally and What are the Barriers to Pro-Environmental Behavior?*, 8 ENVTL. EDUC. RESEARCH 239, 248–49 (2002) (discussing how pro-environmental behaviors require institutional support). See generally Soumyananda Dinda, *Environmental Kuznets Curve Hypothesis: A Survey*, 49 ECOLOGICAL ECON. 431 (2004) (discussing the Environmental Kuznets Curve hypothesis, which posits that the environment deteriorates in initial stages of industrialization but bounces back in later stages).

22. See, e.g., Sean Sweeney, *Earth to Labor: Economic Growth is No Salvation*, 21 NEW LAB. F. 10 (2012) (identifying environmental perils that result from economic growth).
23. See *supra* note 17 and accompanying text. Some scientists even declare that climate change has reached irreversible levels. See Susan Solomon et al., *Persistence of Climate Changes Due to a Range of Greenhouse Gases*, 107 PROC. NAT'L ACAD. SCI. 18,354, 18,354–58 (2010).
24. For instance, renewables can also have adverse environmental consequences. See, e.g., Dustin Mulvaney, *Solar Energy Isn't Always as Green as You Think*, IEEE SPECTRUM (Nov. 13, 2014), <https://perma.cc/C22X-WWQ5> (noting that production processes for solar panels have led to increased water pollution in China).
25. See, e.g., Nuclear Waste Policy Amendments Act of 1987, 42 U.S.C. § 10172 (2012) (directing nuclear waste to Yucca Mountain).
26. Laura Pulido, *Rethinking Environmental Racism: White Privilege and Urban Development in Southern California*, 90 ANNALS ASS'N AM. GEOGRAPHERS 12, 31 (2000) ("[Central Los Angeles,] . . . as a politically weak and industrially oriented area, attracts projects like incinerators . . .").
27. See Charles W. Schmidt, *Unfair Trade: E-Waste in Africa*, 114 ENVTL. HEALTH PERSP. A232, A234 (2006).
28. See Joshua D. Sarnoff, *The Patent System and Climate Change*, 16 VA. J.L. & TECH. 301, 318–19 (2011).

tions matter in environmental policymaking: the weaker party will always bear the brunt of environmental degradation, which frustrates our intuition about how governments should administer justice. Not only do those marginalized have less clout to obstruct the powerful entity, but they also have the least resources to handle the challenges that result from such actions. In fact, those in power rarely need to worry—they can adapt. If sea level rises because of climate change, developed countries can construct levees or implement sophisticated migration policies. The rich can also relocate. In contrast, small island nations—those that contribute little to global greenhouse gas emissions—would risk getting wiped off the map. Residents in coastal areas with modest means who therefore cannot establish new homes would become climate refugees. For an example of the effects of this power and resource imbalance in domestic environmental policy, one need look no further than Hurricane Katrina, in which President Bush's decision to ignore hurricane warnings and cut levee-construction funding led to one of the worst natural disasters suffered by the African American poor.<sup>29</sup> In sum, discussing environmental degradation is incomplete without considering what the effect will be on the least privileged communities.

### *B. The Significance of Gender in Distributional Equity*

If considering distributional equity among populations is crucial to environmental policymaking, then this analysis would be incomplete without accounting for gender,<sup>30</sup> because people typically experience environmental harms differently based on their gender identity. And women may also experience different environmental harms by virtue of their occupational or familial roles. An environmental analysis should account for the different economic, social, and biological positions of men and women, as these positions will impact the differential environmental burdens and benefits that each gender experiences. Relatedly, to advance gender equality, feminists must also account for how women are affected by the environment because gendered environmental harms can possibly overwhelm progress made in other women's causes.

---

29. See Henry A. Giroux, *Reading Hurricane Katrina: Race, Class, and the Biopolitics of Disposability*, 33 *C. LITERATURE* 171, 184–85 (2006).

30. See generally Nandita Singh, *Women's Participation in Local Water Governance: Understanding Institutional Contradictions*, 10 *GENDER, TECH. & DEV.* 61, 64 (2006) (arguing that women's participation in local governance is crucial for justice, efficiency, and diversity).

1. *Gendered Environmental Harms: Environmentalism Needs Feminism*

If population groups with the fewest resources are hurt the most, the fact that more women are in poverty than men<sup>31</sup> means that if a natural disaster strikes, the event does not affect each gender equally. Women are more likely than men to lack the financial capability to resist and recover from the hardship. Statistical studies have demonstrated that natural disasters have a greater impact on the life expectancy of women than men, and the greater the gender discrimination in the country affected by the disaster, the more harm inflicted on women.<sup>32</sup> This phenomenon can be explained by the fact that socioeconomic advantages are critical to reduced vulnerability, and if a society limits access to those advantages if a person is a woman, she will be more vulnerable to environmental hazards.<sup>33</sup>

Aside from socioeconomic differences, gendered environmental harm surfaces in two additional ways. The first manifestation is through occupational experiences that expose women to different environmental risks than men. For example, many women in rural areas of developing countries are tasked with collecting food, water, and fuel for the family.<sup>34</sup> These responsibilities force women to be in “closest contact with the environment,”<sup>35</sup> and natural disasters at these sites would put women at greater risk than men. In the United States, occupational segregation based on gender is pervasive,<sup>36</sup> and if different jobs expose workers to different toxins or pollutants, the harm that men and women are vulnerable to can be different. As an illustration, women, who are the primary workers at nail salons, are vulnerable to toxic chemicals in nail products unless they work in a location that uses safer varieties.<sup>37</sup> This does not mean that men are immune from environmental harms, nor does it mean that women

- 
31. See Sandra Fredman, *Women and Poverty—A Human Rights Approach*, 24 AFR. J. INT’L & COMP. L. 494, 496 (2016).
  32. Eric Neumayer & Thomas Plümper, *The Gendered Nature of Natural Disasters: The Impact of Catastrophic Events on the Gender Gap in Life Expectancy, 1981–2002*, 97 ANNALS ASS’N AM. GEOGRAPHERS 551, 560–62 (2007).
  33. See Susan L. Cutter, Bryan J. Boruff & W. Lynn Shirley, *Social Vulnerability to Environmental Hazards*, 84 SOC. SCI. Q. 242, 246 (2003).
  34. IRENE DANKELMAN & JOAN DAVIDSON, *WOMEN AND THE ENVIRONMENT IN THE THIRD WORLD* 4 (2013).
  35. Abul Kalam Azad, Khondoker Mokaddem Hossain & Mahbuba Nasreen, *Flood-Induced Vulnerabilities and Problems Encountered by Women in Northern Bangladesh*, 4 INT’L J. DISASTER RISK SCI. 190, 190 (2013).
  36. E.g., ARIANE HEGEWISCH & HEIDI HARTMANN, INST. FOR WOMEN’S POLICY RESEARCH, *OCCUPATIONAL SEGREGATION AND THE GENDER WAGE GAP: A JOB HALF DONE* 3–8 (2014), <https://perma.cc/JYW7-KBGN>.
  37. See Julia Carrie Wong, *US Nail Salons: The Challenge to Protect Workers from Toxic Chemicals*, THE GUARDIAN (Nov. 28, 2017), <https://perma.cc/9Y75-326F>.



are always disproportionately harmed by the environment.<sup>38</sup> It simply means that an environmental analysis that does not account for the differential exposures resulting from social factors is incomplete.

The second manifestation is through environmental harms tied to women's social role in caregiving, especially in childrearing. The social burden of childrearing generates environmental harms that disproportionately affect women. If a child becomes sick because of pollution, many traditional societies expect the mother to bear the burden of taking care of the child. This could be especially dangerous if the illness is caused by infectious agents.<sup>39</sup> As climate change will likely increase the prevalence of infectious disease carriers,<sup>40</sup> this concern will only be amplified.

Biology is also a factor; women have different physical tolerances to toxic chemicals than men.<sup>41</sup> Yet the scientific community determines safe chemical loads based on men's body tolerance and exposure, because it assumes that the male body is the scientific norm.<sup>42</sup> Overlooking the physiological differences and thus sanctioning greater chemical exposure may have increased women's risks of various preventable disorders.<sup>43</sup> More research needs to be done in this area, both in identifying the comparative physiological hazards from chemical exposure between men and women, and distinguishing whether the environmental risk is attributable to sex or gender.<sup>44</sup>

Environmental protection is a hollow aspiration if it does not consider how environmental services are delivered or withheld in context. One important way to understand these distributional effects is gender, because women, depending on the cultural and societal context, are differently exposed to certain risks relative to men or simply experience environmental harms differently due to biology. Without considering women's unique social and biological cir-

- 
38. See, e.g., Neumayer & Plümper, *supra* note 32, at 554 (discussing the ways in which natural disasters affect men and women differently in different contexts).
39. WORLD HEALTH ORG., ADDRESSING SEX AND GENDER IN EPIDEMIC-PRONE INFECTIOUS DISEASES 3–4 (2007), <https://perma.cc/W3XD-X5H8>.
40. See, e.g., CLAIRE L. PARKINSON, COMING CLIMATE CRISIS? 136 (2010) (discussing how warmer temperatures increase the prevalence of disease carriers such as insects and rodents).
41. Ioannis Polychronakis et al., *Workplace Health Promotion Interventions Concerning Women Workers' Occupational Hazards*, in PROMOTING HEALTH FOR WORKING WOMEN 73, 77–79 (Athena Linos & Wilhelm Kirch eds., 2008).
42. Susan Buckingham & Rakibe Kulcur, *Gendered Geographies of Environmental Injustice*, 41 ANTIPODE 659, 664–65 (2009).
43. See GAARD, *supra* note 14, at 25.
44. See Lucía Artazcoz et al., *Occupational Epidemiology and Work Related Inequalities in Health: A Gender Perspective for Two Complementary Approaches to Work and Health Research*, 61 EPIDEMIOLOGY & COMMUNITY HEALTH ii39, ii39 (2007); Jane E. Clougherty, *A Growing Role for Gender Analysis in Air Pollution Epidemiology*, 118 ENVTL. HEALTH PERSP. 167, 167 (2010).

cumstances, policy solutions addressing environmental harm and public health will be ineffective.

## 2. *Environmental Gendered Harms: Feminism Needs Environmentalism*

While women have made considerable social advancements in the last fifty years,<sup>45</sup> activists have not, until recently, given sufficient attention to the intersection of women's rights and environmental degradation. Recognizing the unique environmental harms inflicted on women is the logical extension of taking intersectionality seriously. Women are oppressed for many reasons beyond gender, such as race, class, sexuality, or nationality. To truly advance women's rights, one cannot focus on certain factors at the expense of others because other aspects of identity influence how different women experience womanhood.<sup>46</sup> Ecofeminism demands that feminism consider the environment as one of those factors affecting women's identities. Gendered environmental harm deserves more attention as a source of substantial harm that threatens to roll back feminism's progress on other fronts.

Feminism cannot champion women's rights without environmental sustainability for two reasons. First, environmental rights are a component of human rights. To the extent that feminism has frequently relied on human rights discourse,<sup>47</sup> it cannot ignore the emerging international consensus that there is a human right to a healthy environment.<sup>48</sup> The international community, even in its legal documents, already acknowledges environmental protection as a human right.<sup>49</sup> Several U.S. states have adopted environmental protection in their state constitutions as well.<sup>50</sup>

Second, environmental harms can roll back progress on seemingly unrelated feminist causes. Studies indicate that domestic violence and sexual assault

45. See, e.g., HALLEY ET AL., *supra* note 15, at 6–18 (discussing how feminism informed policies related to sexual violence, the family and the market, and modes of governance).

46. See Karen J. Warren, *The Power and the Promise of Ecological Feminism*, 12 ENVTL. ETHICS 125, 132, 132 n.12 (1990).

47. See, e.g., VALERIE BRYSON, FEMINIST POLITICAL THEORY 159 (1992) (discussing how liberal feminism argues that women “are entitled to full human rights”); Hillary Rodham Clinton, Remarks to the United Nations Fourth World Conference on Women (Sept. 5, 1995), CLINTON WHITE HOUSE ARCHIVES, <https://perma.cc/U2VK-B9CL> (“[W]omen’s rights are human rights.”).

48. See Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65, 74–89 (2002).

49. See, e.g., G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social, and Cultural Rights, art. 12 (Dec. 16, 1966), <https://perma.cc/L8XW-3EF8> (articulating that the right to enjoy “the highest attainable standard of physical and mental health” shall include steps necessary to improve “all aspects of environmental and industrial hygiene”).

50. See Jack R. Tuholske, *U.S. State Constitutions and Environmental Protection: Diamonds in the Rough*, 21 WIDENER L. REV. 239, 239 (2015).

increase in times of environmental stress,<sup>51</sup> including after a major pollution event such as an oil spill.<sup>52</sup> But even aside from structural violence in the private realm, environmental degradation also induces governments to prioritize security over human rights. Such re-prioritization has two sinister implications. One implication is the direct threat, which is that a more authoritarian state can emerge and curtail civil liberties. Environmental deterioration puts immense stress on societies. As a result, natural disasters are usually followed by some form of police—or even military—deployment to secure order.<sup>53</sup> The water crisis in Flint, Michigan, demonstrates that even man-made environmental disasters such as lead contamination can cause the government to declare a state of emergency.<sup>54</sup> While this type of response is necessary to mitigate secondary casualties, it may nonetheless be in tension with civil liberties.<sup>55</sup> Given that modern feminist accomplishments have extensively relied on the language of civil liberties,<sup>56</sup> threats to civil liberties—including environmental harms—must be taken seriously.

Another implication is the indirect threat that the government, by reallocating its resources to other needs, might lessen or even withdraw protections and benefits that women would have normally enjoyed. Protecting rights requires some coercive power of the state, such as prosecuting employers who discriminate based on gender or perpetrators of sexual violence. A shift in governmental priorities due to environmental stress could mean less deterrence against violators of women's rights, which would likely increase gender-based harms.<sup>57</sup> Relatedly, the state is also the provider of public goods,<sup>58</sup> some of which are directed towards women, such as reproductive healthcare. Any reallocation of the state's resources due to an environmental crisis might result in women losing such benefits. This scenario is more likely than what we might

- 
51. See Jonathan Lovvorn, *Climate Change Beyond Environmentalism Part I: Intersectional Threats and the Case for Collective Action*, 29 GEO. ENVTL. L. REV. 1, 31–32 (2016).
  52. See Ariane L. Rung et al., *Depression, Mental Distress, and Domestic Conflict among Louisiana Women Exposed to the Deepwater Horizon Oil Spill in the WaTCH Study*, 124 ENVTL. HEALTH PERSP. 1429, 1432–34 (2016) (“Residents who were highly exposed to the [Exxon Valdez Oil Spill] were significantly more likely to report conflict with their spouses or partners and to report increases in domestic violence in their community.” (citations omitted)).
  53. See, e.g., Roberta Berthelot, *The Army Response to Hurricane Katrina*, U.S. ARMY (Sept. 10, 2010), <https://perma.cc/8XWX-YYKR>.
  54. See Ashley Southall, *State of Emergency Declared Over Man-Made Water Disaster in Michigan City*, N.Y. TIMES (Jan. 17, 2016), <https://perma.cc/8RM3-CDQ7>.
  55. See Matthew S. Belser, *Martial Law after the Storm: A Constitutional Analysis of Martial Law and the Aftermath of Hurricane Katrina*, 35 S.U. L. REV. 147, 148–49 (2007).
  56. E.g., U.S. CONST. amend. XIX (women's right to vote); Violence Against Women Act of 1994, 42 U.S.C. §§ 13701–14040 (2012) (protection from domestic violence); *Roe v. Wade*, 410 U.S. 113 (1973) (women's right to abortion).
  57. See *supra* note 51 and accompanying text.
  58. Robert I. Rotberg, *Failed States in a World of Terror*, 81 FOREIGN AFF. 127, 131 (2002).

expect—recovering from natural disasters is costly,<sup>59</sup> and scholars fear that events such as climate change will weaken the government’s ability to provide “personal security, social services, and economic opportunities.”<sup>60</sup>

## II. A TALE OF TWO MERCURY REGULATIONS

This Note examines two different presidential administrations’ environmental regulations of mercury to analyze how ecofeminism could have improved policy. Mercury regulation presents an especially enlightening case study for two reasons. First, mercury pollution has extremely debilitating effects on marginalized or vulnerable populations such as children (for whom adverse neurological effects are more prominent), and indigenous communities whose diet is heavily reliant on fish (in which mercury bioaccumulates).<sup>61</sup> Women are especially harmed as well, both because the substance is more physiologically harmful to women than men and because typically the burden of childcare falls on women. Second, since Congress delegated to EPA the power to regulate mercury under section 112 of the Clean Air Act (“CAA”),<sup>62</sup> it provides an ideal case study to understand and analyze how two different administrations—those of George W. Bush and Barack Obama—have interpreted the same legislative text. Both interpretations would have benefited greatly from an ecofeminist framework.<sup>63</sup> Ecofeminism would have avoided President Bush’s cap and trade solution to mercury because such a policy would concentrate the harmful effects of pollution on certain groups of people, including women. Ecofeminism could also demonstrate that President Obama’s stricter regulation was justifiable under a cost-benefit analysis because of the substantial benefits that would ac-

---

59. *Natural Disasters Cost U.S. a Record \$306 Billion Last Year*, CBS NEWS (Jan. 8, 2018), <https://perma.cc/B2FW-N5HB/>.

60. See Jon Barnett & W. Neil Adger, *Climate Change, Human Security and Violent Conflict*, 26 POL. GEOGRAPHY 639, 646–47 (2007).

61. See UNEP CHEMICALS, GLOBAL MERCURY ASSESSMENT 38–40 (2002), <https://perma.cc/A32F-G9UM>.

62. 42 U.S.C. § 7412 (2012).

63. This Note recognizes that one way of applying ecofeminist thought would be to criticize the larger structures in place, positing that the system itself is incapable of taking women’s harms seriously. See, e.g., VAL PLUMWOOD, ENVIRONMENTAL CULTURE 4–5 (2002) (identifying rationalism and human-nature dualism as the source of the problem); cf. ROBIN WEST, CARING FOR JUSTICE 164–74 (1997) (criticizing modern jurisprudence’s lack of imagination for conceptualizing the full nature of harm). However, this Note will adopt a more limited scope. Given that the CAA is in place and EPA can execute rules to curb mercury emissions, and that courts can review these rules, can ecofeminism position itself in this institutional landscape? Cf. Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 340–47 (2006) (describing how feminists effectively used institutions to instill their ideas).

crue to women by relieving them of many childcare and domestic labor burdens.

### *A. Scientific and Historical Background*

The dangers of mercury poisoning have been known to humanity since the time of ancient Egypt.<sup>64</sup> Anthropogenic mercury pollution became a modern concern with coal-fired power plants, which are one of the largest sources of mercury emissions.<sup>65</sup> Many of the mercury emissions from these power plants settle locally,<sup>66</sup> and the microbial reactions in nearby aquatic environments transform these chemicals into methylmercury, which moves up the food chain through bioaccumulation.<sup>67</sup> Ultimately, humans absorb this toxic chemical primarily by consuming fish.<sup>68</sup>

The long-term health effects can be devastating. Aside from the scientific consensus that methylmercury is a neurotoxicant, methylmercury can also be carcinogenic and harm one's reproductive system, immune system, and cardiovascular health.<sup>69</sup> The tragedy in Minamata, Japan, where large-scale industrial mercury pollution poisoned thousands of residents,<sup>70</sup> demonstrated the seriousness of methylmercury's harms.

Despite this awareness of mercury as a public health concern, governmental efforts to control mercury emissions remained inadequate. The statute was not necessarily the problem—the CAA gave EPA the tools necessary to regulate mercury emissions. In the 1970 CAA, EPA had three options for regulating mercury: (1) identify mercury as a “criteria air pollutant” and set emission

- 
64. See Paul A. Neal, *Mercury Poisoning from the Public Health Viewpoint*, 28 AM. J. PUB. HEALTH 907, 907 (1938).
65. See UNEP CHEMICALS, *supra* note 61, at 9. EPA has estimated that coal-fired power plants account for about half of the anthropogenic mercury emissions in the United States, based on 2005 figures and 2016 projections. See National Emission Standards for Hazardous Air Pollutants from Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 76 Fed. Reg. 24,976, 25,002 (proposed May 3, 2011) (to be codified at 40 C.F.R. pt. 60, 63).
66. See MICHAEL SHORE, ENVTL. DEF., OUT OF CONTROL AND CLOSE TO HOME: MERCURY POLLUTION FROM POWER PLANTS 11–12 (2003), <https://perma.cc/V8W5-U5UT>; see also Emily M. White, Gerald J. Keeler & Matthew S. Landis, *Spatial Variability of Mercury Wet Deposition in Eastern Ohio: Summertime Meteorological Case Study Analysis of Local Source Influences*, 43 ENVTL. SCI. & TECH. 4946, 4952 (2009).
67. See, e.g., James G. Wiener et al., *Toxicological Significance of Mercury in Yellow Perch in the Laurentian Great Lakes Region*, 161 ENVTL. POLLUTION 350, 354–55 (2012).
68. See UNEP CHEMICALS, *supra* note 61, at 38.
69. See Young-Seoub Hong, Yu-Mi Kim & Kyung-Eun Lee, Special Article, *Methylmercury Exposure and Health Effects*, 45 J. PREVENTIVE MED. & PUB. HEALTH 353, 355–58 (2012).
70. See Shigeo Ekino et al., *Minamata Disease Revisited: An Update on the Acute and Chronic Manifestations of Methyl Mercury Poisoning*, 262 J. NEUROLOGICAL SCI. 131, 131 (2007).

standards (sections 108–110);<sup>71</sup> (2) identify it as a “hazardous air pollutant” (“HAP”) and set stricter emission standards (section 112);<sup>72</sup> or (3) directly promulgate regulations for new stationary sources of pollution such as power plants (section 111),<sup>73</sup> which would include how much mercury such sources could release. Nonetheless, in the twenty years after the 1970 CAA, EPA merely set mercury emission standards for ore processing facilities and cell chlor-alkali plants,<sup>74</sup> and sludge from wastewater treatment plants;<sup>75</sup> power plants remained unregulated.<sup>76</sup> In EPA’s defense, mandating a decrease in mercury emission from coal-fired power plants was incredibly difficult. Not only was the relationship between mercury emissions and their final effect on public health still scientifically uncertain, but also the pollutant-reducing technology was costly—an onerous regulation could economically burden a major industry.

In 1990, Congress took the first meaningful step towards regulation of mercury from power plants. Congress amended the statute and explicitly listed “Mercury Compounds,” defined as “any unique chemical substance that contains [mercury] . . . as part of that chemical’s infrastructure,” as a HAP to be regulated under section 112 of the CAA.<sup>77</sup> However, this by itself still did not do much. Congress exempted power plants from this provision, punting the question to the future by requiring EPA to first conduct a study to decide whether it is “appropriate and necessary” to regulate power plants under section 112.<sup>78</sup> In 1998, an EPA study concluded that mercury emissions from power plants were a public health threat.<sup>79</sup> EPA’s Administrator accordingly issued a regulatory finding that it was “appropriate and necessary” to regulate the power

71. 42 U.S.C. §§ 7408–7410 (2012). The option to regulate mercury as a “criteria air pollutant,” *id.* §7408, is no longer available after the 1990 Amendment. *See infra* note 77 and accompanying text.

72. *Id.* § 7412.

73. *Id.* § 7411.

74. EPA Emission Standards for Asbestos, Beryllium, and Mercury, 38 Fed. Reg. 8820, 8824 (Apr. 6, 1973) (codified at 40 C.F.R. pt. 61).

75. EPA Amends Emission Standards for Asbestos and Mercury, 40 Fed. Reg. 48,292, 48,297 (Oct. 14, 1975) (codified at 40 C.F.R. pt. 61).

76. The technical term for power plants that is frequently used in the law is “electric utility steam generating units.” *See* 42 U.S.C. § 7412(a)(8) (2012). Since most legal literature uses the two terms interchangeably, *see, e.g.,* Michigan v. EPA, 135 S. Ct. 2699, 2705 (2015) (“The [CAA] refers to these plants as electric utility steam generating units, but we will simply call them power plants.”), this Note will continue to use the public-friendly term “power plant.”

77. CAA 1990, Pub. L. No. 101-549, sec. 301, § 112(b)(1), 104 Stat. 2399, 2535 (1990) (codified as amended at 42 U.S.C. § 7412(b)(1) (2012)).

78. *See id.* § 112(n)(1), 104 Stat. at 2558–59 (codified as amended at 42 U.S.C. § 7412(n)(1) (2012)).

79. EPA, EPA-453/R-98-004a, STUDY OF HAZARDOUS AIR POLLUTANT EMISSIONS FROM ELECTRIC UTILITY STEAM GENERATING UNITS — FINAL REPORT TO CONGRESS: VOLUME I, at ES-15 to ES-19 (1998), <https://perma.cc/F27V-DNFL>.

plants under section 112 of the CAA.<sup>80</sup> This regulatory finding triggered the requirement that EPA promulgate a rule to regulate power plants' mercury emissions by setting strict emissions standards.<sup>81</sup>

### *B. George W. Bush's Clean Air Mercury Rule ("CAMR")*

The Bush Administration's approach to regulating mercury emissions was to interpret the CAA to allow for the market to reach the "optimal" level of mercury pollution. In the process, President Bush's CAMR would have put in place a more relaxed standard than what would have been required otherwise. Ecofeminists would likely have rejected the policy because it would concentrate pollution in local underprivileged communities with marginal bargaining power.

#### *1. Implementing the CAMR and Its Implications for HAP Pollution Levels*

The Bush Administration's preferred regulatory structure for air pollution was cap and trade, which creates a market for polluters to buy and sell emission permits. President Bush and the Republican Party attempted to amend the CAA to reflect this,<sup>82</sup> and when legislative pushes failed, President Bush relied on administrative regulations to pursue this goal.<sup>83</sup> In the context of mercury regulation, this aspiration manifested in two related agency rules. One, President Bush's EPA delisted mercury as a HAP, so that the substance no longer needed to be governed by section 112 of the CAA.<sup>84</sup> Two, under the CAMR,

---

80. Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,825–26 (Dec. 20, 2000).

81. See 42 U.S.C. § 7412(c)(5) (2012).

82. See Christopher Marquis, *Bush Energy Proposal Seeks To 'Clear Skies' by 2018*, N.Y. TIMES (July 30, 2002), <https://perma.cc/HC6Z-8CGH>; see also Clear Skies Act of 2002, H.R. 5266, 107th Cong. (2002); Clear Skies Act of 2002, S. 2815, 107th Cong. (2002); Clear Skies Act of 2003, H.R. 999, 108th Cong. (2003); Clear Skies Act of 2003, S. 485, 108th Cong. (2003).

83. See, e.g., Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NOx SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005).

84. Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from the Section 112(c) List, 70 Fed. Reg. 15,994 (Mar. 29, 2005); see also Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from the Section 112(c) List, 70 Fed. Reg. 33,000 (June 7, 2005) ("correct[ing] and clarif[y]ing]" text accompanying the published final rule).

section 111 of the CAA would regulate mercury emissions instead, and this regulation would take the form of cap and trade.<sup>85</sup>

The change in regulatory coverage from section 112 to section 111 meant that some power plants would not need to adopt cleaner technology, which could increase mercury pollution, at least in some areas. Section 112 would have demanded a much stricter emissions-reduction requirement and would have been imposed on all power plants. Under section 112, EPA must first issue a Maximum Achievable Control Technology (“MACT”) standard that “shall require the *maximum* degree of reduction in emissions of the hazardous air pollutants . . . achievable . . . .”<sup>86</sup> And if there is still a risk greater than one in a million that the “individual most exposed to emissions” gets cancer, the agency must issue an even more stringent standard that “shall provide an ample margin of safety to protect public health.”<sup>87</sup> In contrast, if an existing power plant is regulated under section 111, the technology required is simply the “best system of emission reduction which . . . the Administrator determines has been adequately demonstrated.”<sup>88</sup>

EPA’s shift from a technology standard to a cap and trade program removed a layer of public environmental protection. Although the administration hoped that cap and trade, through its market mechanism, would reach the optimal level of pollution, the measure still might not have been protective enough of human health. It is possible that a cap that is even stricter than a MACT standard could theoretically be more protective. However, the industry influence in promulgating CAMR<sup>89</sup> indicates that such a goal was not the major priority of the Bush Administration. In addition, a cap that is stricter than the MACT standard could have made EPA more vulnerable to litigation for deviating from the standard of section 111, which simply requires a technology that is “adequately demonstrated” to reduce emissions.<sup>90</sup> Finally, regardless of whether there is a net decrease in emission reduction, the next subsection demonstrates that the real concern with cap and trade is the concentration of pollution.

## 2. *The Concentration of Mercury Pollution*

Cap and trade assumes that the commodity is perfectly fungible—that reduced emissions in area A would also be good for area B. From an ecofeminist

85. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005).

86. 42 U.S.C. § 7412(d)(2) (2012) (emphasis added).

87. *Id.* § 7412(f)(2)(A).

88. *Id.* § 7411(a)(1), (d)(1).

89. See Eric Pianin, *Proposed Industry Rules Bear Industry Mark*, WASH. POST (Jan. 31, 2004), <https://perma.cc/EVE6-ZQ4D>.

90. 42 U.S.C. § 7411(a)(1) (2012) (emphasis added).



perspective, mercury emissions' distributional impacts make cap and trade an unacceptable policy, even though this mechanism has been successful in resolving environmental problems in other situations.<sup>91</sup> Mercury emitted from power plants does not travel far; instead, it settles locally.<sup>92</sup> As a result, cap and trade would alleviate mercury emissions in some places but aggravate concentrations in others. Polluters that purchased emissions permits would potentially emit more than before, concentrating the mercury emissions in certain geographical pockets and worsening the disparity in the distribution of environmental harms. This would compound existing, serious concerns about the location of power plants, as most coal-fired power plants are already disproportionately located in poor and minority communities<sup>93</sup> and mercury deposition harms indigenous communities that rely on subsistence fishing.<sup>94</sup>

While the broad concept of environmental justice can address this issue, ecofeminism can further substantiate and tailor these claims by flagging the effects that mercury emissions have on women.<sup>95</sup> In fact, women suffer disproportionately from mercury pollution. Toxicological data from animal studies indicate that methylmercury harms more women than men as adults.<sup>96</sup> In addition, since women do most of the child-rearing, methylmercury's well-established toxic effects on children<sup>97</sup> will likely burden mothers more. Since ecofeminism directs one to analyze how a given policy impacts women—rather than stopping its cost-benefit analysis at the aggregate population level—it has the tools necessary to understand how the costs and benefits are *distributed* in other contexts, such as race, class, or disability.

- 
91. See, e.g., Sam Napolitano et al., *The U.S. Acid Rain Program: Key Insights from the Design, Operation, and Assessment of a Cap-and-Trade Program*, 20 *ELECTRICITY J.* 47, 47–48 (2007) (discussing cap and trade's success in reducing SO<sub>2</sub> and NO<sub>x</sub> emissions).
  92. See, e.g., White, Keeler & Landis, *supra* note 66, at 4952.
  93. See, e.g., NAACP ET AL., *COAL BLOODED: PUTTING PROFITS BEFORE PEOPLE* 29–30 (Monique W. Morris ed., 2012), <https://perma.cc/45NJ-SE88>.
  94. See David Driscoll, Asta Sorensen & Marion Deerhake, *A Multidisciplinary Approach to Promoting Healthy Subsistence Fish Consumption in Culturally Distinct Communities*, 13 *HEALTH PROMOTION PRAC.* 245, 247–48 (2012).
  95. See, e.g., Marcella Remer Thompson & Kim Boekelheide, *Multiple Environmental Chemical Exposures to Lead, Mercury and Polychlorinated Biphenyls among Childbearing-Aged Women (NHLANES 1999–2004): Body Burden and Risk Factors*, 121 *ENVTL. RES.* 23, 27–28 (2013).
  96. See Laszlo Magos et al., *Comparative Study of the Sensitivity of Male and Female Rats to Methylmercury*, 48 *ARCHIVES TOXICOLOGY* 11, 19–20 (1981).
  97. Bruce P. Lanphear, *The Impact of Toxins on the Developing Brain*, 36 *ANN. REV. PUB. HEALTH* 211, 214 (2015) (“[M]ercury [is an] established risk factor [ ] for cognitive deficits . . . .”).

### 3. *Bargaining Power*

In addition, ecofeminism can supplement how policymakers understand environmental justice by also questioning the bargaining power people originally had when a policy was developed and executed. Cap and trade allows power plants to pollute to the level that they find economically optimal, and those with the least power become subject to the negative externalities.<sup>98</sup> The economically efficient technology functions as a “right to pollute”<sup>99</sup> that is sanctioned by the government. The law has legitimized a certain amount of pollution, and now technologies that used to be considered suboptimal get grouped as acceptable, muddling the discourse on what level of pollution the public should ideally accept.<sup>100</sup> Whether people consent to the optimal level of pollution becomes irrelevant. The unequal power relation between the polluters and the victims makes any consent coerced.<sup>101</sup> Because ecofeminism recognizes that most environmental policies are made by men,<sup>102</sup> the framework is more likely to notice gendered blind-spots such as determining the appropriate toxic exposure for women or identifying the benefits of mercury regulation for caregivers. Paying attention to how costs and benefits are distributed can also help identify other laws that are less considerate to the politically marginalized.

The free market is less optimal and desirable if some people cannot exercise their full bargaining power due to substantive inequality. Increased health risks from methylmercury will prevent socially disadvantaged people from being economically productive, and this demographic will not have the resources to mobilize against entrenched political interests or to reform the law. Market fundamentalists might argue that if coal-fired power plants are so bothersome, those areas will eventually turn non-residential because people will move out. However, this conjecture assumes that current residents have a choice. The fact

- 
98. See *supra* Section I.A.2; cf. Catherine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 656–57 (1983) (criticizing the state for leaving “private matters to civil society to be treated subjectively,” when most of the oppression towards women in fact happen in the private sphere, such as domestic violence).
99. Michael J. Sandel, Opinion, *It’s Immoral to Buy the Right to Pollute*, N.Y. TIMES (Dec. 15, 1997), <https://perma.cc/PJU4-PK4T>.
100. See Lisa Heinzerling & Rena I. Steinzor, *A Perfect Storm: Mercury and the Bush Administration*, 34 ENVTL. L. REP. 10297, 10306–07 (2004); cf. MacKinnon, *supra* note 98, at 644–50 (arguing that drawing lines on what counts as rape means that certain acts will be permitted under the law, which muddles the idea of consent, especially when the entire line-drawing scheme happens under the male’s point of view).
101. Cf. Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 532 (1982) (questioning whether consent is a meaningful concept when women are socially subordinated).
102. See REBECCA TIESSEN, EVERYWHERE/NOWHERE: GENDER MAINSTREAMING IN DEVELOPMENT AGENCIES 138–39 (2007); see also Buckingham & Kulcur, *supra* note 42, at 676–77.

that people stay in these brownfields should not be construed as a revealed preference because they do not have an alternative option.<sup>103</sup> Many residents are too poor, or the displacement will cause such an immense shift in their lifestyle, that they cannot afford to move out. While general environmental justice theory could reach the same conclusion, ecofeminism can contribute to the analysis by considering women's mobility. The relative poverty women experience compared to men would mean that women have less capital to move away from brownfields. In addition, if moving to another area might be disruptive to a child's well-being, families might be discouraged from moving. Ecofeminism is more likely than a traditional environmental justice analysis to identify such disincentives.

#### 4. *The Ecofeminist Alternative*

If policymakers understood the full variety of distributional implications by taking the role of gender into account, they might not have so readily assumed that the market would accomplish a just result, nor assumed that individuals' decisions would achieve economic efficiency. An ecofeminist perspective would counsel policymakers to be conscious of such distributions, likely resulting in keeping mercury regulation under section 112, subject to a MACT standard. Even if the Bush Administration wanted to proceed with cap and trade, it would have at least set minimum-level pollution safeguards that would protect the people that would be disproportionately affected by methylmercury. This could have happened in various ways, such as lowering the cap, adopting a technology floor, or making the cap and trade market regional in scope.

#### C. *Obama's Mercury and Air Toxics Standards ("MATS") Rule*

The Obama Administration tackled mercury pollution by readopting stringent emission control requirements, a move that was immediately challenged in court.<sup>104</sup> Ecofeminists would overall consider the approach a drastic improvement, as the Administration adopted a more holistic calculation by considering how emissions from power plants harm populations in other ways. Arguably, not accounting for all the benefits of the MATS Rule made the Obama Administration's effort vulnerable to greater criticism, and ultimately, to judicial remand; an even more robust ecofeminist analysis could have made the regulation more justifiable to the public. At the same time, the fact that

---

103. Cf. Martha C. Nussbaum, "Whether from Reason or Prejudice": Taking Money for Bodily Services, 27 J. LEGAL STUD. 693, 696–97 (1998) (arguing that to meaningfully discuss the merits of prostitution, one must safeguard the possibility that the person can exit the profession).

104. See, e.g., Petition for Review, White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222 (D.C. Cir. 2014) (No. 12-1100).

most power plants adopted the technology necessary to comply with the standards and declined to subsequently challenge the rule demonstrates that progress is possible.

### 1. *Promulgation and Remand*

After the United States Court of Appeals for the District of Columbia Circuit vacated President Bush's CAMR for violating the CAA,<sup>105</sup> President Obama's EPA withdrew EPA's certiorari petition,<sup>106</sup> and developed a different regulation for mercury emissions. The Obama Administration put mercury regulation back under the jurisdiction of section 112,<sup>107</sup> which meant that EPA had to impose a MACT standard for the power plants emitting mercury.<sup>108</sup> The final MATS Rule was stringent, as EPA calculated that the MACT required power plants to lower their emission levels from twenty-seven to seven tons per year.<sup>109</sup> This figure promulgated by the rule was unique for two reasons. First, EPA considered co-benefits when it calculated the figure. It turns out that the technology used to curb mercury emissions is also useful to decrease other air pollutants such as particulate matter and sulfur dioxide.<sup>110</sup> Second, in calculating the appropriate emission level, EPA declared that it "cannot consider cost in setting the [technology] floor."<sup>111</sup>

Predictably, regulated industry challenged the rule in court. The Supreme Court held that EPA's interpretation of section 112(n)(1)(A) was unreasonable because not considering costs *at all* is not "appropriate" within the "appropriate and necessary" mandate of the statute.<sup>112</sup> However, it is still up for the Agency to decide how to account for the cost—the final calculation does not have to be

105. The court found that EPA did not make the necessary findings to appropriately delist mercury per section 112(c)(9) of the CAA, 42 U.S.C. § 7412(c)(9) (2006). *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008), *cert denied*, 555 U.S. 1162 (2009).

106. Motion to Dismiss the Petition for a Writ of Certiorari Pursuant to Rule 46, *EPA v. New Jersey*, 555 U.S. 1162 (2009) (No. 08-512).

107. National Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 76 Fed. Reg. 24,976 (proposed May 3, 2011) (to be codified at 40 C.F.R. pt. 60, 63).

108. *See* 42 U.S.C. § 7412(d)(2) (2012).

109. National Emission Standards for Hazardous Air Pollutants from Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304, 9424 (Feb. 16, 2012) (to be codified at 40 C.F.R. pt. 60, 63).

110. *Id.* at 9305.

111. *Id.* at 9307.

112. *Michigan v. EPA*, 135 S. Ct. 2699, 2701 (2015).

in completely monetary terms.<sup>113</sup> In addition, the Supreme Court never vacated the rule, which meant that EPA did not have to redo the entire regulation from scratch. Instead, EPA relied on the same 2012 data to consider the costs. In its Supplemental Finding, EPA declared that (1) a formal cost-benefit analysis is unnecessary; and (2) even were such an analysis required, the analysis that EPA conducted as part of its Regulatory Impact Analysis still demonstrated that it was appropriate to regulate mercury emissions from power plants.<sup>114</sup> Several utility companies and states challenged the Supplemental Finding in the D.C. Circuit,<sup>115</sup> but currently the Court has ordered the case in abeyance, subject to ninety-day reports from EPA as the Trump Administration decides whether or not to revoke the Supplemental Finding.<sup>116</sup>

## 2. *Evaluating EPA's Cost-Benefit Analysis*

President Obama's MATS Rule meets many, though not all, of ecofeminism's ideals; it is at least better than President Bush's CAMR proposal. The regulation directly attempted to reduce mercury emissions, which are environmentally destructive and particularly harmful to women. In addition, accounting for co-benefits in the context of environmental regulation is not only rational, but necessary. Many times, environmental policies have been disproportionately burdensome to women because they did not consider the indirect effects that such policies would have on women.<sup>117</sup> If ecofeminism demands that indirect consequences also be acknowledged, that broad demand would also include co-benefits.

Some ecofeminists would declare the administration's refusal to formally conduct a cost-benefit analysis a strategic blunder because opponents can more easily characterize the regulation as unreasonable for not considering cost at all.<sup>118</sup> Had EPA factored in all the benefits of the MATS Rule, it could have fought the cost issue more directly and declared that the benefits outweighed

---

113. *Id.* at 2711.

114. Supplemental Finding That It is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal-and Oil-Fired Electric Utility Steam Generating Units, 79 Fed. Reg. 24,420, 24,421 (Apr. 25, 2016).

115. See Opening Brief of State and Industry Petitioners, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Apr. 25, 2016).

116. Order, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Apr. 27, 2017) (granting motion to continue oral argument and holding the case in abeyance pending further order of the court).

117. See, e.g., Ana Isla, *Who Pays for the Kyoto Protocol?: Selling Oxygen and Selling Sex in Costa Rica*, in *ECO-SUFFICIENCY AND GLOBAL JUSTICE* 199, 210-13 (Ariel Salleh ed., 2009) (discussing how ecotourism and designation of rainforests as carbon sinks displaced local communities and drove women into the sex industry).

118. See Jonathan S. Masur & Eric A. Posner, *Unquantified Benefits and the Problem of Regulation Under Uncertainty*, 102 *CORNELL L. REV.* 87, 132-33 (2016).

the costs to begin with. In EPA's defense, conducting a comprehensive cost-benefit analysis is incredibly challenging.<sup>119</sup> While the costs are easily quantifiable—the price of the technology required—the benefits are not, because the analysis must factor in temporal discounting and judgments on how much society values the environment. On top of these theoretical obstacles, the science is difficult,<sup>120</sup> especially because mercury's harms to the human body operate under vast spatial and temporal scales.<sup>121</sup>

Still, there were several ways that President Obama's EPA could have shored up its methodology and addressed costs head-on under an ecofeminist paradigm. Methylmercury has damning neurotoxic effects—prenatal and early childhood exposure of the substance decreases cognitive performance<sup>122</sup> and decreases IQ in children.<sup>123</sup> In addition, fetal exposure to methylmercury might increase the chance of people having ADHD.<sup>124</sup> Yet when EPA was calculating the benefits of reducing neurotoxic harms, it exclusively focused on IQ loss.<sup>125</sup> The inquiry got even narrower—EPA quantified the monetary value of IQ loss only in terms of an individual's earning potential.<sup>126</sup>

Quantifying the harm of methylmercury exposure purely in terms of IQ loss that is then translated to earning potential is inaccurate and prone to gender bias. For example, limiting the harm of neurotoxins to IQ loss neglects the cost of parents having to take care of a child's ADHD or other cognitive disability. This cost is substantial; medical bills, special education, and accommodation programs are expensive. Studies found that methylmercury's effect on schooling, workforce participation, and lifetime earning amount to \$1.3 billion

---

119. Cf. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 17–19 (2004) (discussing the challenges of making environmental law that accounts for both scientific and economic complexities).

120. *See id.* at 19–21.

121. Noelle E. Selin, *Science and Strategies to Reduce Mercury Risks: A Critical Review*, 13 J. ENVTL. MONITORING 2389, 2390–93 (2011) (discussing how these scales complicate policymaking).

122. *See, e.g.*, Emily Oken et al., *Maternal Fish Intake during Pregnancy, Blood Mercury Levels, and Child Cognition at Age 3 Years in a US Cohort*, 167 AM. J. EPIDEMIOLOGY 1171, 1177–79 (2008).

123. *See, e.g.*, Daniel A. Axelrad et al., *Dose-Response Relationship of Prenatal Mercury Exposure and IQ: An Integrative Analysis of Epidemiologic Data*, 115 ENVTL. HEALTH PERSP. 609, 613–14 (2007).

124. D.K.L. Cheuk & Virginia Wong, *Attention-Deficit Hyperactivity Disorder and Blood Mercury Level: A Case-Control Study in Chinese Children*, 37 NEUROPEDIATRICS 234, 236–39 (2006).

125. National Emission Standards for Hazardous Air Pollutants from Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304, 9428 (Feb. 16, 2012) (to be codified at 40 C.F.R. pt. 60, 63).

126. *Id.*

annually.<sup>127</sup> In addition, using a person's earning potential as the economic standard ignores imputed income, which is the accretion of wealth from not having to pay someone else for a necessity such as cooking, cleaning, or childcare—tasks for the spouse that would stay at home. The omission of imputed income in quantifying economic value thus disregards domestic labor's economic contribution, and by extension a substantial amount of women's contribution to society, as disproportionately more females than males are homemakers or stay-at-home parents in the United States.<sup>128</sup> Given that more women than men take on domestic tasks including childcare,<sup>129</sup> ecofeminism would consider harm in a broader context and not adopt a myopic focus that is limited to the workplace.

Another area that the administration's cost-benefit analysis could have been improved with the support of ecofeminism—potentially helping the MATS Rule survive judicial scrutiny—would be to use even smaller geographical discounts when calculating the benefits. In the past, the benefits of mercury emissions reduction were projected in more modest figures because there was a possibility that emissions from foreign countries would mitigate the effects of reducing domestic emissions. Newer scientific models indicate that mercury deposits locally,<sup>130</sup> so emission reductions will directly lower methylmercury levels in the nearby region and the entire United States. Ecofeminism would generally resist abdicating responsibility under the excuse that other countries' pollution would make domestic efforts useless.<sup>131</sup> Such excuses typically ignore the fact that First World industrialization and consumption habits caused the large-scale pollution in the first place. They also ignore the fact that typically, any mitigation in emissions is still useful because it still decreases net pollution. Ecofeminism's commitment to "global justice and ecological flourishing"<sup>132</sup> would at least discourage using other countries' pollution as a pretext for inaction, because regardless of what they do, the United States has a responsibility to mitigate its own emission as much as possible.

---

127. Leonardo Trasande, Philip J. Landrigan & Clyde Schechter, *Public Health and Economic Consequences of Methyl Mercury Toxicity to the Developing Brain*, 113 ENVTL. HEALTH PERSP. 590, 592 (2005).

128. Belinda Luscombe, *Not as Many Dads Stay at Home as You Think*, TIME (Nov. 29, 2013), <https://perma.cc/BDR2-XZHG>.

129. See Kelley Holland, *Working Moms Still Take on Bulk of Household Chores*, CNBC (Apr. 28, 2015), <https://perma.cc/3CS7-422N>.

130. Yanxu Zhang et al., *Observed Decrease in Atmospheric Mercury Explained by Global Decline in Anthropogenic Emissions*, 113 PROC. NAT'L ACAD. SCI. 526, 526 (2016).

131. Cf. Gaard, *supra* note 14, at 24–25 (criticizing western nations for blaming environmental problems on overpopulation in third world countries).

132. Chris Cuomo, *On Ecofeminist Philosophy*, 7 ETHICS & ENV'T 1, 9 (2002).

### 3. *Subsequent History and Cautious Optimism*

Despite some gaps in EPA's cost-benefit analysis, there is plenty of room to be optimistic about the Obama Administration's general approach to the problem, even after the Supreme Court's decision to reject EPA's reading of section 112(n)(1)(A) of the CAA. After EPA issued the MATS Rule, many power plants came into compliance.<sup>133</sup> By the time some power plant owners challenged the Supplemental Finding, far fewer companies joined the litigation than in the previous lawsuit.<sup>134</sup> The general compliance by the industry was probably why the subsequent Trump Administration decided not to remove the MATS Rule and instead to "review" the Supplemental Finding,<sup>135</sup> effectively suspending the entire litigation. The fact that businesses found it economically more advantageous to adapt to the MATS Rule rather than to fight it tooth and nail proves that ecofeminist ideals can be compatible with market rationality. With the help of minor adjustments to the market, ecofeminism can lead to the rational, optimal result that maximizes both welfare and justice.

## III. TOWARD AN IMPROVED DISTRIBUTIONAL ANALYSIS

Given that distributional inequities are crucial to an environmental policy's success, ecofeminism contributes to environmental policymaking by promoting a more comprehensive "distributional analysis";<sup>136</sup> it makes certain distributions of benefits and burdens more visible. A distributional analysis attempts to map how a prospective policy can shift benefits and burdens among different population groups, with each shift having different implications. A successful distributional analysis that is necessary for responsible policymaking focuses on three elements: the background law, the stakeholders and their underlying interests, and the policy's surplus of value and the value's distribution. Ecofeminism can contribute to all three factors.

---

133. Jeff McMahan, *Nearly All U.S. Coal Plants Now Comply with the EPA Mercury Rule that Was Shot Down by Supreme Court*, FORBES (July 10, 2016), <https://perma.cc/8U2Q-8HLN>.

134. *Compare* Opening Brief of State & Industry Petitioners, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Apr. 25, 2016), *with* *Michigan v. EPA*, 135 S. Ct. 2699, 2702-04 (2015).

135. Respondent EPA's Motion to Continue Oral Argument at 1-2, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Apr. 25, 2016).

136. *See generally* HALLEY ET AL., *supra* note 15, at 253-66. The converse is also true—a proper distributional analysis is crucial to advancing ecofeminism's ideals. After all, distributional analysis is not a tool unique to ecofeminism. *See, e.g.*, Benjamin E. Apple, Note, *Mapping Fracking: An Analysis of Law, Power, and Regional Distribution in the United States*, 38 HARV. ENVTL. L. REV. 217 (2014).



*A. Distributional Analysis: A Brief Introduction and Defense*

Distributional analysis attempts to understand what social effects a particular rule would create by distributing or redistributing harms and benefits.<sup>137</sup> It shares similarities with the typical approach to cost-benefit analysis in that it is a method to decide if change is worth it. The major difference is that distributional analysis avoids an aggregation of the costs and benefits under a unified metric such as utility, because it preserves the different “motives, desires, and aversions” that various interest groups might have.<sup>138</sup> Professor Janet Halley identifies three crucial steps for an effective distributional analysis: (1) identify the background law, (2) identify the stakeholders to the law and their underlying projects, and (3) identify the surplus that each group hopes to gain while also paying attention to how the surplus is distributed.<sup>139</sup>

Parts I and II have demonstrated why a traditional cost-benefit analysis is insufficient. Even well intentioned environmental policies may fail because of the specific burdens imposed on women or other groups of people who might not have an influential say in government. Disproportionately unequal burdens either render such policies counterproductive, such as by increasing the net harm, or by concentrating the harms to the extent that many would find the measures unjust or even unethical.<sup>140</sup> Without considering distributional inequities, policymakers may also gloss over benefits specific to certain populations, which would be detrimental when government agencies use cost-benefit analysis to justify actions. In this sense, distributional analysis would improve cost-benefit analysis as well.

*B. An Ecofeminist Distributional Analysis of the Mercury Regulations*

Ecofeminism improves all three dimensions of the distributional analysis. Ecofeminism not only properly identifies the background law that induces players to act in certain ways, but also can supplement the search by questioning certain standards and assumptions behind the law. Ecofeminism helps identify the stakeholders and their underlying interests by presenting a variety of women’s interests. Finally, ecofeminism effectively identifies the surplus value of a given policy and its distribution by asking which interest group or demography

---

137. See Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 *FORDHAM L. REV.* 3211, 3213 (2015).

138. HALLEY ET AL., *supra* note 15, at 255.

139. *Id.* at 254–59.

140. See, e.g., JACK DONNELLY, *THE CONCEPT OF HUMAN RIGHTS* 55–58 (1985) (“[P]eople drop out of utilitarian calculations, which are instead about disembodied preferences.”); MICHAEL C. WILLIAMS, *THE REALIST TRADITION AND THE LIMITS OF INTERNATIONAL RELATIONS* 172–73 (2005) (“Purely consequential calculation . . . avoids asking the question, ‘responsible to whom or to what?’”).

gains by the governmental action. The Note will continue using the two mercury regulations as an illustration.

### 1. *Identifying the Background Law*

In the realm of identifying the background laws for improving mercury regulations, it is still the case that ecofeminism must adhere to textbook environmental law. Section 112 of the CAA determines how EPA should set emission standards,<sup>141</sup> and the CAA delegates authority to EPA to interpret the text of the CAA and issue corresponding regulations,<sup>142</sup> subject to review under the Administrative Procedure Act.<sup>143</sup> State and local laws, if they set more stringent standards, could also possibly come into play.<sup>144</sup> If an ecofeminist truly wants to focus on environmental justice concerns, several executive orders that EPA must follow also provide hope; these orders require the agency to consider cooperation with Indian Tribal governments,<sup>145</sup> protecting children's health,<sup>146</sup> and the rule's effects on minority and low-income populations.<sup>147</sup>

While this could end the analysis, one must also keep in mind that when EPA decided on the level of regulation, it adopted certain statistical assumptions, such as how to quantify the economic loss of IQ or the tolerance threshold for exposure to toxic chemicals. Ecofeminism can at least challenge these assumptions and, in the process, bring in other sources of law that would persuade EPA to set a greater risk-multiplier for methylmercury exposure. Other possible sources could include family law cases that consider imputed income<sup>148</sup> or the "best interests of the child," or other agency decisions that calculate the value of a statistical life differently.<sup>149</sup>

---

141. *See supra*, notes 77–81 and accompanying text. There is little likelihood that federal common law will also function as a core background law; courts would interpret the CAA to have displaced it. *See* *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 411 (2011).

142. 42 U.S.C. § 7601(a)(1) (2012).

143. 5 U.S.C. §§ 701–706 (2012) (discussing judicial review).

144. 42 U.S.C. § 7416 (2012) (allowing states to set even stricter emission standards for HAPs).

145. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

146. Exec. Order No. 13,045, 62 Fed. Reg. 19,885 (Apr. 23, 1997).

147. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

148. *See, e.g.*, *Graby v. Graby*, 664 N.E.2d 488, 489–90 (N.Y. 1996) (discussing how calculating child support awards includes imputed income).

149. *See, e.g.*, U.S. DEP'T OF TRANSP., GUIDANCE ON TREATMENT OF THE ECONOMIC VALUE OF A STATISTICAL LIFE (VSL) IN U.S. DEPARTMENT OF TRANSPORTATION ANALYSES – 2016 ADJUSTMENT (2016), <https://perma.cc/Z8R2-5KPF>; RYAN C. BOSWORTH, ALECIA HUNTER & AHSAN KIBRIA, STRATA, THE VALUE OF A STATISTICAL LIFE: ECONOMICS AND POLITICS 16–19 (2017), <https://perma.cc/38QM-5393> (discussing the different calculations used by various federal agencies).

## 2. *Identifying the Stakeholders and Their Underlying Interests*

Ecofeminism can help identify the stakeholders and their underlying projects in three different ways. First, ecofeminism puts women's concerns on the table when people discuss the feasibility of an environmental policy. Past examples demonstrated how even the most progressive EPA policies remained ignorant to women's concerns. Accomplishing this bare minimum would still be considered a great success.

Second, ecofeminism can foreground a variety of women's concerns, because each woman's experience of environmental harms depends on her circumstances. A Native American mother who consumes more fish than other demographic groups will have a different underlying interest than a coal miner's wife where greater regulation on power plants might cost her husband his job. Relatedly, female coal miners or power plant workers might also oppose strict regulations because their job is the main source of their livelihood, but they might realign themselves if the regulation fixes the unique occupational hazards as women in the industry. A woman who cares for a child with ADHD will also have a different agenda from a woman who does not have children but suffers from a respiratory disease. In each case, the woman will have varying preferences regarding the optimal level of mercury emissions. Even two supporters of the same MATS Rule can support it for different reasons. Compare an environmentalist who supported the Rule because it reduced other co-pollutants with the CEO of a power plant who is happy that her competitors cannot afford to adopt the requisite emissions technology. Governance feminism recognizes that its project would do a great disservice to women if it simply aggregates people's concerns and preferences without considering the nuances.<sup>150</sup>

Third, because nuance is so important and because women hold identities other than gender, such as race or class, ecofeminism's scrutiny over who is affected can expand to consider other marginalized groups. For example, identifying why women of color want to reduce methylmercury pollution can spill over to identifying why people of color want to reduce it too. This does not mean that the struggles are interchangeable under a common denominator. Grouping the different experiences together frustrates the purpose of a distributional analysis, which is to evaluate how policies affect people differently. Nor does ecofeminism need to be the only way to explain every instance of environmental injustice.<sup>151</sup> Many times, injustice is multi-causal, so other theories such as environmental racism or anthropocentrism could be equally helpful in offer-

---

150. Cf. ELIZABETH BERNSTEIN, *TEMPORARILY YOURS* 163–66 (2007) (discussing how prostitution policies can have different effects on women depending on dynamics such as national identity or gentrification status of the cities where they work).

151. Cf. HALLEY, *supra* note 13, at 7–10 (acknowledging that sometimes a “consolidated” theory is unhelpful and that it could be necessary to “take a break from feminism”).

ing solutions to complex problems.<sup>152</sup> As an illustration, if international patent law prevents developing countries from promoting renewable energy,<sup>153</sup> criticizing the legal structure for its colonialist legacy may be appropriate. Ecofeminism can bolster the criticism by discussing how colonialism harmed women and the environment, but it need not be the starting point. Ultimately, ecofeminism shares the same tools as other forms of progressive movements, which can both enlighten other stakeholders' struggles, or make the alliance easier because there could be a common interest to fight for.

### 3. *Identifying the Policy's Surplus Value and Distribution*

Ecofeminism can be effective in identifying the surplus of a given policy and how it is distributed among the different groups. An interesting example would be to revisit President Bush's CAMR. The reason behind adopting cap and trade was the aspiration that a market solution would lead to even better emissions-reducing technology. Under typical cost-benefit analysis, such an approach would be considered beneficial because there is a real possibility that the aggregate mercury emission might in fact decrease. Even if net mercury emissions might not decrease, the fact that power plants no longer need to spend money adopting the most rigorous technology means that there are tangible monetary benefits, which also could outweigh the costs of pollution. Ecofeminism can disaggregate what that net gain really means—who is gaining what, and to what degree. It does not necessarily reject the idea that net benefits are desirable, nor does it exclusively focus on distribution and equity. Instead, the decisionmaker who conducted the distributional analysis must make a choice—would this specific consequence, which has certain distributional implications, be worth it?

## CONCLUSION

This Note has illustrated how ecofeminism can be a way for feminism and environmentalism to complement each other to improve distributional equity in environmental policies. By analyzing how ecofeminism could have improved two administrations' mercury regulations, the Note has shown that ecofeminism's strength lies in forcing policymakers to be responsible and adopt a more rigorous distributional analysis, which can lead to a more just, sustainable future.

---

152. At the same time, this Note recognizes that some scholars find a unifying ecofeminist theory possible—that ecofeminism's criticism of hierarchy or dualistic thought can account for other theories explaining structural violence as well. *See, e.g.*, CHRIS J. CUOMO, FEMINISM AND ECOLOGICAL COMMUNITIES 136–37 (1998).

153. *See supra* note 28 and accompanying text.