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Peter M. Manus

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THE OWL, THE INDIAN, THE FEMINIST, AND THE BROTHER: ENVIRONMENTALISM ENCOUNTERS THE SOCIAL JUSTICE MOVEMENTS

*Peter M. Manus**

INTRODUCTION

There were mass movements for social justice . . . to end slavery and for women's suffrage. But now all of those rights are threatened by . . . the abuse of the planet in which those rights might be exercised or implemented. And thus we must see in our fervor for rights that without the right to breath, nothing else really matters.

The Reverend Jesse Jackson¹

Modern environmentalism, a philosophy perhaps first captured in the writing of Rachel Carson, urges a heightened appreciation of nature expressed through prospective, long-range consideration of the ecological impacts that human activities visit on the earth.² Readers of Carson and other ecology writers may be moved by the simplicity and rightness of the basic premises of their environmental theses: all life-forms and habitats on the planet are linked;³ humans

* Associate Professor, New England School of Law; B.A., 1980, Dartmouth College; J.D., 1987, Cornell Law School. The author thanks the Board of Trustees and Dean John O'Brien of the New England School of Law for the stipend that made this Article possible.

¹ David Lapp, *Fighting for the Right to Breathe Free*, E: THE ENVIRONMENTAL MAGAZINE, May-June 1992, at 10, 10.

² See generally RACHEL CARSON, *THE EDGE OF THE SEA* (1955); RACHEL CARSON, *THE SEA AROUND US* (Mentor 1989) (1950) [hereinafter CARSON, *THE SEA AROUND US*]; RACHEL CARSON, *SILENT SPRING* (1962) [hereinafter CARSON, *SILENT SPRING*]; Zygmunt J.B. Plater, *From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981 (1994).

³ CARSON, *THE SEA AROUND US*, *supra* note 2, at 32 ("[T]hrough a series of delicately

have a responsibility to serve as stewards to earth's other life-forms because we can perceive the potential for environmental devastation;⁴ the preservation of ecological diversity is worth the sacrifice of short-term economic gains and technological conveniences.⁵ We dip into *Silent Spring* and are inspired to dig our crabgrass by hand. On a macro level, we look to the U.S. Environmental Protection Agency (EPA) to champion the cause of the earth's well-being.

Inherent in the philosophy of environmentalism, however, is the necessity of a sustained dedication to self-sacrifice.⁶ Most of us, unfortunately, find such a mind-set difficult to maintain, and, like King Midas's barber, our resolve to behave selflessly weakens over time.⁷ Where dead fish or oil slicks present obvious threats to human consumption or the lives of gulls and otters, the more remote sacrifice of higher-priced oil bows to a resolve to prevent future spills.⁸ Where a state program to upgrade septic systems will cost homeowners tens of thousands of dollars to combat the threat that septic leaching

adjusted, interlocking relationships, the life of all parts of the sea is linked."); see also CARSON, *SILENT SPRING*, *supra* note 2, at 293. ("The predator and the preyed upon exist not alone, but as part of a vast web of life.")

⁴ CARSON, *THE SEA AROUND US*, *supra* note 2, at 16 ("[M]an's record as a steward of the natural resources of the earth has been a discouraging one.")

⁵ Indeed, Carson explains that because all parts of the environment are connected, significant degradation of any part of the environment will at some point affect a direct, utilitarian resource to humans. Thus, economic gains at the expense of the environment lead to economic losses. See, e.g., CARSON, *SILENT SPRING* *supra* note 2, at 43, 50 (environmental degradation leading to eventual destruction of drinking water supply); *id.* at 2, 43 (destruction of livestock); *id.* at 2-3, 43 (destruction of crops); *id.* at 8, 43 (destruction of health); *id.* at 3 (destruction of fish supplies).

Along with Carson's works, two other books widely credited with having schooled the modern environmentalist are *A Sand County Almanac* (1949) by Aldo Leopold, and *Encounters with the Archdruid* (1971) by John McPhee. See generally ALDO LEOPOLD, *A SAND COUNTY ALMANAC* (Oxford Univ. Press 1987) (1949); JOHN MCPHEE, *ENCOUNTERS WITH THE ARCHDRUID* (The Noonday Press 1993) (1971).

⁶ See, e.g., Matt Ridley & Bobbi S. Low, *Can Selfishness Save the Environment?*, *THE ATLANTIC MONTHLY*, Sept. 1993, at 76, 78 (pointing out that "the environmental lobby posits a view of the human species in which individual self-interest is not the mainspring of human conduct").

⁷ See THOMAS BULFINCH, *THE AGE OF FABLE* 79 (1962). Only King Midas's barber was aware that the King had been punished by Apollo with a pair of donkey ears. Breaking under the pressure of his secret, the barber finally dug a hole and whispered it into the ground. Unfortunately, a field of reeds grew at the spot and repeated the barber's whisper whenever a breeze passed.

See also Theodore Roszak, *The Greening of Psychology*, *UTNE READER*, Jan.-Feb. 1995, at 51, 51; Mark Dowie, *Greens Under Siege*, *CALIFORNIA LAWYER*, Apr. 1995, at 37; Keith Schneider, *As Earth Day Turns 25, Life Gets Complicated*, *N.Y. TIMES*, Apr. 16, 1995, at 6.

⁸ Witness the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-61 (1988 & Supp. 1992), developed in the aftermath of the much-publicized March, 1990 *Exxon Valdez* oil spill.

presents to a superficially "clean" river, however, environmental philosophy often falls before a more palpable "green" concern, that of real estate values.⁹

Like a man whose well-meaning embrace of feminism is at first bolstered by the hope that conversing in Faludi or Steinem might lead to a second date, but then deflated when a female co-worker gets the big promotion, even well-meaning mainstream environmentalists often put aside the Carson and pick up the Contract with America when jobs, financial well-being, and personal power are directly threatened.¹⁰ Environmentalism is more vulnerable to this type of abandonment than modern Western feminism, however, and perhaps more vulnerable than any other political or spiritual philosophy, because when we abandon nature, nature sits silent, its few loyal advocates easily discounted as self-flagellating fanatics.¹¹ One can barely imagine a United States without enough women and racial or ethnic minorities who feel so personally cheated or oppressed as to maintain a political presence for their social causes, fed in great part by the passion borne of self-interest. In Western democratic culture, positions taken in self-interest are the positions we respect.¹²

⁹ See, e.g., David Nyhan, *State's Septic System Rules Have Made a New Mess*, BOSTON GLOBE, Apr. 26, 1995, at 15. See generally David Helvarg, *Private—Keep Out*, CALIFORNIA LAWYER, Apr. 1995, at 30; Robert Braile, *Blowin' in the Wind: Is Mainstream Environmentalism Sustainable?*, UTNE READER, Jan.-Feb. 1995, at 83.

Ironically . . . the environmental movement is struggling with a "vision thing" because of a pervasive sense—the movement would call it an illusion—that its vision has become a reality: The environment is not in danger. "Without thick particles of dirt filling the air, without rivers bursting into flames, the issue is much more difficult to perceive," said Philip Shabecoff, . . . executive publisher of Greenwire, a daily environmental news service. "This is especially true with an issue like global warming, which you [do not see]."

Braile, *supra* at 86.

¹⁰ Although it makes no direct mention of environmental issues, the so-called "Contract with America," a ten point legislative agenda produced by the Republican-dominated 104th U.S. House of Representatives, is fiercely anti-regulation and widely understood to present grave risk to federal environmental programs. See generally H.R. 1022, 104th Cong., 1st Sess. (1995), entitled *Risk Assessment and Communication Act of 1995*; see also Scott Allen, "Contract" Reframes Issue of Environment's Worth, BOSTON GLOBE, Feb. 6, 1995, at 25.

¹¹ See Carl T. Rowan, *Nature's Disasters Show Earth's Fragility*, CHICAGO SUN TIMES, Jan. 19, 1994, at 35 (discussing writer Rush Limbaugh's diatribes against "environmental wackos," described further by Limbaugh as "socialist and enviro-religious fanatics" who are enemies of capitalism); see also Maura Dolan, *Bush Woos West by Trying to Ease Land Restrictions Policy: Plans Benefit 'Wise Use' Coalition of Loggers, Ranchers and Others*, L.A. TIMES, Aug. 4, 1992, at 1.

¹² In *Sierra Club v. Morton*, 405 U.S. 727, 741-2 (1972), Justice Douglas penned a dissent advocating that the law fashion "a federal rule that allowed environmental issues to be litigated

Cultural awareness of the vulnerability inherent in the environmentalist philosophy's call for perpetual self-sacrifice is evident in both political and legal arenas. In one instance, a statute sets an unequivocal roadblock before government projects that would threaten endangered life-forms or their habitats, thus attempting to fortify government decisionmakers against weakened resolve in the face of proposals for such government projects.¹³ In another instance, a court determines that an agency decision must accord more weight to action that preserves a natural setting, exhibiting sensitivity to the fact that the environment is always vulnerable to weighing in as weaker than direct human impacts.¹⁴ More generally, courts and legislators work to segregate and narrowly define environmental issues and decisions as a means of insulating and thus protecting the environmental cause from its persistent threat, the erosion of selflessness.¹⁵ Logic does

before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers . . ." Justice Douglas references Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). The law has not followed the directives of these environmental advocates, underscoring the fact that legal systems focus on and afford far more credibility to self-interested advocates than to those who would stand up for injuries other than their own. See also Ridley & Low, *supra* note 6, at 78 ("For some reason it is thought conservative to believe that human nature is inherently incapable of ignoring individual incentives for the greater good, and liberal to believe the opposite."). The article also points out that economists and biologists seem to share a common misbelief that "all environmental problems stem from man's recent and hubristic attempt to establish dominion over nature, rather than living in harmony with it." *Id.* at 84.

¹³ See former federal Endangered Species Act, 16 U.S.C. §§ 1531–43 (1976). Section 1536 reads:

[a]ll . . . Federal departments and agencies shall . . . [take] such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species . . .

The present Endangered Species Act, 16 U.S.C. §§ 1531–44 (1994), reads:

[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . unless such agency has been granted an exemption for such action by the [Endangered Species] Committee . . .

16 U.S.C. § 1536(a)(2).

¹⁴ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411–12 (1971).

It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible . . . Thus, if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes . . . [T]he very existence of the statutes indicates that protection of parkland was to be given paramount importance.

Id. at 412.

¹⁵ See, e.g., *Image of Greater San Antonio v. Brown*, 570 F.2d 517, 522 (5th Cir. 1978) (rejecting the contention that socioeconomic or "quality of life" impacts on the human environment must be considered in an environmental impact study under the National Environmental Policy Act

seem to dictate that a selfless cause, if too closely merged with a self-interested cause, faces a threat of being compromised, overshadowed, or marginalized.

In spite of both governmental and non-governmental public interest efforts to maintain a degree of urgency in connection with the state of the earth, signs that the public has abandoned the environmental cause are alarmingly pervasive.¹⁶ The Contract with America, regardless of its fate, launched a popular wholesale attack against the fundamental environmentalist premise that government decisionmaking must favor long-term ecological balance over short-term economic rewards.¹⁷ Congress threatens to gut the Clean Water Act, while the Endangered Species Act and the Clean Air Act face similar threats.¹⁸ Predictably, anti-environmentalists, whose parents attacked Rachel Carson as a spinsterish zealot,¹⁹ today attack environmentalists as an owl-hugging cult of liberals bent on bulldozing the jobs and property rights of people in favor of obscure sub-species of birds and undevelopable swampland.²⁰

The present movement to integrate environmentalism into mainstream market systems is one political response to the waning public concern over nature's well-being.²¹ The EPA promoted its affiliation with the Chicago Board of Trade when launching the air emissions trading program as if trading credits on a stock exchange would somehow render air pollution a simple commodity, unlinked to any

(NEPA)); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983) (limiting the term "environmental," as used in NEPA, to the physical environment).

¹⁶ See Braille, *supra* note 9, at 83.

Environmentalists are bemoaning a backlash against their work. They say the signs are everywhere, from the barrage of amendments on Capitol Hill that would weaken some of America's premier environmental laws, to the wave of industry advertisements that make polluters look like Thoreau, to the outpouring of newspaper and magazine articles that have challenged environmental totems.

Id.

¹⁷ See *supra* note 10.

¹⁸ See H.R. 961, 104th Cong., 1st Sess. (1995) (Clean Water Act Amendments of 1995); S. 503, 104th Cong., 1st Sess. (1995) (Senate freeze on new endangered species listings until Sept. 30, 1995); H.R. 479, 104th Cong., 1st Sess. (1995) (House bill to repeal 1990 Clean Air Act Amendments); *Blame It on the Snail Darter*, CALIFORNIA LAWYER, Apr. 1995, at 43; John H. Cushman, Jr., *Babbitt Seeks to Ease Rules in Bid to Rescue Imperiled Species Law*, N.Y. TIMES, Mar. 7, 1995, at C4; John H. Cushman, Jr., *House Vote Blocks Assault on EPA Rules*, COURIER-JOURNAL LOUISVILLE, KY, July 29, 1995, at 1A; William K. Stevens, *Future of Endangered Species Act in Doubt as Law is Debated*, N.Y. TIMES, May 16, 1995, at C4.

¹⁹ See PAUL BROOKS, *THE HOUSE OF LIFE: RACHEL CARSON AT WORK* 293-307 (1972); *American Experience* (PBS television broadcast, Feb. 8, 1993) (Transcript # 551, at 13-14).

²⁰ See, e.g., *Endangered Species Act Doesn't Work*, U.S.A. TODAY, Dec. 30, 1993, at 8A (complaining about people who "howl" about "sockeye fish and spotted owl[s]").

²¹ See, e.g., Robert Metz, *Some Firms Find It's Easy Being Green—and Profitable*, BOSTON

social cause and relieved of any self-sacrificial, leftist taint.²² Additionally, the repeated attempts to elevate the EPA to executive cabinet status may be, in part, another example of a political move to preserve environmentalism by burrowing it into the political mainstream.²³ Mainstream politicians such as U.S. Vice-President Al Gore and the EPA Administrator Carol Browner may figure that conservative environmentalism squared off against liberal environmentalism, where both factions sit at the governmental table, is better than an anti-environmental political body squared off against uncompromising, non-governmental environmentalists.²⁴

Determining whether a diluted, political environmental philosophy is superior to a pure one whose existence is threatened, and, indeed, whether a diluted environmental philosophy can even exist as more than a monument to a battle against the pesticide industry, once waged and won by an ailing botanist, requires taking into account an important aftermath of environmental mainstreaming. As part of the bureaucratic system, environmentalism is subject to the same suspicions leveled against the rest of the bureaucracy.²⁵ Like many governmental actors, federal environmentalists have been charged with racism

GLOBE, Apr. 25, 1995, at 48; Ronald Rosenberg, *EPA to Urge Programs to Boost Environmental Technology Industry*, BOSTON GLOBE, May 10, 1995, at 38.

²² See, e.g., Laurent Belsie, *Pollution Credits Go to Auction in Test of Clean-Air Law*, CHRISTIAN SCIENCE MONITOR, Mar. 25, 1993, at 9.

²³ See S. 533, 102d Cong., 1st Sess. (1991) (Department of the Environment Act of 1991, proposed during the Bush administration); 140 CONG. REC. H171, H173 (Feb. 2, 1994), debating H.R. 3425, the Clinton administration's similar proposal. The cited Congressional Records contain very partisan discussion over whether the bill creating the Department of the Environment should address a right of citizens to demand compensation when environmental regulation results in a taking of private property.

²⁴ See, e.g., John H. Cushman, Jr., *Few Environmental Laws Emerge From 103d Congress*, N.Y. TIMES, Oct. 3, 1994, at B12 (discussing how partisanship has taken hold of environmental issues).

²⁵ See, e.g., Robert D. Bullard, *Overcoming Racism in Environmental Decisionmaking*, ENVIRONMENT, May 1994, at 10, 10.

[T]he current environmental protection paradigm has institutionalized unequal enforcement; traded human health for profit; placed the burden of proof on the "victims" rather than on the polluting industry; legitimated human exposure to harmful substances; promoted "risky" technologies such as incinerators; exploited the vulnerability of economically and politically disenfranchised communities; subsidized ecological destruction; created an industry around risk assessment; delayed cleanup actions; and failed to develop pollution prevention as the overarching and dominant strategy. As a result, low-income and minority communities continue to bear greater health and environmental burdens, while the more affluent and whites receive the bulk of the benefits.

in siting and cleanup decisions.²⁶ On a second front, federal environmentalists must cope with complex issues of sovereignty and cultural sensitivity when regulating activities on, or affecting, American Indian lands.²⁷ In a third area, environmentalists attempting to address the international problem of overpopulation are forging a tentative alliance with the feminist cause.²⁸

In these areas where mainstream environmentalists must develop a sensitivity to other social causes, both an opportunity to strengthen environmentalism and a threat to environmental integrity exist.²⁹ For example, nature benefits when environmental decisionmakers eradicate unwitting, or at least tacit, racist biases from their decisions. On the other hand, cultural or gender-based sensitivities can overshadow the most environmentally sound solutions and therefore may threaten environmentalism.

This Article surveys certain policies, practices, and studies that challenge, integrate, or juxtapose the concerns of environmentalists with the concerns of other social causes. In particular, this Article focuses on how and whether certain human-oriented causes detract from or aid the cause of environmentalism. Section I discusses the manner in which the newfound regulatory enthusiasm of mainstream environmentalists has clashed with the human-earth relationship of American Indian cultures. Section II explores the frictions inherent in the broadening confrontation between mainstream environmentalism and those groups who discern and decry a perceived systematized and disproportionate exposure of minority populations to toxic environmental conditions. Section III examines the tentative alliance between feminists and population control advocates.

This Article's examination of the environmental movement's successes and failures in accommodating the three social movements

²⁶ See *infra* Section II.

²⁷ See *infra* Section I.

²⁸ See *infra* Section III.

²⁹ This Article uses the terms "mainstream environmentalism" and "Northern environmentalism" to describe the environmental movement that has developed throughout the dominant U.S. culture since the publication of *Silent Spring*. These terms will distinguish this form of environmentalism, presently dominant in U.S. politics and law, from other perspectives on the human-earth relationship, such as those found in American Indian cultures, and also from special, non-mainstream environmental issues, such as those of racial minority groups. Environmental groups comprising the mainstream movement "are typically male-Anglo-dominated." See Karl Grossman, *From Toxic Racism to Environmental Justice*, E: THE ENVIRONMENTAL MAGAZINE, May-June 1992, at 28, 31 (quoting former New Mexico governor Toney Anaya, an Hispanic-American and co-chair of the October, 1991 First National People of Color Environmental Leadership summit held in Washington, D.C.).

herein discussed may lead some readers to conclude that environmentalists must beware of human rights advocates because those advocates so fervently resist their own marginalization. Indeed, it might be concluded that the protest-oriented personalities of the grass roots human rights social movements threaten to prioritize their own interests over the goal of a balanced environment in a manner as smothering as the tactics of the advocates of laissez-faire economics and property rights.

On the other hand, the environmental cause can only stagnate if it maintains its current isolationary, command-and-control form. Achieving true permanence as a social cause requires environmentalists to identify and foster the types of human self-interested activities that are consistent with the goals of earth preservation.³⁰ In this regard, environmentalists may learn a great deal about limitations in our thinking and our efforts by considering the criticisms that have been leveled against the mainstream environmental program by other social causes.

I. STIFLING AMERICAN INDIAN EARTH PHILOSOPHIES WITH EUROCENTRIC ENVIRONMENTALISM

First, they stuck us out on these remote reservations, where it's almost impossible to make a living And then they restrict the land use. These environmentalists come out here from the cities and tell us how to care for the land.

Chief Ray Yowell, Western Shoshone Tribe³¹

[I]n the newly-revived cosmology of Indian people, Indian lands and waste projects are simply incompatible.

Andre Carothers, environmentalist³²

³⁰ See Ridley & Low, *supra* note 6, at 77.

At the center of all environmentalism lies a problem: whether to appeal to the heart or to the head—whether to urge people to make sacrifices in [sic] behalf of the planet or to accept that they will not, and instead rig the economic choices so that they find it rational to be environmentalist. It is a problem that most activists in the environmental movement barely pause to recognize. . . .

Those who do recognize this problem often conclude that their appeals should not be made to self-interest but rather should be couched in terms of sacrifice, selflessness, or, increasingly, moral shame.

We believe they are wrong.

Id.

³¹ Dirk Johnson, *Indians' New Foe: Environmentalists*, N.Y. TIMES, Dec. 28, 1991, at 7.

³² 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, 942 (1992) (quoting from Andre Carothers, *The First People*, E: THE ENVIRONMENTAL MAGAZINE, Sept.-Oct. 1991, at 72).

During the last several decades, American Indian tribes have pushed hard against the dominant American culture, fighting the ongoing erosion of Indian culture by aggressively asserting Indian sovereignty and land rights.³³ In this battle, the dominant American culture, both conservative and liberal,³⁴ has exerted steady pressure to increase assimilation of tribes into mainstream America. As part of the dominant culture and a sometimes adversary of Indian cultures, mainstream environmentalism has shared in the diminishing sensitivity to the complexity and historical primacy of tribal sovereignty. This pressure toward replacing Indian land perspectives with mainstream views has occurred simultaneously with the conservative attack on the dominant American culture's own brand of earth-awareness.³⁵ With both philosophical constructs of the human obligation to nature under siege, an examination of their commonalities and differences is worthwhile.

This section explores the fundamental clash between Indian and eurocentric views of the human-nature relationship. The section next traces the attrition of the law's sensitivity toward Indian rights as related to environmental matters as reflected in Supreme Court decisions. Finally, this section discusses the impact that the present state of Indian-non-Indian relations may have on Indian and mainstream environmentalism, and how aspects of Indian human-nature spiritualism may instruct mainstream environmentalism.

A. Philosophical Differences Between Indian and Eurocentric American Environmentalisms

[W]e, as humans, are one of the weakest of the whole Creation, since we are totally dependent on the whole Creation for our survival.

Chief Segwalise³⁶

³³ The tendency of the U.S. dominant culture to override Indian culture is evident in more areas than land relations. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447 (1988) (finding no First Amendment protection against the construction of a road through an area of undeveloped land held sacred by three tribes and used for religious practices). This Article, however, limits its examination to cases and policies focused directly on land use and other environmental matters.

³⁴ See Williamson B.C. Chang, *The "Wasteland" in the Western Exploitation of "Race" and the Environment*, 63 U. COLO. L. REV. 849, 862 (1992) ("[T]he left, particularly left 'people of color,' must confront the possibility that they are using indigenous people, particularly the moral claims of such groups, to achieve their own assimilatory ends.").

³⁵ See *supra* notes 6-24 and accompanying text.

³⁶ PETER MARSHALL, *NATURE'S WEB: AN EXPLORATION OF ECOLOGICAL THINKING* 142 (1992).

[M]an is steadily controlling nature.

Dr. Robert White-Stevens³⁷

Mainstream U.S. culture, including politics, law, and values, has emerged from eurocentric roots.³⁸ At its simplest, eurocentric culture is based on the mythological notion that individuals should strive to rise above the status quo and to search for, claim, wrest, and possess the scarce valuables, both material and moral, from a great wasteland.³⁹ The holy grail stories embody the central theme of this tradition, as do the Christian crusades. Incorporated into the theme of quest and individual valor rising out of a wasteland of sin is the notion that the crusading European is "other," or better, than the non-European races.⁴⁰

Like most mainstream U.S. culture, the U.S. environmental movement emerges from these cultural roots. Indeed, the mainstream environmental movement may be cast in Arthurian terms: a few noble visionaries buck the status quo of a sedentary population under the thumb of powerful, evil capitalist polluters, tapping into uncommon valor to seek, conquer, and rescue our precious natural resources from the contaminated wasteland.⁴¹ Inherent in this Western environmentalist view is the premise that nature is in distress, separate from its

³⁷ *American Experience*, *supra* note 19, at 15.

³⁸ See Chang, *supra* note 34, at 849 ("Eurocentric thinking refers to the credo that suddenly and vastly elevated the importance of the individual in the Twelfth Century. The construction of the individual as a moral agent, with freedom, will, and purpose is signified by the twin metaphors of the wasteland and the grail quest." (citing JOSEPH CAMPBELL, *TRANSFORMATIONS OF MYTH THROUGH TIME* 209–10 (1990))).

³⁹ *Id.* at 849–51.

⁴⁰ See *id.*

⁴¹ Indeed, the mainstream environmentalist image even includes a "white knight," the elite patricians who served as early leaders in the wilderness preservation and conservation movements. See Bill McKibben, *An Explosion of Green*, *THE ATLANTIC MONTHLY*, Apr. 1995, at 61, 74 ("Eastern environmentalism was long a patrician enterprise—the effort of big-city swells to protect the mountain heights where they spent their summers, the lakes where they had their camps."); see also Nancy E. Anderson, *The Visible Spectrum*, 21 *FORDHAM URB. L.J.* 723, 723 (1994) ("Conservationist leaders were the mainstream elite and political reformers. [A] . . . second phase, emerging in the late 1960's, was a social movement made up of young, well educated, left of center activists.").

Interestingly, however, Rachel Carson's writing appears to reflect something other than a eurocentric or elitist cultural grounding that glorifies the individual apart from the mass. Carson states that "[f]or mankind as a whole, a possession infinitely more valuable than individual life is our genetic heritage, our link with past and future." CARSON, *SILENT SPRING*, *supra* note 2, at 208.

human destroyers and needing rescue, cultivation, and perhaps benign domination by heroic individuals.⁴²

American Indian cultures, on the other hand, generally relate to nature in a more holistic manner.⁴³ Rather than engaging in the Christian holy experience of defying odds and rescuing the virgin environment, Indian cultures tend to express the relationship as a merging of person and environment through which the person receives ongoing strengthening of both a physical and spiritual nature.⁴⁴ Native American culture defies hierarchy and boundaries, perceiving the past and present, the natural and supernatural, and the environment and its inhabitants on an equally valued physical and temporal plane.⁴⁵

Naturally, these contrary philosophical views nevertheless encompass many of the same general impacts on nature. Both European-rooted Americans and Native Americans fell forests and hunt fish and wildlife.⁴⁶ Indeed, two hundred years of the ongoing conquest of

⁴² See Chang, *supra* note 34, at 859 ("Indeed, the approach of organizations such as the Nature Conservancy is to use money to deny humans access to critical areas. The Human species is not part of the ecological system of the world. Thus, nature must be protected from humans.").

⁴³ The author apologizes for discussing tribal culture and the American Indian perspective on human-nature relations as if there were one "Indigenous American Ideal" of nature exercised by all tribes. In actuality, the fundamental elements of Native American religious traditions discussed in this Article have found expression in "a rich plurality of highly differentiated types of religious traditions." See Allison M. Dussias, *Science, Sovereignty, and the Sacred Text: Paleontological Resources and Native American Rights*, 55 MD. L. REV. (forthcoming, Jan. 1996) (manuscript at n.75) (quoting JOSEPH EPES BROWN, *THE SPIRITUAL LEGACY OF THE AMERICAN INDIAN* 1 (1982)). The author commits this generalization in an effort to handle more readily the juxtaposition of modern mainstream environmentalism (which is itself internally varied) with an alternative model, and hopes justification may be found in the words of John (Fire) Lame Deer: "[A]ll Indian religions somehow are part of the same belief, the same mystery. Our unity, it's in there." *Id.* (quoting JOHN (FIRE) LAME DEER & RICHARD ERDOES, *LAME DEER, SEEKER OF VISIONS* 251-52 (Washington Square Press 1994) (1972)).

⁴⁴ See, e.g., Chang, *supra* note 34, at 856-57.

Hawaiian thought links one's clan with nature, making one a trustee of nature, not a conqueror of it. When the environment is presumptively "sacred" as opposed to "profane," human endeavor is limited to stewardship. Nature is not a stage for heroic deeds. Nature is heroic in itself 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. The resources that were part of the European wasteland were thus alive in the world of the Hawaiian.

Id.

⁴⁵ See Dussias, *supra* note 43, at notes 78-92 and accompanying text.

⁴⁶ The similarities may not withstand too close a scrutiny, of course. See, e.g., Bill McKibben, *supra* note 41, at 66.

[O]ver thousands of years Indians rearranged the landscape to suit their needs. . . . Indians cleared land for agriculture and burnt some forests once or twice a year, keeping them open and parklike.

American Indians by European-rooted America have obscured the differences between Native and mainstream environmentalism as Indians utilize non-Native property constructs to function within the dominant, non-Native culture.⁴⁷ It may seem ironic, from a philosophical perspective, when non-Indian environmentalists clash with a tribe hoping to locate a hazardous waste facility on Indian land.⁴⁸

On one level, such disputes may arise because the dominant, money-based culture, having infiltrated the Native culture's spiritual purity, responds with suspicion to the Native culture's attempts to conform, as if polluting activities and the accompanying profits should be the exclusive domain of the invader. A less cynical explanation for disputes between tribes wanting to "defile" their lands and non-Native protesters is that modern mainstream environmentalism embodies a spiritualism that overlaps Native constructs even as Indians attempt to fight poverty by adopting non-Native land values. After all, Rachel Carson's philosophy of sustained earth-human coexistence is far more akin to an American Indian view than to the eurocentric, plunder-then-rescue model.⁴⁹ Perhaps it is neither surprising nor ironic that mainstream American culture may afford the luxury of adopting a newfound earth-awareness, even as tribes abandon their philosophies.

From an even broader perspective, the lack of synchrony between mainstream environmentalism and Indian cultural attitudes toward nature may be due to the simple fact that mainstream environmentalism, which operates primarily through a regulatory regime, presents an increasing threat to Indian culture in general. American Indians very well may share the environmental concerns of state regulators and private environmental groups, but allowing the imposition of non-tribal regulation on their lands would threaten the mainstay of tribal existence—its sovereignty.⁵⁰

The Indian disruptions, though extensive, were usually temporary. When Indians had used one area for a time, they often moved to another. Not so Europeans. Early logging was bad enough, but farmers cut down *every* tree as they cleared pasture, and then brought in grazing animals that ate the native grasses down to the dirt.

Id. (emphasis in original).

⁴⁷ See *infra* notes 81–92 and accompanying text.

⁴⁸ *Id.*

⁴⁹ Compare the words of Chief Seattle to President Franklin Pierce in 1854, "[m]an did not weave the web of life; he is merely a strand in it. Whatever he does to the web, he does to himself . . ." (quoted in MARSHALL, *supra* note 36, at 141), with those of Rachel Carson in 1955, "each living thing is bound to its world by many threads, weaving the intricate design of the fabric of life." CARSON, *THE EDGE OF THE SEA*, *supra* note 2, at 14.

⁵⁰ See, e.g., *One Standard for All; a Balancing Act between Sovereignty and Ecology*, L.A. TIMES, June 1, 1991, at 5.

B. *The Supreme Court on Indians: From Tribes as Sovereign Nations to Tribes as Clubs*

The meaning of tribal sovereignty has been an unsettled issue since the early days of U.S. history. In 1810, in what has been called the first Indian case decided by the United States Supreme Court, Justice Johnson observed in a concurring opinion that Indian tribes had lost "the right of governing every person within their limits except themselves."⁵¹ In contrast, in 1831 and 1832, Chief Justice John Marshall penned the opinions *Cherokee Nation v. Georgia*⁵² and *Worcester v. Georgia*.⁵³ In those cases, Chief Justice Marshall conceptualized tribes as sovereign nations with such authority as sovereigns generally enjoy over their land and over both Indian and non-Indian people who came within the borders of that land.⁵⁴

Notwithstanding Chief Justice Marshall's broad vision of tribal sovereignty, recent Supreme Court opinions largely reject a geographically based view of tribal sovereignty in favor of a recognition of tribal sovereignty primarily as existing only over the members of the tribe.⁵⁵ Indeed, the most recent Supreme Court decisions addressing tribal sovereignty reveal a heightened willingness on the part of the Court to relinquish the judicial authority Chief Justice Marshall utilized in his attempt to protect the tribes.⁵⁶ Instead, the Court appears to prefer that the tribal sovereignty issue be addressed primarily as a

Most American Indians share [the] environmental concern [of non-Indian environmentalists living near the Los Coyotes Band of Mission Indians reservation], but resist additional regulation as an erosion of sovereignty. Protecting both can only be accomplished by cooperation. No one wins if the sovereignty issue is pushed to the wall.

Id.

⁵¹ See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring).

⁵² 30 U.S. (5 Pet.) 1 (1831).

⁵³ 31 U.S. (6 Pet.) 515 (1832).

⁵⁴ See *Worcester*, 31 U.S. (6 Pet.) at 538; *Cherokee Nation*, 30 U.S. (5 Pet.) at 15; see also *Duro v. Reina*, 495 U.S. 676, 685 (1990) ("A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens.").

⁵⁵ See, e.g., *Duro*, 495 U.S. at 693 ("[I]n the criminal sphere membership marks the bounds of tribal authority."). But see *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 457 (1989) (Blackmun, J., dissenting in part and concurring in part) ("Indian tribes . . . are unique aggregations possessing attributes of sovereignty over both their members and their territory.") (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)) (emphasis added in *Brendale*).

For a comprehensive analysis of the history and theoretical bases of geographically based and membership-based tribal sovereignty as conceptualized by the Supreme Court, see generally Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993).

⁵⁶ In the *Georgia* cases, Marshall attempted to shield the Cherokee Nation and its sovereignty

federal political issue, with the courts' role as one of mere judicial umpiring.

In areas of importance to the environmentalist, the Supreme Court, during a fourteen year span, has issued three important opinions concerning tribal authority over hunting, fishing, and land development.⁵⁷ These cases generally limit tribal power to the authority necessary to regulate such activities of tribal members in connection with lands within Indian reservations.

For example, in 1981 in *Montana v. United States*, the Supreme Court reviewed a Crow Tribe resolution prohibiting hunting and fishing by nonmembers within the reservation.⁵⁸ The Court limited the tribe's regulatory authority to land within the reservation that was owned by the tribe or held by the United States in trust for the tribe.⁵⁹ The Court rejected the United States Court of Appeals for the Ninth Circuit's holding that the Crow Tribe possessed "inherent sovereignty" over the entire reservation, including land within the reservation owned by non-Indians.⁶⁰ The Court recognized that tribes possessed some attributes of sovereignty over both tribal members and tribal territory, but observed that tribes have been divested of certain attributes of sovereignty in matters involving relations between the tribe and nonmembers.⁶¹ According to the Court, modern tribal sovereignty includes only the power "necessary to protect tribal self-government or to control internal relations . . ."⁶² In this case, however, the Court concluded that regulating hunting and fishing by nonmembers on nonmember-owned land within the reservation "bears no clear relationship to tribal self-government or internal relations."⁶³

Thus, while acknowledging that territorial boundaries played a role in determining the extent of tribal sovereignty, the Court limited

from violence at the hands of state and federal military authorities. *See supra* notes 52-53 and accompanying text.

⁵⁷ *See generally* *South Dakota v. Bourland*, ___ U.S. ___, 113 S. Ct. 2309 (1993); *Montana v. United States*, 450 U.S. 544 (1981); *Brendale*, 492 U.S. 408.

⁵⁸ *Montana*, 450 U.S. at 547.

⁵⁹ *Id.* at 557.

⁶⁰ *Id.*

⁶¹ *Id.* at 563-64.

⁶² *Id.* at 564. More specifically, *Montana* explains that tribes may regulate by taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe, and that tribes "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 567.

⁶³ *Montana*, 450 U.S. at 564-65.

territorial authority to matters necessary for tribal government or internal relations. By so doing, the Court presumptively segregated the tribe from its territory, as if the tribe's natural environment is something completely separate from its self-government or its control over internal relationships. Thus, the Court utilized a eurocentric view of human-nature relations to analyze the sovereign relationship between a non-European people and territory.

Eight years after *Montana*, in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, the Court again limited tribal sovereignty to land within the reservation that was owned by tribal members.⁶⁴ In *Brendale*, the Court considered the Yakima Indian Nation's imposition of zoning regulations on lands owned by nonmembers within the Yakima reservation boundaries.⁶⁵ In spite of the fact that the treaty between the Yakima Nation and the United States dictated that the Yakima reservation land was set aside for exclusive use and benefit of the Yakima Nation, Justice White, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, concluded that the Yakima Nation's sovereign authority did not extend to land owned by non-Indians within the Yakima reservation.⁶⁶ Justice White reasoned that it would "defy common sense" for Congress to have intended for non-Indian landowners who purchased land within the reservation to be subject to tribal sovereignty.⁶⁷ Putting aside the treaty, Justice White reached the same conclusion based on a more generalized analysis of tribal sovereignty.⁶⁸ Like *Montana* before it,

⁶⁴ *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 425 (1989).

⁶⁵ *Id.* at 414. Eighty percent of the land within the boundaries of the reservation was held in trust by the United States for the tribe or individual tribal members, while the remaining twenty percent consisted of "fee land." *Id.* at 415. The Washington State Yakima County Planning Department approved two development proposals, one in trust land, and the other in fee land. The Yakima Nation protested this exercise of non-tribal zoning authority within reservation boundaries, and brought suit in federal district court to challenge it. *Id.* at 416-19.

⁶⁶ *Id.* at 425.

⁶⁷ *Id.* at 422-23 (quoting *Montana*, 450 U.S. at 560 n.9). Justice White's "common sense" passage refers to Congress's allotment policy, one stated aim of which was to destroy tribal government. *Id.* at 423. Justice White does not, however, fit into his common sense analysis the fact that Congress later repudiated its allotment policy. See *id.* (noting that the allotment policy was later repudiated).

⁶⁸ *Id.* at 425-32. Following a *Montana* analysis, Justice White considered whether Yakima authority over reservation land owned by non-Indians was necessary to protect self-government or control internal tribal relations. The Yakima Nation argued that its zoning control controlled internal tribal relations. Justice White observed that this second exception in *Montana* was prefaced by the word "may," which he concluded to mean that the question of whether tribal authority extends to conduct threatening internal tribal relations "depends on the circum-

Justice White's *Brendale* opinion conceptualized the tribe over which sovereignty could be asserted as a tribe of governed people, completely separate from the territory occupied by that people.

Presenting a somewhat different view of tribal sovereignty, Justice Stevens, joined by Justice O'Connor, considered the validity of the Yakima Nation zoning ordinance on an area of land within the Yakima reservation, the majority of which was held in trust by the United States for the benefit of the tribe.⁶⁹ Unlike Justice White, Justice Stevens recognized the tribe's power to exclude nonmembers from its territory, and reasoned that such power "necessarily must include the lesser power to regulate land use in the interest of protecting the tribal community."⁷⁰ Indeed, Justice Stevens identified the source of this power as the tribe's aboriginal sovereignty and characterized the treaty between the Yakima Nation and the United States as a confirmation of this sovereignty.⁷¹ According to Justice Stevens, only federal statute or voluntary surrender could diminish this tribal sovereignty over its territory.⁷² Further, where a tribe maintains the power to exclude nonmembers from an area of its reservation, "the Tribe has preserved the power to define the essential character of that area."⁷³ Importantly, Justice Stevens concluded that this power extended to portions of such an area owned by nonmembers, thus displaying some sensitivity to the importance of geography in Indian sovereignty.⁷⁴

It would be an exaggeration, however, to assert that Justice Stevens endorsed a perspective of the human-nature relationship that merged the two when considering the concepts of nation and sovereignty. Rather, Justice Stevens appears to consider the matter of tribal sovereignty over tribal lands one of demographics. Where a tribe has allowed non-Indians to purchase a few parcels of land in a larger area of tribal territory, Justice Stevens found that the tribe retained sovereign control over that area.⁷⁵ However, where a tribe had lost the power to exclude nonmembers from a significant portion of an area of tribal territory, even where the tribe had not made a voluntary choice

stances." *Id.* at 428-29. Justice White rejected the argument that the zoning ordinance at issue triggered the tribe's authority over internal tribal relations, interpreting the exception as one of inherently limited duration. *See id.* at 429-30.

⁶⁹ *Brendale*, 492 U.S. at 433 (Stevens, J., concurring).

⁷⁰ *Id.*

⁷¹ *Id.* at 435 (Stevens, J., concurring).

⁷² *See id.* at 433.

⁷³ *Id.* at 441 (Stevens, J., concurring).

⁷⁴ *See Brendale*, 492 U.S. at 441.

⁷⁵ *Id.*

to allow non-Indians to purchase reservation land, the tribe lost sovereign authority over the non-Indian owned land.⁷⁶ Thus, Justice Stevens concurred in Justice White's opinion rejecting the Yakima Nation's attempt to halt the development project in the area of the Yakima reservation where non-Indian ownership was more than minimal.⁷⁷

Justice Blackmun, concurring in part and dissenting in part, sharply criticized the views of tribal sovereignty presented by both Justices White and Stevens. Joined by Justices Brennan and Marshall, Justice Blackmun interpreted *Montana v. United States* to find that "tribes may regulate the on-reservation conduct of non-Indians whenever a significant tribal interest is threatened or directly affected."⁷⁸ Unlike the other writing Justices, Justice Blackmun then observed the centrality to tribal welfare of controlling land use.⁷⁹ Justice Blackmun concluded, therefore, that the *Montana* decision authorized tribes to assert exclusive zoning authority over all reservation lands, including that owned by nonmembers.⁸⁰

A third landmark Supreme Court decision, *South Dakota v. Bourland*, also addressed tribal sovereignty.⁸¹ In *Bourland*, with Justice Thomas authoring the opinion, the Court held that the Cheyenne River Sioux Tribe did not possess the sovereign authority to regulate hunting and fishing by non-Indians on reservation land that the United States had taken from both the tribe and non-Indians to construct a dam and reservoir.⁸² In legislation authorizing the project, Congress provided that the taken land would be open to the public for recreational uses, including hunting and fishing.⁸³ Although the treaty between the tribe and the United States reserved for the tribe "absolute and undisturbed use and occupation" of the reservation lands,⁸⁴ including the power to regulate non-Indian uses, Justice Thomas

⁷⁶ *Id.* at 444-45 (Stevens, J., concurring).

⁷⁷ *Id.* at 445 (Stevens, J., concurring).

⁷⁸ *Id.* at 456-57 (Blackmun, J., concurring in part and dissenting in part); see also *Montana v. United States*, 450 U.S. 544, 563-64 (1981).

⁷⁹ *Brendale*, 492 U.S. at 458 (Blackmun, J., concurring in part and dissenting in part).

⁸⁰ *Id.* Justice Blackmun did recognize that discrete areas within a reservation might be exempt from tribal authority, noting that: "[i]t may be that on some reservations, including the Yakima reservation, there are essentially self-contained, definable, areas in which non-Indian fee lands so predominate that the tribe has no significant interest in controlling land use." *Id.* at 467 n.9 (Blackmun, J., concurring in part and dissenting in part).

⁸¹ *South Dakota v. Bourland*, ___ U.S. ___, 113 S. Ct. 2309 (1993).

⁸² *Id.* at 2317. The taken land, located in South Dakota, included 104,420 acres of trust land and 18,000 acres acquired from non-Indians. *Id.* at 2314.

⁸³ *Id.* at 2317.

⁸⁴ *Id.* at 2316.

concluded that the tribe had lost any power to regulate exclusively by conveying ownership of tribal lands to non-Indians.⁸⁵

Echoing his concerns in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, Justice Blackmun penned a dissent in *Bourland* that was joined by Justice Souter.⁸⁶ Blackmun's dissent identified the tribe's right to regulate hunting and fishing on tribal land as stemming from aboriginal sovereign power over both its members and its territory.⁸⁷ Moreover, that power was confirmed by treaty and only could be extinguished by the treaty's abrogation.⁸⁸ Justice Blackmun pointed out that the majority opinion did not establish that, in taking the land and opening it to the public, Congress also intended to destroy the tribe's sovereign authority to regulate hunting and fishing on the taken land.⁸⁹

The three recent Supreme Court opinions outlined above exhibit a steady decline in the Supreme Court's sensitivity to the nature of tribal values regarding the environment. The three Justices writing in favor of recognizing inherent, geographically based tribal sovereignty in *Bourland* have retired. Their retirements leave Justice Souter as the lone Justice who signed on to an opinion recognizing a non-eurocentric land view. In light of the judicial trend toward the full elimination of the Indian land culture in favor of treating tribes only as societies of people, the tribes' and individual tribal members adoption of the mainstream view of land as a profit-bearing commodity is unsurprising.

C. *Mainstream Environmentalism and the State of Native America*

Of course, we're concerned about Mother Earth But we're also concerned about Navajo families who need a paycheck.

DeWayne Beyal, Navajo Nation spokesman⁹⁰

In an apparent cultural role reversal, mainstream environmentalists now work to curb the perceived environmentally exploitive behavior of tribes or tribal members. In one case, the Solicitor of the

⁸⁵ *Id.* at 2316–17.

⁸⁶ *Bourland*, 113 S. Ct. at 2321 (Blackmun, J., dissenting).

⁸⁷ *See id.* at 2321–22 (Blackmun, J., dissenting).

⁸⁸ *Id.* at 2322 (Blackmun, J., dissenting).

⁸⁹ *Id.* at 2322–23 (Blackmun, J., dissenting).

⁹⁰ Johnson, *supra* note 31, at 7.

United States Department of the Interior issued an opinion that the federal Endangered Species Act overrides Indian rights, whether these rights were created by treaty or otherwise, to hunt or fish species listed as threatened or endangered.⁹¹ As if reminding Indian readers of their traditional relationship with other living species, the Solicitor cited a 1915 statement by Chief Weninock of the Yakima Nation, a party to a Pacific Northwest fishing treaty.

Then the Creator gave us Indians Life; we walked, and as soon as we saw the game and fish we knew they were made for us We had the fish before the Missionaries came, before the White man came This was the food on which we lived. My mother gathered berries; my father fished and killed the game My strength is from the fish; my blood is from the fish, from the roots and berries. The fish and the game are the essence of my life.⁹²

The Solicitor interpreted this statement as evidence of tribal sentiments in favor of the later-promulgated Endangered Species Act regulating tribal fishing.⁹³

In another instance, a tribe argued against a California state bill that would compel tribal adherence to state regulations when locating a landfill on tribal territory.⁹⁴ The tribe contended that treaties and legal precedents made the tribe accountable only to the EPA and the United States Bureau of Indian Affairs when constructing a private dump.⁹⁵ In addition to making the case for sovereignty and arguing

⁹¹ See 87 Op. Solic. Dep't Interior 525 (1980). The opinion expresses the view that the hunting and fishing rights of tribes emanating from treaties or other sources do not include the right to take endangered or threatened species, although the United States and tribes entering into such treaties never contemplated whether this right extended to the taking of a species on the brink of extinction. *Id.* at 526; see also, *United States v. Dion*, 476 U.S. 734, 743-46 (1986) (finding that both the Eagle Protection Act and the Endangered Species Act work to abrogate the treaty rights of the Yankton Sioux Tribe to hunt and kill bald eagles); *Department of Game of Washington v. Puyallup Tribe*, 414 U.S. 44, 49 (1973) ("[T]he treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) ("At the time the treaties were executed there was a great abundance of fish and a relative scarcity of people. No one had any doubt about the Indians' capacity to take as many fish as they might need.").

⁹² 87 Op. Solic. Dep't Interior, *supra* note 91, at 533 (quoting 13 PROCEEDINGS OF THE NEW JERSEY HISTORICAL SOCIETY, NEW SERIES, 477-79 (1928), cited in T.C. McLAUHAN, TOUCH THE EARTH 10 (1971)).

⁹³ *Id.*

⁹⁴ See, e.g., Ralph Frammolino, *Bill to Regulate Toxic Dumps on Indian Reservations Heads for Assembly Passage*, L.A. TIMES, Sept. 1, 1990, at B3.

⁹⁵ *Id.*; see also, Amy Wallace, *Landfill on Indian Land Draws Fire*, L.A. TIMES, Dec. 12, 1990, at B2.

that the tribe's own environmental regulatory program was effective, the tribe noted that "the landfill represents a concerted effort by the small tribe to lift itself out of poverty."⁹⁶

This focus shows not that tribes have abandoned respect for nature while federal bureaucrats have developed newfound respect, but that present-generation tribal subsistence, when immediately threatened, acquires primacy over the longer term goal of human-nature symbiosis.⁹⁷ Certainly, mainstream America must accept some credit for conditioning tribes to value fighting poverty more than preserving the purity of their cultural heritage, mostly through actions that created the poverty crisis on reservations. Of course, not all governmental actions that perpetuate tribal poverty are directly or purposefully malevolent.⁹⁸ In a number of examples, the United States Bureau of Indian Affairs has acted in the name of "the Federal interest . . . protecting the use of Indian resources"⁹⁹ to prohibit tribal or tribe member activities on reservation land that would deface the land for profit.¹⁰⁰ In the end, however, mainstream America encroaches on Indian author-

⁹⁶ Frammolino, *supra* note 94, at B3.

⁹⁷ See, e.g., Matthew L. Wald, *Nuclear Storage Divides Apaches and Neighbors*, N.Y. TIMES, Nov. 11, 1993, at A18.

For a decade, the nuclear utilities and the Department of Energy have been looking for a few hundred acres . . . to store several thousand tons of high-level nuclear waste . . . The industry or the Government could pay tens of millions of dollars a year . . . [The Mescalero Apaches] see it as another way to use their 460,000-acre reservation to support the 3,400-member tribe.

Id.

⁹⁸ See Dean B. Suagee & Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 59, 68 (1994).

Federal policymakers . . . generally have acted on the basis of one of two fundamentally different attitudes toward Indian tribes. One paradigm regards the tribes as separate peoples for whom the federal government is obliged to provide a measure of protection; the other regards the tribes as primitive forms of social organization that should be abolished as individual Indians become assimilated into the larger society.

Id. (citing CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 23-31 (1987); FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 49, 128-32, 139-41, 152, 180-88 (1982)).

⁹⁹ See, e.g., *Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs*, IBIA 92-211-A, Department of the Interior, 1993 I.D. LEXIS 57, at *16-*17, *21-*23 (Aug. 31, 1993) (invalidating a contract to erect billboards on Indian trust land due to the fact that the parties had not obtained approval from the Secretary of the Interior, thereby violating 25 U.S.C. § 81 (1988), which requires such approval pursuant to Indians entering agreements relative to their lands).

¹⁰⁰ See, e.g., *Administrative Appeal of the Morongo Band of Mission Indians v. Area Director, Sacramento Area Office*, 7 IBIA 299, Department of the Interior, 1979 I.D. LEXIS 80 at *1 (Dec. 13, 1979).

ity to reap profits from tribal lands on many fronts, and one such front is the environmental cause.¹⁰¹

On their side, tribes at times have utilized the burgeoning environmental regulatory program to exert regulatory control over non-Indians. In the late 1980s Congress enacted a rash of amendments to environmental statutes that authorized tribes to enforce environmental regulations on their lands.¹⁰² Taking advantage of these amendments has brought tribes into conflict with states over matters such as transportation of spent fuel and high-level radioactive waste through Indian reservations.¹⁰³ Tribes also have called upon the United Nations to combat industrial polluters who threaten their natural resources.¹⁰⁴ In such settings, tribes have stressed “[t]he unique consciousness of Native American peoples . . . [who] rely so closely on and live within the context of natural resources” and have asserted the need to impose environmental regulations more stringent than the non-Native governments surrounding Indian territory.¹⁰⁵

These Indian-non-Indian disputes reveal a serious lack of synergy between the mainstream environmental movement, which is aimed at asserting a consistent, draconian regulatory system across the U.S. continent, and the collection of indigenous cultures struggling to subsist while resisting further erosion of their native sovereignty. This lack of synergy is all the more frustrating in light of the common ground shared by Carsonian environmentalism and Indian cultures. Both viewpoints believe in a synergistic human-earth relationship in which humans nurture and are nurtured by nature. In 1854, Chief

¹⁰¹ Worse than preventing Indian participation in pollution producing activity are instances where non-Indians and Indians work together to deface Indian lands and culture for financial profits. See, e.g., Scott Allen, *The Price of Power? Damming Great Whale*, BOSTON GLOBE, Aug. 23, 1993, at 25. The Northern Quebec Cree Tribe sold the right to flood its land for hydro-electric power in exchange for millions of dollars, resulting in radical changes in Cree lifestyles, which in turn led to increases in alcoholism, suicide, vandalism, and family violence among tribal members. *Id.*

¹⁰² See, e.g., Hazardous Materials Transportation Uniform Safety Act of 1990, Pub. L. No. 101-615, § 4, 104 Stat. 3244, 3248-49 (codified as amended 49 U.S.C.A. §§ 5101-29 (West Special Pamphlet 1995)).

¹⁰³ See Keith Schneider, *Idaho Tribe Stops Nuclear Waste Truck*, N.Y. TIMES, Oct. 17, 1991, at A18.

¹⁰⁴ See, *Great Lakes' Native Peoples Fight Pollution*, UNITED PRESS INTERNATIONAL, July 18, 1995 (discussing a plea for \$700 million submitted to the United Nations Environment Programme by the Haudenosaunee, also known as the Iroquois Six Nations Confederacy, to upgrade monitoring, research and education to halt polychlorinated biphenyl degradation of the Great Lakes).

¹⁰⁵ *Id.*

Seattle wrote that "the earth does not belong to man; man belongs to the earth. This we know. All things are connected, like the blood which unites one family. All things are connected."¹⁰⁶ Tashunka Witko (Crazy Horse) wrote that "[o]ne does not sell the earth upon which the people walk."¹⁰⁷ In 1962, Rachel Carson wrote that "[t]he 'control of nature' is a phrase conceived in arrogance, born of the Neanderthal age of biology and philosophy, when it was supposed that nature exists for the convenience of man,"¹⁰⁸ and observed that "[m]an, however much he may like to pretend the contrary, is part of nature."¹⁰⁹

Both Indian culture and Carson's brand of environmentalism also call for a spiritual or philosophical perspective involving almost inexpressible appreciation for and valuing of nature as part of the very essence of earthly existence. Chief Seattle wrote that "[e]very part of this earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing and humming insect is holy in the memory and experiences of my people."¹¹⁰ A century later, Carson wrote that "[t]o the bird watcher, the suburbanite who derives joy from birds in his garden, the hunter, the fisherman or the explorer of wild regions, anything that destroys the wildlife of an area . . . has deprived him of pleasure to which he has a legitimate right."¹¹¹ Although Rachel Carson's writing is primarily science-focused, and in many ways distinct from Indian land-spiritualism, one might conclude that she would embrace Indian nature-spiritualism with the ease of one who simply learns a new language to express well-developed ideas.

Perhaps the lack of synergy between mainstream and Native American environmentalism lies less in philosophical differences than in politics.¹¹² Non-Indian Americans may read Carson and take her earth-

¹⁰⁶ MARSHALL, *supra* note 36, at 141.

¹⁰⁷ *Id.* at 137.

¹⁰⁸ CARSON, *SILENT SPRING*, *supra* note 2, at 297.

¹⁰⁹ *Id.* at 188.

¹¹⁰ MARSHALL, *supra* note 36, at 141.

¹¹¹ CARSON, *SILENT SPRING*, *supra* note 2, at 86.

¹¹² Even as this idea is considered, it is interesting to note that a number of scholars have observed that the philosophers and politicians credited with having developed the concept of United States democracy, based on the ideas that individuals have inalienable rights and the government derives its authority from the collective will of the people, drew heavily upon their study of how the Indian nations of eastern North America governed themselves. See Suagee & Stearns, *supra* note 98, at 67 (citing Oren R. Lyons, *The American Indian in the Past, in EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION* 13 (1992)); John C. Mohawk, *Indians and Democracy, in EXILED, supra* at 43; Robert W. Venables, *American Indian Influence on the America of the Founding Fathers, in EXILED,*

view to heart, but we aim cries to save the country's resources first at the federal government, the only authority perceived as powerful enough to regulate the economic institutions that dominate the country.¹¹³ In other words, mainstream Americans perceive environmental control as something that must be imposed on people and policed by government, rather than something to be inculcated into each individual's outlook. This command-and-control perspective is reflected in the tepid state of the environmental movement's efforts to indoctrinate mainstream America to a self-policing mind-set in connection with nature preservation and waste minimization.¹¹⁴

The fact that command-and-control environmentalism has not resulted in a self-sustaining culture of earth sensitivity does not mean that top-down environmentalism was the wrong approach for mainstream America to have taken. Smaller communities, like tribes, may be natural environmental self-policers.¹¹⁵ The United States, however, cannot be divided into small communities; states are inexorably linked, competing with one another for private industries that are free to roam the nation looking to maximize profit.¹¹⁶ Although this Article makes broad generalizations about all Indian cultures, cultures within individual tribes can vary greatly. Each tribe's autonomy may be crucial in allowing environmentalism to exist naturally in Indian cultures.¹¹⁷ In short, the mere size and interconnectedness of mainstream U.S. culture make U.S. culture qualitatively different from smaller, independent cultures.

supra at 73; Donald A. Grinde, Jr., *Iroquois Political Theory and the Roots of American Democracy*, in EXILED, *supra* at 227; Robert J. Miller, *American Indian Influence on the United States Constitution and Its Framers*, 18 AM. INDIAN L. REV. 133 (1993); Gregory Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America's Democratic Roots*, 14 AM. INDIAN L. REV. 323 (1989); *contra* Erik M. Jensen, *The Imaginary Connection Between the Great Law of Peace and the United States Constitution: A Reply to Professor Schaaf*, 15 AM. INDIAN L. REV. 295 (1990).

¹¹³ Indeed, this may be in keeping with Carson's message that "[we live in] an era dominated by industry, in which the right to make a dollar at whatever cost is seldom challenged." CARSON, *SILENT SPRING*, *supra* note 2, at 13.

¹¹⁴ See Roszak, *supra* note 7, at 51 ("Some ecopsychologists believe there are elements of addiction and denial embedded in our bad environmental habits.")

¹¹⁵ See, e.g., Hilary F. French, *Forging a New Global Partnership to Save the Earth*, U.S.A. TODAY, May 1995, at 76 ("Problems are solved best at the most decentralized level of governance that is consistent with efficient performance of the task."); see also Ridley & Low, *supra* note 6, at 76.

¹¹⁶ Witness the overwhelming breadth of the Interstate Commerce Clause, U.S. CONST., art. I, § 8, cl. 3.

¹¹⁷ See Chang, *supra* note 34, at 858; Ridley & Low, *supra* note 6, at 83.

Thus, one observation that may be made in light of the distinctions between mainstream environmentalism and Indian views of the human-nature relationship is that the majority, eurocentric-rooted U.S. culture can never encompass or emulate the aboriginal culture. Education and spiritual awareness of the type Rachel Carson taught have a limited impact on industrial and personal habits of the majority of Americans. It is almost guaranteed that mainstream Americans, like Arthurian knights, will respond to isolated instances of nature in distress.¹¹⁸ We will not, however, adjust our preferred behavior as land-conqueror on a broader basis.

A second, related observation is that imposing eurocentric economic systems and values on tribes necessarily compromises the tribe's cultural relationship with nature.¹¹⁹ A larger culture, steeped in toxins, surrounding and encroaching on a smaller culture based on ongoing, non-destructive exploitation of nature, taints the smaller culture, as surely as a landfill upgradient from a reservation taints the reservation's groundwater. Accusations of hypocrisy leveled against tribes desiring to site hazardous waste facilities on tribal lands while simultaneously arguing against the imposition of state environmental regulations by invoking their land-worship heritage on reservations are, at the very least, simplistic.¹²⁰ Through treaties, legislation, and court decisions, mainstream America has introduced capitalistic property

¹¹⁸ See *supra* notes 38–43 and accompanying text; see also Chang, *supra* note 34, at 849, 853–54 (comparing environmentalism to the Crusades).

¹¹⁹ Ridley & Low, *supra* note 6, at 86. It is worth remembering that the tribal relationship with the earth has pragmatic as well as spiritual roots.

History abounds with evidence that limitations of technology or demand, rather than a culture of self-restraint, are what has kept tribal people from overgrazing their commons. The Indians of Canada had the technology to exterminate the beaver long before white men arrived; at that point they changed their behavior not because they lost some ancient reverence for their prey but because for the first time they had an insatiable market for beaver pelts.

Id.

¹²⁰ See Gover & Walker, *supra* note 32, at 933, 938.

Tribes . . . have become the focus of uninformed media coverage like the [countless articles entitled] “Dances with Garbage” These authors, many of them environmentalists, managed to glean from the movie “Dances with Wolves” only the “noble savage” stereotype that leads one to believe that “real Indians” do not produce trash, would never harm their environment, are simple in their approach to complex issues—in short, that Indians are just not smart enough to develop or regulate waste disposal responsibly. This Indian stereotype is insulting to say the least, and it smacks of the same arrogance that led fifteenth-century Europeans to conclude that they had “discovered” America.

Id. at 942.

concepts and short-term thinking into Indian culture, and tribes cannot ignore these once foreign concepts if their people are to survive.

Thus, eurocentric Americans and Indians are, indeed, foreign nations locked in mind-sets that clash even where they overlap. Productive relationships between tribes and non-Indian environmentalists can develop, however, where the dominant culture is sensitive to the distinctions in mainstream and Indian perspectives on the environment, and to the overarching sovereignty concerns of tribes.¹²¹ For example, some states have learned to avoid the sovereignty tinderbox by scrapping attempts to regulate tribes with state law.¹²² Instead, these states enter into cooperative agreements in which tribes voluntarily agree to adopt the state's regulatory standards for particular environmentally sensitive projects, such as operating waste facilities.¹²³ In 1993, the World Wildlife Fund and the California Hoopa Valley Tribe announced the first joint conservation venture aimed at managing the tribe's resources while developing a sustainable tribal economy.¹²⁴

More generally, mainstream environmentalists must remember that there is much to be learned from Indian views on the environment, and that dismissing Indian destruction of nature as hypocritical may close off opportunities for learning. Indian cultures naturally embraced and encompassed environmentalist concepts well before *Silent Spring* motivated the federal government to create the EPA. Indian cultures' fundamental environmentalism allows a more natural symbiotic thinking than the selfless urgency that is characteristic of the

¹²¹ See *id.* at 933, 942-43. Congress and the EPA have amended many federal environmental statutes to recognize Indian sovereignty. See Suagee & Stearns, *supra* note 98, at 71. However, the form of these amendments, which generally establishes procedures for tribes to attain "treatment as states" status, may not offer complete comfort to a tribe that considers itself a sovereign nation. See, e.g., Federal Water Pollution Control Act, 33 U.S.C. § 1377 (1988); Clean Air Act, 42 U.S.C. § 7601(d) (1988); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9626 (1988).

¹²² From early in U.S. history, the supremacy of federal authority over Indian matters has worked to protect tribes from assertions of state law within reservations. See Suagee & Stearns, *supra* note 98, at 71 (citing to COHEN, *supra* note 98, at 275-79). Under certain federal environmental statutes, however, the EPA may delegate implementation authority to states, a situation under which a question arises as to whether states may assert such federally delegated regulatory authority within reservations. See, e.g., 40 C.F.R. §§ 271-72 (1992) (providing procedure for the EPA to delegate regulatory oversight of hazardous waste to states under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-92(k) (1988)).

¹²³ See, e.g., Ralph Frammolino, *Pact Reached to Regulate Dumps on Indian Lands*, L.A. TIMES, Sept. 11, 1991, at 18; see generally AMERICAN INDIAN LAW DESKBOOK 383-404 (1993).

¹²⁴ See *WWF and Hoopa Valley Tribe Form Conservation Partnership*, WORLD WILDLIFE FEDERATION FOCUS, May-June 1993, at 1.

mainstream environmentalist. Judy Knight Frank, leader of the Colorado Mountain Utes, in discussing an irrigation project stated that, "[f]or 100 years, we did not have running water on this reservation Where were the environmentalists then? They weren't hollering about the terrible conditions for our children. But now, suddenly, the squawfish is so important. More important than the Indian people, apparently."¹²⁵ When confronting a tribe with any collective memory, mainstream environmentalists will never convince it of the well-meaning intentions of new regulation.

Finally, although mainstream America cannot emulate Indian cultures, the study of Indian culture may encourage the market model to emerge as the new phase of broadened mainstream environmental thinking.¹²⁶ As noted above, tribal land-spiritualism did not develop coincidentally. Hunting, fishing, and gathering were the mainstay of tribal sustenance, and respect for nature was, in part, a matter of respecting one's food source.¹²⁷ Today, some commentators urge environmentalists to shift their primary efforts away from the altruistic, consciousness-raising, educational aims of environmentalism, and to focus instead on what environmentalism can do, in the short term, for members of our own species.¹²⁸ Indeed, an environmental program that links environmentalism to financial profit may be the closest our mainstream U.S. culture can come to the symbiosis between land and culture that characterizes tribal spiritualism. This strain of environmentalism shows promise because it focuses on nurturing human well-being, not on preserving pristine wilderness for its own sake. One protects one's food source, be it fish, forests, or financial markets.

II. ENVIRONMENTALISM FACES THE RACISM CHARGE: PEOPLE OF COLOR VS. THE GREENS

Distinct from the clash between eurocentric and indigenous American cultural concepts of the nature-human relationship are the charges aimed at mainstream environmentalists from non-indigenous racial

¹²⁵ See Johnson, *supra* note 31, at 7.

¹²⁶ See *supra* notes 21-22 and accompanying text.

¹²⁷ See Suagee & Stearns, *supra* note 98, at 97 ("From an Indian perspective, of course, one might say that the natural environment is the cultural environment."); see also Robert Laurence, *American Indians and the Environment: A Legal Primer for Newcomers to the Field*, NAT. RESOURCES & ENV'T, Spring 1993 at 3 ("True, Indian governments and their resource management were not likely as sentimentally 'green' as Kevin Costner and other New Agers would have it.")

¹²⁸ See generally Ridley & Low, *supra* note 6; Braille, *supra* note 9.

and cultural minority populations.¹²⁹ A problem facing these peoples has been termed “environmental racism,” and is addressed in the less contentiously labeled “environmental justice” or “environmental equity” movement.¹³⁰ This section presents an overview of the environmental justice debate, then briefly tracks the history of the movement. Finally, this section discusses whether and how issues of racial justice have integrated with environmentalism.

*A. Overview of the Debate: Preventing Racial
Issues from Tainting Environmental Decisions vs.
Admitting It's Already Happening*

Ostensibly, the EPA and other governmental decisionmakers who address matters such as the siting of a polluting facility or the priority of a spill cleanup make such decisions based solely on environmental criteria. In such decisions, although the potential for human health impact plays an important role, the race of potential pollution victims is not supposed to be used to value health and safety effects. For a number of years, however, advocates for the rights of American minorities have challenged the premise that environmental decisionmakers do not consider the race of individuals living in the vicinity of proposed or existing toxic conditions. Indeed, the much-cited 1987

¹²⁹ Indeed, advocates for the rights of indigenous peoples point out the dangers of their problems being cast in terms of race. See, e.g., Chang, *supra* note 34, at 861–62.

The present politics of race, which asserts that native indigenous persons are one spectrum of the rainbow of “people of color” is self-serving and benefits the political agenda of the left. The left seeks a political transformation of America, perhaps in revolutionary ways, but always as Americans. Indigenous persons . . . seek what was always theirs—a homeland for their culture . . . [This] is not revolutionary in the leftist sense at all.

Id. (emphasis in original).

¹³⁰ “Environmental justice” has been defined as the “identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of . . . programs, policies, and activities on minority populations and low-income populations . . .” Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994). “Environmental equity” has been defined as “the distribution and effects of environmental problems and the policies and processes to reduce differences in who bears environmental risks.” ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES VOLUME 1: WORKGROUP REPORT TO THE ADMINISTRATOR 2 (1992) [hereinafter ENVIRONMENTAL EQUITY]. Thus, the terms appear to refer to overlapping, if not identical, efforts. *But see* Charles J. McDermott, *Balancing the Scales of Environmental Justice*, 21 FORDHAM URB. L.J. 689, 689 (1994) (defining “environmental justice” as “a movement to relieve all communities of the burden of emissions by curtailing waste generation and preventing all pollution” and defining “environmental equity” as “involv[ing] evenly balancing the siting of potentially environmentally hazardous facilities among communities of all backgrounds”).

United Church of Christ study concluded that the race or cultural background of a community is often the primary guiding factor in determining where a hazardous waste facility will be located and where toxic waste spills will be abandoned without cleanup.¹³¹

Adversaries of the environmental racism accusers admit that environmental decisions about siting hazardous activities might be swayed by other than strict environmental concerns.¹³² These adversaries, however, argue that the non-environmental concerns that may taint such decisions are purely economic, focusing on land values.¹³³ According to these adversaries, the fact that land in the proximity of many communities of color is cheaper and therefore more accessible for such sitings creates the illusion that environmental decisions are race-conscious.¹³⁴

This defense of the status-quo may be addressed on a number of levels. In some instances, the accusers directly confront the economic defense by pointing to examples of hazardous facility sitings and foregone cleanups resulting in a disproportionate presence of toxins in the vicinity of middle-class minority neighborhoods. Examples include the planned siting of a municipal landfill in the middle-class black neighborhood of Northwood Manor, in Houston, Texas, and the location of the largest hazardous waste landfill in the nation in Emelle, Alabama, home to many middle-class blacks.¹³⁵

¹³¹ UNITED CHURCH OF CHRIST, COMM'N FOR RACIAL JUSTICE, *TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT OF THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES* (1987).

¹³² See Anthony R. Chase, *Assessing and Addressing Problems Posed by Environmental Racism*, 45 RUTGERS L. REV. 335, 344-46 (1993). The article points out that depressed property values in minority communities may themselves constitute a manifestation of racism created by whites who are reluctant to move into an area that is as much as 20% black. Therefore, the argument that disproportionate exposure of minorities to toxins is a product of economics is not an argument that clears the phenomenon from a charge of racism.

¹³³ See *id.*

¹³⁴ Economic-focused explanations of why waste facilities are sited in minority communities might also point to the financial incentives low-income minority communities may welcome, offered by waste management firms as a means of overriding resistance from the neighborhood in which a waste facility is to be located. See Chase, *supra* note 132, at 346.

¹³⁵ See Karl Grossman, *From Toxic Racism to Environmental Justice*, E: THE ENVIRONMENTAL MAGAZINE, June 1992, at 28, 33; see also Bullard, *supra* note 25, at 12 ("There is a racial divide in the way the U.S. government cleans up toxic waste sites and punishes polluters. White communities see faster action, better results and stiffer penalties than communities where blacks, Hispanics and other minorities live. This unequal protection often occurs whether the community is wealthy or poor." (citing M. Lavell & M. Coyle, *Unequal Protection*, NAT'L L.J. Sept. 1992, at 1-2)).

On a more fundamental level, however, the racism accusers argue that such examples are unnecessary to validate their charge.¹³⁶ At this level, whether the disproportionate siting of toxin-producing activities near minority neighborhoods is purposeful or inadvertent in no way alleviates the need to address the troublesome reality.¹³⁷

This sentiment does not receive support under equal protection analysis, where proving racial discrimination necessitates evidence of intent.¹³⁸ For example, in *R.I.S.E., Inc. v. Kay*,¹³⁹ evidence that a proposed landfill would disproportionately impact a black community failed to pass equal protection muster because, according to judicial review of the facts, discriminatory intent had not motivated the government decisionmaker to site the landfill in the proximity of the black community.¹⁴⁰

The discriminatory intent burden may be close to impossible to prove in most cases.¹⁴¹ For example, in *Bean v. Southwestern Waste Management Corp.*, residents contended that racism motivated the Texas Department of Health decision to locate a waste facility in the suburban, middle-class, eighty-two percent black neighborhood of Northwood Manor.¹⁴² The plaintiffs presented almost overwhelming

¹³⁶ See, e.g., Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 840 (1992).

¹³⁷ Walter Willard, *Environmental Racism: The Merging of Civil Rights and Environmental Activism*, 19 S.U. L. REV. 77, 79 (1992) (citing *Residents: Racism Behind Rats, Stench*, NEW ORLEANS TIMES PICAYUNE, October 25, 1991 at B1-2 (quoting Oliver Houck stating, "[t]he allegation isn't that people are poisoning minorities with malice, [sic] the allegation is they are doing it . . . because it's the cheapest place to do it and nobody gives a damn."); see also Barry Commoner, *Failure to the Environmental Effort*, 18 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,195, 10,198 (June 1988) ("[T]hinly veiled by a seemingly straightforward numerical computation, there is a profound, unresolved moral question: Should poor be subjected to a more severe environmental burden than richer people, simply because they lack resources to evade it?").

¹³⁸ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 267 (1989); *Batson v. Kentucky*, 476 U.S. 79, 92 (1986); *Washington v. Davis*, 426 U.S. 229, 239 (1976). A clearly overwhelming pattern of discrimination may be sufficient for a court to infer intent. *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). Intent may be inferred from a combination of factors, such as statistical evidence, historical background of a decision, and deviation from prior standard procedure. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977).

¹³⁹ 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992).

¹⁴⁰ *Id.* at 1150; see also *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880, 884 (M.D. Ga.), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

¹⁴¹ Environmental racism advocates call for the law to allow disparate impact and statistical weight to replace intent as the criteria to compel decisionmakers to alter hazardous facility siting plans. See generally Bullard, *supra* note 25.

¹⁴² *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673, 675 (S.D. Tex. 1979), *aff'd*, 782 F.2d 1038 (5th Cir. 1986).

statistical evidence of patterned discriminatory behavior, which the plaintiffs claimed amounted to intent.¹⁴³

An earlier attempt had been made to locate a municipal landfill in the same general area in 1970, when the subdivision and local school district had a majority white population. The 1970 landfill proposal was killed by the Harris County Board of Supervisors as being an incompatible land use; the site was deemed to be too close to a residential area and a neighborhood school. In 1978, however, the controversial sanitary landfill was built only 1,400 feet from a high school, football stadium, track field, and the North Forest Independent School District's administration building. Because Houston has been and continues to be highly segregated, few Houstonians are unaware of where the African American neighborhoods end and the white ones begin . . . Overall, 14 of the 17 (82 percent) solid waste facilities used to dispose of Houston's garbage were located in mostly African American neighborhoods.¹⁴⁴

However, the federal judge ruled against the plaintiffs, finding that the plaintiffs had not demonstrated purposeful discrimination.¹⁴⁵

The failure to garner constitutional support for the call to sensitize environmental decisionmaking to racial impact does not eliminate the racism charge against the mainstream environmental community.¹⁴⁶ Unfortunately, it does allow the mainstream environmental community to confront the task of evaluating and alleviating racial disparity in toxic siting and cleanup decisions in a purely political and tentative manner.¹⁴⁷

¹⁴³ *Id.* at 677-79.

¹⁴⁴ Bullard, *supra* note 25, at 41 (footnotes omitted).

¹⁴⁵ *Id.* The court found that approximately 50% of the waste sites in the targeted area were located in census tracts with less than 25% minority populations. *Bean*, 482 F. Supp. at 677.

¹⁴⁶ Legal claims short of constitutional equal protection have been utilized by plaintiffs suffering from environmental racial injustice. See *Copart Indus., Inc. v. Consolidated Edison Co. of New York, Inc.*, 362 N.E.2d 968, 970 (1977) (private nuisance action brought against defendant in connection with five oil-fired smokestacks and burners); see also Willard, *supra* note 137 at 86-90 (discussing strict liability and negligence tort actions that victims of environmental racism might utilize). Willard's article does not indicate that these actions directly would utilize the fact that the injury claimed was being suffered due to the race of the plaintiffs.

¹⁴⁷ A number of bills have been introduced into Congress that address environmental justice, including: the Environmental Justice Act of 1993, H.R. 2105, 103d Cong., 1st Sess. (1993); the Environmental Equal Rights Act of 1993, H.R. 1924, 103d Cong., 1st Sess. (1993); the Environmental Health Equity Information Act of 1993, H.R. 1925, 103d Cong., 1st Sess. (1993); and the Waste Export and Import Prohibition Act, H.R. 3706, 103d Cong., 1st Sess. (1993). None of these bills has resulted in the passage of a law. States, however, led by Arkansas and Louisiana, have enacted environmental justice laws. In addition, EPA's Office of Civil Rights has begun inves-

B. *A Brief Chronology of the Justice Movement: Moving the Mainstream from Skepticism to Tolerance of the Issues*

For over two decades, civil rights leaders have contended that the environmental mainstream discriminates against racial minorities.¹⁴⁸ The genesis of widespread public awareness that minorities bore an inequitable burden of exposure to toxins, however, may have occurred in 1982, when the state of North Carolina removed soil contaminated by polychlorinated biphenyls from 210 miles of North Carolina highways, then disposed of the waste in Warren County.¹⁴⁹ The population of Warren County was sixty percent black, the highest concentration of minority residents in the state.¹⁵⁰ Warren County was also one of the poorest counties in the state.¹⁵¹ Civil rights, labor, and political leaders joined with community protesters in acts of civil disobedience that received national attention.¹⁵²

A number of studies were conducted following the Warren County incident, starting with a General Accounting Office (GAO) survey of the relationship between race and hazardous waste facility sitings.¹⁵³ The GAO study focused on the eight southeastern EPA Region IV states and concluded that three out of four hazardous waste landfills were located in black communities.¹⁵⁴ The GAO study also concluded that, in those four communities, over ninety percent of the population living below the poverty level was black.¹⁵⁵

Expanding upon the scope of the GAO study, the United Church of Christ Commission for Racial Justice (UCC) conducted a nationwide study of the correlation between hazardous waste facilities, uncontrolled toxic waste spill sites, and race and socioeconomic conditions.¹⁵⁶

tigating charges of environmental discrimination under Title VI of the 1964 Civil Rights Act. See Bullard, *supra* note 25, at 15.

¹⁴⁸ See, e.g., UNITED STATES COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 1974 (1975).

¹⁴⁹ See, e.g., Chase, *supra* note 132, at 340.

¹⁵⁰ See *id.*

¹⁵¹ *Id.*

¹⁵² *Id.*; see also *South Carolina Environmental Equity Study: Executive Summary*, cited in KENTUCKY BAR ASS'N, ENVIRONMENTAL JUSTICE: "JUSTICE . . . NOT JUST A WORD" 39 (1995) [hereinafter JUSTICE . . . NOT JUST A WORD].

¹⁵³ UNITED STATES GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 1-4 (1983).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ UNITED CHURCH OF CHRIST, *supra* note 131.

The study concluded that racial demographics was a more significant predictor of toxic waste concentrations than socioeconomic status, although socioeconomic status also appeared to play an important role in decisions about where to locate hazardous waste facilities and when to abandon spills.¹⁵⁷ According to the UCC study, a pattern, too consistent to have occurred by chance, forces black or Latino neighborhoods to bear disproportionate environmental harms from both controlled and uncontrolled concentrations of toxins.¹⁵⁸

In 1990, social scientists and civil rights leaders formed the Michigan Coalition (Coalition) and gathered at the University of Michigan School of Natural Resources to study the relationship between race and commercial hazardous waste facilities in the Detroit area.¹⁵⁹ Reaching similar results as those found in the GAO and UCC reports via face-to-face interviews, the Coalition wrote to William K. Reilly, then the EPA Administrator, requesting that the EPA give attention to the issue of environmental racism.¹⁶⁰ Reilly responded by creating the EPA Environmental Equity Workgroup, composed of staff from across the Agency, which convened in July, 1990.¹⁶¹ The 1992 workgroup

¹⁵⁷ *Id.* at xiii.

¹⁵⁸ *Id.* at xiv-xv.

¹⁵⁹ Chase, *supra* note 132, at 341-42; ENVIRONMENTAL EQUITY, *supra* note 130, at 6.

¹⁶⁰ ENVIRONMENTAL EQUITY, *supra* note 130, at 6-7. Specifically, the Coalition requested that the EPA:

[u]ndertake research geared toward understanding environmental risks faced by minority and low-income communities;

Initiate projects to enhance risk communication targeted to minority and low-income population groups;

Require, on a demonstration basis, that racial and socioeconomic equity considerations be included in Regulatory Impact Assessments;

Include a racial and socioeconomic dimension in geographic studies of environmental risk;

Enhance the ability of minority academic institutions to participate in and contribute to the development of environmental equity;

Appoint special assistants for environmental equity at decision-making levels; and

Develop a policy statement on environmental equity.

Id.

¹⁶¹ *Id.* at 8. Reilly's charge to the Workgroup included four tasks:

Task One: Review and evaluate the evidence that racial minority and low-income people bear a disproportionate risk burden.

Task Two: Review current EPA programs to identify factors that might give rise to differential risk reduction, and develop approaches to correct such problems.

Task Three: Review EPA risk assessment and risk communication guidelines with respect to race and income-related risks.

Task Four: Review institutional relationships, including outreach to and consultation with racial minority and low-income organizations, to assure that EPA is fulfilling its mission with respect to these populations.

Id. at 7-8.

report to Reilly, entitled *Environmental Equity: Reducing Risk for All Communities*,¹⁶² concluded that racial minorities and low-income populations experience heightened exposure to certain air pollutants, hazardous waste facilities, contaminated fish, agricultural pesticides, and lead.¹⁶³ The report characterized its conclusions as limited by the lack of data on racial and socioeconomic group exposure to environmental risks, and recommended the development of a research and data collection plan.¹⁶⁴ The report also recommended the incorporation of environmental equity considerations into agency decisionmaking.¹⁶⁵

These early studies on the relationship between race and toxin exposure have not led to immediate and wholesale overhaul of the environmental regulatory regime. Skeptics who prefer to deny the existence of racist motivation will always find support for denial. Indeed, a more recent study conducted by the University of Massachusetts concluded that hazardous waste facilities in the area studied were not more likely to be sited in minority communities.¹⁶⁶ In addition, the progress that has taken place has suffered from the leadening effects of bureaucracy. Both Reilly and present EPA Administrator Carol Browner have been criticized for their approaches to the equity issue.¹⁶⁷ Reilly has admitted that correlating environmentally

¹⁶² ENVIRONMENTAL EQUITY, *supra* note 130, at 7-8.

¹⁶³ *Id.* at 11-15.

¹⁶⁴ *Id.* at 26.

¹⁶⁵ *Id.* at 28-29. Other recommendations in the EPA Workgroup report include the recommendations that the EPA increase the priority it gives to environmental equity issues; that the EPA work to reduce environmental risks for targeted population groups; that the EPA consider the potential for disproportionate risk distribution in its rulemaking and initiatives; that the EPA revise permitting, enforcement, and other procedures to address equity issues, and urge states to conform; that the EPA open communication channels with minority and low-income communities and involve them in policymaking; and that the EPA should develop an environmental equity staff to ensure that its long-range development includes equity concerns. *Id.* at 25-31; see generally Clarice Gaylord, ENVIRONMENTAL EQUITY UPDATE MEMO (Oct. 27, 1992) (on file with author) (describing the EPA's Environmental Equity Office and the policy-developing Environmental Equity Cluster).

¹⁶⁶ See JUSTICE . . . NOT JUST A WORD, *supra* note 152, at 39 (containing results of study conducted by the University of Massachusetts). The University of Massachusetts study found that in the largest 25 metropolitan areas studied, commercial hazardous waste facilities were slightly more likely to be in industrial neighborhoods with a lower percentage of minorities and a higher percentage of white working-class families. Douglas L. Anderton, co-author of the University of Massachusetts study, and director of the Social and Demographic Research Institute, notes that their study does not disprove the existence of environmental racism in any specific case or other environmental inequities, and called for further research on the question of environmental racism.

¹⁶⁷ See, e.g., Catalina Camia, *Poor, Minorities Want Voice in Environmental Choices*, 51 CONG. Q. WKY. REP. 2257, 2258 (1993) (citing to Charles Lee of the United Church of Christ Commission for Racial Justice when observing that EPA officials "branded the [UCC report] finding as

dangerous conditions with income is easier than correlating those conditions with race, pointing to the diets, lifestyle, hygiene, and greater exposure to the unprotected environment of lower income groups.¹⁶⁸ Browner has been criticized for giving little more than lip service to the environmental racism issue.¹⁶⁹ Generally, equity advocates worry that the EPA's approach blames the victims for their exposure to pollution, minimizing the racial element of the issue, and deflecting responsibility.¹⁷⁰

Perhaps the culmination of these first major efforts to acknowledge and assess the issue of toxic racism and environmental justice was President Clinton's February, 1994 Executive Order.¹⁷¹ That Executive Order charged seventeen federal agency heads with the responsibility of overseeing the development of environmental justice strategies in all federal agencies.¹⁷² As part of its strategy, each agency must identify and address disproportionately high and adverse human health or environmental effects of the various agency programs on minority and low-income populations. In addition, each agency must revise programs and practices to improve environmental conditions for those populations.¹⁷³ In April, 1995, the EPA issued "Environmental Justice Strategy: Executive Order 12898."¹⁷⁴ The EPA's strategy provides general guidance, underscoring the importance of early and ongoing public participation in cases where environmental justice is an issue.

simply out of the agency's reach. They said it was the task of the agency to deal with environmental issues that are technical and regulatory—not social.”); *see also* Marianne Lavelle, *EPA Enforcement to be Probed*, NAT'L L.J., Apr. 5, 1993, at 3 (discussing a U.S. Commission on Civil Rights inquiry into whether EPA discriminates against minorities and the poor in enforcement, in cleanup decisions, and in other work).

¹⁶⁸ *See* Chase, *supra* note 132, at 351–52; *see also* William K. Reilly, *Environmental Equity: EPA's Position*, EPA J., Mar.-Apr. 1992, at 18–19.

¹⁶⁹ *See, e.g.*, Usha Lee McFarling, *Poor, Minorities Seek Role in "Environmental Justice,"* BOSTON GLOBE, Feb. 13, 1994, at 18 (“Calling [an] apparently spontaneous open-mike session ‘Browner’s classic M.O.,’ one questioner said it was the fourth time she had spoken to Browner at such a forum.”).

¹⁷⁰ Chase, *supra* note 132, at 352–53 (quoting from Reilly, *supra* note 168) (“EPA alone cannot correct whatever imbalance has developed in the application of environmental protection Addressing equity issues will need the concerted efforts of state and local governments and of the private sector, as well.”).

¹⁷¹ Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (1994).

¹⁷² *Id.* at 7,629–30.

¹⁷³ *Id.*

¹⁷⁴ EPA/200-R-95-002. The document does not provide detailed guidance and criteria. Rather, it underscores the importance of early and ongoing public participation in cases where environmental justice is an issue.

The outcome of these studies and political initiatives has not had an overwhelming impact yet on environmental decisionmaking. For example, in June, 1995, the EPA Environmental Appeals Board (Appeals Board) examined the decision by EPA Region V to issue the federal portion of a Resource Conservation and Recovery Act (RCRA) permit allowing Chemical Waste Management of Indiana, Inc. to site a landfill in Fort Wayne, Indiana.¹⁷⁵ During the permit comment period, local residents claimed that the landfill would violate Executive Order 12,898 and would visit a disproportionate adverse impact on area minority populations.¹⁷⁶

The Appeals Board concluded that the Executive Order did not have the effect of changing the substantive requirements for issuance of a permit under RCRA and its implementing regulations.¹⁷⁷ The Appeals Board reached this conclusion even though it acknowledged that EPA officials considering a RCRA permit application, "as a matter of policy . . . should exercise discretion to implement the Executive Order to the greatest extent practicable," where RCRA and its regulations allow such discretion.¹⁷⁸ According to the Appeals Board, implementation of the policy included "assur[ing] early and ongoing opportunities for public involvement in the permitting process."¹⁷⁹ The Appeals Board concluded, however, that "if a permit applicant meets the requirements of RCRA and its implementing regulations, the Agency must issue the permit, regardless of the racial or socio-economic composition of the surrounding community and regardless of the economic effect of the facility on the surrounding community."¹⁸⁰

The April, 1995 EPA Environmental Justice Strategy was distributed pending the appeal of the Region V permit decision. Therefore, although the original EPA decision on the RCRA permit was made

¹⁷⁵ Chemical Waste Management of Indiana, Inc., 1995 WL 395962 at *1 (E.P.A. 1995).

¹⁷⁶ *Id.* at *1. More precisely, petitioners argued that the EPA limited its consideration of potential disproportionate impact to a one-mile radius of the proposed facility, ignoring census and other information submitted during the comment period that indicated a disproportionate impact of far greater magnitude if a broader demographic study had been conducted. The Appeals Board found that the EPA's decision to study racial impact only within a one-mile radius of the proposed facility constituted a technical judgment, and that the petitioner must meet a heavy burden to persuade the Appeals Board to review such judgments. The Appeals Board was not persuaded to review the EPA's decision by a study indicating that particulates from the facility "could" affect an African-American community living as far as two miles from the site. *Id.* at *8-10.

¹⁷⁷ *Id.* at *5.

¹⁷⁸ *Id.* at *4.

¹⁷⁹ *Id.* at *5.

¹⁸⁰ Chemical Waste Management of Indiana, Inc. 1995 WL 395962 (E.P.A. 1995) at *5.

without the benefit of the 1995 EPA Environmental Justice Strategy, the Appeals Board made its decision while aware of the strategy. Indeed, the Appeals Board asserted that it viewed its reading of Executive Order 12,898 and the actions of the Region V office as consistent with the strategy.¹⁸¹ In short, the environmental justice movement has not persuaded EPA to alter its primary focus from the customary, precise, and technical readings of the duties set forth in environmental statutes and regulations. Certainly, former EPA Administrator Reilly was correct when he declared, "EPA alone cannot correct whatever imbalance has developed in the application of environmental protection."¹⁸²

C. *Can the Green Movement Accommodate the Rainbow Coalition?*

NIMBY is a syndrome in which politically influential citizens pressure environmental decisionmakers to site environmentally undesirable activities away from their neighborhoods.¹⁸³ The goal of environmental justice is not simply to eliminate NIMBY by eradicating any and all political and financial influence from environmental siting and cleanup decisions. On the contrary, the environmental justice movement demands that environmental decisionmakers take account of the distributional implications of siting decisions, and not purport to work in a demographic vacuum.¹⁸⁴ Indeed, the call for the conscious reduction of minority exposure to environmentally hazardous conditions adds new complexity to already difficult decisions.

Sensitizing environmental decisionmakers to the disproportionate toxic exposure that results from certain decisions helps elucidate some fundamental, albeit often ignored, truths about the impact of environmental law. First, following the Rachel Carson model of environmentalism, environmentally benign behavior is as much about dispersal of toxins as it is about reduction.¹⁸⁵ Morally corrupt behavior

¹⁸¹ *Id.* at *8.

¹⁸² Reilly, *supra* note 168, at 20.

¹⁸³ "NIMBY" is an acronym for the phrase "Not In My BackYard." Robert Bullard points out that "public officials and private industry have in many cases responded to the NIMBY phenomenon using the place-in-blacks'-backyard (PIBBY) principle." ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY* 5 (1990) [hereinafter BULLARD, *DUMPING IN DIXIE*].

¹⁸⁴ See Richard Lazarus, *Environmental Justice and the Teaching of Environmental Law*, 96 W. VA. L. REV. 1025-26 (1994) (citing to Robert Bullard, *Environmental Racism and Invisible Communities*, 96 W. VA. L. REV. 1037 (1994)).

¹⁸⁵ See CARSON, *SILENT SPRING*, *supra* note 2, at 275.

occurs, according to Carson, where humans pollute an environment beyond self-healing.¹⁸⁶ For example, attempts to “eradicate” so-called insect “pests” was the sin of the pesticides industry, not efforts to reduce and control insect populations.¹⁸⁷ In another instance, Carson points to the vulnerability of elms grouped too densely to beetle infestation.¹⁸⁸ In both scenarios, Carson advocated that the dispersal of natural elements among each other, and the dispersal of toxins so as not to weigh too heavily on any particular environmental constituent, were key to the environment’s health.

Indeed, mainstream environmentalism is already a movement as steeped in dispersal as in reduction. For example, by requiring reduction of wastewater discharge, the Clean Water Act forces the conversion of some discharge into incinerator or landfill waste, thus dispersing as well as reducing the waste. In addition, environmental statutes that ban a particular discharge from one watershed redistribute at least some of that discharge to a neighboring watershed.¹⁸⁹ In short, distribution of pollution is a core aspect of environmentalism. Thus, asking environmental decisionmakers to consider racial demographics in the distribution of toxic hazards does not import a completely alien idea into environmentalism.

In both history and philosophy, however, mainstream environmentalism does not view itself as a program focused on the widespread dispersal of contaminants. Modern environmentalism is the child of the utilitarian conservation movement and the aesthetic-focused preservation movement. These elite and progressive movements coupled in the minds of thinkers like Rachel Carson, and were influenced further by the civil rights and anti-war movements of the 1960s.¹⁹⁰ This environmentalism stems from an Arcadian perspective that is anti-urban and pro-pastoral.¹⁹¹ Thus, mainstream environmentalism

¹⁸⁶ See *id.* at 99.

¹⁸⁷ See *id.* at 275.

¹⁸⁸ *Id.* at 10. Carson writes:

A generation or more ago, the towns of large areas of the United States lined their streets with the noble elm tree. Now the beauty they hopefully created is threatened with complete destruction as disease sweeps through the elms, carried by a beetle that would have only limited chance to build up large populations and to spread from tree to tree if the elms were only occasional trees in a richly diversified planting.

Id.

¹⁸⁹ See Lazarus, *supra* note 184, at 1027.

¹⁹⁰ See, e.g., A. Dan Tarlock, *City Versus Countryside: Environmental Equity in Context*, 21 *FORDHAM URB. L.J.* 461, 467 (1994).

¹⁹¹ *Id.* at 466, 470–72. Professor Tarlock discusses how the Arcadian tradition, which asserts

sees itself as protecting the countryside from the ills of the city. There exists, then, a very real gap between the separatist perspective of mainstream environmentalism and the perspective of the environmental equity advocate who strives to ameliorate toxic conditions in the city by redistributing toxic activity so that all settings share equally. This fundamental distinction in perspectives cannot be addressed by a simple heightening of racial awareness on the part of the mainstream, Arcadian program.¹⁹²

The meagerness of the environmental justice program's impact on environmental decisions thus serves to remind mainstream environmentalists of our Arcadian elitism. This reminder might provoke doubt as to whether other mainstream environmental efforts are as hampered by the anti-urban, pro-pastoral mind-set. For example, the emissions and discharge allowance programs under the Clean Air and Water Acts may result in disproportionate pollution allowances for larger, more efficient urban polluters. Moreover, mobile sources of air pollution may have been addressed only recently in the U.S. environmental program in part because vehicle pollution, the major source of such air pollution, has the largest impact on urban air quality.

The environmental justice movement also has brought focus to a second, related truth about environmental decisionmaking—that environmentalists do not strive to eradicate all pollution but rather prioritize the threats to the environment. This prioritization stretches from legislators determining the order in which to promulgate or revise statutes, to local enforcement agencies deciding which polluters to pursue. Inevitably, prioritization is influenced in part by the condition of the various environmental media and the egregiousness of the assaults on these media, and in part by the particular scientific and other resources available and an assessment of the likelihood that those resources can be used to achieve successful conservation or remediation among an array of projects. A third influence, of course, is the political muscle of the groups who would benefit or suffer from prioritized pursuit of any particular item on the environmental agenda.¹⁹³ Thus, actors with the technical resources to comprehend

the superiority of the pastoral over the urban, has been a profound influence on environmentalism, including its science. *Id.* at 470–71. Under the Arcadian model, “good” ecosystems include “Aldo Leopold’s southern Wisconsin Prairie, a wetland, an exotic coral reef, or tropical rainforest . . . because they perform life regulating and pollution prevention functions in contrast to the city which is a ‘bad’ or ‘unbalanced’ ecosystem.” *Id.* at 471.

¹⁹² See *id.* at 491 (“The history of efforts to promote both environmental protection and social equity offers few positive lessons for the future.”).

¹⁹³ See Bullard, *supra* note 25, at 18–19. For example, during the spring of 1991, then President

environmental statutes and regulations, and the political savvy to translate that comprehension into influence, greatly affect environmental prioritization. These resources and savvy are available more readily to wealthy white groups who dwell high in the power structure.¹⁹⁴ To state the matter bluntly, environmental decisionmaking is already stacked against the country's minorities, who as a group have less resources and political representation with which to fund, research, and otherwise influence the environmental prioritization.¹⁹⁵ Thus, adding racial considerations to environmental decisionmaking may make such decisions more, rather than less, environmentally sound.

Finally, the environmental justice movement reminds environmental decisionmakers that some degree of ingrained racism accompanies almost all actions and choices impacting the public.¹⁹⁶ Even without political pressure and funding from white politicians and others, decisionmakers at environmental agencies are susceptible to culturally ingrained racism. In most circumstances, the people who collect data adequate to make decisions about a proposed facility site unavoidably also garner some idea, whether conscious or not, of the racial and ethnic demographics of such sites. Given that decisionmakers have this information, taking race into account explicitly may lead to more socially desirable and justifiable results than would be achieved by allowing insidious racial biases to corrupt decisions through an implicit role. In short, conscious consideration of racial distribution of toxins by environmentalists may promise to do more to balance non-environmental influences on environmental decisionmaking than to

Bush endorsed a program to reduce lead exposure of children which included widespread testing of homes, certification of those who remove lead, and medical treatment for affected children. Later that year, the Centers for Disease Control announced that the administration "does not see this as a necessary federal role." The New York Times indicated that the National Association of Realtors had pressured President Bush to drop his lead program, fearing that it would threaten the real estate market. *See id.* (citing P.J. Hiltz, *White House Shuns Key Role in Lead Exposure*, N.Y. TIMES, Aug. 24, 1991, at 14).

¹⁹⁴ *See* Bullard, *supra* note 25, at 11 nn.5-7.

¹⁹⁵ BULLARD, *DUMPING IN DIXIE*, *supra* note 183, at 4. Bullard states that, organized black resistance to toxic dumping, municipal waste facility siting, and discriminatory environmental and land-use decisions is a relatively recent phenomenon Low-income and minority communities have had few advocates and lobbyists at the national level and within the mainstream environmental movement.

Id.

¹⁹⁶ *See id.* at 18; *see also* Edward Patrick Boyle, Note, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937, 944-45 (1993) (citing JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* (Columbia 1984) (discussing unconscious racism)).

complicate and taint the single-minded environmental focus of such decisionmaking.

III. ENVIRONMENTALISTS ARE FROM EARTH, FEMINISTS ARE FROM VENUS: POPULATION POLICY IN THE 1990S

Empowered women have more control over their societal roles and tend to limit their birthrates. At first blush, therefore, environmentalism and feminism might seem natural allies on the subject of population control. Indeed, the two movements do share a number of characteristics. Both social causes achieved a more widespread, advanced presence in Northern countries than in Southern countries. Both causes require a fundamental shift away from dualistic, hierarchical thinking toward pluralistic thinking. Both causes suffer from backsliding when hardships crop up, indicating a lack of conviction regarding environmentalism and feminism among the powerful.¹⁹⁷ Finally, both environmentalists and feminists are concerned with human health.¹⁹⁸

On the other hand, the interests of environmentalism and feminism split along a divide arguably so fundamental as to undermine seriously any alliance between the two causes. Feminists strive to sensitize those in power to recognize the human needs and goals of members of society whom the power structure traditionally has cast in a collateral, voiceless, will-less role.¹⁹⁹ In contrast to the feminist goal to increase sensitivity to human needs, environmentalism strives to submerge human concerns, needs, and goals to the needs of the natural environment.²⁰⁰

¹⁹⁷ See generally SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991); see also *supra* notes 6–10 and accompanying text.

¹⁹⁸ See, e.g., Lynn Freedman & Deborah Maine, *Facing Facts: the Role of Epidemiology in Reproductive Rights Advocacy*, 44 AM. U. L. REV. 1085, 1086–87 (1995) (discussing the correlation between the women's human rights movement and the women's health movement); Aart Hendriks, *Promotion and Protection of Women's Right to Sexual and Reproductive Health Under International Law: The Economic Covenant and the Women's Convention*, 44 AM. U. L. REV. 1123, 1124–25 (1995).

¹⁹⁹ See, e.g., Rebecca J. Cook, *Human Rights and Reproductive Self-Determination*, 44 AM. U. L. REV. 975, 976 (1995) ("Although women were historically valued only because of their childbearing capacity, women are now coming to value themselves and expecting others to value them as decisionmakers with regard to their own reproduction.")

Historically, in many cultures, women have circulated, served, and even existed, legally and politically, solely at the whim of and in support of men. See Cecilia Medina-Quiroga, *Remarks of Cecilia Medina-Quiroga*, 44 AM. U. L. REV. 1093, 1093 (1995) (discussing the feminist effort to establish that "women are human beings and that consequently they have human rights").

²⁰⁰ See *supra* notes 11–15 and accompanying text.

This section explores the relationship between feminism and environmentalism as it has developed around the issue of population, first identifying the clash between the movements, then briefly tracing the evolution of the struggle between feminist and environmentalist views of the population issue. Ultimately, this section considers how the feminist approach to the issue of women's empowerment may instruct the environmental movement in its goal of developing a more permanent place for environmentally benign human behavior.

A. *Raising and Lowering Consciousness: Conflicts Between Feminist and Environmentalist Perspectives*

The divergence between the feminist goal of broadening human sensitivity to include women's needs and the environmentalist goal of subordinating human needs to the needs of nature is not simply an academic distinction. Indeed, in a number of instances, the literature on reproductive rights omits or even disclaims the idea that beneficial environmental impacts may flow from increased female self-determination in reproductive matters.²⁰¹ This omission is particularly striking in light of the fact that feminist literature also points out that many reproductive freedom advocates, particularly from Southern countries, are also environmental activists.²⁰²

One explanation for the hesitancy on the part of reproductive rights advocates to ally themselves with population control advocates is that reproductive rights advocates may be choosing not to immerse themselves simultaneously in confrontation over two overlapping causes, regardless of the causes' mutually supportive positions. Indeed, proving to the power structure, which favors maintaining the status quo, the seemingly obvious premise that reduced population reduces stress on the environment, may be difficult, as proof of environmental concerns often is. For this reason alone, feminists may be wise to avoid

²⁰¹ See Gita Sen, *The World Programme of Action: A New Paradigm for Population Policy*, ENVIRONMENT, Jan.-Feb. 1995, at 10, 15 ("[M]any women . . . prefer [] to drop all demographic justification [for population policies] and to derive reproductive health programs directly from the assessment of the health needs of individuals, especially women.").

²⁰² The rhetoric of international human rights has adapted the terms North and South to indicate the positions of highly developed countries, usually led by the United States, and less developed countries. Essential elements of the North/South debate include Northern nations being blamed by environmentalists for overwhelming consumption patterns and waste-producing technologies. Southern nations are blamed for overpopulation and destruction of global natural resources such as rainforests. See, e.g., Thomas E. Lovejoy, *Will Expectedly the Top Blow Off? Environmental Trends and the Need for Critical Decision Making*, BIOSCIENCE, 1995 Supp., at S3, S4.

the environmental proof morass, especially because a simple demand for equity may be sufficient to justify their own, ultimate goal.

More likely, however, reproductive rights advocates skirt the issue of population reduction as environmentally beneficial because of the fundamental distinction in the goals of the two movements. Indeed, environmentalists and feminists diverge immediately upon approaching the population issue. For environmentalists, population control traditionally has been a matter of reducing numbers of births.²⁰³ A conceivable method for altering birth demographics is government mandates of compulsory sterilization, a tactic used in India,²⁰⁴ or the one-child-per-couple mandates adopted by China's Central Government.²⁰⁵

At first, the top-down, government mandate method might seem attractive to even the mainstream environmentalist as the most direct, immediate solution to the alarming incremental increases in human population that threaten to overwhelm our natural resources. Indeed, draconian regulatory command-and-control programs have

²⁰³ See, e.g., PAUL R. EHRLICH & ANNE H. EHRLICH, *THE POPULATION EXPLOSION* (1990).

²⁰⁴ See Mahhoud F. Fathalla, *The Impact of Reproductive Subordination on Women's Health Family Planning Services*, 44 AM. U. L. REV. 1179, 1183 (1995). See generally Cook, *supra* note 199, at 995-96.

Government control of population growth may be expressed in crude programs, all of which implicate, if not actively violate, the right to liberty and security of the person. For instance, there have been programs to reduce population by openly compelled sterilization and abortion, and for promotion of population by stringently enforcing against health services professionals and women prohibitions of abortion, and denial of voluntary sterilization and contraception services. Control may also be achieved through more subtle or targeted means, such as by making the use of contraception a condition of receiving welfare payments, or allowing courts to offer convicted women offenders probation on the condition that they submit to invasive long-acting contraceptive implants. Similarly, medical care may be arranged so that women who have accepted long-acting contraceptive implants cannot have them removed on simple request.

Id.

²⁰⁵ See Reed Boland, *Population Policies, Human Rights, and Legal Change*, 44 AM. U. L. REV. 1257, 1260-61 (1995).

In China, coercion plays a key role in government population planning and takes many forms. Much of it is psychological in nature . . . [pressuring] women who are perceived to be violating the mandates of the one-child-per-couple policy . . . to use contraception—most often IUDs (which they are forbidden to remove)—undergo sterilization, or, if they are pregnant and already have one child, obtain an abortion. Often this pressure is accompanied by explicit or implicit threats of physical force. In some cases, actual physical force is applied and women have been ordered to have an abortion or undergo sterilization.

Id.

been the first avenue of attack on behalf of almost all environmental media, including air, water, and land.²⁰⁶

Obviously, a government mandate limiting births would do damage to the feminist goal of female empowerment over reproduction decisions.²⁰⁷ The concept of reproductive freedom encompasses the freedom for women to produce more children than the patriarchal power structure desires, a theoretical possibility that underscores the distinctions between environmentalist and feminist goals.²⁰⁸ Indeed, the attempted domination of women's reproductive will that is present in government-mandated population control regimes fundamentally divides reproductive rights advocates from demographic-focused environmentalists. This conflict has crystalized at recent conferences on population issues.

B. *A Brief Survey of Population Conventions Over the Decades*

The three decennial international conferences on population sponsored by the United Nations reveal an evolution of discovery regarding the definition of population control in terms of demographics.²⁰⁹ The first conference, held in Bucharest in 1974, was an exercise in polarization, with the North and the South disagreeing over the importance of demographics relative to other issues.²¹⁰ In particular, the

²⁰⁶ The Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation and Liability Act all utilize a structure in which the federal government sets nationwide standards and goals for environmental media cleanliness. States may regulate only in a manner that does not interfere with the command-and-control federal system.

²⁰⁷ See Cook, *supra* note 199, at 984-85.

Top-down programs of population control that do not incorporate into their planning perceptions of women at the grassroots compel women's compliance as merely a means to their ends. This control mentality is a male-gendered characteristic, which stands in contrast to female-gendered characteristics that focus on personal relationships and the ethics of care Even democratic governments tend to maintain patriarchal institutions, as conservative leaders lack incentives to empower women to make contributions that conservative leaders perceive would introduce emotion, indeterminacy, and irrationality.

Id.

²⁰⁸ See Fathalla, *supra* note 204, at 1183. ("[T]here is little difference between coerced contraception, sterilization, or abortion, because society *does not want* the child, and coerced motherhood, because society *wants* the child. Both interventions deny women the dignity of making a choice in their reproductive life").

²⁰⁹ See Elizabeth K. Spahn, *Waiting for Credentials: Feminist Theories of Enforcement of International Human Rights*, 44 AM. U. L. REV. 1053, 1057-58 (1995); Lincoln C. Chen et al., *Women, Politics, and Global Management*, 37 ENV'T 4, 4 (Jan. 1995).

²¹⁰ Chen et al., *supra* note 209, at 4.

United States advocated vigorously in favor of family planning or contraception programs as the cornerstone of population control.²¹¹ China and India were leaders in expressing the Southern governments' view, arguing that socioeconomic development toward global equity was the key to slowing population growth.²¹²

Ten years later, the Northern-Southern dynamic had been dramatically altered. At the 1984 international population conference in Mexico City, many Southern countries responded to a decade of overwhelming population growth with stern antinatalist policies, expressed in terms of health and social development goals.²¹³ The United States, too, had switched positions, reacting to domestic political pressure from conservative and religious groups that opposed abortion and the population control platform that offered support to a pro-abortion position.²¹⁴ Instead, the U.S. delegates to the conference argued that private markets would somehow solve the population problem.²¹⁵ Consistent with this position, the United States withdrew funding from a number of international family planning organizations, including the International Planned Parenthood Federation and the United Nations Population Fund.²¹⁶

The third United Nations conference on population, the International Conference on Population and Development (ICPD), took place in Cairo, Egypt in September of 1994.²¹⁷ The general international consensus at ICPD was "a watershed global event."²¹⁸ The Southern countries had endured a decade of indebtedness and increasing concerns over the transfer of resources from Northern countries. These countries now viewed population control as both an important component of socioeconomic development and an independent demographic issue.²¹⁹ The North, led by the Clinton administration's general support of both environmental and women's programs, already had abandoned

²¹¹ *Id.*

²¹² *Id.* "Development is the best contraceptive" became the slogan of the Southern view.

²¹³ *Id.* at 4.

²¹⁴ *Id.*

²¹⁵ Chen et al., *supra* note 209, at 4.

²¹⁶ *Id.* (citing Sharon L. Camp, *The Politics of U.S. Population Assistance*, in *BEYOND THE NUMBERS* 122-34 (Laurie Mazur ed. 1994)).

²¹⁷ *Id.*

²¹⁸ *See id.*; see also Hilary F. French, *supra* note 115, at 3 ("Vatican opposition to proposed language on abortion rights captured headlines during the conference, but the real news was the consensus forged . . . among representatives of population, women's, and human rights groups during the two years of preparation for the meeting.")

²¹⁹ Chen et al., *supra* note 209, at 4.

the Mexico City anti-abortion, pro-market solution to the population problem.²²⁰ In Cairo, the United States favored allowing non-governmental organizations (NGOs) and women's health groups to shape global consensus on the population issue.²²¹

In Cairo, unlike at prior conferences, the so-called "population alarmists," who advocate demographic targets as a means of slowing population growth, found common ground with the advocates of human welfare by focusing on population programs at three preparatory conference meetings. This coalition resulted in a focus on high-quality reproductive health services. Focusing on health services met the goals of both groups because such services generally support the importance of birth control without reliance on coercive practices.

In addition to being different from earlier population conferences, the ICPD also deviated markedly from the 1992 Rio de Janeiro Earth Summit, where tensions separated women's health groups from environmentalists.²²² Disagreement in Rio had focused on whether global environmental problems are linked more centrally to population growth or unsustainable consumption.²²³ In Rio, women and Northern environmentalists debated over whether population policy should acknowledge the right of Southern countries to develop, and how population policy could accommodate women's concerns about reproductive freedom.²²⁴ At least in part, this outspoken sparring between social interest groups may have been an attempt to prevent themselves from becoming pawns or casualties in another group's social movement.²²⁵

Learning from the Rio conference, women's groups from the North and South networked, developing and endorsing the "Women's Declaration on Population Policies," as part of an effort to harmonize the positions of various women's groups.²²⁶ The solidarity achieved allowed women's NGOs to emerge as a strong, well-focused block well prior to the ICPD.²²⁷ As a result, participants arrived in Cairo pre-

²²⁰ See *id.*

²²¹ See *id.* According to one commentator, the U.S. position was actually more complex than this, with the U.S. Department of State in disagreement with the U.S. Agency for International Development (USAID), the lead implementer of U.S. population programs. USAID may be more inclined to focus on the population issue as one of demographic controls. See Sen, *supra* note 201, at 37 n.8.

²²² Chen et al., *supra* note 209, at n.25.

²²³ See Sen, *supra* note 201, at 13.

²²⁴ *Id.*

²²⁵ *Id.* at 13.

²²⁶ Chen et al., *supra* note 209 n.22.

²²⁷ Sen, *supra* note 201, at 11-12.

pared to focus on gender equality as perhaps the key component to population control. In short, "the Cairo Conference turned out to be a women's conference."²²⁸

Indeed, population control as an environmental issue was marginalized at the ICPD, with women's health advocates successfully relegating to the sideline the notion that population growth is a direct and central cause of environmental degradation.²²⁹ The World Programme of Action (WPOA), perhaps the most important document emerging from the ICPD, is no more or less than a mission statement for women's empowerment.²³⁰ The final WPOA was transformed completely from an initial outline relying on the demographic control model to achieve population control,²³¹ to a document that notes in passing the potential for a diminishing birthrate to benefit the environment.²³² On the other hand, the WPOA does advocate the goal of limiting global population to not more than 9,800,000,000 by the year 2050. Whether the WPOA represents a marginalization of environmentalism in population control, "a human, proactive effort to bring human numbers under control,"²³³ or some combination of those effects remains to be seen.

²²⁸ Mona Zulficar, *From Human Rights to Program Reality: Vienna, Cairo, and Beijing in Perspective*, 44 AM. U. L. REV. 1017, 1029 (1995) (paraphrasing the words of an unidentified "famous Egyptian commentator").

²²⁹ See Sen, *supra* note 201, at 13-14.

²³⁰ *Id.* at 15.

Previous population documents usually started with demographic information as a basis for action, defined the principal objective as control of numbers, and moved to family planning programs as the action required to meet the objective. WPOA, on the other hand, starts with very moderate language on population growth, acknowledges the problem of numbers without using scare tactics, places unsustainable production and consumption earlier in the list than population growth in terms of environmental effects, and refers to the problems caused by the unfavorable international economic environment. The preamble then gives central place to the need to empower women and to the "new comprehensive concept of reproductive health."

Id.

²³¹ The original outline had been produced two years before the ICPD by the ICPD Secretariat under the United Nations Population Fund. See Sen, *supra* note 201, at 11.

²³² Chapter IV of the WPOA, entitled *Gender Equality, Equity and Empowerment of Women*, does emphasize that the empowerment of women and the improvement of their political, social, economic, and health status is not only an important end in itself, but also an essential condition for the achievement of sustainable development. UNITED NATIONS, INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT, at § 4.1, U.N. Doc. A/CONF.171/13 (1994).

²³³ See Lovejoy, *supra* note 202, at S3.

C. *Broadening Rachel Carson's Thesis: What Environmentalism Can Learn from Feminism*

The convergence of environmentalist and feminist views on population can only occur, as happened in Cairo, when environmentalists adopt the feminist dedication to a grass roots approach to women's empowerment as the way to achieve control over birthrates. In light of the history of modern government, women's groups will never trust resolution of the problem to top-down demographic regulation.²³⁴ Psychologically, too, the feminist perspective rejects the demographic control approach to the problem. Structurally, Western societies are hierarchical systems, dualistic in their simplest form, with the leaders dominating the non-leaders.²³⁵ Dualism tends to permeate such a system in ways other than the power structure as well. Men tend to be segregated from women as far as rights and responsibilities, and the interests of property owners are collected and viewed as separate from and balanced against the collected interests of the environment.²³⁶ Rigid, hierarchical social structures have been identified as arising from a male perspective.²³⁷ Certainly, these systems have worked well for many men.

In contrast, the feminist perspective is reportedly pluralistic, non-hierarchical, holistic, and inclusive of a "full chorus of voices clamoring to be heard."²³⁸ In keeping with the pluralist feminist perspective, reproductive freedom advocates mistrust the male-oriented command-and-control systems, striving instead to rethink the elemental goals of societies that repress women and enforce high birthrates. These feminists urge attention to health care to lower infant mortality, thereby reducing parental concern that many offspring are necessary to ensure survival of enough children to continue the family line. Even more broadly, general social advancement leads to education of females, which in turn results in women developing power over personal decisions, including whether and how to utilize birth control.²³⁹

²³⁴ See *supra* notes 205-08 and accompanying text.

²³⁵ See Sarah Hutcheson, *Walking the Line: Facing the Complexities of the Woman-Nature Link*, ALTERNATIVES, Apr. 1995, at 16.

²³⁶ See *id.*

²³⁷ See, e.g., Riane Eisler, *From Domination to Partnership: the Hidden Subtext for Organization Change*, TRAINING & DEVELOPMENT, Feb. 1995, at 32.

²³⁸ Sue Hendler & Tzaporah Berman, *Building Bridges, Tearing Down Walls*, ALTERNATIVES, Apr. 1995, at 1, 1.

²³⁹ See Lovejoy, *supra* note 202, at S3. ("The role and empowerment of women are recognized

These initiatives promise more effective and long-term control of birthrates than any government mandate.

Thus, population-control advocates may learn a great deal from reproductive freedom advocates about the advantages of the pluralistic approach. The population control example illustrates that the most effective route to an environmental goal may not be the most direct, narrowly focused, regulatory route. Supporting the empowerment of women in Southern countries, as divergent as that is from the cause of a self-sustaining natural environment, indeed may be a more effective environmentalist tactic than many direct attacks on polluters and exploiters of the earth's resources.

Interestingly, the holistic approach to environmentalism first was presented by Rachel Carson, who tirelessly explained how everything is connected to everything else.²⁴⁰ Carson's thesis of interconnectedness focuses on the synergy between elements of the natural environment, such as the sea and its inhabitants.²⁴¹ In Cairo, environmentalists might have observed that the interconnectedness of nature also includes the human element. Thus, "human husbandry," in the form of promoting a healthy environment for females, is part of the symbiotic web of self-sustaining life. One author observed that "[i]f anything is now clear, it is that we . . . can no longer approach environmental problems in unrelated increments and fragmented jurisdictions. Indeed, institutional fragmentation is as serious an environmental problem as habitat fragmentation."²⁴²

More generally, the focus on pluralism engendered by the feminist-environmentalist friction illustrates an additional, basic dichotomy between the concept of environmentalism and the regulatory mode of operation. In essence, environmentalists view the earth and its inhabitants from a pluralistic perspective.²⁴³ Rather than remaining a plu-

as integral to any successful programs [toward population control]. We have learned that there are ways to make progress through education, particularly woman's [sic] education, and through the availability of contraception . . .").

²⁴⁰ See *supra* notes 2-3 and accompanying text.

²⁴¹ *Id.*

²⁴² Lovejoy, *supra* note 202, at S3.

²⁴³ See Heather Eaton, *Ecofeminist Spiritualities*, ALTERNATIVES, Apr. 1995, at 28, 28; Michelle Summer Fike & Sarah Kerr, *Making the Links: Why Bioregionalism Needs Feminism*, ALTERNATIVES, Apr. 1995, at 22, 22; Hendler & Berman, *supra* note 238, at 1; Hutcheson, *supra* note 235, at 16; see also Plater, *supra* note 2, at 982. Plater observes a general shift in the U.S. governing structure from a "bipolar, Market/Regulatory Government Paradigm to a multipolar, actively Pluralist Model," which Plater believes aided the development of U.S. environmental law. Plater, *supra* note 2, at 982. Rather than seeing the environmental regula-

ralistic, grass roots movement, however, mainstream environmentalism has constructed a regulatory regime. Perhaps, over the past quarter century, far more environmental cleanup may have been accomplished in less time than would have been achievable without the environmental bureaucracy. However, environmentalism also has become vulnerable to the power struggles inevitable in a dualistic system. Property rights and industry advocates view the command-and-control environmental regime as an adversary against which to vie for political clout and legal rights.²⁴⁴

CONCLUSION

The Bible suggests that there will be peace in the valley when the lions and the lambs lie down together. It seems like an unlikely coalition What do lions and lambs have in common? Neither want the forest to catch on fire. Neither want acid rain on their backs, neither want their water poisoned.

The Reverend Jesse Jackson²⁴⁵

The three sections of this Article began with discussions of the barriers that exist between one or another form of mainstream U.S. environmentalism and various social justice movements. These barriers underscore that environmentalism is a cause with elitist roots, conceived of and implemented primarily from a white, male, and mainstream perspective.²⁴⁶ As such, environmentalism has a proclivity to immerse itself in pure science, as opposed to human science, and

tory structure as a pluralistic concept cast in dualistic terms, Plater sees the breadth of subject areas covered by environmental law evidence of environmentalism's pluralistic vision. *Id.* at 1003-04.

²⁴⁴ See *supra* notes 17-20 and accompanying text.

²⁴⁵ David Lapp, *supra* note 1, at 13.

²⁴⁶ Luke Cole, *Lawyers, the Law & Environmental Justice: Dangers for the Movement*, RACE, POVERTY & THE ENVIRONMENT, Fall 1994/Winter 1995, at 3, 4.

The traditional environmental movement . . . began its most recent wave of activity as a grassroots movement in the late 1960s. . . . [The movement borrowed] tactics from the contemporaneous Civil Rights Movement, such as mass demonstrations like Earth Day in 1970

However, shortly after Earth Day, the traditional environmental movement began to turn away from its grass roots to focus on national policy. And it carried out that focus from Washington, D.C., seeking to become a player in national legislation and through lawsuits in federal courts. Lawyers became an increasingly dominant force within the traditional environmental movement as it began this professionalization, and by the early 1980s most of the [mainstream environmental] groups were run by lawyers. The traditional groups moved away from a broad, participatory strategy of protest to an insider strategy of trying to influence and shape environmental law—both

to express itself in command-and-control regulation, as opposed to consensus.²⁴⁷ And yet, the heart of the movement is neither mainstream nor male. The fountainhead of modern environmentalism was a woman who urged pluralistic thinking and often ignored hierarchy. Still, even Rachel Carson's environmentalism has an elitist ring, calling for self-sacrifice from all persons, even those societal groups that may not be in a position to sacrifice rights and opportunities.

These factors may contribute less to the lack of synergy between environmentalism and other social causes, however, than does the fact that environmentalism has become so much a regulatory regime embedded in mainstream politics and law.²⁴⁸ It is the bureaucracy of mainstream environmentalism, and the centrality of legislation and litigation to its identity that cause environmentalism to stand separate from the other social causes. In the end, the barriers between mainstream environmentalism and the advocates of Indian sovereignty, racial justice, and women's empowerment are as fundamental as the barriers that lie between an empowered political party and a grass roots social evolution.²⁴⁹

All is not lost, however, for a developing understanding between environmentalism and the other social causes. Indeed, as mainstream environmentalism has suffered recent attacks from the right, the movement has evolved into a more broad-based, less legally and politically oriented movement. As important to this evolution as the marketization of environmental law²⁵⁰ are efforts, however experi-

before it was made, by lobbying Congress, and after it was passed, by bringing numerous lawsuits to refine it.

Id.

²⁴⁷ See Tarlock, *supra* note 190, at 461 ("Our environmental policy has sought to achieve two objectives, pollution risk minimization and biodiversity protection through regulatory strategies which move toward allocative efficiency, although efficiency has often been subordinated to moral imperatives.")

²⁴⁸ Cole, *supra* note 246, at 5 ("The law is dangerous to social movements because it is a cocooning and self-referential game, in which its players believe they are important simply because they are playing—whether or not they are losing or winning.")

²⁴⁹ *Id.*

[T]he embracing of "environmental justice" by Washington-based and -oriented groups means an institutionalization of the idea within the system and a consequent dilution of its power. . . . The national legal groups have, by history and design, a *national* focus and a *legal* orientation. This stands in direct contrast to the environmental justice movement, which has historically had a *local* focus and a *community* orientation. So when the legal groups get ahold of the concept of environmental justice, they redefine it to fit their focus and orientation, although they are in direct opposition to what environmental justice is all about.

Id. (emphasis in original).

²⁵⁰ See Michael Oppenheimer, *Context, Connection, and Opportunity in Environmental Prob-*

mental, toward integrating other social interests into the environmental decisionmaking.

Like feminists who strive for overall social development to foster women's empowerment rather than focusing only on abortion rights legislation, environmentalists are beginning to take a broader perspective on how to ingrain environmentally benign behavior into the human culture. Like American Indians, environmentalists are taking a more holistic approach to the universe, not just by heeding Rachel Carson's thesis that all nature is interconnected, but also by understanding that all social, economic, and political interests are interconnected. Environmentalists are learning that a social movement that refuses to integrate with the human scheme will face periodic and serious setbacks. As one commentator states:

[e]nvironment is the physical, biological, and social setting for living things [It] unfolds in a social context, an evolving framework of economic, political, and intellectual relations. This framework has changed radically in the past 25 years; consequently, the solutions to environmental problems, and even notions of what constitutes an environmental problem, have been profoundly altered.²⁵¹

In sum, environmentalism inevitably will move from an isolationary stage, during which it defined and asserted its presence, into a movement that accepts once again the meaning of the term "environment" as more than the physical earth habitat. Concededly, the environmental movement makes this move at some risk of becoming subsumed by human interests. More importantly, however, environmentalism makes this move to avoid stagnating into nothing more than law and politics.²⁵²

lem Solving, ENVIRONMENT, June 1995, at 10 ("The most remarkable transformation of environmental thinking involves the gradual incorporation of economic approaches to problem solving. Whether the eventual goal of this process is the incorporation of environmentalism into economics or vice versa remains unclear.").

²⁵¹ *Id.* at 10.

²⁵² *Id.*

As long as the social context was viewed as static background, environmental problems were seen as mechanical failures with straightforward technological remedies. Appreciation of context makes environmental problems more complex but at the same time provides many alternative means of solution. Once it is understood that context can change, it is obvious that intentional change is a promising avenue for environmental mitigation.

Id.