RACIALIZING ENVIRONMENTAL JUSTICE

ERIC K. YAMAMOTO*

JEN-L W. LYMAN**

INTRODUCTION

"[Racial c]ommunities are not all created equal."[1] Yet, the established environmental justice framework tends to treat racial minorities as interchangeable and to assume for all communities of color that health and distribution of environmental burdens are main concerns. For some racialized communities,[2] however, environmental justice is not only, or even primarily, about immediate health concerns or burden distribution. Rather, for them, and particularly for some indigenous peoples, environmental justice is mainly about cultural and economic self-determination and belief systems that connect their history, spirituality, and livelihood to the natural environment.[3]

This article explores the meaning of "environmental justice," focusing on race as it merges with the environment. The word "environment" triggers images of the physical surround-

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*Professor of Law, University of Hawai'i Law School; Visiting Professor of Law, Boalt Hall School of Law, University of California at Berkeley, 1999. Our thanks to Denise Antolini, Isaac Moriwake, Daisy Ha, Dean Uehara, Donna Kalama, and Shellie Park for their valuable research, comments, insights, and assistance, particularly regarding the Native Hawaiian claims in the Waiahole Ditch case. We also thank specially Ho'oipo Kalaena'auao Pa and Moses Nahono Haia for their knowledge discussed in Part IV *infra*.

**Class of 1997, University of Hawai'i Law School; Stirling & Kleintop, 1999.

1. Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, *in* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 15 (Robert D. Bullard ed., 1993).

2. See Part IV *infra* for a discussion of the process of "racialization."

3. As explained in Part III, *infra*, indigenous peoples' identity in the United States is sometimes treated as a political identity (defining government-to-government relationships) and at other times treated as a racial identity (in popular understandings and sometimes in law). The concept of differential racialization, developed in Part IV, *infra*, offers analytical tools for addressing these shifting characterizations.

ings—water, trees, ecosystems.[4] Society tends to separate physical environment from social environment—the latter including people, culture, and social structures.[5] But the "race" in "environmental racism" suggests that the physical and the social are integrally connected. Indeed, understanding "our environment" is impossible without understanding both its physical and social aspects, and their interplay.[6] Much of the scholarly writing on environmental justice does not address with adequate complexity or depth the interplay between the natural and the racial.

Rather, many articles make unexplored assumptions about racialized environments, failing to inquire into distinct cultural and power differences among communities of color and their relationships to "the environment." For instance, while some might describe the siting of a waste disposal plan near an indigenous American community as environmental racism, that community might say that the wrong is not racial discrimination or unequal treatment; it is the denial of group sovereignty—the control over land and resources for the cultural and spiritual well-being of a people. Alternatively, the community might say that the siting is, on balance, desirable because it provides needed jobs in the area and is an aspect of group economic survival.

This article examines assumptions and misassumptions about racialized environments. It also suggests that to build strong alliances and address contemporary environmental injustice in concrete situations, scholars, lawyers, and activists must treat racial and indigenous[7] communities and their relationships to "the environment" with greater complexity. That means grappling with racial and cultural differences, understanding the often unacknowledged role of whiteness in environmental law and policy, and, in sum, rebuilding the established environmental justice framework itself.

The early environmental justice movement, with its community organizing, scholarly writing, lobbying, and litigating produced some substantial gains for communities of color.[8]

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4. *See infra* Part I.
5. *See id.*
6. *See id.*
7. For a discussion of differences between racial and indigenous communities see *infra* Part I.
8. *See* ROBERT D. BULLARD, DUMPING IN DIXIE 1 (1990).

Those who developed theory and fought on the community frontlines deserve considerable credit for their achievements. We submit, however, that in present-day America, characterized in many locales by a "retreat from racial justice,"[9] original understandings of and initial approaches to environmental racism need to be rethought.

Accordingly, this article is divided into five parts. Part I describes the established environmental justice framework generated by much of the scholarly writing and the misassumptions it tends to make about health, distributive justice, culture, and race. Part II explores Native American legal scholars' more contextual approaches and their implications for environmental justice. Part III offers insight into the evolving environmental justice movement by using critical sociological and race theories to explain how groups acquire different identities, status, and power and develop or sustain differing cultures and relationships to the physical environment. We call this "racializing environmental justice."[10]

Part IV employs this approach to environmental justice in order to explore one particular racialized environmental controversy: a water controversy in Hawai'i that illustrates the need for scholars, activists, lawyers, and community leaders to integrate community history, racial and political identities, and socio-economic and cultural needs in defining environmental problems and in fashioning remedies. Finally, the article concludes with a suggestion: that by treating each racialized community with greater complexity, according to its specific cultural values, racialized history, socio-economic power, and group needs and goals, we move from a universalized, overly-broad environment/racism paradigm to a more integrated particularized approach to racialized environmental justice.

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9. *See* STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY (1995).

10. The term "racializing environmental justice" was used by Eric Yamamoto at the joint session of the Environmental, Civil Rights, and Native American sections of the American Association of Law Schools, Annual Conference, on January 6, 1996. *See* audio tape of Environmental Justice held by the American Association of Law Schools (Jan. 6–8, 1996) (on file with author).

I. THE ESTABLISHED ENVIRONMENTAL JUSTICE FRAMEWORK

The environmental movement traditionally focused on wilderness and wildlife preservation, pollution abatement, population control, and resource conservation.[11] Building upon mainstream environmentalism is a movement initiated by environmental and racial justice groups in response to the inequitable distribution of environmental burdens, particularly burdens assumed by poorer communities of color.[12] This movement, environmental justice, responds to "environmental racism" by combining environmentalism with civil rights.[13] Environmental justice, with its social and legal dimensions, is also a "critique of traditional views of environmentalism, science, and social policy."[14]

Most scholarly writing on environmental justice tackles two tasks: (1) identifying the roots of environmental degradation with disproportionate impacts on racial minorities, and (2)

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11. *See* BULLARD, *supra* note 8.

12. The environmental justice movement also includes claims by residents of poor communities. Studies show, however, that inequities in the distribution of environmental harms among poor communities also have a direct correlation to race. Thus, this article will focus on environmental justice claims by communities of color. *See* James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 126, 126 n.3 (1994); *see also* Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992) (discussing environmental poverty issues separate from environmental race issues); Valerie P. Mahoney, Note, *Environmental Justice: From Partial Victories to Complete Solutions*, 21 CARDOZO L. REV. 361, 369 (1999) (citing several studies that support the proposition that race and income are directly correlated with the inequitable siting of hazardous waste facilities).

13. *See generally* Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 748 (1993) (discussing the current environmental justice movement as a convergence of the environmental movement and the civil rights movement); R. Gregory Roberts, Comment, *Environmental Justice and Community Empowerment: Learning From the Civil Rights Movement*, 48 AM. U. L. REV. 229 (1998) (tracking the parallels between the civil rights and the environmental justice movements, discussing the integration of civil rights and environmental laws and concluding that community empowerment strategies are most effective for achieving environmental justice).

14. Charles Lee, *Developing the Vision of Environmental Justice: A Paradigm for Achieving Healthy and Sustainable Communities*, 14 VA. ENVTL. L.J. 571, 571 (1995). Environmental justice advocates "have employed a wide variety of legal strategies including federal and state environmental laws, common law tort claims, constitutional challenges, and civil rights laws." Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631, 638 (2000).

developing solutions for redistributing environmental burdens. As a consequence, the established environmental justice framework conceptualizes environmental racism in terms of the siting of hazards and related health problems, focuses on the decisionmaking process underlying siting problems, and endeavors to remedy the harms of disproportionate siting. This part examines the established environmental justice framework and finds considerable benefit to racial and indigenous communities in certain situations.[15] It then suggests that the framework is limited because it sometimes makes misassumptions about race and fails to develop approaches to environmental racism that account for cultural, power, and goal differences among racial and indigenous communities that extend beyond health and the distributional concerns. The next part explores Native American legal scholars' departure from this environmental justice framework and their attempts, which are in some respects still limited, to develop a more integrated discourse by approaching environmental justice with greater cultural and historical depth.

A. Characteristics

"To achieve justice, we must understand the roots of injustice."[16]

The roots of environmental injustice lie in what the Reverend Benjamin Chavis termed "environmental racism."[17] Environmental racism is described as the "nationwide phenome-

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15. Although indigenous groups in the United States are racialized, they are also externally recognized, and often internally define themselves as "political" minorities—a quasi-sovereign status rather than a racial one. *See* Morton v. Mancari, 417 U.S. 535, 554 (1974); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 697 n.16 (1989); *see also infra* Part IV.

16. Michael Gelobter, *The Meaning of Urban Environmental Justice*, 21 FORDHAM URB. L.J. 841, 842 (1994).

17. The Reverend Benjamin F. Chavis, Jr., first coined the term "environmental racism" in a study by the Commission for Racial Justice of the United Church of Christ. *See* Adam Swartz, *Environment Justice: A Survey of the Ailments of Environmental Racism*, 2 HOW. SCROLL 35, 35 (1993) (citing COMMISSION FOR RACIAL JUSTICE OF THE UNITED CHURCH OF CHRIST, TOXIC WASTE AND RACE IN THE UNITED STATES ix–x (1987)); *see also* Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 COLO. L. REV. 839 (1992).

non"[18] that occurs when "any policy, practice, or directive . . . differentially impacts or disadvantages [whether intended or unintended] individuals, groups, or communities based on race or color."[19] For most scholars, this "differential effect," measured against white communities, results in the unfair distribution of environmental hazards. The established environmental justice framework addresses this problem of environmental racism and seeks to achieve healthy and sustainable communities.[20]

This vision of environmental justice has four general characteristics. First, it focuses on traditional environmental hazards such as waste facilities and resulting pollution. As one scholar observes: "[a]t the crossroads where race and environment meet, the most fundamental problem . . . is *pollution*."[21] Environmental justice advocates assert that "all Americans have a basic right to live and work in healthy environments."[22] Much of the literature on the subject examines the causal relationship between pollution arising from hazardous waste facilities, for instance, and the increased incidence of negative health effects in people of color.[23] A key component in the environmental justice framework, therefore, concentrates on reducing the threat of health hazards to people of color and "improv[ing] their quality of life by making their communities safe from toxic chemicals, without sacrificing resources for future

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18. Edward Patrick Boyle, *It's Not Easy Bein' Green: The Psychology of Racism, Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937, 967 (1993).

19. Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 289–90 (1995) (quoting Robert D. Bullard, *Environmental Equity: Examining the Evidence of Environmental Racism*, LAND USE F., Winter 1993, at 6). *But see* Daniel Kevin, *"Environmental Racism" and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 VILL. ENVTL. L.J. 121, 138–39 (1997) (arguing disproportionate siting is usually determined by non-racial factors, including physical geography, expense, proximity to other facilities and transportation routes, and local opposition).

20. *See* Fisher, *supra* note 19, at 289–90.

21. Charles J. McDermott, *Balancing the Scales of Environmental Justice*, 21 FORDHAM URB. L.J. 689, 690 (1994). The characteristics described in this part reflect broad generalizations gleaned from the literature and are not an agreed-upon list of environmental justice attributes.

22. Mariaea Ramirez Fisher, *On the Road from Environmental Racism to Environmental Justice*, 5 VILL. ENVTL. L.J. 449, 450 (1994).

23. *See, e.g.*, Bunyan Bryant, *Pollution Prevention and Participatory Research as a Methodology for Environmental Justice*, 14 VA. ENVTL. L.J. 589 (1995).

generations."[24] Thus, for some, and perhaps most, environmental justice scholars, "quality-of-life issues"[25] are connected to pollution prevention and resource control measures that "are desirable for all people, no matter what their race."[26]

Second, and closely related, the environmental justice framework focuses on the disproportionate distribution of hazardous facilities and on the re-siting of those facilities. Its aim is to rectify the injustice of disproportionate siting. Its emphasis on physical facilities location stresses narrow scientific assessments about pollution levels and limits and statistical calculations about population numbers and facility distances. This emphasis on physical proximity is related to, yet distinct from, what is sometimes called environmental equity,[27] or distributive justice. Distributive justice asks "whether there is a 'morally proper distribution of social benefits and burdens among society's members.'"[28] Indeed, in 1993, Richard Lazarus observed that environmental policymakers were ignoring the effects and sources of racism because "[c]onsideration of distributional consequences was characterized as raising 'social' issues that had little to do with the kinds of 'technical' and 'scientific' judgments considered central to the establishment of environmental protection programs."[29]

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24. *Id.* at 594.

25. *See id.* at 598.

26. McDermott, *supra* note 21, at 698.

27. *See* H. PEYTON YOUNG, EQUITY IN THEORY AND PRACTICE 1 (1994) (discussing the concept and meaning of equity and society's distributive problems); Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3, 13 (2000) (examining the cultural harm to Native American fishing practices caused by current agency practice regarding environmental hazards).

28. Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 790 (1998) (quoting IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DEFERENCE 5 (1990)).

29. Richard J. Lazarus, *The Meaning and Promotion of Environmental Justice*, 5 MD. J. CONTEMP. LEGAL ISSUES 1, 2 (1994). Some take a broad "social justice view." Catherine O'Neill observed that for Native Americans and environmental justice, "current agency practice is deeply troubling as a matter of distributive justice." O'Neill, *supra* note 27, at 13. O'Neill also noted that "[a]lthough distributive justice is one facet of environmental justice, advocates point out that achieving equal distribution of environmental harms is not coextensive with achieving environmental justice." *Id.* at 14 n.26. *See also* Ora Fred Harris, Jr., *Environmental Justice: The Path to a Remedy That Hits the Mark*, 21 U. ARK. LITTLE ROCK L. REV. 797, 797 (1999) (describing the environmental justice movement's dismissive attitude for social justice concerns).

The 1992 Environmental Protection Agency's ("EPA") report on "Environmental Equity" recognized racism, along with class status, as underlying explanations of skewed distribution of burdens.[30] It nevertheless limited its remedial actions to "inequities based on scientific data" that are "measurable and quantifiable."[31] By emphasizing "scientific data" in defining problems and fashioning remedies, the established environmental justice framework generally has focused on the physical location and relocation of polluting facilities, and not on the social and cultural effects for racial communities.

Third, the established environmental justice framework seeks to ensure that communities of color have equal representation in the administration of environmental laws and policies.[32] Environmental justice advocates assert that people of color are prime targets for both private and public environmental abuses because of their inability to mobilize effectively against the government and business policies that adversely affect their communities.[33] Environmental justice scholars attribute this "deficiency" to the shortage of political power in communities of color.[34] Political powerlessness ranges from the failure of people of color to exercise their elective votes to the under-representation of people of color in government, law, and business.[35] Consequently, people of color have been largely under-represented on environmental issues in legislative, regulatory, and enforcement arenas. Environmental justice attempts to level the playing field in these arenas by opening communi-

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30. Environmental Equity Workgroup, U.S. Envtl. Protection Agency, EPA 230-R-92-008, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, WORKGROUP REPORT TO THE ADMINISTRATOR 10 (1992).

31. *Id.*

32. *See* Robert D. Bullard, *Environmental Justice For All: It's the Right Thing to Do*, 9 J. ENVTL. L. & LITIG. 281, 286 (1994).

33. *See* Peggy M. Shepard, *Issues of Community Empowerment*, 21 FORDHAM URB. L.J. 739, 739 (1994).

34. *See* Swartz, *supra* note 17, at 42; *see also* Paul Mohai & Bunyan Bryant, *Environmental Racism: Reviewing the Evidence*, *in* RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS 163, 164 (Bunyan Bryant & Paul Mohai eds., 1992) (listing as a cause of disparity the "lack of local opposition to the facility, often resulting from minorities' lack of organization and political resources"); Bullard, *supra* note 1, at 23 ("[S]ocial inequality and imbalances of social power are at the heart of environmental degradation . . . ."); Mahoney, *supra* note 12, at 368 (noting that poor and minority communities lack "any real political power" and therefore "suffer from inadequate representation, both in the membership of mainstream environmental organizations and in national government positions").

35. *See* Fisher, *supra* note 22, at 461; Mahoney, *supra* note 12, at 368.

cations between environmental and minority groups and improving minority group access to legislative, administrative, and judicial fora.

Fourth, environmental justice framework emphasizes "a community-based movement to bring pressure on the person or agency with decisionmaking authority."[36] By building "people power,"[37] environmental justice is a "crucial aspect of improving the quality of life in many communities of color,"[38] empowering community members to participate in collective efforts to solve common problems and to assert greater control over decisions which affect their lives.[39]

Two different models describe this "empowering" role of local communities in environmental decisions.[40] In response to growing concern that "regulatory agencies might develop a bias in favor of the organized interests of the regulated,"[41] environmental justice advocates advance a pluralist model of decisionmaking. Based on utilitarianism, the pluralist model holds that "all participants are equally qualified to participate in decisions [and so] preferences of the participants stand on substantively equal footing."[42] The pluralist model further maintains that public participation is necessary to guard against agency bias and to help the agency understand the claims of all interested groups and to mediate among them.[43] In the late 1980s, however, this model of participation received sharp criticism for having "no orientation toward the public interest or common good, [and focusing on] 'just private interests in ag-

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36. Mahoney, *supra* note 12, at 368; *see also* Harris, *supra* note 29, at 805 (endorsing a remedial scheme utilizing "cooperation, not litigation, along with the political empowerment of those who disproportionately bear the burdens of environmental hazards").

37. *See* Environmental Equity Workgroup, *supra* note 30, at 661.

38. Shepard, *supra* note 33, at 740.

39. *See id.*; *see also* Roberts, *supra* note 13, at 263–69 (arguing that community empowerment strategies, with their focus on the gradual building of a movement ultimately capable of exerting pressure on those with decisionmaking authority are the most effective tool towards achieving environmental justice).

40. *See* Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 17 (1998). Gauna also offers a third model, the expertise model. This model relies on empiricism and science to solve environmental problems. *See id.*

41. *Id.* at 19.

42. *Id.* at 21.

43. *See id.* at 24–25.

gregate forming an overall social utility.'"[44] Critics offered a second model: civic republicanism. This model, which rejected utilitarianism, required participants "to put aside private interests and deliberate upon the greater common good."[45] In both models, community control over end-value decisions was deemed critical.[46]

Collectively, these four characteristics, broadly stated, are: an emphasis on traditional environmental hazards, particularly pollution; a remedial focus on relocation of facilities and cleaning of polluted ones; an embrace of the norm of equal representation in the administration of environmental laws and policies; and a belief in community activism.

B. Limits

The established framework sometimes furthers, and at times undermines, environmental justice. It furthers environmental justice when it provides racial and indigenous communities the concepts and language they need to advocate effectively for the siting and health outcomes they desire.

The framework, however, at times also undercuts environmental justice struggles by racial and indigenous communities because it tends to foster misassumptions about race, culture, sovereignty, and the importance of distributive justice. Those misassumptions sometimes lead environmental justice scholars and activists to miss what is of central importance to affected communities.

The first misassumption is that for all racialized groups in all situations, a hazard-free physical environment is their main, if not only, concern.[47] Environmental justice advocates foster this notion by placing emphasis on "high quality environments"[48] and the adverse health effects caused by exposure to air pollutants and hazardous waste materials.

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44. *Id.* at 28 n.102 (citing Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 57 (1996)).

45. Gauna, *supra* note 40, at 29.

46. *See* Bryant, *supra* note 23, at 598.

47. *See* Angela P. Harris, *Criminal Justice as Environmental Justice*, 1 J. GENDER, RACE & JUST. 1, 23 (1997) (employing environmental justice precepts beyond health and pollution issues to redefine criminal justice at the turn of the millennium).

48. Gelobter, *supra* note 16, at 852.

Not all facility sitings that pose health risks, however, warrant full-scale opposition by host communities. Some communities, on balance, are willing to tolerate these facilities for the economic benefits they confer or in lieu of the cultural or social disruption that might accompany large-scale remedial efforts. Other communities, struggling to deal with joblessness, inadequate education, and housing discrimination, indeed with daily survival, prefer to devote most of their limited time and political capital to those challenges. In these situations, racial and indigenous communities may have pressing needs and long-range goals beyond the re-siting of polluting facilities.[49]

For example, as Native communities endeavor to ameliorate conditions of poverty and social dislocation by encouraging the economic development of tribal lands, some increasingly find themselves in conflict with environmentalists, who are sometimes but not always environmental justice advocates. In the mining industry, several Native American tribes are attempting to tap mineral resources on their reservations.[50] Urged by the increased emphasis on economic self-determination in federal Native American policy in the 1970s, the tribes formed the Council of Energy Resource Tribes to deal

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49. *See* Regina Austin & Michael Schill, *Black, Brown, Red, and Poisoned*, *in* UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 53, 69–71 (Robert D. Bullard ed., 1994) (discussing letters by the Southwest Organizing Project that express exasperation with environmentalists eliminating environmental hazards at the cost of ignoring survival needs and cultures). The "Shintech Saga" in Louisiana, in which environmental justice advocates challenged a $700 million chemical plant planned for a predominantly black community (in an area known as "cancer alley"), is an example of how the established framework does not analytically account for the social, economic, and cultural complexities of racial communities. While the EPA focused on statistical analyses, the controversy:

> resulted in split allegiances within the greater African-American community, pitting the Reverend Jesse Jackson and Congressional Black Caucus (urging EPA to stop the plant) against the National Black Chamber of Commerce and the local chapter of the NAACP (supporting the jobs and economic growth the plant would provide to the economically depressed community).

Worsham, *supra* note 14, at 659.

50. *See* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 302 (1996); *see also* Ronald Trosper, *Traditional American Indian Economic Policy*, 19 AM. INDIAN CULTURE AND RES. J., NO. 1, 1995, at 87–88 (analyzing the situation of overgrazing of cattle and sheep on the Navajo reservation).

with both the siting of new mines on Native American lands and the environmental and the cultural problems that might result.[51] Those efforts met stiff opposition from some environmental groups concerned mainly with land degradation and pollution. The environmentalists' seeming lack of understanding of the economic and cultural complexity of the Native American groups' decisions have led some Native Americans to express cynicism about environmentalists who sometimes treat them as mascots for the environmental cause.[52]

The established framework also assumes that fair distribution of physical burdens is the primary, if not sole, means of achieving environmental justice. Sheila Foster rejects this assumption as "monolithic"[53] and "one-dimensional,"[54] focusing "too much on outcomes and not enough on the processes that produce those outcomes."[55] According to Foster, by not addressing *why* racial communities are overexposed to pollution, hazardous waste sites, and poisoned fish stocks, agencies like the EPA fail to confront: "discriminatory housing and real estate policies and practices, residential segregation and limited residential choices influenced by such discrimination, discriminatory zoning regulations and ineffective land use policies, racial disparities in the availability of jobs and municipal services, imbalances in political access and power, and 'white flight.'"[56]

The established framework's prescription of the public's role is also limited. Under the pluralist model, since "[p]references are defined by the relative power of self-interested subjects[,] they may be distorted by existing inequalities, poorly construed as a result of exclusion and unequal political clout or prove simply unethical."[57] Since "[e]nvironmental justice challenges reside in an ethical dimension beyond"[58] utilitarian choices, the pluralism model cannot resolve all problems associated with environmental racism.

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51. *See* Tsosie, *supra* note 50, at 302.
52. *See id.* at 324–25.
53. *See* Foster, *supra* note 28, at 790.
54. *See* Foster, *supra* note 13, at 741.
55. *Id.* at 748.
56. *Id.* at 736–37.
57. Gauna, *supra* note 40, at 36–37.
58. *Id.* at 46.

The civic republican model may seem "intuitively better equipped to respond to the ethical claim of environmental justice"[59] by depending on a discourse of the "common good." But, critics ask, how realistic is it to believe that self-interested groups will sacrifice their economic self-interest to an often vaguely defined "common good"?[60] The "common good," furthermore, is an elastic concept, expanding and contracting depending upon historical, social, and cultural context and power disparities within a community.[61]

Finally, the established framework tends to assume that all racial and indigenous groups, and therefore racial and indigenous group needs, are the same.[62] In general, it assumes that in terms of cultural needs and political-legal remedies, one size fits all. This simplifying assumption is rooted in the long-standing perception of many disciplines that race is fixed and biologically determined rather than socially constructed and that it is, therefore, largely devoid of cultural content. It is also rooted in the related perception that skin color and hair type are the reason for ill-treatment by some, but are otherwise irrelevant to social interactions—that beyond biological distinctions, all people (and groups) are essentially the same.[63] A number of courts and environmental justice scholars make this simplifying assumption about race and culture.

1. The Courts

Courts usually forgo meaningful analysis of racial or cultural discrimination in considering environmental justice issues. In particular, when addressing claims of environmental racism, courts focus their equal protection inquiries on the disparate impact of a governmental decision and a search for racial animus by individual government actors.[64] Under this nar-

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59. *Id.* at 47.

60. *See* Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1610–11 (1988); Gauna, *supra* note 40, at 48.

61. *See* Guana, *supra* note 40, at 50.

62. *See infra* Part II.B.1–2.

63. *See* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (discussing race as socially rather than biologically constructed).

64. *See* Washington v. Davis, 426 U.S. 229, 235 (1976) (holding that a law is not unconstitutional solely because of disparate impact unless it reflects a racially discriminatory purpose).

row approach, affected racial and indigenous communities need to establish that identified government decisionmakers were motivated by some form of racial ill-will. This proof is not only difficult to muster, it focuses attention on government officials and tends to flatten racial and cultural distinctions into a monolithic "racial minority" victim. It does not call for participants to examine closely racial groups' cultural or economic connections to the environment or the ways in which those connections have been damaged or possibly enhanced.

This narrow judicial focus is illustrated by two opinions, *East Bibb Twiggs Neighborhood Association v. Macon-Bibb County Planning & Zoning Commission*[65] and *R.I.S.E. v. Kay*.[66] In *East Bibb Twiggs*, African Americans challenged the siting decision of a landfill in a housing tract populated predominantly by black residents.[67] The court admitted that the landfill would impact blacks in the neighborhood to a "somewhat larger degree,"[68] but it held that there was insufficient evidence to demonstrate any governmental intent to discriminate against black persons.[69] The local planning and zoning commission had earlier decided to place a landfill in a white neighborhood.[70] The court thus found, without exploring the institutional and cultural sources of the government's actions, that there was no "clear pattern" of racial discrimination evidencing wrongful intent.[71]

Similarly, in *R.I.S.E. v. Kay*, the United States District Court for the Eastern District of Virginia rejected an equal protection challenge to the siting of a regional landfill near a historical African American church in an area populated primarily by African Americans.[72] Three other landfills in the County were also sited in areas where the racial composition was ninety-five to one hundred percent African American.[73] In addition to health concerns, R.I.S.E., a predominantly white-led environmental group, first complained about the decline in

65. 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd* 896 F.2d 1264 (11th Cir. 1989).
66. 768 F. Supp. 1144 (E.D. Va. 1991).
67. *See* 706 F. Supp. at 881.
68. *See id.* at 885.
69. *See id.* at 886.
70. *See id.* at 884.
71. *See id.* at 885.
72. *See* 768 F. Supp. 1144, 1145 (E.D. Va. 1991).
73. *See id.* at 1148.

property values, noise, and increased traffic. Later, the group raised racially discriminatory siting of the landfill. The court found that the County's siting of landfills over the past twenty years did in fact have a disproportionate impact on black residents.[74] It nevertheless held that plaintiffs failed to show that the siting was racially motivated, without examining what "racial motivation" might mean in this particular situation to the affected African American communities. The court, instead, simply declared that the "Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups. Rather, it merely prohibits government officials from intentionally discriminating on the basis of race."[75] Without thoughtfully discussing the African American community's spiritual and cultural concerns,[76] which deeply animated its opposition to the siting decision, the court stated, as a seeming afterthought, that the County had properly "balanced the economic, environmental, and cultural needs of the County in a responsible and conscientious manner."[77]

The courts' narrow application of the discriminatory intent test in *East Bibb* and *R.I.S.E.* reflects an implicit value judgment about racial discrimination that resembles a "strong version of color-blind constitutionalism," referred to by Neil Gotanda as "formal-race."[78] When employing formal-race analysis, courts, denying racial history and existing racial subordination, treat race as a neutral category.[79] Moreover, formal-race analysis overlooks social reality and "fails to recognize the connections between the race of an individual and the real social conditions underlying" the current problems.[80]

Justice Scalia's concurrence in *Adarand Constructors Inc. v. Pena*[81] is an example of formal-race analysis. In *Adarand*, the Supreme Court upheld a constitutional challenge to Con-

74. *See id.* at 1149.
75. *Id.* at 1150.
76. *See infra* notes 94–96 and accompanying text.
77. *Id.*
78. Neil Gotanda, *Critique of "Our Constitution in Color-Blind"*, 44 STAN. L. REV. 1, 48 (1991).
79. *See id.* at 47; *see also* Jen-L A. Wong, Note, Adarand Constructors Inc. v. Pena: *A Colorblind Remedy Eliminating Racial Preferences*, 18 U. HAW. L. REV. 939, 974–75 (suggesting the United States Supreme Court engaged in formal-race analysis denying race group history and context).
80. Gotanda, *supra* note 78, at 7.
81. 515 U.S. 200 (1995).

gressionally-authorized affirmative action programs for federal contractors. Adarand Constructors, a white-owned business, lost a subcontract bid for guardrail work on a highway construction project. A Hispanic American-owned business prevailed.[82] In his concurrence, Justice Scalia called for race-neutral treatment of all government contracts, declaring that "[i]n the eyes of the government, we are just one race. It is American."[83] Scalia's vision is an extraordinarily narrow one. It erases all traces of racial history in the United States and treats all racial groups the same despite marked differences in histories, current conditions, and treatment by mainstream America. Most important, it ignores the contemporary reality that people of color continue to experience stereotyping and discrimination.[84]

Gotanda suggests that the highly formalistic discriminatory intent test also fails to acknowledge a community's "historical-race"[85] and "cultural-race."[86] Historical-race means the historical underpinnings of racial designation or classification;[87] cultural-race speaks to the cultural aspects of racial group identity that gives race social meaning.[88] Cultural-race thus addresses "the customs, beliefs and intellectual and artistic traditions" of a racial group.[89]

Palmore v. Sidoti[90] is illustrative. There, the Supreme Court devalued cultural-race in its analysis. The Court unanimously overturned a Florida trial court's decision to modify a white mother's custody of her child after the mother married a black man.[91] The Court acknowledged that there was a "risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same ethnic origin."[92] It nevertheless concluded that a court could not con-

82. *See id.* at 204.
83. *Id.* at 239 (Scalia, J., concurring).
84. For further discussion, see Wong, *supra* note 79, at 971–76.
85. Gotanda, *supra* note 78, at 39.
86. *Id.* at 56.
87. *See id.* at 40.
88. *See id.*
89. *Id.*
90. 466 U.S. 429 (1984).
91. Gotanda, *supra* note 78, at 57.
92. *Id.* at 57–58 (quoting *Palmore*, 466 U.S. at 433).

stitutionally consider such private "biases."[93] According to Gotanda, the *Palmore* Court "failed to consider . . . the possibility that a Black stepfather might offer a positive value to [a] child beyond a caring home."[94] In a bicultural environment, a child is exposed to the mother's background, but "also to Black culture in a way which [a] child could never have experienced in her biological father's home."[95] By failing to recognize this experience, Gotanda observes that the "Supreme Court simply lacked the imagination to consider and separate the subordination dimension of race—the historical-race element which accounted for prejudice outside the home—from the positive concept of culture-race."[96]

In *R.I.S.E.*, discussed earlier, the court disregarded underlying social conditions by neglecting both cultural-race and historical-race.[97] The African American plaintiffs complained that the landfill would interfere with their community activities and their worship as African Americans in the Second Mt. Olive Church; they believed the landfill would desecrate the special significance of the historic church founded by freed slaves.[98] The court discussed their claims without reference to history or context and was therefore able to conclude easily that the African American plaintiffs failed to state a claim of environmental racism.

For those African Americans, however, the church was historically and socially important to their existence as a racial community. Indeed the black residents had long been racialized and segregated and had been compelled by Southern racism to create their own African American institutions. Desecration of the church was, to that community, a racial act with profound social and cultural consequences.[99] By summarily ignoring this historical context, the court undermined the black community's ability to call the local government to account for

93. *See id.* at 58.
94. *Id.*
95. *Id.*
96. *Id.*
97. R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991).
98. *See id.* at 1147.
99. *See infra* Part V for a more detailed discussion of the case.

the potentially devastating social and cultural impacts of its decision.[100]

2. The Commentators

Some commentators on environmental racism treat the meaning of race with sophistication.[101] The established framework, however, tends to engender formal-race analysis and thus to encourage writing about environmental racism without

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100. Another example of this narrow judicial focus is illustrated by various courts and agencies addressing (or not addressing) the issue of environmental racism through procedural means. For example, forty of the eighty-seven environmental justice Title VI administrative complaints filed with the EPA by September 30, 1999 were "rejected on procedural grounds, such as lack of federal financial assistance or failure to file within the 180-day statute of limitations." Luke W. Cole, *"Wrong on the Facts, Wrong on the Law": Civil Rights Advocates Excoriate EPAs Most Recent Title VI Misstep*, 29 ENVTL. L. REP. 10775, 10775 (1999).

Although faced with the opportunity to clarify the area of disparate treatment in environmental justice Title VI litigation, the United States Supreme Court dismissed as moot a recent Title VI environmental justice claim. *See* Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 524 U.S. 915, *and vacated as moot*, 524 U.S. 974 (1998). The city of Chester, located in Delaware County, Pennsylvania, has a population of about 42,000, of which sixty-five percent is African American. *See Seif*, 132 F.3d at 927 n.1. The remainder of Delaware County, having a population of approximately 502,000, is ninety-one percent white. *See id.* An organization of Chester residents alleged that the Pennsylvania Department of Environmental Protection ("PADEP") violated their civil rights by issuing a permit to a private corporation to operate a hazardous waste facility in the city. *See id.* at 927.

Since 1987, PADEP issued five waste facility permits for sites in the city of Chester. *See id.* at 927 n.1. By stark contrast, the entire remainder of Delaware County only received two such permits during the same time period. *See id.*

However, instead of reaching the merits, the case was ultimately decided on the issue of plaintiff's standing to sue. *See id.* at 937. The district court below held that there was no private right of action under section 602 of Title VI, and thus dismissed the case, in part on that ground. *See Seif*, 944 F.Supp. at 413.

Although the Third Circuit Court of Appeals found that a disparate impact private right of action did exist under section 602 of Title VI, see *Seif*, 132 F.3d. at 933–37 (3d Cir. 1997), the Supreme Court subsequently vacated the judgment and remanded the case with instructions to dismiss in accordance with *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *See Seif*, 524 U.S. at 974. *See generally* Richard Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 835 (1993) (suggesting potential utility of Title VI for environmental justice claims); Worsham, *supra* note 14, at 647–49 (discussing EPA Office of Civil Rights' controversial "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits").

101. *See infra* notes 135–178.

explanation of, or sometimes even use of, the term, "race."[102] By not acknowledging race and racial context, these writings are limited. However otherwise illuminating, they do not address: (1) racial groups' (or subgroups') differing understandings of "the environment," and of "race" itself; (2) groups' differing spiritual, cultural, and economic connections to the environment; and (3) the importance of the environment to the groups' identities. By treating all racial groups alike, they fail to provide analytical and organizational frameworks for understanding specific environmental justice problems and for tailoring actual remedies to meet the needs and goals of different racial communities. The writings tend to embody a one-size-fits-all approach, overlooking distinct historical experiences of particular communities of color and their current cultural and economic concerns.[103]

In doing so, the writings sometimes ignore the distinct sovereignty-based claims of Native Americans.[104] For example,

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102. *See, e.g.*, Kevin, *supra* note 19 (arguing for limited recognition of environmental justice claims without thoughtfully addressing the meanings of race and culture); Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COLO. L. REV. 387 (1999) (surveying thoroughly the various perspectives on environmental justice literature without exploring issues of race and culture); Maura Lynn Tierney, *Environmental Justice and Title VI Challenges to Permit Decisions: The EPA's Interim Guidance*, 48 CATH. U. L. REV. 1277, 1317 (1999) (focusing on Title VI and arguing for the need to balance the interests of environmentalists, advocates of urban redevelopment, civil rights groups, and federal, state, and local governments to protect "a community's economic and social health," but omitting the interests of racial communities). *See generally* Gelobter, *supra* note 16, at 841; Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991); Seth D. Jaffe, *The Market's Response to Environmental Inequity: We Have the Solution; What's the Problem?*, 14 VA. ENVTL. L.J. 655 (1995); Francisco Leal, *Environmental Injustice*, 14 CHICANO-LATINO L. REV. 37 (1994); A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 U. COLO. L. REV. 871 (1992); Jimmy White, *Environmental Justice: Is Disparate Impact Enough?*, 50 MERCER L. REV. 1155 (1999).

103. *See, e.g.*, Amanda C.L. Vig, *Using Title VI to Salvage Civil Rights From Waste:* Chester Residents Concerned For Quality Living v. Seif, 67 U. CIN. L. REV. 907 (1999) (providing insightful analysis of the Third Circuit's decision in *Seif*, but discussing only the impact of *Seif* on "environmental justice plaintiffs"); Mahoney, *supra* note 12, at 365 (identifying racism, economic pressures, and lack of political power as the "[t]hree fundamental obstacles exacerbat[ing] the problems faced by the environmental justice movement," but not distinguishing racial groups or analyzing cultural or historical context).

104. There are, however, some recent scholars who address these issues. For example, Catherine O'Neill, in critiquing the actions of federal and state health and environmental agencies in response to the problem of contaminated fish in the Pacific Northwest, points out that "conventional understanding . . .

stories of waste disposal on Native American reservations recently inspired a series of derisively titled news articles, "Dances with Garbage."[105] The Campo Band in California decided to build a waste landfill on its reservation, sparking vehement protest not from tribal members, but from non-Native local residents.[106] In New Mexico, the Mescalero Apaches are negotiating with a private company to locate a monitored, retrievable storage nuclear waste facility on their lands, inciting the wrath of non-Native neighbors.[107]

These stories turn sideways traditional environmentalist notions of Native Americans as the primitive foot soldiers in the war against pollution. The disputes also destabilize the conventional wisdom of the environmental justice movement that opposes as discriminatory the siting of the same sort of waste disposal facilities that some Native tribes are cautiously inviting onto their lands.[108] Viewed paternalistically, the question might be: Are the tribes acting against their better judgment, imperiling both the environment and themselves? Viewed critically, the question might be different: Are the tribes, after calculation, exercising rights of self-determination

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fails to appreciate the cultural dimension of the harm and fails to recognize the integral role of fish, fishing, and fish consumption in the lives of the Pacific Northwest peoples." O'Neill, *supra* note 27, at 9.

105. *See* Kevin Gover & Jana L. Walker, *Escaping Environmental Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project in Indian Country*, 63 U. COLO. L. REV. 933, 933 n.2 (1992).

106. *See id.*; *see also* DAN MCGOVERN, THE CAMPO INDIAN LANDFILL WAR: THE FIGHT FOR GOLD IN CALIFORNIA'S GARBAGE (1995).

107. *See* Conrad L. Huygen, *Mescalero Revisited*, ENVIRONS ENVTL. L. & POL'Y J., Dec. 1996, at 52, 53; Louis G. Leonard, III, *Sovereignty, Self-Determination, and Environmental Justice in the Mescalero Apache's Decision to Store Nuclear Waste*, 24 B.C. ENVTL. AFF. L. REV. 651 (1997).

108. Other tribes have rejected overtures made by non-Native waste corporations interested in siting such facilities on their reservations as insulting to their cultural values and tantamount to genocide. Many Native communities are looking to traditional cultural values for guidance in environment and economic developmental decisionmaking. *See supra* notes 51–52 and accompanying text. Tribes have cited their unique cultural beliefs to support the imposition of stringent tribal environmental regulations on non-Natives. *See* Peter M. Manus, *The Owl, the Indian, the Feminist, and the Brother: Environmentalism Encounters the Social Justice Movements*, 23 B.C. ENVTL. AFF. L. REV. 249, 269 (1996). Even in situations like those faced by the Campo Band, Tsosie suggests that tribes may not be so much "abandoning" their cultural values as "subordinating" certain values to other less glamorized but equally central norms such as "ensuring the survival of the people and a decent standard of living." *See* Tsosie, *supra* note 50, at 326.

in order to build an economic base to assure cultural and political survival?

Context is key here in framing the relevant question. In the Campo Band's situation, poverty, poor land quality, and location played important roles.[109] But other factors contributed, including the tribe's ability to dictate contractual terms, to establish health and safety standards[110] and, significantly, to counter the ongoing assault on tribal economic sovereignty by non-Natives outside the reservation.[111] According to their attorneys, the major problem facing tribes seeking to build commercial waste disposal projects is not the "environment," but "power and race."[112] The "clear implication [from outsiders] is that Indians lack the intelligence to balance and protect adequately their own economic and environmental interests. [But w]e need the support and understanding of the environmental community, not its protection."[113] Contextual analysis, thus, reveals different questions: How might a tribe's decision to site such a facility on its lands enhance tribal efforts to improve education, health, elder care, housing, and care for other tribal lands? With what social and economic tradeoffs? And who should make the judgment call?

Much of the environmental justice literature focuses on the causes, symptoms, and solutions associated with the uneven distribution of environmental burdens and recognizes race as a "factor"[114] or a "potent variable"[115] in determining "who gets what, where, and why."[116] A leading scholar in the area, Robert D. Bullard, did just this in helping to establish the prevailing environmental justice framework[117] discussed earlier.[118] In his

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109. *See* Tsosie, *supra* note 50, at 306–07.

110. *See* Gover & Walker, *supra* note 105, at 936–41.

111. *See* Tsosie, *supra* note 50, at 308 (noting that the tribe apparently perceived the risk to its sovereignty as more pressing than the risk of groundwater contamination).

112. *See* Gover & Walker, *supra* note 105, at 942.

113. *Id.* at 942–43.

114. *See* Richard J. Lazarus, *Distribution in Environmental Justice: Is there a Middle Ground?*, 9 ST. JOHN'S J. LEGAL COMMENT. 481, 488 (1994).

115. *See* Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 9 ST. JOHN'S J. LEGAL COMMENT. 445, 450 (1994).

116. *Id.*

117. Dr. Bullard's critique of mainstream environmentalism suggests that the environmental protection paradigm does the following:

> (1) institutionalizes unequal enforcement; (2) trades human health for profit; (3) places the burden of proof on the "victims," not on the polluting

path-breaking 1990 book, *Dumping in Dixie,* Bullard provided a detailed account of problems and dispute-handling mechanisms used by residents of five different racial communities.[119] Each case study addressed: issue crystallization, leadership type, opposition tactics, resolution mechanisms, and outcome.[120] Bullard's studies recognized race as a potent variable in determining a community's needs, resources, and support. The case studies also characterized environmental issues in terms of conservation, public health, and economic tradeoffs.[121]

Bullard thus wedded community activism theory with environmental protection and in spectacular fashion opened a crucial dimension of U.S. racism to scrutiny and remediation. He did not, however, examine closely how groups are racialized or how culture influences group perceptions and goals; nor did he acknowledge that communities of color and their relationship to the environment differ in important ways.

Other scholars recognize that race, along with class, is crucial to understanding the unequal distribution of environ-

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industry; (4) legitimates human exposure to harmful chemicals, pesticides, and hazardous substances; (5) promotes "risky" technologies, such as incinerators; (6) exploits the vulnerability of economically and politically disenfranchised industry around risk assessment; (7) subsidizes ecological destruction; (8) creates an industry around risk assessment; (9) delays cleanup actions; and (10) fails to develop pollution prevention as the overarching and dominant strategy.

Robert D. Bullard, *Introduction* to UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR xv, at xvi (Robert D. Bullard ed., 1994). Dr. Bullard's framework for environmental justice consists of five basic characteristics:

1. Incorporates the principle of the right of all individuals to be protected from environmental degradation,
2. Adopts a public health model of prevention (elimination of the threat before harm occurs) as the preferred strategy,
3. Shifts the burden of proof to polluters and dischargers who do harm or discriminate or who do not give equal protection to racial and ethnic minorities and other "protected" classes,
4. Allows disparate impact and statistical weight, as opposed to "intent," to infer discrimination,
5. Redresses disproportionate risk burdens through targeted action and resources.

Id. at 10.

118. *See supra* notes 11, 19, 32, 34, 49, 117 and accompanying text.

119. *See* BULLARD, *supra* note 8.

120. *See id.* at 46–47.

121. *See id.* at 48.

mental burdens.[122] Even these scholars, however, do not examine the differential racialization of minority and indigenous groups, oftentimes lumping all "racial" groups into one. For instance, many writings use, without explanation, the terms "racial minority communities," "communities of color," or "people of color."[123] These categories are cited without discussion of the cultural, social, and political differences among racial groups and without an analysis of how these categories are socially and politically constructed.[124]

One example is the insightful writing of environmental justice advocate Charles Lee. Lee acknowledges that "some communities are more equal than others."[125] He also acknowledges that "communities that suffer from environmental inequities also suffer from social inequities,"[126] including housing discrimination and residential segregation, inadequate health care, and lack of fair opportunity in education and employment.[127] Lee, though, tends to overlook the racial and social differences among these communities. For example, he lists the environmental inequities from which "[t]hese so called 'other side of the track' communities suffer."[128] By characterizing racial minority groups as "other side of the track communities" and broadly listing "their problems," Lee flattens important cultural, social, and locale distinctions.

3. Critical Re-examination of Race, Culture and Sovereignty

Richard Lazarus, on the other hand, identifies the conceptual flaw in treating all racial groups in the same way by acknowledging that policymakers often ignore "cultural assumptions [that] affect environmental protection standards."[129] He recalls an EPA report dismissing the claims of environmental inequity. The report attributed disparity in exposure to con-

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122. *See supra* notes 117, 120–124 and accompanying text.

123. *See* Lee, *supra* note 14, at 573; *see also* YOUNG, *supra* note 27 (discussing the concept and meaning of equity and society's distributive problems); Fisher, *supra* note 22, at 461.

124. *See supra* notes 93–100 and accompanying text.

125. Lee, *supra* note 14, at 571.

126. *Id.* at 573.

127. *See id.*

128. *Id.*

129. Lazarus, *supra* note 114, at 485.

taminated fish consumption to the fact that "[s]ome populations . . . and some cultural groups, consume more fish than the average population."[130] The report implied that those groups who choose to eat more fish must suffer the risk of increased contamination since they can reduce the risk simply by eating less fish. Lazarus observes that in making these assumptions, the EPA disregarded those distinct communities that catch and consume more fish on a daily basis as a matter of historical and cultural practice.[131]

Lazarus thus aptly identifies the cultural flattening reflected in this kind of environmental justice policymaking, though he also tends to simplify the notion of culture. He frames the issue of differing group behavior and needs in terms of the quantity of fish consumption; he does not develop how fishing itself might be the central facet of communal and economic life of the group or how contamination of fish may do more than pose health risks—it may destroy the cultural and economic fabric of the community.

By contrast, Catherine O'Neill directly addresses the issue of cultural harm to Native Americans due to contaminated fish in the Puget Sound and Columbia River Basin.[132] O'Neill points out that because agencies frame the problem as "harm to individual humans' physical health,"[133] this merely "separates out and recognizes but a single strand—individual humans' physical health—from an integrated set of harms wrought by chemical contamination."[134] O'Neill recognizes that "the contours of environmental injustice are different for Native Americans than for other affected groups, and so remedying the injustice will require consideration of a different constellation of issues—among other things, recognition of the unique historical and legal aspects of Native Americans' claims."[135] In addition, O'Neill recognizes that certain environmental risks are "disproportionately imposed on some identifiable Native

130. ENVIRONMENTAL PROTECTION AGENCY, EPA 230-R-92-008A, 2 ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, at 12 (1992).

131. *See id.* Professor Lazarus made these and the other comments recited about the EPA report at a panel presentation, and therefore, did not have the opportunity to develop them in depth.

132. *See* O'Neill, *supra* note 27, at 9.

133. *Id.* at 8.

134. *Id.* at 9.

135. *Id.*

American subpopulations," distinct from other subpopulations and the general population as a whole.[136] O'Neill predicts that "an understanding of discrimination as cultural suppression may undergird recent governmental cognizance of environmental injustice."[137]

What O'Neill identifies and what is missing from many other commentators' accounts is an express understanding of how race and culture operate in contemporary U.S. communities. Racial categories are not biological realities. Rather, they are socially constructed by culture, politics, history, and human interaction.[138] By perceiving race as fixed and objective—instead of socially constructed—the established environmental justice framework tends to treat "race [as] a neutral, apolitical term, divorced from social content"[139] and devoid of cultural meaning. This further reflects the inclination of many courts and commentators to avoid facing race through the "painful revelations that may be lurking in an examination of either racial history or the current racial disparities of society."[140]

II. AN EMERGING NATIVE AMERICAN FRAMEWORK

As part of a critical re-examination, Native American legal scholars are attempting to develop an integrated environmental, race, and sovereignty framework by approaching environmental justice with greater cultural and historical depth. For example, Williamson B. C. Chang[141] "contends that Eurocentric conceptualizations of nature have dominated the discourse on environment and race to the exclusion of other cultural perspectives."[142] In particular, for Chang, the term

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136. *Id.* at 18.

137. *Id.* at 90–91.

138. *See* Lopez, *supra* note 63, at 8–9 (discussing race as socially rather than biologically constructed).

139. Susan Serrano, Comment, *Rethinking Race for Strict Scrutiny Purposes:* Yniguez *and the Racialization of English Only*, 19 U. HAW. L. REV. 221, 238 (1997). *See also* Gotanda, *supra* note 78, at 32.

140. John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 324 (1993–94).

141. Williamson B.C. Chang, *The "Wasteland" in the Western Exploitation of "Race" and the Environment*, 63 U. COLO. L. REV. 849 (1992).

142. Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 J. ENVTL. L. & LITIG. 121, 162 (1994) (reviewing Williamson Chang's article); *see also* Chang, *supra* note 141, at 849–52.

"environmental racism" reaffirms a framework in which political and civil rights are confused with indigenous peoples' claims.[143] Among groups with racial identities (whether imposed or chosen), Chang differentiates "Americans by consent" (mainly racial immigrants) from "Americans by conquest" (indigenous groups).[144] More generally, Chang maintains that problems of race and environment will not be solved until greater attention is paid to indigenous people "who hold completely different attitudes towards scarcity and human influence on nature."[145]

Like Chang, Robert A. Williams, Jr. offers a view of environmental justice that departs from the established framework. Williams suggests that society "decolonize" environmental law to account for "Indian visions of environmental justice."[146] According to Williams, in many American Indian belief systems, there is "an intimate relation between the spiritual world, the physical world, and the social world."[147] In contrast, the American system of environmental values has "lost its sense of reliance on nature for survival, . . . lost [its] sense of respect for the world,"[148] and failed to recognize that human values and environmental values are "intimately connected with who we are as human beings."[149] Therefore, for Williams, society cannot change environmental racism without grasping what it means to be spiritually, physically, and socially connected to the environment.

William A. Shutkin also offers an indigenous perspective to environmental justice that "embodies the distinctively Native American conception of the environment as a key to a healthy community."[150] According to Shutkin, "the political, social, and cultural [lives] of Native American communities are inextricably linked to environmental health because the 'environment is not something "out there," but something deep within each of

143. *See* Chang, *supra* note 141, at 867.

144. *See id.* at 860.

145. *Id.* at 852.

146. Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1164 (1994).

147. *Id.* at 1153.

148. *Id.* at 1164.

149. *Id.* at 1134–35.

150. William A. Shutkin, *The Concept of Environmental Justice and a Reconception of Democracy*, 14 VA. ENVTL. L.J. 579, 586 (1994–95).

us, a part of each of us.'"[151] Undertaking this indigenous perspective, the environment infuses and affects all forms of social life.[152]

In a comprehensive treatment of land ethics and environmental law, Rebecca Tsosie finds a strong link between traditional Anglo-American philosophy and American environmental law and policy.[153] Tsosie finds contemporary American environmentalism rooted in the Judeo-Christian tradition's emphasis on individual endeavor and focus on man as master of all creation, as well as in secular economic norms of "order," "reform," and "opportunity."[154] These principles connect to an overarching value system "that places humans at the center of thought and land as an accessory to human use."[155] This anthropocentric value system forms the foundation of the environmental movement and, for Tsosie, clashes with traditional Native views of the universe and the place of humans within it.[156]

Native communities in the United States tend to share general cultural value and belief systems that are distinguishable from those of the Western world.[157] As many commentators have observed, traditional Native worldviews tend to be "holistic" or "ecocentric" in orientation.[158] Instead of drawing a line between subject and object, self and the environment, or spirit and matter, traditional Native worldviews tend to see the

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151. *Id.* at 586 (quoting the Pre-filed Testimony of Tribal Judge Michael Delaney, The Abenaki Nation, *In re* Champlain Oil Company, (No. CUD-94-11) (Mar. 9, 1995)).

152. *See id.*

153. Tsosie, *supra* note 50, at 259–66; *see also* CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic, eds., 2d ed. 2000). Professor Tsotsie links philosophy to American environmental law and policy. To what extent does that linkage extend to environmental justice scholarship and practice? Professor Chang and others argue that there is a direct connection. *See* Chang, *supra* note 141, at 849–52.

154. *See* Tsosie, *supra* note 50, at 248–59.

155. *Id.* at 259.

156. *See id.*

157. *See id.* at 268–72 (noting the difficulties of finding a distinct "Native voice" in environmental protection).

158. *See generally* VINE DELORIA, JR., RED EARTH, WHITE LIES: NATIVE AMERICANS AND THE MYTH OF SCIENTIFIC FACT (1995); Ronald Trosper, *Traditional American Indian Economic Policy*, 19 AM. INDIAN CULTURE AND RES. J. 65 (1995).

creation as an integrated whole.[159] This understanding of humans as merely one element of a greater "oneness" is both related to and different from a revitalized aspect of environmental law: the public trust doctrine and its premise that people ("the public") should be stewards of the physical environment.[160]

From this perspective, modern environmentalism thus implicitly promotes an anthropocentric ethic of nature as property, dismissing the physical, cultural, and spiritual relationship between Native communities and the land. For this reason, Robert A. Williams criticizes American environmental law as "colonized by a perverse system of values which is antithetical to achieving environmental justice for American Indian peoples."[161] The Anglo-American value system, he asserts, "privileges what it labels as 'human values' over 'environmental values,'" ignoring how "both sets of values are intimately connected to . . . the complete set of forces which give meaning and life to our world."[162] For Native peoples, nature is not property. Nature is culture, religion, even family.[163] Nature is home. For these scholars, prevailing environmentalism, with its anthropocentric premises, thus undermines the very thing it seeks to promote: genuine environmental justice.

James Huffman also criticizes the traditional environmental justice framework, but from the perspective of Native American economic development. He identifies three assumptions of modern environmental thought that work against Na-

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159. *See* Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175, 181–85 (1992) (describing the "holistic" view of Native cultures).

160. Integrating a wealth of prior scholarship on indigenous cultures, Tsosie thus identifies four central features of native environmental belief systems. First, Native cultures perceive the natural world as an animate being deserving care and respect. *See* Tsosie, *supra* note 50, at 276–79. Second, the relationship between humans and nature is one of "kinship" rather than "ownership." *See id.* at 279–82. Third, land and place hold special significance for Native community identity. *See id.* at 282–85. Finally, "reciprocity" and "balance" serve as the guiding principles of native culture. *See id.* at 285–87.

161. Williams, *supra* note 146, at 1134.

162. *Id.* at 1134–35.

163. *See* Chang, *supra* note 141, at 857 ("In the Hawaiian world, if one understands natural resources to be an extension of one's family, accumulating more cousins really does not make much sense. One is born into a family and cannot do much to change it."). *Id.*

tive interests.[164] First, orthodox environmentalism assumes the existence of a scientifically "correct" natural condition and thus tends toward oppressive command and control methods.[165] The second assumption is that regulations must limit development and growth.[166] Finally, in marked contrast to arguments that anthropocentrism in American environmentalism clashes with Native cultural beliefs, Huffman asserts that American environmentalism assumes a "biocentric" approach fundamentally opposed to economic development, even when necessary for Native survival.[167] He criticizes environmental protection as a "luxury good" enjoyed by wealthier societies[168] that promotes the idea that "the poverty and economic depression of the reservations [is] not only inevitable but desired."[169]

Huffman's critique is harsh: "Native Americans, more than any other segment of American society, will suffer at the altar of environmentalism worshipped in their name."[170] Commentator Conrad Huygen arrives at a similar conclusion: "We have romanticized indigenous cultures in a manner that threatens to stifle development on reservations and perpetuate the poverty that permeates them."[171] In more measured terms, Tsosie agrees with Huffman's view that "national implementation of centralized policies (whatever their origin and content) often disregards tribal sovereignty and the special interests of indigenous peoples."[172]

From these varied visions of Native American scholars emerges a point of commonality: traditional environmentalism and, by extension, the established environmental justice framework, do not necessarily work well for Native Americans or for other racial and indigenous groups.[173] In light of the

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164. *See* James L. Huffman, *An Exploratory Essay on Native Americans and Environmentalism*, 63 U. COLO. L. REV. 901, 909–19 (1992).

165. *See id.* at 911–14.

166. *See id.* at 914–16.

167. *See id.* at 916–19.

168. *See id.*

169. *Id.* at 919.

170. *Id.* at 902.

171. Huygen, *supra* note 107, at 57.

172. Tsosie, *supra* note 50, at 325.

173. The dysfunction includes the conflicts between well-intentioned conservationism and native knowledge—for instance, displacement of tribes to accommodate national parks and the simmering dispute between native gatherers and proponents of endangered species protection and animal rights. *See, e.g.*, Tsosie, *supra* note 50, at 239–41 (relating how protection of the Mexican Spotted Owl

philosophical and practical limitations of the established environmental justice framework, the writings of Professors Chang, Williams, Shutkin, Tsosie, and Huffman illuminate an indigenous American cultural perspective on the environment, race, and sovereignty. They demonstrate how the dominant environmental justice narrative tends to ignore or even undermine that perspective.

Although illuminating in important respects, the emerging Native American framework itself is limited. It reconstructs environmental justice in terms of a more or less singular indigenous perspective of the environment. This perspective is important for indigenous groups facing environmental injustice—or seeking to define for themselves how "the environment" and "justice" connect. But to a large extent, the writings overlook salient differences among Native American groups and subgroups and wide differences among traditionally classified "racial minorities" in terms of understandings of environmental injustice and how to deal with it.

So how can environmental justice scholars, commentators, activists, and decision makers grapple with important differences among groups while advancing concepts, language, and methods for addressing concrete problems? Shutkin and Lord suggest that "the legal system has perpetuated environmental injustice by misreading or disregarding [a] community's history."[174] These scholars urge "a more complete history that incorporates not only a view of the past, present, and future, but also the question of justice."[175]

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shut down the Navajo Nation's timber enterprise); Manus, *supra* note 108, at 266–67 (discussing the United States Department of the Interior opinion that the Endangered Species Act overrides Indian rights); Michael L. Chiropolos, Comment, *Inupiat Subsistence and the Bowhead Whale: Can Indigenous Hunting Cultures Coexist with Endangered Animal Species?*, 5 COLO. J. INT'L ENVTL. L & POL'Y 213 (1994) (exploring tension between honoring indigenous subsistence practices and preserving endangered species). The Mount Rushmore National Monument, for example, defaced part of the Black Hills considered sacred by the Lakota tribe and reserved for them by treaty. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 424 (1980).

Environmentalists also opposed the repatriation of Native sacred objects and cultural patrimony on grounds that they are part of a "public trust:" the "common heritage of all mankind." *See* John Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989); Richard A Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111 (1995–96).

174. Charles P. Lord and William A. Shutkin, *Environmental Justice and the Use of History*, 22 B.C. ENVTL. AFF. L. REV. 1, 1 (1994).

175. *Id.* at 4.

Michael Gelobter also suggests that the "history and context of racial struggle . . . must be understood" along with environmental issues.[176] Similarly, Sheila Foster critiques current environmental justice scholarship as "fail[ing] to articulate coherently what exactly [is] at work when we refer to environmental racism."[177] For Foster, "contemporary [environmental] racism cannot be understood apart from the historical and social contexts that influence discriminatory outcomes and create structures and institutions that continually reinforce those outcomes."[178]

This suggested contextual approach moves closer to treating racial and indigenous groups and their relationships to the environment in light of cultural and social differences. The approach, however, needs both expansion and refinement in order to: (1) address explicitly how racial categories are constructed, racial identities forged, and racial meanings developed; (2) account for significant differences between groups traditionally described as racial minorities (African Americans, Asian Americans, Latinas/os, and indigenous peoples (including American Indians, Aleuts, Eskimos, Native Hawaiians)); and (3) recognize and deal more directly with the influences of whiteness in the formation and implementation of environmental law and policy. What is needed, then, is a framework that more subtly interrogates social, political, historical, cultural, and power interactions among whites and racial and indigenous groups.

III. RACIALIZING ENVIRONMENTAL JUSTICE

Critical race theory[179] offers communities and environmental justice proponents important critical tools for evaluating past experiences and present conditions.[180] Beginning with a skepticism of legal impartiality common to all legal realists, critical race theory pays particular attention to the roles that

176. Gelobter, *supra* note 16, at 848.

177. Foster, *supra* note 13, at 734.

178. *Id.* at 733–34.

179. *See generally* CRITICAL RACE THEORY, *supra* note 153.

180. *See, e.g.*, Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQ. J. 103 (1987) (asserting that although critical legal theories have not fully incorporated the viewpoints of native peoples, they provide important tools of inquiry).

race, racism, and nativism play in the formation of legal norms and the administration of justice. Recognizing the law as a "text" written by society, critical race theory looks beyond the law's main story to those "outsider" accounts that the legal system suppresses or ignores. Critical race theory thus examines power in social relationships and seeks to reframe legal concepts of justice by challenging and reworking their implicit biases.[181] It offers an approach for integrating key aspects of the established environmental justice framework and the emerging Native peoples' framework with new insights into racial differentiation and empowerment, the influences of whiteness, and the importance of praxis. That approach is what we call "racializing environmental justice."

A. Racialization and Differentiation

"Racializing environmental justice," in part, is a method of inquiry and analysis that builds on critical race theory concepts of "differential racialization"[182] and "differential empowerment."[183] It recognizes that for traditional "racial minorities" and for America's indigenous peoples, "group and subgroup identities, political and socioeconomic goals, and 'available responses' may sometimes coincide and oftentimes differ."[184] To better enable scholars, lawyers, and activists to grapple concretely with the "racism" and "justice" components of environmental justice, the racializing environmental justice method inquires into the ways racial (and Native) communities acquire differing identities, status, and power, and how those differences affect their respective connections to "the environment." By acknowledging communities' important racial and cultural distinctions, the method also frees those communities and their advocates to identify, and coalesce around, the similarities of treatment by public and private entities with political and economic power.

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181. *See generally* CRITICAL RACE THEORY, *supra* note 153.

182. Michael Omi, *Out of the Melting Pot and Into the Fire: Race Relations Policy, in* THE STATE OF ASIAN PACIFIC AMERICA: POLICY ISSUES TO THE YEAR 2020, at 199, 207 (1993).

183. Jeff Chang, *On Ice Cube's "Black Korea",* 19 AMERASIA J. 87, 103 (1993).

184. Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 U.C.L.A. ASIAN PAC. AMER. L.J. 33, 62 (1995).

Critical race theory challenges the very concept of "race" as "immutable" or biological, as something objective and largely devoid of social content or historical context.[185] It moves analytical understandings of "race" beyond its conception as "an independent variable requiring little or no elaboration."[186] For Michael Omi and Howard Winant, race is understood "as an unstable and 'decentered' complex of social meanings constantly being transformed by political struggle."[187] Race, and, more particularly, racial categories and identities, are continually formed and reformed through social and political struggle. This process of racialization[188] extends "racial meaning to a previously racially unclassified relationship, social practice, or group."[189] Racializing environmental justice thus entails interrogation into the ways evolving public perceptions and the particular struggles of a community have generated racial or cultural meanings for that community.

For example, for Asian Americans, different social forces lead to differential racialization of Asian American groups. Omi sees class cleavages, which create different levels of racial status and power for subgroups, as a primary factor.[190] "The problems encountered by a rich entrepreneur from Hong Kong and a recently arrived Hmong refugee are obviously distinct. The sites and types of discriminatory acts each is likely to encounter, and the range of *available responses* to them, differ by class location."[191] Differential racialization may exist even within subgroups, such as between a first generation Vietnamese American immigrant and a second generation Vietnamese American,[192] or as between black descendants of Jamaica and Senegal. Pat Chew thus "adds country of origin, length of

185. *See generally* Serrano, *supra* note 139, at 238; CRITICAL RACE THEORY, *supra* note 153; MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (2d ed. 1994).

186. Omi, *supra* note 182, at 203.

187. OMI & WINANT, *supra* note 185, at 55.

188. For further discussion of the differential racialization process in the context of English only rules, see generally Serrano, *supra* note 139, at 221.

189. Omi, *supra* note 182, at 203.

190. *See* Yamamoto, *supra* note 184, at 61.

191. Omi, *supra* note 182, at 207.

192. *See* Yamamoto, *supra* note 184, at 61 (citing Omi, *supra* note 182, at 207).

United States residence [as well as] gender to the differential racialization calculus."[193]

The racialization process, furthermore, "fixes status and allocates power differentially among and within racial groups."[194] So, for instance, more "'established' immigrant groups, with greater resources and access to political power may organize around mobility issues ('glass ceiling'), while recent immigrant groups may focus on 'survival issues' (funding for language classes and job-training programs)."[195] As a result, differential racialization primarily pursues a framing of race that acknowledges that historical and contemporary social and cultural influences have important consequences for "individual identity and collective consciousness, and political organization."[196]

For Native peoples, differential racialization fosters another kind of inquiry, one that addresses often substantial differences among immigrant racial populations in America, imported slaves, and conquered indigenous peoples. The inquiry focuses on the effects of land dispossession, culture destruction, loss of sovereignty, and, in turn, on claims to self-determination and nationhood (rather than to equality and integration).

To further refine the differential racialization analysis, "Jeff Chang suggests a notion of 'differential forms of disempowerment among communities of color.'"[197] Differential disempowerment focuses on recognition of power differences among racial or Native groups and sees power in terms of status, locale, time, and economics.[198] Disempowerment is used "to emphasize that [racial] group power in most settings must be assessed in the context of dominant political and economic powers in the area."[199] It is "[o]nly when groups acknowledge

193. *Id.* (citing Pat Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 26 (1994)).

194. *Id.* at 62. White Americans, too, are not a monolithic group. Values, interests, practices, and environmental concerns are diverse. Racialization analysis accounts for and reveals this internal group diversity while concomitantly identifying certain general commonalities. *See infra* Section B, "Unpacking Whiteness" for a further discussion.

195. *Id.* at 61.

196. Omi, *supra* note 182, at 207.

197. Yamamoto, *supra* note 184, at 62.

198. *See id.* at 59–60 n.166.

199. *Id.*

how and why they are differentially empowered or disempowered that they can begin to work in coalition and advance their interests."[200]

For example, before Hawai'i became a state, "white oligarchical control, Asian immigration and Native Hawaiian separation from land and traditional cultural roots constructed differing racial group identities."[201] Native Hawaiians, as the subjects of a conquered sovereign, and Asians, as first or second generation immigrants, were differentially racialized. The two groups were differently situated although they had experienced similar hardships. Unlike Asian Americans, Native Hawaiians underwent land dispossession resulting in large-scale cultural destruction, along with "death and dying and spiritual suffering."[202] Moreover, "the rhetoric describing group characteristics, the market distribution of labor, the opportunities for education, housing and economic advancement towards the middle of the century lifted Asian Americans above Native Hawaiians in terms of socio-economic status."[203]

Thus, although mainstream America sometimes treats "Native Hawaiian" as a race—for example, the U.S. census classifies Native Hawaiians as a racial group[204]—many Native Hawaiians view themselves and their social-political situation in terms of nationhood.[205] Their claims are not to racial equality but to sovereignty:

> It is thus in light of, and not despite, complex historical group and subgroup interactions, and the power relations underlying them, that we begin to understand deeply felt beliefs about group oppression and complex claims for group justice, that we begin to understand the conflicts, claims, reparatory efforts and resistance characterizing contemporary Asian American and Native Hawaiian relations. Without historicizing contemporary inter-group power relations and grounding them in concrete particulars, racial groups facing real life inter-group conflicts and claims of injustice

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200. *Id.*

201. *Id.* at 62.

202. *Id.*

203. *Id.* at 63 (citing LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY (1961) (describing socio-economic changes in Hawai'i from 1900–1959)).

204. *See* Rice v. Cayetano, 120 S. Ct. 1044 (2000) (Breyer, J., concurring).

205. *See* Eric K. Yamamoto & Chris Iijima, *The Colonizer's Story: The Supreme Court Violates Native Hawaiian Sovereignty–Again*, COLORLINES, May 2000, at 6.

> are likely to assume understandings of "others." . . . Without attention to differential racialization in the context of both national and localized "struggles for identity and power," racial groups cannot begin to address meaningfully issues of "mutual misunderstanding and mistrust."[206]

Differential racialization and disempowerment concepts reveal how history has "present effects on group identity and group claims"[207] and thus provide a preliminary framework for inquiry into particulars of environmental racism in a given setting. That framework enables us to ask meaningful questions about the interplay between race and the environment because it focuses on ways in which history and culture are linked to what we call "the environment." Specifically, what emerges from this framework is this: environmental justice must recognize that each racial or Native group is differently situated and that differing contexts contribute to differing group goals, identities, and differential group power.[208] This idea is important because it enables scholars, activists, and others to analyze particular kinds of harms to specific racial or Native communities and to fashion appropriately tailored remedies for those harms. When applied, this framework illuminates the underlying racialized character of environmental justice claims and treats each racial or Native community separately according to its specific socio-economic needs, cultural values, and group goals.

For example, environmental racism may be different for Latina/o or African Americans residing in a low-income area with a toxic waste dump than it is for Native Hawaiians or Native Americans faced with problems of cultural destruction and loss of spiritual connection to the land. Their goals, needs, and racial identities differ. Latinas/os and African Americans may be mainly concerned about health risks associated with exposure to toxic pollutants,[209] while Native Hawaiians and Native Americans may be primarily concerned about cultural survival, economic self-sufficiency, political self-governance, and the

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206. Yamamoto, *supra* note 184, at 64.

207. *Id.* at 63.

208. *See id.* at 64.

209. *See* BULLARD, *supra* note 8, at 45–78 (describing five case studies where citizens rallied against governmental decisions to place hazardous waste dumps in their neighborhoods).

maintenance of a spiritual connection to the environment. Or the particular groups may have entirely different concerns and interests. Racializing environmental justice provides concepts and language to help scholars, activists, lawyers, and community leaders assess how each group is differently situated and why cultural and socio-economic needs cannot be met by a "one size fits all" environmental justice remedy.

B. Unpacking Whiteness

Critical race theory also facilitates interrogation of the often unexamined influences of whiteness on environmental law, policy, and practice. According to Peter Manus, the environmental movement, from which environmental justice springs in part, "is determined by the norms or perceptions of white mainstream America."[210] Manus thus attributes the tension between environmentalism and other social justice movements to environmentalism's "elitist roots, conceived of and implemented primarily from a white, male, and mainstream perspective" and to its resulting "proclivity to immerse itself in pure science, as opposed to human science, and to express itself in command-and-control regulation, as opposed to consensus."[211] To what extent, if at all, is this true?

Critical race theory helps us grapple with this question by unpacking whiteness. In law, whiteness is the racial referent—"inequality" means "not equal to white." Whiteness is the norm.[212] Yet whiteness itself, until recently, has been largely unexplored. Critical race theorists and historians are now unraveling the often hidden strands of white influence and privilege and the ways in which whiteness (as a norm and as a racial identity) dramatically, yet quietly, shapes all racial relationships.[213] Joe Feagin observes the following about the influence of Anglo law, religion, and language:

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210. Yamamoto, *supra* note 184, at 45.

211. Manus, *supra* note 108, at 297–98.

212. *See* IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (describing how whiteness is the norm for citizenship).

213. *See generally* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic, eds., 1997); George A. Martinez, *The Legal Construction of Race: Mexican Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997); DAVID ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1999).

> From the 1700s to the present, . . . [i]mmigrant assimilation has been seen as one-way, as conformity to the Anglo-Protestant culture: "If there is anything in American life which can be described as an overall American culture . . . it can best be described . . . as the middle-class cultural patterns of largely white Protestant, Anglo-Saxon origins."[214]

White influence is so pervasive that it often goes unnoticed. It is, according to Barbara Flagg, "transparent":

> In this society, the white person has an everyday option not to think of herself in racial terms at all. In fact, whites appear to pursue that option so habitually that it may be a defining characteristic of whiteness . . . . I label the tendency for whiteness to vanish from whites' self-perception the transparency phenomenon.[215]

Integral to this transparency is "the very vocabulary we use to talk about discrimination."[216] "Evil racist individuals" discriminate; by implication, all others do not. This vocabulary hides "power systems and the privilege that is their natural companion."[217]

Critical race theory thus pushes environmental justice proponents to examine the white racism (and sometimes the racism by other groups) that undergirds the environmental problems affecting Native communities and communities of color. It also challenges proponents to closely interrogate the influence of whiteness in environmental law, policy, and practice, and its effect, in turn, on established approaches to environmental justice controversies.

The need to unpack whiteness in the environmental movement is revealed by the recent leadership struggles of the Sierra Club Legal Defense Fund (now Earth Justice Legal De-

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214. Joe Feagin, *Old Poison in New Bottles: The Deep Roots of Nativism*, in IMMIGRANTS OUT 18 (Juan F. Perea ed. 1997) (quoting MILTON M. GORDON, ASSIMILATION IN AMERICAN LIFE 72–73 (1964)); *see also* Derrick Bell, *White Superiority in America: Its Legacy, Its Economic Costs*, 33 VILL. L. REV. 767 (1988).

215. Barbara Flagg, *Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent,* 91 MICH. L. REV. 953, 969 (1993); *see also* ROEDIGER, *supra* note 213.

216. Stephanie Wildman & Adrienne Davis, *Making Systems of Privilege Visible*, in PRIVILEGE REVEALED 11, 12 (1996); *see also* DAVID ROEDIGER, TOWARDS THE ABOLITION OF WHITENESS (1994).

217. Wildman and Davis, *supra* note 216, at 12.

fense Fund). While the Sierra Club Legal Defense Fund ("LDF") is only part of the environmental movement, its long history and prominent profile lend significance to its conflicts over race. Recently, Judge LaDoris Hazzard Cordell served as the first African American head of the Sierra Club LDF. After eight months, she resigned as chair of the board. An African American staff attorney, Veronica Eady, also departed. Both charged the organization with "not putting enough emphasis on the environmental problems of minority communities."[218] Judge Cordell expressed sadness at Eady's resignation and identified the source of the Sierra Club LDF's difficulties as the reluctance of many of its supporters to acknowledge the racialized nature of important environmental problems. "[M]any people in the minority community 'who do not support the traditional environmental organizations would do so if these groups would begin working sincerely and earnestly in the area of environmental justice.'"[219]

The Sierra Club LDF has faced considerable difficulty in moving its supporters "from the traditional 'turf and critters' agenda to issues affecting minority communities."[220] Letters by Williams L. Rutherford, a retired board member, reflect a genuine problem. Criticizing a proposed alliance on environmental issues with the NAACP, his letter to the Sierra Club LDF president described the NAACP as "'one of the most diabolical organizations in this nation,' and a 'black man's Ku Klux Klan.'"[221] Rutherford asserted that he did not want the Sierra Club LDF to get into "'those areas'" because "'we [have] enough baggage.'"[222] Another letter to Judge Cordell deemed "her board role 'interesting' because 'in the [forty] years I have worked intensely in environmental matters, I have found total disinterest among children or adults of your race in environmental matters.'"[223]

The Sierra Club (an organization separate from the LDF) recently voted on a proposal to reduce U.S. immigration from 900,000 a year to around 200,000, because "population growth

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218. Victoria Slind-Flor, *Amid Board Rancor, Sierra Club LDF Loses 2d Black*, NAT'L. L.J., Oct. 30, 1995, at A-6.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

is the source of environmental problems in America."[224] The simple environmental solution: "[c]ut off the immigrants,"[225] who are mainly Asian and Latina/o. Though the Club leadership predicted a "landslide" vote against the proposal, forty percent voted to support it.

Journalist Emil Guillermo dubbed the forty percent of the Sierra Club that voted in favor of the proposal the "Mean Green."[226] Anti-immigration nativism, he said, "adopted the green shield of environmentalism to mask its racism."[227] Conservative groups paid nearly $1 million to support the proposal's campaign. Some of the "most virulent anti-immigration groups have accepted money from the Pioneer Fund, which has long supported white supremacist views."[228]

According to Guillermo, these anti-immigrant groups, emboldened by the Sierra Club proposal, have "turned immigrants from society's toxin to toxic waste itself."[229] Instead of "mere polluters," immigrants are defined as the "pollutants themselves." "From the nativist view, the United States is pristine water. Immigrants muck it up. It's the subtext of the whole proposal."[230] Alan Kuper, the Sierra Club member responsible for sponsoring the ballot measure, promised to return with another one, this time creating a newly-formed group, the Sierrans for U.S. Population Stabilization.

Certainly, it is unfair to tar all environmentalists with the political initiatives of the Sierra Club—especially when the immigration initiative ultimately failed. Many operate from a place of racial goodwill and have contributed significantly not only to the traditional environmental justice movement, but also to the broader justice efforts of racial communities.[231] At the same time it is unfair to racial communities struggling with

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224. Emil Guillermo, *Sierra Club Settles Immigration–for Now*, ASIANWEEK, Apr. 30, 1998, at 7.

225. *See id.*

226. *See id.* (as opposed to the "Just Green").

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. Interview with Denise Antolini, former litigation director of Sierra Club Legal Defense Fund Hawai`i, in Honolulu, Hawai`i (March 20, 2001) (describing successful LDF cases integrating environmental law and indigenous communities' concerns regarding water and native gathering rights, including the Waiahole Ditch case, *infra* Part IV) (notes on file with authors).

environmental injustice to ignore, or at least discount, the influences of whiteness in the forging of environmental law norms and the shaping of strategic environmental practices.

In sum, racializing environmental justice is a method of inquiry leading to action in environmental justice controversies—a type of praxis.[232] It does not displace the established, and often useful, environmental justice framework. Nor does it replace the emerging Native American framework—which offers an insightful alternative to Native peoples' conception of "the environment" and "justice." Rather, in the ways just described, racializing environmental justice expands and deepens the prevailing analysis and strategic calculations of scholars, lawyers, and activists. Its aim is to theoretically and practically reframe our understanding of environmental justice to better account for the experiences, needs, and goals of racial and Native communities and to generate more resonant remedial options.

IV. CASE STUDY: THE WAIAHOLE WATER CONTROVERSY

"Aia i hea ka wai a Kane?" Where are the waters of life? So begins the ancient Native Hawaiian chant that explains, in Homeric detail, the place of water in Hawaiian society. Responding to its opening question, the chant names various points of Hawaiian geography and other physical locations such as the streams and the clouds.[233] As the chant unfolds, how-

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232. Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997) (describing a praxis that integrates progressive race theory developments with frontline justice practice).

233. *See* Interviews with Ho'oipo Kalaena'auao Pa, in Honolulu, Haw. (Mar. 15 & 18, 2000) (on file with author); Interviews with Moses Nahono Haia, in Honolulu, Haw. (Feb. 22–23, 2000) (on file with author) (Pa and Haia served as co-counsel representing Native Hawaiian interests in the Waiahole Ditch case); Interview with Denise Antolini, *supra* note 231 (Antolini, as attorney for the Sierra Club LDF along with the Native Hawaiian Legal Corporation, represented both environmental and Native Hawaiian interests in the Waiahole Ditch case); Interview with Aimoku Pali, in Honokohau, Maui, Haw. (Oct. 10, 1997) (on file with author) (discussing taro farming, water, and Hawaiian community structure). *See generally* Elizabeth Ann Ho'opipo Kalaena'auao Pa Martin, et al., *Cultures in Conflict in Hawai'i: The Law and Politics of Native Hawaiian Water Rights*, 18 HAW. L. REV. 1 (1996) (discussing Hawai'i water law and native Hawaiians traditional and customary rights in water); LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AI? (1992) (describing traditional Hawaiian metaphors for land and human connections to it). This

ever, both speaker and listener meet in mutual recognition that in spite of the endless list of places and spaces, the water is actually nowhere in particular. The water is everywhere.

"Aia i hea ka wai a Kane" has served as a rallying cry for a cross-cultural coalition of Native Hawaiians, family farmers, and environmentalists engaged in a pitched battle against historically dominant white agribusinesses over the limited water resources on the island of Oahu, Hawai'i.[234] This battle is an environmental justice controversy that would not be so characterized by the established environmental justice framework. Why is this the case?

The conflict began in 1916, when the Waiahole Water Co. Ltd., a subsidiary of O'ahu Sugar Co., opened the Waiahole Ditch Tunnel.[235] The Ditch diverted almost all of the twenty-seven million gallons of water per day drawn from windward (wet side) O'ahu streams to leeward (dry side) O'ahu in order to irrigate the fertile sugar cane lands owned by agribusiness.[236] The diversion of water devastated the cultural and economic life of many Native Hawaiian windward residents.[237] It destroyed aquatic estuaries, native wildlife, and plant species and threatened the traditional life of indigenous Hawaiian communities in the valleys.[238] Many Hawaiians moved out of the valleys and into towns in order to survive. The leeward landowners, on the other hand, prospered from the diversion,

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part's descriptions of Hawaiian culture are drawn from accounts of Native Hawaiian scholars, attorneys and cultural practitioners. Co-author Yamamoto is a Japanese American from Hawai'i; co-author Wong Lyman is of part-Chinese American and of part-Hawaiian ancestry, also from Hawai'i.

234. *See* In the Matter of Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petition for Water Reservations for the Waiahole Ditch Combined Contested Case Hearing, 2000 WL 1193271 (Hawai'i) (hereinafter *"Waiahole Ditch"*).

235. *See* Patricia Tummons, *Liquid Assets*, HONOLULU WEEKLY, Nov. 9, 1994, at 3 (providing a brief history of the Waiahole Ditch system).

236. *See id.* at 4; *see also* LAWRENCE FUCHS, HAWAI'I PONO (1961) (describing the "Big Five" oligarchy that ruled Hawai'i from 1900 until the late 1950s). *See generally* Peter Wagner, *On Tap: A Sticky Battle For Old Waiahole's Water*, THE HONOLULU STAR-BULLETIN, Sept. 16, 1995, at A1.

237. *See* Tummons, *supra* note 235, at 4.

238. *See* Videotape: Stolen Waters (Native Hawaiian Advisory Council 1995) (on file with the author) (describing the impact the ditch had on the windward residents).

benefitting from vast agricultural and urban growth on the leeward plain.[239]

Today, the sugar industry is practically finished and a battle ensues for control over the diverted windward valley water. The issue is whether any or all of the twenty-seven million gallons of water that the Waiahole Ditch transported to the leeward side will be returned permanently to the windward valley streams. Battle lines have been drawn at the State Commission on Water Resource Management, where large landowners, state agriculturalists, windward farmers, Native Hawaiians, and environmentalists have petitioned for control of the water.[240]

The Waiahole Ditch controversy is about more than the control of one water source on a single island. For leeward landowners, this case is about contract and vested rights claims to the water.[241] Environmentalists are concerned about clean water, habitat restoration, and endangered species protection. The emerging media narrative portrays a stark black and white controversy: an economic choice of enhancing the tourism-dependent state economy through diversified agriculture versus wasting water for a few windward farmers, Native Hawaiian groups, and environmentalists.[242]

The controversy has particular resonance for Native Hawaiians, in whose existence water occupies a central place. Without water, traditional Hawaiian agriculture, religion, and culture cannot survive. A lack of water means the end of Hawaiians as a distinct people.[243] More specifically, the Native

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239. *See* Robbie Dingeman, *Cayetano Supports Leeward*, THE HONOLULU ADVERTISER, Dec. 16, 1996, at A1 (supporting the leeward position to get most of the water from the Waiahole Ditch system to increase agriculture and urban growth).

240. Contested case hearings on the issue began in June 1995 and ended on September 20, 1996. The commission issued its proposed findings of fact and conclusions of law, decision, and order on July 15, 1997. Ultimately, the Commission's proposed decision restored 16.76 million gallons of water to the windward streams. This controversy, however, has not ended and the final decision will most likely be appealed to the Hawai'i Supreme Court.

241. *See* Alan M. Oshima, *Windward Water: Where Should it Go?*, THE HONOLULU ADVERTISER, Oct. 6, 1996, at B1.

242. *See* Dingeman, *Cayetano Supports Leeward, supra* note 239.

243. *See* Kekuni Blaisdell, *Water Diversion is "Genocide,"* THE HONOLULU ADVERTISER, May 30, 1998, at A31 "The oli (chants) and ipu (gourds) declared that kalo (taro) is our hiapo (elder sibling), Haloa, who feeds us. Without Wai (water) and 'aina (land), we have no kalo. And, therefore, we kanaka maoli (Native Hawaiians) perish as a distinct people and nation." *Id.*

Hawaiians remaining in the valley, and those who have returned, are attempting to engage in traditional taro farming. Taro growing, around which communal life in Hawaiian valleys was historically organized and which provides a potato-like staple in the Hawaiian diet, depends on a steady flow of fresh, cool water.

Together, these dimensions of the Waiahole Ditch controversy raise complex issues of environmental justice—issues not fully comprehended by the established environmental justice framework. The controversy is partially about the imposition of disproportionate environmental burdens on relatively poor communities. Thus, to the extent that the controversy centers on the effects of water diversion and corresponding environmental degradation on Native Hawaiians, the Waiahole water dispute generally fits the established environmental racism model.

The Waiahole Water controversy, however, is also about something much more. It is about the environment and its connections to Hawai'i's indigenous peoples. It is about past and present group-based wrongs and future political and cultural survival. It is a controversy that cannot be understood without confronting the influence of whiteness in the colonization of Hawai'i, beginning in the early 1800s and culminating in the U.S. annexation of Hawai'i in 1898.[244] In brief, the agribusinesses that acquired vast lands on the leeward plain were part of the American expansionist movement that first brought Christianity to Hawai'i. This movement replaced indigenous, communal notions of landholding with western property law principles based on private ownership, and then illegally overthrew Hawai'i's reigning sovereign (with the aid of the U.S. Minister to Hawai'i, armed marines, and a warship) and "acquired" the former Hawaiian government's lands (later ceded to the United States). The agribusinesses diverted the water from the windward valleys to the leeward plain to further what can be fairly described as white colonial economic interests—in

244. *See* Yamamoto & Iijima, *supra* note 205 (describing a brief history of U.S. colonization of Hawai'i); *see also* THE HAWAIIAN RIGHTS HANDBOOK (Melody Mackenzie ed., 1993); TOM COFFMAN, NATION WITHIN: THE STORY OF AMERICA'S ANNEXATION OF THE NATION OF HAWAI'I (1998).

derogation of Native Hawaiian communal, economic, and spiritual interests.[245]

Fully explored through the racialized environmental justice method described earlier, the Waiahole Water controversy emerges as a case about race, sovereignty, economic self-sufficiency, and cultural restoration—an expansive, group-resonant type of environmental justice. That method leads us first to look at Native Hawaiians not as an encompassing racial group but as a highly differentiated indigenous community. That assessment in turn leads to important cultural, political, and spiritual distinctions.

Native Hawaiian culture has a close relationship with the physical and natural environment. The land, waters, and living things that make up the environment are integral components of Native Hawaiian social, cultural, and spiritual life governed by the principle of *malama 'aina*—caring for the land. More important, water is a powerful symbol of life:

> He hue wai ola ke kanaka na Kane.
>
> Water is life and Kane (man) is the keeper of water.[246]

Water determines work roles, political allegiances, human relationships, and legal obligations. Without it, Native Hawaiians cannot fish and gather native species central to their diet. Native Hawaiians also cannot grow taro, the staple that anchors not only their diet, but also their form of social organization. For Native Hawaiians, taro has a spiritual, cultural, political, and economic dimension. Legend has it that the taro plant is the elder brother of the Hawaiian race.[247] Part of the Hawaiian renaissance is returning the Native people to the

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245. *See generally* HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER (rev. ed. 1999).

246. MARY K. PUKUI, OLELO NO'EAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 68 (1983).

247. *See* Interviews with Pa and Haia, *supra* note 233; Interview with Kunani Nihipali, in Honolulu, Haw. (Nov. 1998) (on file with author) (discussing taro farming, water, and Hawaiian spirituality); *see generally* KAME'ELEIHIWA, *supra* note 233; Daviana MacGregor, Kupa'a I Ka 'Aina: Persistence on the Land (1989) (unpublished Ph.D. dissertation, University of Hawai'i) (on file with the Hamilton Library, Hawaiian Pacific Collection, University of Hawai'i, Manao); THE NATIVE HAWAIIAN RIGHTS HANDBOOK (Melody Kapilialoha MacKenzie ed., 1991).

land and growing taro.[248] An increase of water in the windward streams would thus revive a communal practice that brings together the Native Hawaiian community for taro farming, camaraderie, and conversation.[249] A taro farming revival would also support the community's goal of self-sufficiency by expanding agriculture and protecting the community's integrity and lifestyle.[250]

Racializing environmental justice reveals Native Hawaiian interests by inquiring into the historical and contemporary social influences on Native Hawaiian identity. This means examining the painful loss of culture Native Hawaiians experienced as a result of the overthrow of the Hawaiian Nation in 1893. This harm goes beyond the loss of the Native Hawaiian government. The Hawaiian people have also experienced the ravaging of their families by disease, the loss of their communal lands, and the prohibition of their cultural practices and language.[251] These harms also extend to the racial identity and cultural existence of Native Hawaiians as they attempt to remedy past wrongs "so that self-governance and self-determination may be achieved and justice pursued."[252]

The non-Hawaiian windward area parties to the Waiahole water controversy focused on the "physical" environment: the windward stream and estuary ecosystem. They relied on conventional environmental rules and remedies, most importantly, the public trust doctrine.[253] The logic of the public trust doc-

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248. *See* Curt Sanburn, *Waiahole: The Triumph of Community*, HONOLULU WEEKLY, Jan. 25, 1995, at 4 (describing the cultural and economic significance of returning to the land and reviving economic self-sufficiency for the native Hawaiian communities in Waiahole Valley).

249. *See id.*

250. *See id.* at 5.

251. *See* Isaac Moriwake, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian Cultural Property Repatriation*, 20 U. HAW. L. REV. 261 (1998) (describing the difficulties of reclaiming Hawaiian cultural property).

252. Becky Ashizawa, *Church Apologized for Overthrow Role*, THE HONOLULU STAR-BULLETIN, Jan. 18, 1993, at A6 (quoting the Reverend Dr. Paul Sherry, national president of the United Church of Christ).

253. The public trust doctrine has received increasing attention as a theoretical basis for conservation-oriented natural resource management. *See generally* DAVID C. SLADE, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LAND, WATER AND LIVING RESOURCES OF THE COASTAL STATES (1990); JACK H. ARCHER ET AL., THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS (1994); M. Casey Jarman & Richard McLaughlin, *A Higher Public Pur-*

trine initially appeared to work in favor of the windward parties, including Native Hawaiians. During its six month administrative hearing, the Water Commission ordered temporary restoration of ten million gallons per day to windward valley streams.

For some Native Hawaiians, however, the public trust doctrine seemed to pose more questions than answers. First, the prominence of the public trust arguments tended to overshadow even the traditional environmental justice issue in the case—the historical and continuing inequitable distribution of natural resources and environmental burdens. Second, those arguments, although bringing temporary and partial benefit to Native Hawaiians, also tended to limit scrutiny of the "social" (or racial) environmental issues and the depth of the Native Hawaiian claims.

Racializing the environmental justice dimension of the Waiahole water controversy reveals a host of questions about the traditional public trust approach advanced by the non-Hawaiian windward advocates. Would the Commission (or later the court) employ the doctrine without reference to Native Hawaiian concerns? What do the terms "public" and "trust" really mean? Would the public trust doctrine, with its larger public good emphasis, undermine more specialized Hawaiian rights to water and traditional agricultural practices? Would the doctrine demand the preservation of the stream ecosystems to the detriment of Native Hawaiian communal interests? Would the use of the public trust doctrine within the state legal system foreclose Native Hawaiian claims based on Hawaiian political sovereignty? Would the public trust ignore deeply held cultural beliefs of indigenous Hawaiians about nature as family rather than as trust *res* or property? Would arguing be-

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pose? The Constitutionality of Mississippi's Public Trust Tidelands Legislation, 11 MISS. C. L. REV. 5 (1990). At the core of the doctrine lies the notion that, apart from any private property rights (*jus privatum*) in land or natural resources, the state holds an interest in certain publicly important lands (*jus publicum*) for the "higher good" of the general citizenry. The public trust doctrine features four central elements. "Public" refers to the collective body of people or citizens covered by the doctrine. "Trust" invokes the concept of a duty, a relationship of care or guardianship enjoyed by this collectivity. In addition to the body politic and the duty, the compound concept of the "public trust" involves two more elements: the governing authority subject to the public trust and the *res*, or thing protected by the doctrine.

fore the "courts of the conqueror"[254] get Native Hawaiians, as distinct from the non-Native Hawaiian windward parties, anywhere at all? Would a state-controlled public trust provide Native Hawaiians a remedy they desire?

The racializing environmental justice approach—and particularly the concepts of differential racialization and empowerment—leads us to ask these questions. For many Native Hawaiians, the controversy is about their spiritual and economic connections to the environment. It is also about cultural resurrection and political nationalism.[255] Racializing environmental justice provides a framework for this kind of analysis and it shapes how we view the "environmental" problem, the rights claims, and the possible "justice" remedies.

In August 2000, the Hawai'i Supreme Court issued its ruling in the Waiahole water controversy, affirming in part and reversing in part the Water Commission's decision.[256] As advocated by the windward parties, the court based its legal framework for water resource protection on the public trust doctrine. The court, however, significantly reconceptualized the doctrine in terms of indigenous peoples' rights. Building on prior decisions identifying the public trust as a residual aspect of Hawaiian Kingdom law ensuring the rights of "the people" to water, the court stated, "In acknowledging the general public's need for water, we do not lose sight of the trust's original intent."[257] Looking at history and traditional Hawaiian culture, the court identified that original intent as the "preservation of the rights of native tenants during the transition to a western system of private property."[258] The court, therefore, vowed to "continue to uphold the exercise of Native Hawaiian rights as a public trust purpose," among others.[259]

The Hawai'i court's framing of the public trust doctrine is an historic first step toward broadening public understanding and regarding the complex physical and social environmental issues. As highlighted by an analysis that racializes environ-

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254. *See* Williams, *supra* note 146.

255. *See* Interviews with Pa and Haia, *supra* note 233; Robbie Dingeman, *Windward Demanding Return of Flow Lost to Waiahole Ditch*, THE HONOLULU ADVERTISER, Dec. 16, 1996, at A1; Trask, *supra* note 245.

256. *See Waiahole Ditch*, *supra* note 234.

257. *Id.* at 23.

258. *Id.*

259. *Id.*

mental justice, that new framing is also a first step toward explicitly integrating indigenous peoples' environmental interests into the public trust calculus and, indeed, into a more encompassing conception of environmental justice.

CONCLUSION

Racializing environmental justice goes beyond treating race as fixed and biological. It acknowledges the construction of race and racial categories through politics and culture. It also entails expanding environmental justice to recognize that each racial group is differently situated according to its specific socio-economic needs, political power, cultural values, and group goals. In doing so, racializing environmental justice enables scholars and activists to better grapple with varying forms of subordination and to tailor specific remedies for the harms that are specific to each racial community.

The preliminary analysis of the Waiahole Ditch controversy illustrated aspects of this approach to racializing environmental justice by highlighting the complexity of racial and Native peoples' issues in an attempt to characterize claims and fashion remedies addressing the specific needs of the particular communities.

The earlier discussion of the *R.I.S.E.* case illuminated other aspects of the approach. It revealed the district court's limited, perhaps myopic, view of the racialized nature of the siting decision. The court acknowledged the "disparate impact on African American communities" (measured against whites).[260] But without examining the economic, cultural, or spiritual impacts on the specific African American communities, the court found that the decisionmaking board did not intend to discriminate and "balanced the economic, environmental, and cultural needs of the County in a responsible and conscientious manner."[261]

Examination of the *R.I.S.E* case also revealed the "biracial," non-profit advocacy group's initial focus on traditional environmental harms such as pollution, traffic, and noise. For the group's predominantly white leadership, it appears, racial community harms were largely an afterthought. The district

260. R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144, 1150 (E.D. Va. 1991).
261. *Id.*

court found, dismissively, that "[r]ace discrimination did not become a significant public issue until it appeared that the initial [environmental] thrust was failing."[262]

How might the litigation in *R.I.S.E* have differed, politically and legally, had the controversy been conceptualized from the outset not as a pollution/noise/traffic problem? What if it had instead been conceived as continuing subordination of a particular African American community in the South, for whom the desecration of its church and communal center, founded by freed slaves, was a racial act with profound social and cultural meaning?[263] How might the cross-racial alliance have been more effectively forged? How might the public's understanding of the controversy, and other environmental justice disputes, have differed if the controversy had been differently conceived and advocated? The racializing environmental justice approach, offered here in preliminary form, does not definitively answer these tough questions. It does, however, raise them and suggest points of critical inquiry and analysis.

Not all scholars or practitioners will embrace the racialization of environmental justice. And further development and refinement is needed. This approach urges us, nevertheless, at a minimum, to begin rethinking the established environmental justice framework and to begin treating racial and Native communities and their relationship to the environment with greater complexity based on each community's cultural, historical, and political experience and its specific needs and goals. To deal meaningfully with environmental racism, the environmental justice movement must seriously take account of race. "[I]n order to treat some persons equally, we must treat them differently."[264] And in doing so, we might also open fresh understandings of the interplay between communities and "the environment."

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262. *Id.* at 1148.

263. *See* Charles R. Lawrence, III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (suggesting a cultural meaning test for ascertaining "intentional" discrimination); *see also* Susan Kiyomi Serrano, *supra* note 139, at 221.

264. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).