

JEDEDIAH PURDY

## The Politics of Nature: Climate Change, Environmental Law, and Democracy

**ABSTRACT.** Legal scholars' discussions of climate change assume that the issue is one mainly of engineering incentives, and that "environmental values" are too weak, vague, or both to spur political action to address the emerging crisis. This Article gives reason to believe otherwise. The major natural resource and environmental statutes, from the acts creating national forests and parks to the Clean Air and Clean Water Acts, have emerged from precisely the activity that discussions of climate change neglect: democratic argument over the value of the natural world and its role in competing ideas of citizenship, national purpose, and the role and scale of government. This Article traces several major episodes in those developments: the rise of a Romantic attachment to spectacular landscapes, a utilitarian ideal of rational management of resources, the legal and cultural concept of "wilderness," and the innovation of "the environment" as a centerpiece of public debate at the end of the 1960s. The Article connects each development to changes in background culture and values and the social movements and political actors that brought them into public debate and, eventually, legislation. The result is both a set of specific studies and the outline of an account of the ways that the political struggles of a democratic community have created new, and always contested, ideas of "nature" throughout American history. The Article then shows how past episodes cast light on the present: today's climate politics, including the seemingly anomalous (even "irrational") choices by municipalities to adopt the Kyoto carbon-emissions goals, makes most sense when understood as an extension of a long tradition of political argument about nature, which does not simply take "interests" as fixed, but changes both interests and values by changing how citizens understand themselves, the country, and the natural world.

**AUTHOR.** Professor, Duke Law School. Thanks for comments and conversations go to Bruce Ackerman, James Boyle, Daniela Cammack, Jeff Collins, Bob Ellickson, Chris Elmendorf, Dan Esty, Owen Fiss, Kate Galbraith, Jo Guldi, Robert Gordon, David Grewal, Paul Haagen, John Inazu, Greg Klass, Anthony Kronman, Sarah Krakoff, Doug Kysar, Jesse Lichtenstein, Daniel Markovits, Noah Messing, Robert Post, Aziz Rana, Paul Sabin, Jim Salzman, Chris Schroeder, Reva Siegel, and Jonathan Wiener, plus participants in the Yale Law School faculty workshop, University of Connecticut faculty workshop, Duke Law School faculty workshop, Queens College of Law faculty workshop, 2009 Property Works in Progress conference at Colorado Law School, and the 2009 New Thinking in Climate Change conference, also at Colorado Law School. For terrific research help I am indebted to Elizabeth Benson and Karen Grohman. I am grateful to Brantley Webb for insightful and constructive editorial work, and to all the editors of *The Yale Law Journal*.



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## INTRODUCTION

Environmental crises are defining challenges for the next few decades and probably well beyond. Yet legal scholars approach these issues in a way that encourages pessimism and needlessly narrows the legal and political imagination. This is especially true of climate change, probably today's signal environmental question. Most scholarship envisions environmental politics as the pursuit of already fixed interests. That approach ignores the power of political communities to *change* both their values and their interests through the self-interpreting activity of democratic politics. In that politics, new forms of normative identity—who we take ourselves to be and what matters most to us—arise from reciprocal efforts at persuasion, arguments about the meaning of shared ideas and commitments. The medium of this persuasion is *public language*, the repertoire of arguments and appeals that make up the ongoing conversation of a polity. *Nature*, like *liberty* and *equality*, is a centerpiece of public language, one of the always-contested terms around which Americans orient individual identity and dispute the terms of common life.

The aim of this Article is to challenge the narrowing assumptions of the conventional approach to climate change, and environmental issues at large, by giving an account of nature's role in American public language. Doing so means challenging two widespread assumptions. The first is that, although people sometimes act on moral and civic motives,<sup>1</sup> such motives apply to

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1. For a discussion of moral identity as a source of motivation, see JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* 26-30 (Yale Univ. Press 2000) (1999). For a particularly rich account of its action in an episode long assumed to be governed by conventional economic self-interest, see DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 231-49 (2006), which argues that free-labor ideology and an attendant conception of civic dignity motivated laboring and middle classes to demand abolition of slavery at recognized and substantial economic cost to the British Empire. For a partisan but careful account of the character of motives inseparable from membership in a political or other community, see CHARLES TAYLOR, *PHILOSOPHICAL ARGUMENTS* 127-45 (1995). For rich considerations of how citizens actually use one class of such arguments, see Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006), which describes the role of social movements in opening up settled points of interpretation in constitutional culture and bringing new commitments to previously closed debates; and Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1350-66 (2006), which sets out an account of the role of social movements in contesting and contributing to the meaning of basic but underspecified public values. See also Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 427 (2007) ("So long as groups continue to argue about the meaning of our common Constitution, so long do they remain committed to a common constitutional enterprise. . . . [O]ur constitutional system consists of 'an historically

environmental problems in a way that is vague in content and motivationally weak.<sup>2</sup> The second conventional assumption is that “environmentalism,” which

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extended tradition of argument’ whose ‘integrity and coherence . . . are to be found in, not apart from, controversy.’”)

2. See RICHARD B. STEWART & JONATHAN B. WIENER, RECONSTRUCTING CLIMATE POLICY: BEYOND KYOTO (2003) (concentrating on an interest-mediating structure of prospective global climate architecture); Kirsten H. Engel & Barak Y. Orbach, *Micro-Motives and State and Local Climate Change Initiatives*, 2 HARV. L. & POL'Y REV. 119, 129-30 (2008) (lumping moral and otherwise other-regarding motives into a residual category); Eric A. Posner & Cass R. Sunstein, *Should Greenhouse Gas Permits Be Allocated on a Per Capita Basis?*, 97 CAL. L. REV. 51, 86-92 (2009) [hereinafter Posner & Sunstein, *Should Greenhouse Gas*] (arguing that the incentives of self-interested nation-states should be regarded as an intractable constraint on distributive policies of any global climate agreement but not discussing domestic politics); Cass R. Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 HARV. ENVTL. L. REV. 1, 44-46 (2007) [hereinafter Sunstein, *A Tale of Two Protocols*] (acknowledging the possibility that public opinion is not fixed and might respond to leadership, but analyzing the failure of Kyoto as overwhelmingly a matter of national-interest calculations relative to the Montreal Protocol); Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503 (2007) [hereinafter Sunstein, *On the Divergent Reactions*] (discussing rational, boundedly rational, and extrarational motives for assessing the two threats, but not engaging the development of normative culture as other than an explanandum); Cass R. Sunstein, *The World vs. the United States and China? The Complex Climate Change Incentives of the Leading Greenhouse Gas Emitters*, 55 UCLA L. REV. 1675 (2008) [hereinafter Sunstein, *Complex Climate Change Incentives*] (concentrating analysis on respective national self-interests, then arguing that political action depends on a combination of diffuse moral sentiment and confusion about the inefficacy of local action, which might together push along a norms cascade); Jonathan B. Wiener, *Climate Change Policy and Policy Change in China*, 55 UCLA L. REV. 1805, 1812-16 (2008) [hereinafter Wiener, *Climate Change Policy*] (setting aside “constructivist persuasion” in international climate negotiations as fraught with threats of “moralizing,” too weak to overcome economic interests, carrying the potential to backfire or cause unintended consequences, and too slow); Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961 (2007) (using interest-based analysis to argue that state and local climate initiatives are likely to be ineffective at best and counterproductive at worst); Steven Pinker, *The Moral Instinct*, N.Y. TIMES, Jan. 13, 2008, § 6 (Magazine), at 32, 58 (“[N]owhere is moralization more of a hazard than in our greatest global challenge. . . . Our habit of moralizing problems, merging them with intuitions of purity and contamination, and resting content when we feel the right feelings, can get in the way of doing the right thing.”). These scholars are not ethical nihilists: indeed, they conduct normative analysis in the manner of normative realists, that is, those who believe moral assertions are unproblematic. See Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565 (2008) (conducting a normative analysis of distributive considerations in climate change remedies); Posner & Sunstein, *Should Greenhouse Gas*, *supra*, at 71-86 (conducting “welfarist” and “fairness” analyses of the per capita principle). What they do not do is connect their political and normative analyses to an understanding of values as political motives, potentially in more than a weak and secondary role, and as products of political and cultural contest. It is worth noting that divisions of individual scholars, rather than arguments, into camps is inevitably somewhat artificial. Jonathan Wiener, in

might otherwise furnish such values, is unhelpful in significant ways. In one account, environmentalism is an essentially negative politics: suspicious of human agency, always on the defensive against incursions into natural systems, and temperamentally associated with sacrifice, austerity, and guilt.<sup>3</sup> It is hostile to, or at best apart from, the projects of progress and justice.<sup>4</sup> In another, frequently overlapping view, environmentalism is nostalgic and ontologically naïve, inseparably attached to an essential “nature” which environmentalists insistently contrast with the intruding human species.<sup>5</sup> A negative and

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particular, has written thoughtfully on the role of changing ideas of the natural world in informing (or failing to inform) the goals and methods of environmental regulation. See Jonathan Baert Wiener, *Beyond the Balance of Nature*, 7 DUKE ENVTL. L. & POL’Y F. 1 (1996); Jonathan Baert Wiener, *Law and the New Ecology: Evolution, Categories, and Consequences*, 22 ECOLOGY L.Q. 325 (1995). My focus here is not on what important scholars know or find interesting in general, but on the tools they adopt in the face of large and emergent issues such as climate change.

3. See GREGG EASTERBROOK, *A MOMENT ON THE EARTH: THE COMING AGE OF ENVIRONMENTAL OPTIMISM* (1995) (arguing that environmentalism has been defined by pessimism about human agency, technology, and their effects on nature); LUC FERRY, *THE NEW ECOLOGICAL ORDER* 57-126 (Carol Volk trans., Univ. of Chi. Press 1995) (1992) (arguing that both European and American environmentalism are characterized by nostalgic hostility to the Enlightenment projects of humanism and reason); TED NORDHAUS & MICHAEL SHELLENBERGER, *BREAK THROUGH: FROM THE DEATH OF ENVIRONMENTALISM TO THE POLITICS OF POSSIBILITY* 5-6 (2007) (arguing that environmentalism as presently constituted is narrow and elitist, indifferent to progress and justice, and hostile to the human appetite for hope); *id.* at 120 (“[E]nvironmentalists have long defined their politics in the negative.”); *id.* at 154 (characterizing environmentalism as “the ethics born of . . . living in a fallen world pervaded by fears of the eco-apocalypse to come”); William Cronon, *The Trouble with Wilderness; or, Getting Back to the Wrong Nature*, in UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE 69 (William Cronon ed., 1995) (arguing that a fixation on wilderness values has made environmentalists indifferent to the justice and grace, or otherwise, of most of the human environment); Wiener, *Climate Change Policy*, *supra* note 2, at 1813 (warning against “moralizing” as counterproductive); Pinker, *supra* note 2 (characterizing environmentalist attitudes to climate change as “moralizing” about allegedly excessive consumption and calling for a “post-moralism era” to address climate issues).
4. See FERRY, *supra* note 3; NORDHAUS & SHELLENBERGER, *supra* note 3; Cronon, *supra* note 3.
5. See EASTERBROOK, *supra* note 3 (stating that progress in relation to the natural world will mean reengineering it to satisfy human aims, including such humanitarian considerations as averting predation among wild animals, all in opposition to environmentalists’ static conception of nature); BILL MCKIBBEN, *THE END OF NATURE* 47-55 (2d ed. 2006) (claiming that environmentalism depends on an idea of undisturbed and permanent nature, which climate change renders infeasible); NORDHAUS & SHELLENBERGER, *supra* note 3, at 105-29 (arguing that environmentalism is defined by a “pollution paradigm” in which unspoiled nature is invaded by harmful human activity); *id.* at 216-40 (arguing that environmentalism is committed to a philosophically discredited and practically counterproductive “essentialist” divide between humanity and nature); Cronon, *supra* note 3, at 69-70, 80-88 (maintaining

defensive stance, the argument goes, cannot mobilize a political response to problems as big as climate change.<sup>6</sup> Similarly, a politics premised on a nostalgic contrast between human beings and the natural world is conceptually rudderless in a time when human action and natural systems have joined in irreversible symbiosis, most markedly in climate change, in which the global atmosphere stands revealed as substantially a human artifact.<sup>7</sup>

Of course, the ideal types conceal variety and disagreement. Nonetheless, they form a dominant attitude in which the only realistic, hence responsible, approach to climate change and other environmental problems is one of instrumentally rational resource management constrained by interest-based politics. In this attitude, interests that are regarded as effectively immutable (1) guide ideal public policy and (2) constrain public policy practice through politics.<sup>8</sup> This attitude is so incomplete as to be seriously mistaken. Moreover, it is mistaken in ways that underwrite exaggerated pessimism about an issue where a realistic sense of hope is essential.

A “realistic” focus on interests can never be the whole story because interests are themselves creations of democratic activity. Interests arise from a history of persuasion and experimentation in which new aims and experiences become central to the value of our lives.<sup>9</sup> Environmental language and ideas have been deeply involved in this history. They contain themes that can help organize our understanding of the past—including the history of interests, interwoven as it is with that of values—and illuminate prospects for the future.

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that environmentalism has been defined by the idealization of a “wilderness” radically opposed to and unsullied by human activity).

6. Those who make this claim usually offer to cure the defect with a more “positive” agenda, such as Nordhaus and Shellenberger’s “politics of possibility” or McKibben’s remark that “[i]f [the effort to address climate change has] success, it won’t be environmentalism anymore. It will be something much more important.” Bill McKibben, *An Atom of Difference: Just Give Us That Old-Time Pollution*, ORION, July-Aug. 2005, at 14-15. Near the heart of this Article’s argument is that the offer of radical remedial breaks with a caricatured “environmentalism” mistakes the situation almost entirely: environmental public language has always been connected with ideas of progress, civic dignity, and national purpose.
7. See NORDHAUS & SHELLENBERGER, *supra* note 3; Cronon, *supra* note 3. For an application of this idea to legal scholarship, see Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, 44 NAT. RESOURCES J. 573 (2004), which argues that a favorite legal tool of environmentalists, the perpetual conservation easement, is based on a naïve conception of nature as static.
8. See *supra* note 2.
9. See generally CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* (2004) (outlining and recounting the rise of distinctively modern ways of understanding the legitimate interests of individuals and states in political and social relations).

A minority strand of commentators assumes what this Article argues: that environmental public language is more coherent and important than is conventionally recognized.<sup>10</sup> This Article begins where they leave off.<sup>11</sup> Its central argument is that environmental public language has been involved throughout American history in contests over the nature of progress, the role and scale of government, and the meaning of national identity, social membership, and civic dignity. Environmental language has taken shape from these contests, and it has lent its shape to them. Such language has not, mainly, been attached to any naïve contrast between humanity and nature, but has instead been the vehicle for exploring the complex ways in which interaction

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10. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 47-50 (2004) (noting diverse ideas in the early 1970s of the directions in which environmental law might develop); JAMES GUSTAVE SPETH, *THE BRIDGE AT THE EDGE OF THE WORLD: CAPITALISM, THE ENVIRONMENT, AND CROSSING FROM CRISIS TO SUSTAINABILITY* (2008) (arguing that the only prospect for successfully engaging the current panoply of global environmental problems is to engage basic questions about human purposes, sources of satisfaction, and moral obligations); Cronon, *supra* note 3, at 88-90 (using criticism of the wilderness idea to urge a broader engagement with cultural and moral sources, in the hope of correcting the defects Cronon ascribes to wilderness-focused environmentalism); Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis*, 1 *WORLD TRADE REV.* 7 (2002) (engaging normative questions at the intersection of environmental and economic governance); Douglas A. Kysar, *Climate Change, Cultural Transformation, and Comprehensive Rationality*, 31 *B.C. ENVTL. AFF. L. REV.* 555 (2004) (arguing that moral reflection about environmental values may be engaged through cultural transformation, which necessarily draws on the existing normative resources of the culture); Douglas A. Kysar, *Discounting . . . on Stilts*, 74 *U. CHI. L. REV.* 119 (2007) [hereinafter Kysar, *Discounting*] (claiming that a direct engagement with substantive normative issues is unavoidable in assessing intergenerational allocation of climate change burdens); Douglas A. Kysar, *The Consultants' Republic*, 121 *HARV. L. REV.* 2041 (2008) (reviewing NORDHAUS & SHELLENBERGER, *supra* note 3) (arguing that the book's characterization of environmentalism, among other defects, overlooks the diversity of environmentalists' institutional strategies and normative conceptions in the early 1970s).
  11. Each of the figures just invoked sets the stage in some way for this project. Doug Kysar's work makes the case that an inquiry like the one this Article undertakes is analytically unavoidable and culturally promising, but he has not so far undertaken it himself. Gus Speth makes a similar case, but his treatment of the issues he raises includes very little engagement with developments before roughly 1970. Lazarus gestures at a connection between the environmentalism of the 1970s, public health, and other reformist movements of earlier decades, but does not develop it or engage the other themes of this Article. Cronon's landmark essay on wilderness is closest in scope to what this Article attempts, but its manner is very much that of the impressionistic and associative essay; Cronon does not engage issues such as democratic self-interpretation, the contested question of national purpose, or the complex interaction between wilderness and managerial conservationism. What one wants is to see the historical and interpretive richness of his earlier work on environmental history brought to bear on the themes he beautifully paints in his essay. His essay, which I have long admired, is thus a kind of cue for this project.

with the natural world can serve, inform, and constitute human purposes. The deficiencies that critics identify do exist, but they are hardly touchstones of a monolithic environmentalism. On the contrary, more subtle and affirmative ideas have been the leading qualities of a richly multifarious tradition of argument.<sup>12</sup>

Other major areas of public law, such as constitutional law, the statutory law of civil rights and employment relations, and criminal law are studied and taught as parts of the ongoing self-definition of the political community. Nothing commensurate has developed in environmental law. There are at least three reasons to begin addressing this lack. For one, legal scholars' picture of American public language is incomplete without an account of the place that the natural world has played in it. Second, our understanding of existing environmental laws can gain from appreciating how they grow out of, and contribute to, changes in public language—that is, by locating them in the tradition of argument that they both emerge from and help to shape. Third, which is the immediate motivation of this Article, a sense of the resources of history can enrich choices for the future. In addressing new environmental challenges, such as climate change, a lack of a tractable vocabulary for discussing the interplay of values and interests in democratic self-interpretation has helped push scholarship toward a narrow variety of political economy that neglects the capacity of political communities to achieve basic change in their own identities. This omission underestimates our cultural resources and can produce a blinkered view of new environmental questions.

Part I of this Article briefly sets out the pessimistic view of climate change as a politically insurmountable problem and the response from the history of public language and values: sometimes people use democratic processes to change their own reasons for acting. The Article then turns to history to develop this idea. Part II describes the prevailing attitude toward the natural world in the American politics of the early and middle nineteenth century and the rise of new and very different views, which form the basis of much of today's environmental public language. The earlier view valorized the productive use of natural resources and honored an individual right to expropriate unused or unclaimed lands, a right which was often invoked as a mark of membership in the polity. A series of innovations then introduced a new mode of valuing the natural world, first in literary expression and personal experience, and eventually in public language: the Romantic mode. Beginning

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12. By invoking "tradition," I do not mean something that befalls us from the past, but instead what the living make of the materials available in the world they find. One of the suppositions of this Article is that awareness of those inherited materials can enrich the forward-looking repertoire of a public, so recollection can stand in support of innovation.

in aesthetic theory and literature, it moved, signally through the popularizing work of John Muir, into the hands of a social movement, the Sierra Club, which created a limited public in which the Romantic valuation of nature was common currency, available as an account of the motives for conservation. The Romantic mode of valuation interacted with another basis of conservation politics, the Progressive mode, which elevated public management of natural resources as both utilitarian public policy and a way of rekindling civic virtue in an individualistic society. Romantic and Progressive views coincided in supporting the public management of natural resources and in opposing the perceived individualism and materialism of nineteenth-century America; but they also rested on quite distinct views of nature and social life.

Part III traces one of the most important developments in twentieth-century conservation: the creation of wilderness as a cultural and legal category, which in turn laid the groundwork for much of the environmental language of the 1960s and 1970s. Incubated in a relatively small and elite social movement, centered on the Wilderness Society, the wilderness idea came into its own with the passage of the 1964 Wilderness Act. Wilderness debates helped produce new arguments that nature as such, rather than the most spectacular places alone, has high and intrinsic value that both enriches human experience and demands respect in its own right. These arguments later burst into view, seemingly from nowhere, in the efflorescence of environmental politics during the years 1968 to 1973.

Part IV sets out the major developments of the 1960s and early 1970s. These include the rise of a new category, *the environment*, as an organizing concept for a set of problems and demands; the valence of this idea as a moral account of the perceived failures of technological society and technocratic mastery, which could now be cast as departures from ecological principles; and an apocalyptic view of the consequences of that departure. These developments were in some respects displacements of broader anxieties, which “the environment” served to organize and partially reconcile. They also represented a new public use of arguments generated, in good part, in the more specialized debates of the wilderness movement. The legislative landmarks of that period, the Clean Air Act and Clean Water Act, make most sense when one understands that their drafters and sponsors intended them as enactments, not just of specific regulatory instruments, but of a new set of defining national commitments. Features of the acts that have come in for persistent and cogent criticism, notably their embrace of unattainable goals and relative indifference to cost-benefit accounting, made sense to those who created them because they seemed to fit the statutes’ status as national commitments.

Part V comes to the present, asking how we might look at today’s environmental politics differently if we regarded them as part of the history that this Article traces. The superficially mysterious initiatives of local

governments to address climate change are one telling example: they make most sense when understood as parts of a continuing argument among citizens, addressed to the question of what values bear on our relation to the natural world. From the anchor of this example, Part V proceeds to consider the directions American traditions of environmental values might take in addressing climate change. Both the Romantic and Progressive modes remain vital as elements of public language, and each might take new shape even as it provides parts of an approach to valuing and managing the global atmosphere. A final Section of Part V then proposes some ways that teachers of environmental law might take account of the arguments of this Article. A brief Conclusion follows.

## I. THE SPECIAL CONFOUNDMENTS OF CLIMATE CHANGE

### A. Rational Inhibitions

The basis of pessimism about climate politics is not elusive. Climate change threatens to be the externality that ate the world. Within a year of its release, carbon dioxide is dispersed uniformly through the earth's atmosphere. Whoever uses energy derived from fossil fuels gets the full benefit of that power while evenly dividing the atmospheric harm with somewhat more than 6.8 billion others. That is a ratio of benefit to harm all but certain to induce overindulgence.

The standard solution to negative externalities, of course, is to change the incentives of individual choices by legally internalizing some of the costs of the harms.<sup>13</sup> The difficulty is that both the spatial and the temporal scales of political choice replicate the basic externalities problem of individual choice. In addressing a global problem, a national public must absorb the full cost of any measure it adopts, but will receive only a fraction of the globally distributed benefit. Climate policy distributes costs and benefits in the pattern of a foreign-aid project—distributing, in the case of an American action, ninety-five percent of its benefits to foreigners.<sup>14</sup>

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13. This is the basic strategy of many proposals to address climate change, notably the cap-and-trade mechanisms of most climate legislation introduced last year in Congress, as well as deliberately simpler devices such as the partial Pigouvian tax that Thomas Merrill and David Schizer have devised to avoid some of the public choice hazards of the more complex instruments. See Thomas Merrill & David Schizer, *Energy Policy for an Economic Downturn: A Proposed Petroleum Fuel Price Stabilization Plan*, 26 YALE J. ON REG. (forthcoming 2010).

14. This ratio is purely demographic; it would be lower if it assumed that residents of wealthy countries have "more to lose" from climate change; but of course, that is not at all clear, as

Making a bad situation worse, the distribution of harms from climate change is both uncertain and likely to be highly uneven. On some prominent estimates, the United States would have been a massive net loser from adopting the Kyoto Protocol, even assuming perfect global compliance, because the country is projected to feel relatively light effects from a warming world in the next few decades.<sup>15</sup> Some countries, notably Russia, might benefit from unchecked climate change in the medium term, even excluding the savings from forgone mitigation measures.<sup>16</sup> One might think it should be possible in principle to redistribute the benefits of coordinated mitigation by payments to otherwise reluctant participants, but that approach presents serious difficulties: strategic misrepresentation of anticipated effects as countries jockey to be bought off; pure holdout problems; disputes about acceptable distributions of benefits and burdens, including politicized arguments about international distributive justice;<sup>17</sup> and, closely linked to the last, domestic political reluctance to subsidize the interests of foreigners.<sup>18</sup>

The problem of temporal scale is as basic as the spatial externalities and coordination problems. Each year's greenhouse gas emissions commit the

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vulnerable populations in poor countries may live close to survival or very basic quality-of-life thresholds vulnerable to climatic disruption, such as exposure to malaria. See U.S. Census Bureau, U.S. & World Population Clocks, <http://www.census.gov/main/www/popclock.html> (last visited Nov. 16, 2009) (offering up-to-the-minute tracking of estimated world and United States human populations).

15. See CASS R. SUNSTEIN, *WORST-CASE SCENARIOS* 71-117 (2007).
16. See Jonathan Baert Wiener, *Designing Global Climate Regulation*, in *CLIMATE CHANGE POLICY: A SURVEY* 151, 160 (Stephen H. Schneider, Armin Rosencranz & John O. Niles eds., 2002).
17. See Posner & Sunstein, *Should Greenhouse Gas*, *supra* note 2 (discussing the political barriers to redistributing wealth through a global climate regime).
18. See Sunstein, *A Tale of Two Protocols*, *supra* note 2 (discussing the American reluctance to pay for climate mitigation with benefits abroad). These worries are not hypothetical: one has only to consider the projections of national costs and arguments about fairness that powered the Senate's 1997 discussion of the Byrd-Hagel resolution denouncing Kyoto for its release of poor countries from emissions-reduction obligations and compare this idea of a fair distribution of climate burdens (each country must do its part) to that developing in the public conversation of countries such as India (each human being should benefit from an equal share of the atmosphere's absorptive capacity). See 143 CONG. REC. 15,785 (1997) (statement of Sen. Byrd) ("I do not think the Senate should support a treaty that requires only half the world—in other words, the developed countries—to endure the economic costs of reducing emissions while developing countries are left free to pollute the atmosphere and, in so doing, siphon off American industries."). For an account of developing-country perspectives on the question, see LAVANYA RAJAMANI, *DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW* 216-36 (2006) (describing conflicting ideas of fairness among developing and developed countries).

global atmosphere to decades of resulting change, and the sum of atmospheric changes, arising from interacting natural and anthropogenic influences, may emerge over an even longer time.<sup>19</sup> This means that the benefits of mitigating climate change will accrue to future generations while the living bear the costs. Domestic political decisions, particularly in democracies, are tied to electoral cycles not generally longer than seven years, and frequently shorter. Within any political cycle, it is highly likely that the costs of a serious mitigation effort will outweigh the benefits, even setting aside the inevitably speculative character of benefits measured in nonevents. Addressing climate change, therefore, means sacrifice today to win uncertain advantages for the strangers who compose future generations.<sup>20</sup>

### *B. Nonrational Inhibitions*

As if this were not enough discouragement, a set of cognitive biases allegedly make political commitment especially elusive around climate change. Climate change so far lacks the charismatic or terrifying images that give an issue “salience”—centrality and power in the public mind.<sup>21</sup> This is in contrast to the attacks of September 11, 2001, which gave terrorism great salience for years thereafter, and, in environmental politics, visible crises such as the burning of the Cuyahoga River and charismatic conservationist images such as redwood trees, blue whales, and Yosemite Valley.<sup>22</sup> Moreover, the argument goes, climate change is a problem of complex systems, while moral motivation is keyed to the rights and wrongs of individuals, meaning that the scale of the problem tends to overwhelm and numb, rather than spur, motives to

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19. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE: CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERNATIONAL PANEL ON CLIMATE CHANGE: SUMMARY FOR POLICYMAKERS (Martin Parry et al. eds., 2007), <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4/ar4-wg2-wg1-spm.pdf> (forecasting hard-to-predict and mutually reinforcing changes including rising global temperatures and sea levels, increased frequency of droughts and severe storms, changing regional weather and rainfall patterns, and increased desertification, among other effects).
  20. This entire point supposes a conventional discount rate and relative indifference to the fate of future generations. I do not mean to endorse this approach as the right view of climate change, and the whole thrust of my argument is that we should not regard these constraints as fixed.
  21. See SUNSTEIN, *supra* note 15, at 65-70 (discussing psychological barriers to climate politics); Jon Gertner, *Why Isn't the Brain Green?*, N.Y. TIMES, Apr. 19, 2009, § 6 (Magazine), at 36.
  22. See Sunstein, *On the Divergent Reactions*, *supra* note 2 (contrasting terrorism with climate change). On the role of salient events in spurring earlier episodes of environmental lawmaking, see, for example, NORDHAUS & SHELLENBERGER, *supra* note 3, at 22-24, which discusses the impact of the Cuyahoga River Fire.

respond.<sup>23</sup> Finally, the distance in space and time between the acts that contribute to climate change and its final effects is much greater than human causal perception and the conjoined sense of responsibility evolved to contemplate, meaning instinct draws us toward incomprehension and indifference.<sup>24</sup> The complexity of climate processes only worsens this inhibition.<sup>25</sup> To summarize, human beings may be hard-wired not to arrest even a catastrophic process if it is diffuse, hard to envision, and delayed in time, particularly when the actions that drive it are immediate, conventional, and convenient (such as driving).

### C. *The Relevance of Democratic Politics*

How much of the grounds for pessimism is in fact hard-wired and how much is open to change? On its face, climate change does appear unique in its capacity to outstrip the self-correcting resources of human choice. It is, therefore, all the more important to appreciate that those resources include the power to change the very grounds of our choices.

This Article approaches that issue by emphasizing an aspect of human decisionmaking distinct from our propensity (or failure) to pursue maximum satisfaction of our preferences. It begins from the premise that human action pervasively responds to the experience of strong and qualitative values. Human beings are self-conscious creatures; we experience ourselves as making decisions not at random, but for reasons: we act in ways we think more just than the alternatives, or more dignified, or more consistent with the ideals of our own character.<sup>26</sup> That is to say, we act always under descriptions of our setting and our alternatives, and these descriptions are not idiosyncratic, but are shaped by shared ideas about people, social relations, and the natural world.<sup>27</sup> Moreover, these descriptions and ideas vary across place and time, frequently changing endogenously through human engagement with the very

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23. See Gertner, *supra* note 21. See generally Paul Slovic, "If I Look at the Mass, I Will Never Act": Psychic Numbing and Genocide (Oct. 16, 2006) (unpublished manuscript, on file with author).

24. See Gertner, *supra* note 21.

25. See *id.*

26. See 1 CHARLES TAYLOR, *Self-Interpreting Animals* [hereinafter TAYLOR, *Self-Interpreting Animals*], in *PHILOSOPHICAL PAPERS: HUMAN AGENCY AND LANGUAGE* 45, 45-76 (1985); 1 CHARLES TAYLOR, *What Is Human Agency?*, in *PHILOSOPHICAL PAPERS: HUMAN AGENCY AND LANGUAGE* 15, 15-44 (1985).

27. See CHARLES TAYLOR, *SOURCES OF THE SELF* 25-52 (1989) (theorizing relations between self-conscious and self-interpreting agents and the questions of value that they confront).

experience of value that structures our experience.<sup>28</sup> In complement to microeconomists' interest in the formal structure of human choice, and to interest-based theorists' usual assumption that individuals seek wealth and power, this approach concentrates on the source and character of the diverse substantive ends that people pursue.

This Article focuses on democratic politics for two reasons. First, democracy is one of the arenas in which people can change their own reasons for acting: in struggling to persuade one another of the meaning of central but overdetermined ideas such as liberty, equality, and nature, democratic citizens change the range of potential meanings that these values carry, eliminating some and generating new alternatives. Second, values expressed in the register of democratic politics carry a special burden, that of justifying to other citizens proposed uses of the power of the state and imprimatur of the polity. Because the stakes of political argument are high, there is particular motive to make basic commitments and urgent innovations intelligible in this register. Tracking changes in environmental public language, the language of democratic citizens at grips with ideas of nature, means writing not just a history of what people have thought and said, but of what they have been able to assert to one another in the special business of laying claims on the political community.

Note that the point here is not to oppose high-minded values to low-built interests, but to insist on their interpenetration. On the individual level, one's interests are substantially in those things one has come to value: as this Article shows, coming to value the natural world in new ways has been a major theme of American experience. Moreover, in political argument, those interests one can legitimately and persuasively assert are limited by the commitments that define the polity. Thus, to anticipate a later argument, the mainly elite conservationists of the early Wilderness Society did indeed have an interest in preserving large tracts of public land for solitary trekking; but this interest was an artifact of more than a half-century of cultural and political ferment, and turning it into legislative action required introducing a new way of valuing the natural world into the heart of American political debate.<sup>29</sup>

A focus on the self-transforming effect of political argument highlights the depth of past change and implies that the future, too, might see very different governing values. History is full of reforms that were cogently argued to be as impossible as addressing climate change can seem today. The abolition of

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28. See 2 CHARLES TAYLOR, *Interpretation and the Sciences of Man*, in *PHILOSOPHICAL PAPERS: PHILOSOPHY AND THE HUMAN SCIENCES* 15, 37 (1985).

29. This discussion falls mainly in Section III.A., *infra*.

slavery, sexual equality, and democracy itself are among these.<sup>30</sup> Such pessimistic arguments have in common that their cogency depends on taking “human nature”—people’s characteristic motives—as a permanent fact, at least for practical purposes. When those arguments have failed, it has been partly because “human nature” has changed, not randomly, but as democratic politics has drawn people’s motives in a relatively egalitarian direction.<sup>31</sup>

Sometimes, then, human nature is as good (or bad) as permanent, and sometimes it is not. This is at least partly because one permanent feature of that nature is also the basis of its impermanence: people create their own reasons for acting by reinterpreting the personalities, communities, traditions, and natural world in which they live.<sup>32</sup> By doing so in the forum of democratic politics, they can expand the set of viable alternatives, the range of paths a country might take. There is, of course, no guarantee that Americans will do so in connection with climate change. But we might. That act of democratic freedom would change the grounds of the debate.

The rest of this Article examines how earlier Americans have engaged in self-transforming self-interpretation around environmental issues, and where that practice might move today.

## II. THE RISE OF CONSERVATION IN THE NINETEENTH CENTURY

Previous accounts of the sources of environmental law and politics have taken two paths. One is cultural history conducted at a fairly high level of abstraction.<sup>33</sup> The other is rich in empirical particulars but lacking in theoretical

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30. I discuss some of these developments in JEDEDIAH PURDY, *A TOLERABLE ANARCHY* 97-160 (2009). For a particularly illuminating discussion of this issue in connection with slavery, see DAVIS, *supra* note 1, at 231-49.

31. See DAVIS, *supra* note 1, at 231-49; TAYLOR, *Self-Interpreting Animals*, *supra* note 26, at 45-76.

32. See TAYLOR, *Self-Interpreting Animals*, *supra* note 26, at 45-76.

33. See LEO MARX, *THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* (1964) (tracing the ambivalent American relationship to nature and technology); CAROLYN MERCHANT, *THE DEATH OF NATURE: WOMEN, ECOLOGY, AND THE SCIENTIFIC REVOLUTION* (1980) (arguing that the rise of an instrumentalizing idea of nature arose with, and in mutual support of, a male-centered and oppressive version of subjecthood); 3 RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* (1982) (tracing the idea of wilderness through American history); DONALD WORSTER, *NATURE’S ECONOMY: A HISTORY OF ECOLOGICAL IDEAS* (2d ed. 2000) (setting a history of scientific conceptions of nature alongside an account of changing practices of use and habitation of the natural world); Cronon, *supra* note 3 (using cultural history to track the idea of wilderness through American history, with particular attention to the various human motives it has been imagined to serve).

ambition and, where it has a theoretical element, generally founded on the political economy of interests.<sup>34</sup> Some of the most interesting work falls into neither category. Exemplified by the scholarship of William Cronon, the third strand integrates natural and social history as mutually constitutive processes. That work, however, does not engage the topic of this Article: the ways in which people create their shared public language by participating in it, by seeking to persuade one another.<sup>35</sup>

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34. See CRAIG W. ALLIN, *THE POLITICS OF WILDERNESS PRESERVATION* (1982) (tracing primarily the legislative and other political processes eventuating in the 1964 Wilderness Act); PHILLIP O. FOSS, *POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN* (1960) (setting out the history of grazing policy development); PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (1968) (providing an extraordinarily rich and informed history of the political processes and interests at work in the development and disbursement of the United States public domain); JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915* (1964) (setting out in detail the massive, often illegal lumbering of the nineteenth and early twentieth centuries); ROY M. ROBBINS, *OUR LANDED HERITAGE: THE PUBLIC DOMAIN 1776-1936* (1950) (providing a history of the development from disbursement to retention and regulation of the public domain as a story of rationality and progress, albeit fraught with politics); DONALD WORSTER, *RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST* (1985) (providing a history of Western water policy joined with a Marxian-informed account of the power relations attendant on irrigation systems).
35. The most impressive of this work is William Cronon's. See WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* (Hill & Wang rev. ed. 2003) (1983) (describing as ecological practices the Anglo settler and Native American forms of life that coexisted in early New England); WILLIAM CRONON, *NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST* (1991) (setting out the development of a commodity economy in the Midwest, with Chicago as its epicenter, as a history of economic systems, interests, and ideas). What I do not find in Cronon is a focus on the self-interpretation of democratic communities in relation to nature. In that respect, my interests are complementary to and, I hope, in the spirit of his. Some more popular but very interesting and influential work has taken its cue from Cronon in combining systems theory with accounts of culture. See, e.g., JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* (2005) (providing an account of ecological catastrophe and the conditions for averting it in light of both natural systems and cultural judgments); MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* (2006) (describing food-production systems and the relation to ideas of food's purpose and cultural role). Other environmental histories have adopted a subaltern concern with the experiences and perspectives of those omitted from "traditional" history and often the objects, rather than the authors, of environmental management schemes. See, e.g., RAMACHANDRA GUHA, *THE UNQUIET WOODS: ECOLOGICAL CHANGE AND PEASANT RESISTANCE IN THE HIMALAYA* (Univ. of Cal. Press expanded ed. 2000) (1989) (describing the political lives and activity of local dwellers in the face of harvesting from outside their communities); KARL JACOBY, *CRIMES AGAINST NATURE: SQUATTERS, POACHERS, THIEVES, AND THE HIDDEN HISTORY OF AMERICAN CONSERVATION* (2001) (describing the experiences and perspectives of local populations in the Adirondack State Park, Yellowstone National Park, and the Grand Canyon). A final class of work treats subaltern environmental history in connection with a

This Article sets environmental ideas within democratic self-interpretation and action, through two interwoven inquiries. It first asks how environmental public language emerges and changes. How have new claims about the value of the natural world become intelligible, even authoritative, as parts of a public vocabulary? Some of the answer lies in the activity of social movements, some in the language of politicians, and some in relatively rarefied domains such as literature, spirituality, and science. These rarefied innovations, however, enter public language only when social movements and political leaders seize and develop them for political persuasion. The intelligibility and authority of environmental public language depend on the activity of a democratic community.

Two broad patterns emerge. In one, advocates anchor their arguments in an existing or emergent public vocabulary. One such anchor was the Progressive ideal of expert management, which was closely tied to the advent of permanent resource-management regimes for federal public lands, most notably in the National Forests. Another was the perception of technology-driven crisis, even apocalyptic threat, which helped to inspire the environmental movement of the 1960s and 1970s. Even in these cases, environmental language did more than take the shape of an existing conversation. Rather, those who found new ways to articulate environmental values contributed to the development of the larger public language of their times, making the American relation to the natural world a paradigm of broader themes.

In the other pattern, environmental disputes have added *new* kinds of values to public argument. National parks and wilderness reserves exist in part because their advocates developed arguments that certain kinds of aesthetic and spiritual experience were uniquely available in spectacular natural settings. Romantic and Transcendentalist aesthetics formed a backdrop to these ideas, but a new kind of personal encounter with nature became a premise of public vocabulary, available for claims on editorial pages, in sermons and public hearings, and on the floor of Congress, through the labor of popularizing innovators, notably John Muir, and, especially, social-movement practitioners of the new language, such as the Sierra Club and Wilderness Society.

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critique of modernity as characterized by an imperializing form of instrumental reason and hyper-rational technocracy. See, e.g., CAROLYN MERCHANT, *ECOLOGICAL REVOLUTIONS: NATURE, GENDER, AND SCIENCE IN NEW ENGLAND* (1989) (arguing that early New England settlers enjoyed a relatively ecologically minded, precapitalist relation to the natural world, which gave way in time to a market-driven instrumental attitude); JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 11-24 (1998) (describing nineteenth-century “scientific forestry” as an instance of “high modern” aesthetics and management).

Now it is time to begin somewhere near, if not at, the beginning.<sup>36</sup>

A. *Early Attitudes*

In 1831, Alexis de Tocqueville perplexed his hosts on the Michigan frontier when he asked to see the primeval American forest, not to find acreage for timber or land speculation, but to admire an untamed landscape.<sup>37</sup> Tocqueville wrote,

To break through almost impenetrable forests, to cross deep rivers, to brave pestilential marshes . . . those are exertions that the American readily contemplates, if it is a question of earning a guinea; for that is the point. But that one should do such things from curiosity is more than his mind can take in.<sup>38</sup>

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36. The discussion that immediately follows is by no means a comprehensive history of environmental attitudes before the middle and later decades of the nineteenth century. It is most importantly bounded by its exclusive treatment of *American* and *public* environmental language. Outside the United States, considerable national forest conservation had developed in Europe and imperial government in the Caribbean and regions of India had produced policies that resembled later domestic conservation legislation. See RICHARD H. GROVE, *GREEN IMPERIALISM: COLONIAL EXPANSION, TROPICAL ISLAND EDENS AND THE ORIGINS OF ENVIRONMENTALISM, 1600-1860*, at 168-216 (1995) (describing French colonial conservation ideologies and policies in the Caribbean); *id.* at 380-473 (describing British colonial conservation ideologies and policies in India); JOHN MUIR, *OUR NATIONAL PARKS* 337-40 (1901) (surveying national forest regulation in Europe, Japan, and colonial India). Outside the political and legal core of public language, Americans took part in the Romantic culture of their time, embracing literary declarations of admiration for wild forests and sublime landscapes, which often had a fraught connection with the dominant public commitment to exploitation and material progress. See HANS HUTH, *NATURE AND THE AMERICAN: THREE CENTURIES OF CHANGING ATTITUDES* 14-29 (1957) (describing the Romantic appreciation of nature that some scientists and explorers brought to the American landscape in the early nineteenth century); *id.* at 30-53 (discussing the development of Romantic imagery in American landscape art); Angela Miller, *The Fate of Wilderness in American Landscape Art: The Dilemmas of "Nature's Nation,"* in *AMERICAN WILDERNESS: A NEW HISTORY* 91 (Michael Lewis ed., 2007) (discussing the development of American images of wild sublimity). The domestic cultural developments, in particular, belong in any thorough history of the backdrop on which Romantic conservationism eventually drew: my discussion of the literary and theoretical sources of Romantic nature aesthetics is, I think, accurate, but partial. Tocqueville's frontier anecdote is, of course, not strictly an account of *public* language in the sense this Article addresses. It is here because it was too entertaining to exclude.
37. ALEXIS DE TOCQUEVILLE, *JOURNEY TO AMERICA* 335 (J.P. Mayer ed., George Lawrence trans., 1962) (1959).
38. *Id.*

1. *The Imperative of Use*

Tocqueville's frontiersmen may have been indifferent to the aesthetic merits of the frontier, but they were intensely attuned to its economic value. The belief he attributed to them, that land exists for economically productive use, found exemplary expression in congressional debates over forest management on federal land. Early Secretaries of the Interior tried to assert control over massive timber pirating, an effort which culminated in the creation of the National Forest system in 1890. Thrown on the defensive, traditionalists indignantly rallied around the rights of individual settlers to extract resources from the public lands. In doing so, they set out the basic terms of their worldview.

In 1878, Interior Secretary Carl Schurz invoked an 1831 statute, originally intended to ensure the Navy's shipbuilding wood supply, to stop unauthorized timbering on federal land.<sup>39</sup> The hostile comments of several senators presented a conceptual and rhetorical map of the then-prevalent ideology of resource use.<sup>40</sup> They aligned clearing and using land with inviolable human rights, invoking the Declaration of Independence—always ready at hand when nineteenth-century Americans wanted to accuse government of tyranny—which in its bill of particulars had complained of the 1763 prohibition on settlement west of the Alleghenies.<sup>41</sup> They argued that timbering was a traditional prerogative of settlers and that equitable treatment required granting Western settlers the same privileges earlier pioneers had enjoyed on Midwestern public lands.<sup>42</sup> They further claimed that settlers had earned the right to timber by embracing the risks and burdens of developing the West.<sup>43</sup> Finally, they insisted that commercial-scale timbering was practically necessary to develop the Western economy; otherwise, each settler household would

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39. See GATES, *supra* note 34, at 531-61.

40. 7 CONG. REC. 1719-23, 1861-69 (1878).

41. *Id.* at 1722 (statement of Sen. Blaine) ("I know nothing in the world to parallel it except that great assertion in our immortal Declaration of Independence that the King of England 'has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance.'").

42. *Id.* (statement of Sen. Teller) ("I claim that nothing is demanded by the people in the Territories now that has not been conceded to all settlers in the new Territories.").

43. See *id.* at 1721 (statement of Sen. Blaine) ("[I]t is a thing which has been conceded by the Government, that the hardy pioneer who goes forth and bears the flag of civilization onward against difficulties and through dangers that appal stout hearts . . . shall have the air and the water and the wood . . .").

remain in primitive autarky.<sup>44</sup> Various senators also denounced restrictions on timbering as “spoliation” and “robbery of the poor”;<sup>45</sup> as driving settlers into “barbarism”;<sup>46</sup> and as “depopulat[ing]” the Western lands.<sup>47</sup>

To some degree, these arguments were ideological cover for powerful interests that had little to do with small settlers. Schurz aimed his enforcement at large timber operations, which often claimed timber through fraudulent homesteading claims.<sup>48</sup> The arguments, though, reveal a good deal about what counted as legitimate resource use. By calling on the Declaration of Independence, senators linked free citizenship with access to open lands and forests: restricting the settlers would make them second-class citizens, as American Revolutionaries had claimed that royal and parliamentary interference turned them from free subjects into slaves.<sup>49</sup> This resource-use ideology paralleled contemporary developments in the antimonopoly, open-market agendas of Jacksonian and Free Labor partisans, for whom free participation in markets, including developing open land, was a key mark of citizenship.<sup>50</sup> Adherents of all these positions contrasted open markets with monopolies that favored the politically connected.

The then-dominant idea of the public domain took the shape of these ideas. Public lands were envisioned as being held in trust for use by, and prompt disbursement to, the citizens who had the only ultimate and just claim to them. In this view, if the federal government retained public lands, it set itself up as that *bête noire* of the era, a monopolist—the worst kind, because it was both creator and beneficiary of the monopoly.<sup>51</sup> Today’s idea of the public domain as permanently reserved federal lands, managed (ideally) in the public interest, is

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44. See *id.* at 1861 (statement of Sen. Blaine).

45. *Id.* at 1865 (statement of Sen. Eustis).

46. *Id.* at 1867 (statement of Sen. Sargent).

47. *Id.*

48. See GATES, *supra* note 34, at 531-61 (setting out the history of unauthorized timbering on public lands).

49. See generally AZIZ RANA, FREEDOM WITHOUT EMPIRE: THE PARADOX OF AMERICA’S SETTLER LEGACY (forthcoming 2010) (arguing that the Revolutionary American polity rested on an ideal of the equality of each male citizen that implied brutal exclusion of racial and religious outsiders and exploitation of natural resources).

50. See ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 11-18, 27-29 (1970) (setting forth these ideas).

51. See 7 CONG. REC. at 1869 (statement of Sen. Teller) (denying that “there is any law . . . that authorizes the Secretary of the Interior to turn himself into a wood-peddler and to peddle out the timber from the public domain”).

very nearly the opposite of what these nineteenth-century senators would have meant by the term.<sup>52</sup>

2. *A Limited Exception: "Curiosities and Wonders" in the Early Parks*

An exemplary exception highlights the rule. Congressional discussion of Yellowstone National Park, established in 1872, and the 1864 Congressional grant of Yosemite Valley to California "for public use, resort, and recreation"<sup>53</sup> involved places that are today's paradigms of public-minded preservation. In the nineteenth-century debates, even defenders of the parks treated them as anomalies in a general practice of use and disbursement, and the aesthetic value they associated with the parks was much narrower than Romantic ideas. In an 1883 debate over administration and funding of Yellowstone,<sup>54</sup> the threshold issue was whether any portion of federal public lands should remain in government hands. Senator Ingalls of Kansas argued that the government should retain none, insisting, "The best thing that the Government could do with the Yellowstone National Park is to survey it and sell it as other public lands are sold."<sup>55</sup> Ingalls's position was a representative fragment of the general view that government's role was to disburse public lands to citizens and corporations that would use them productively.

That view deeply constrained arguments for parks conservation. Senators defending the parks described them as bizarre and wondrous, without the spiritualized conception of nature that later defined the very concept of national parks. Defending Yellowstone, Senator Vest of Missouri sounded what could seem, to a carelessly anachronistic eye, a twenty-first century argument. The Park was "the great wonder-land of the world," a "great breathing-place for the national lungs," and a dignifying national project, a "republican park" on par with the royal parks of Europe, "free to the people of the States, with these great curiosities that exist nowhere else."<sup>56</sup> This appears on its face to be the Romantic aesthetic of morally educative nature, John Muir

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52. The narrow exception was that class of semipublic goods traditionally governed by the public trust doctrine. That the doctrine in some instances became a principle of environmental management in the twentieth century is an ironic development. For an introduction to this issue, see DAVID C. SLADE, R. KERRY KEHOE & JANE K. STAHL, *PUTTING THE PUBLIC TRUST DOCTRINE TO WORK* (2d ed. 1997).

53. CONG. GLOBE, 38th Cong., 1st Sess. 2300 (1864).

54. In its early years, Yellowstone was the scene of poaching massacres and general lawlessness, and federal troops oversaw the park for some time. See JACOBY, *supra* note 35, at 121-46.

55. 14 CONG. REC. 3488 (1883).

56. *Id.*

slightly *avant la lettre*. A bit earlier in the debate, however, Vest had clarified just what he valued in Yellowstone. Addressing the call to dispose of the valley to private owners, he declared, "If I had control to-day of 5,000 acres of that park, the rest of it could be disposed of . . . Nobody goes to that park to see any of it except the geysers and the falls and the Yellowstone Lake. Take those out and the rest of it is simply useless . . . mere leather and prunella."<sup>57</sup> The argument, then, was for preserving, and ensuring public access to, the most extraordinary features of the American landscape, but Vest's emphasis on the freakishness of that landscape sets his terms, "wonders" and "curiosities," in a revealing light. His Yellowstone was one part spa, two parts circus, and no part spiritualized nature. When Vest referred to Yellowstone's geysers as "the most wonderful, the most singular of all the productions of nature upon this continent,"<sup>58</sup> he intended a sense of the park's significance that was quite compatible with Ingalls's objection: "I do not understand myself what the necessity is for the Government entering into the *show business* in the Yellowstone National Park."<sup>59</sup>

The Senate's brief discussion of the Yosemite grant to California also highlights both the primacy of nature's use-value and the narrowness of aesthetic grounds for preservation. John Conness of California, defending the grant, argued that the acres at issue "are for all public purposes worthless, but . . . constitute, perhaps, some of the greatest wonders of the world."<sup>60</sup> The pairing of worthlessness and uniqueness highlights both the use-based meaning of "worth" and the sense in which "wonders" was meant. Conness went on to defend the grant with a description of the incredulity that a section from one of the valley's giant sequoias had caused at the London World's Fair, where "[t]he English who saw it declared it to be a Yankee invention, made from beginning to end."<sup>61</sup> It was the very oddness of the valley that made the special federal grant *sui generis* and thus compatible with the conventional program of privatizing the public domain for productive use. Conness insisted, "There is no parallel, and can be no parallel for this measure, for there is not . . . on earth just such a condition of things."<sup>62</sup> It was important that the grant be unique, for those who opposed reserving land in public hands were ready

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57. *Id.* at 3487 (internal quotation marks omitted). According to casual Internet research, prunella provides an herbal cure for syphilis—an interesting glimpse into the mind of a nineteenth-century senator.

58. *Id.* at 3484.

59. *Id.* at 3488 (emphasis added).

60. CONG. GLOBE, 38th Cong., 1st Sess. 2300 (1864).

61. *Id.* at 2301.

62. *Id.*

with Ingalls's argument that federal administration of Yellowstone was an incubus, the demon-seed of bureaucratic management.<sup>63</sup>

*B. New Ways of Experiencing Nature: From Romantic Aesthetics to the Politics of Romanticism*

*1. Background Innovations*

For all the instrumentalism of the senators who attacked Schurz's enforcement actions, ideas of nature in mid-nineteenth-century America had already come far from the times of the first European settlement. William Bradford, governor of the Plymouth colony in many of its earliest years, famously described the new land as "a hideous and desolate wilderness" of "wild and savage hue."<sup>64</sup> Nearly two centuries later, in 1814, the young William Cullen Bryant made a Romantic declaration a world away from Bradford's: "To him who in the love of Nature holds / Communion with her visible forms, she speaks / A various language . . ."<sup>65</sup> Bryant would later declare, "The groves were God's first temples."<sup>66</sup> Such sentiments were something new in American life. They remained, however, literary delectations, not parts of the public language of persuasion and commitment.

One Romantic innovation formed the conceptual watershed of a new public language: the concept of the sublime.<sup>67</sup> Sublimity, as Edmund Burke described it, arose in response to enormous power, vast size, and profound

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63. 14 CONG. REC. 3488 (1883).

64. William Bradford, *A Hideous and Desolate Wilderness*, in ENVIRONMENT: AN INTERDISCIPLINARY ANTHOLOGY 282, 283 (Glenn Adelson et al. eds., 2008). It would be a mistake to understand Bradford's view as simple abhorrence of wilderness, as some, notably Roderick Nash, have done. See NASH, *supra* note 33, at 23-25. Much more helpful is William Cronon's recognition that wild nature was associated with biblical ideas of spiritual testing and sojourn, which tied into the idea of the settling of North America as a covenantal project. See Cronon, *supra* note 3, at 69-71. This Article essentially begins in the nineteenth century and does not engage these themes.

65. WILLIAM CULLEN BRYANT, *Thanatopsis*, in POETICAL WORKS OF WILLIAM CULLEN BRYANT 24, 24 (1891).

66. WILLIAM CULLEN BRYANT, *A Forest Hymn*, in POETICAL WORKS OF WILLIAM CULLEN BRYANT, *supra* note 65, at 87, 87.

67. As noted in an earlier footnote, a more complete account of the cultural background in which the concept of sublimity arose and became associated with particular American landscapes would treat the growth of landscape art in the same decades in which Thoreau and Emerson were active. See, e.g., HUTH, *supra* note 36, at 87-104 (describing this development); Miller, *supra* note 36 (same).

obscurity—whatever tended toward infinity.<sup>68</sup> Arising from innate terror of death, it was literally overwhelming, a surrender of mental self-control to the power of encounter with nature's extremes.<sup>69</sup> Yet the sublime was, in its terror, "delightful," a kind of recreational awe, an experience of one's own impending obliteration without the dire consummation.<sup>70</sup> Immanuel Kant turned Burke's account to a different end, claiming that sublimity's terror inspired the mind to resist panic, an exercise of rational will that provided a symbol of freedom, a hint of the noumenal will by which rational beings could choose and legislate for themselves.<sup>71</sup> Sublimity was edifying because it excited instinctual terror but, at the same time, inspired rational freedom. William Wordsworth sounded similar themes, describing sublime nature as both source and symbol of the potential sublimity of the mind.<sup>72</sup> Vitality, moral knowledge, and a spirit of beneficence all coursed through nature. Access to them was concentrated in the most spectacular places, and to find the mutual consummation of those currents with the corresponding forces in one's own mind "alone is genuine liberty: / . . . one perpetual progress smooth and bright . . ." <sup>73</sup>

In the United States, Ralph Waldo Emerson had proposed a view close to Kant's and Wordsworth's: the human mind and the natural world bodied forth the same organizing principles.<sup>74</sup> To apprehend nature directly was to

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68. See EDMUND BURKE, *A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL* 70 (J. T. Boulton ed., Notre Dame Press 1968) (1757).

69. Burke described sublimity as "productive of the strongest emotion which the mind is capable of feeling," the terror of death. *Id.* at 39-40.

70. *Id.* at 40 ("When danger or pain press too nearly, they are incapable of giving any delight, and are simply terrible; but at certain distances, and with certain modifications, they may be, and they are delightful.")

71. IMMANUEL KANT, *THE CRITIQUE OF JUDGMENT* 109-14 (James Creed Meredith trans., Oxford, Clarendon Press 1952) (1790).

72. See WILLIAM WORDSWORTH, *Book Thirteenth: Imagination and Taste, How Impaired and Restored-(Concluded)*, in *THE PRELUDE* 484, 504 (Jonathan Wordsworth ed., Penguin Books 1995) (1850) ("[T]he forms / Of Nature have a passion in themselves / That intermingles with the works of man / To which she summons him."). In the philosophical summation of his early poetry, he drew particular attention to the Welsh peak Snowdon: "A deep and gloomy breathing-place through which / Mounted the roar of waters, torrents, streams / Innumerable, roaring with one voice!" WILLIAM WORDSWORTH, *Book Fourteenth: Conclusion* [hereinafter WORDSWORTH, *Book Fourteenth*], in *THE PRELUDE*, *supra*, at 511, 512. In that sublime setting, "I beheld the emblem of a mind / That feeds upon infinity, that broods / Over the dark abyss, intent to hear . . . a mind sustained / By recognitions of transcendent power . . ." *Id.* at 515.

73. WORDSWORTH, *Book Fourteenth*, *supra* note 72, at 517.

74. See RALPH WALDO EMERSON, *Nature*, in *THE ESSENTIAL WRITINGS OF RALPH WALDO EMERSON* 3, 33 (Brooks Atkinson ed., Modern Library 2000) ("[S]pirit creates . . . behind

encounter one's self in external form.<sup>75</sup> That self-knowledge, in turn, enabled freedom of a certain sort: life governed only by the constraints indigenous to one's own being.<sup>76</sup> In *Walden*, Henry David Thoreau tried to perform what Emerson had urged, setting out a practice of attentiveness to nature's places and processes as a path to self-awareness.<sup>77</sup>

These literary and philosophical developments make up the backdrop from which John Muir's popularizing innovations emerged as the lexicon of new social movements. All these figures helped to inaugurate and give voice to a mode of experience in which religious inspiration was relocated to the natural world and recast in terms both aesthetic and vitalist. The touchstone was visual and intellectual stimulus that embodied nature's most vital forces and, in so doing, called forth corresponding forces in human observers.

## 2. *John Muir's Popular Innovation*

John Muir, a widely influential popular writer and first president of the Sierra Club, was the individual most responsible for establishing this set of ideas in American public language. Muir, whose acolytes called him without

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nature, throughout nature, spirit is present; one and not compound it does not act on us from without . . . but spiritually, or through ourselves . . . . The world proceeds from the same spirit as the body of man. . . . We are as much strangers in nature as we are aliens from God.”).

75. See RALPH WALDO EMERSON, *The American Scholar* [hereinafter EMERSON, *The American Scholar*], in *THE ESSENTIAL WRITINGS OF RALPH WALDO EMERSON*, *supra* note 74, at 43, 45 (“[T]o this schoolboy under the bending dome of day, is suggested that he and it proceed from one root; one is leaf and one is flower; relation, sympathy, stirring in every vein. And what is that root? Is it not the soul of his soul?”); EMERSON, *supra* note 74, at 33. (“[M]an has access to the entire mind of the Creator, is himself the creator in the finite.”).
76. See EMERSON, *The American Scholar*, *supra* note 75, at 54 (“[T]he definition of freedom, ‘without any hindrance that does not arise out of his own constitution.’”); EMERSON, *supra* note 74, at 37-38 (“Man is the dwarf of himself. Once he was permeated and dissolved by spirit. He filled nature with his overflowing currents. . . . The problem of restoring to the world original and eternal beauty is solved by the redemption of the soul. . . . The reason why the world lacks unity, and lies broken and in heaps, is because man is disunited with himself. He cannot be a naturalist until he satisfies all the demands of the spirit.”).
77. See HENRY DAVID THOREAU, *Walden*, in *WALDEN AND OTHER WRITINGS* 149 (Brooks Atkinson ed., Modern Library 2000) (1854) (“When my hoe tinkled against the stones, that music echoed to the woods and the sky, and was an accompaniment to my labor which yielded an instant and immeasurable crop. It was no longer beans that I hoed, nor I that hoed beans.”); *id.* at 176 (“A lake is the landscape’s most beautiful and expressive feature. It is the earth’s eye; looking into which the beholder measures the depth of his own nature.”); *id.* at 290 (concluding upon careful examination of a bank of thawing soil that “[t]he earth is not a mere fragment of dead history . . . but living poetry”); *id.* at 300-12 (arguing that all knowledge of the world is only knowledge of one’s self, which is the great goal).

irony “John of the Mountains,” was not an innovator—he followed and somewhat bowdlerized Romanticism—nor was he a systematic thinker. His prose veers among theism, pantheism, and paganism, and between humanism and what later generations would come to call biocentrism. He sometimes seemed to join the utilitarianism of his intermittent ally, forester and conservationist Gifford Pinchot, while at other times he rejected that attitude to embrace incommensurable aesthetic or spiritual value in nature.<sup>78</sup> His deliberate identification with Romantic traditions, however, is unmistakable, as is his effort to claim the cachet of the Romantic seer. Muir was schooled in the poetry of Wordsworth, to whose grave at Grasmere he made a pilgrimage in 1893.<sup>79</sup> He sought to present himself as a successor to Emerson in the vein of American prophecy, describing the old Concord Transcendentalist as an exhausted force who must give way to the new Romanticism of the West.<sup>80</sup>

For a man who did much to shape a new social movement, he held vague views on the great disputes of his time: labor, industrialism, imperialism, and race and gender relations.<sup>81</sup> It may have been because of his vagueness, his susceptibility to many interpretations, that Muir could become symbol and muse of the first generation of American environmental politics. He wrote travel narratives which centered on verbal portraits of landscapes, particularly those of the Sierra Nevada, with which he grew indelibly identified even in his lifetime. At reliable intervals, the prose breaks into soaring evocations of delight and a sense of revelation in nature’s beauty. Despite lacking theological and metaphysical structure, these passages consistently conveyed a cluster of ideas that, together, made up the core perspective of Romantic conservation. Everyday life was spilled out in instrumental activity and drab settings, which left the eyes bleary and the mind blunt.<sup>82</sup> In the most spectacular natural settings—mountain peaks, endless vistas, and sheer rock faces—something entirely different broke through in the mind. Previous Romantics would have

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78. Muir often referred to animals as “animal people” to emphasize their equal standing with his own species, but he also accepted the near-extinction of the American bison as progress. See MUIR, *supra* note 36, at 16-17 (describing “animal people”); *id.* at 361-62.

79. See DONALD WORSTER, *A PASSION FOR NATURE: THE LIFE OF JOHN MUIR* 160-61, 336-37 (2008).

80. See MUIR, *supra* note 36, at 131-36 (setting out Muir’s disappointment that the aged Emerson could not join him in the high mountains, suggesting that this represented the exhaustion of New England transcendentalism as a cultural force, and concluding with a recollection of his own visit to Emerson’s grave).

81. See WORSTER, *supra* note 79, at 276-332.

82. See, e.g., MUIR, *supra* note 36, at 1 (proposing outdoor recreation as a tonic for “tired, nerve-shaken, over-civilized people . . . [a]wakening from the stupefying effects of the vice of over-industry and the deadly apathy of luxury”).

called those places sublime, but the sensation Muir linked to them was free of the terror of earlier sublimes. Instead, it was a pure dose of wonder, awe, even ecstasy. This experience taught a moral lesson: it revealed that both world and mind were morally good, formed by harmonies that Muir frequently called “divine.” Encounters with nature’s most dramatic landscapes, Muir insisted, would restore the proper harmony and vitality of the mind and bring a feeling of fraternity with all living things.<sup>83</sup> This idea rested on a belief that he shared with his literary predecessors, notably Emerson and Wordsworth, that a single, benign ordering principle underlay all reality and expressed itself in the patterns of both world and mind.

The sensation was not new, of course, nor had it been altogether restricted to literary expression.<sup>84</sup> Muir’s widely read books and magazine articles, though, provided something new: a manual for experience of a certain type. Muir’s writing enacted a journey on foot over extreme and spectacular landscapes; a precise, appreciative, even reverent way of seeing the land as one moved across it; and a register of overwhelming yet exquisite emotional response, with a benign moral interpretation already latent in it. To read Muir was to learn to make that experience your own. Muir’s greatest contribution to the Sierra Club, the social movement that brought Romantic accounts of nature fully into public language, was as publicist of a new type of back-country tourism and a vocabulary to express its high points.

3. *A Romantic Social Movement: The Language of Experience in the Sierra Club*

Those who created the Sierra Club, as well as Muir’s admirers outside it, understood him as having inducted readers into a new experience of nature. In 1916, William Frederic Badè, an archeologist and scholar of Near Eastern religion at Berkeley, wrote a typical passage in a memorial issue of the *Sierra Club Bulletin* following Muir’s death. Counting Muir among “prophets and interpreters of nature,” he forecast: “Thousands and thousands, hereafter, who

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83. See *id.* at 74, 98-99 (promising readers “a multitude of still, small voices . . . directing you to look through all this transient, shifting show . . . into the truly substantial spiritual world” and “everything . . . hospitable and kind, as if planned for your pleasure, ministering to every want of body and soul”). For a summary of Muir’s thought, see WORSTER, *supra* note 79, at 5-10, 99-102, 366-431.

84. In 1851, L.H. Bunnell, a member of a federal military mission to punish California Indians who had resisted the incursions of gold miners, reported of entering Yosemite Valley: “As I looked, a peculiar exalted sensation seemed to fill my whole being, and I found myself in tears with emotion.” ALLIN, *supra* note 34, at 25.

go to the mountains, streams and cañons of California will choose to see them through the eyes of John Muir, and they will see more deeply because they see with his eyes.”<sup>85</sup> A year later, commenting on the posthumous appearance of a book drawn from his early journals, the *New York Times* reflected, “many who have sought a vision of truth beneath the surface of nature have found it through the eyes of John Muir.”<sup>86</sup> Even Muir’s honorary doctorate of laws from the University of California picked him out as “uniquely gifted to interpret unto other men [nature’s] mind and ways.”<sup>87</sup>

Those who adopted this view of nature made it the basis of a community and, eventually, a movement, in the Sierra Club. The Club was a crucible of public language, an early testing ground for a new way of describing the value of nature. Members used the *Sierra Club Bulletin* to develop and test this language. The *Bulletin*’s many accounts of journeys to the high Sierra echo Muir’s style and themes and set them—unlike Muir’s own, mostly solitary expeditions—within a mode of sociality defined by shared aesthetics. Marion Randall, an early and longtime member of the Club, wrote in 1905 that its expeditions restored participants for ordinary life by reconnecting them with morally educative beauty:

For a little while [on an outing] you have dwelt close to the heart of things . . . lived daylong amid the majesty of snowy ranges, and in the whispering silences of the forest you have thought to hear the voice of Him who “flies upon the wings of the wind.” And these things live with you . . . back in the working world, linger even until the growing year once more brings around the vacation days, and you are ready to turn to the hills again, whence comes, not only your help, but your strength, your inspiration.<sup>88</sup>

An account of an ascent of Mount Lyell describes “[h]ours pass[ing] like moments” in “this sacred spot.”<sup>89</sup> The worries and problems of everyday life in cities and suburbs fall away, and political division melts into childlike appreciation of the landscape. One group of college friends, by their own account ideological opponents in the low country (the author is a conservative

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85. William Frederic Badè, *To Higher Sierras*, 10 SIERRA CLUB BULL. 38, 40 (1916-1919).

86. *Notable Books in Brief Review: John Muir’s Account of His Historic Thousand-Mile Walk to the Gulf and Other Recent Publications*, N.Y. TIMES, Jan. 21, 1917, at BR 4.

87. John Muir, *Doctor of Laws, University of California*, 10 SIERRA CLUB BULL. 24 (1916-1919).

88. Marion Randall, *Some Aspects of a Sierra Club Outing*, 5 SIERRA CLUB BULL. 221, 227-28 (1904-1905).

89. Helen M. Gompertz, *A Tramp to Mt. Lyell*, 1 SIERRA CLUB BULL. 136, 141 (1893-1896).

congressional representative, one companion a sort of socialist), find that in the high Sierra “[t]he varnish of civilization was rubbed off, and the true strata of individual organism developed. . . . We . . . learned to interpret and love the ‘various language’ in which nature speaks to the children of men. . . . We were acolytes in the grand temple of the eternal.”<sup>90</sup>

The Sierra Club’s correspondents propagated a mode of experience and a language to match it. The articles were also guides for outdoor spiritual seekers, with detailed descriptions of routes, seasons, and appropriate gear. Aesthetic rapture became a familiar stage of the journey across spectacular landscapes. Drawing on Muir’s language, the movement inaugurated a way of experiencing the natural world, as well as a public language expressing that experience. The words in which they addressed one another both reinforced the shared experience and trained others to feel it themselves.

### C. *The New Conservation Politics: Romantics and Progressives*

#### 1. *The Sierra Club, Conservation, and “Materialism”*

Elite, professional, and middle-class reformers of the late nineteenth century, often labeled “Progressives,” argued that the citizens of industrial, democratic America had grown narrowly selfish, debasing themselves and the nation.<sup>91</sup> They condemned the spoils-driven and often corrupt politics of the

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90. John R. Glascock, *A California Outing*, 1 *SIERRA CLUB BULL.* 147, 161 (1893-1896).

91. See Oliver Wendell Holmes, Jr., *A Soldier’s Faith*, Address at Harvard University Graduation (May 30, 1895), reprinted in *SPEECHES BY OLIVER WENDELL HOLMES* 56 (1934) (lamenting the rise of materialism over heroic values); William James, *The Moral Equivalent of War*, in *MEMORIES AND STUDIES* 265 (1924) (praising heroic and warrior-like forms of motivation and declaring mere comfort and convenience intolerable as social goals); Theodore Roosevelt, *The New Nationalism*, Speech at Osawatomic (Aug. 31, 1910) [hereinafter Roosevelt, *The New Nationalism*], reprinted in *THE NEW NATIONALISM* 3 (1910) (arguing that the country needed a new civic spirit); Theodore Roosevelt, *The Strenuous Life*, Speech before the Hamilton Club (Apr. 10, 1899) [hereinafter Roosevelt, *The Strenuous Life*], reprinted in *THE STRENUOUS LIFE: ESSAYS AND ADDRESSES* 1 (1902) (warning that selfishness and lassitude threatened to sink the country into severe decline). It seems clear that at least some of this criticism reflected the reformist constituencies’ decline in civic and economic status and their wish to create a culture in which their values and cultural characteristics, their “refinement,” would attract respect. That is not to say, of course, that their reformist program was insincere, only that it expressed a complex interplay of interests and ideas, in which distinctions between the classes of motivation could only be approximate, as status-based interests made certain principles attractive, and those principles in turn helped constitute and reinforce status-based interests by articulating and justifying them. See RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYANT TO F.D.R.* 131-72 (1955) (on status politics and the origins of progressive ideas).

post-Civil War era and, in private life, what they saw as wasteful and exploitative individualism.<sup>92</sup> Progressives called for higher purposes in politics and in life generally.<sup>93</sup> They hoped to cultivate such purposes by elevating “the public interest,” as distinct from individual, class, or sectional interests, and designating national government, especially the executive branch, the special servant of that interest.<sup>94</sup> They regarded the expertise of professionals and scientists as particularly suited to the impersonal pursuit of public interest.<sup>95</sup>

These ideas were in part responses to the complexity of increasingly urban and industrial society, in which issues such as public health and the terms and conditions of employment invited systemic understanding and expert regulation.<sup>96</sup> Indeed, some Progressives adopted public-lands management as

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92. See GIFFORD PINCHOT, *THE FIGHT FOR CONSERVATION* (1910); Roosevelt, *The New Nationalism*, *supra* note 91. For more general introductions to the development, see SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT 1890-1920* (1979), which connects an account of Progressive commitments to natural resource regulation; HOFSTADTER, *supra* note 91, which argues in particular for the importance of status anxiety among the motives of Progressives; MORTON KELLER, *REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900-1933* (1990) [hereinafter KELLER, *REGULATING A NEW ECONOMY*], which surveys the motives and programmatic agendas of Progressives, with an emphasis on economic regulation; MORTON KELLER, *REGULATING A NEW SOCIETY: PUBLIC POLICY AND SOCIAL CHANGE IN AMERICA, 1900-1933* (1994) [hereinafter KELLER, *REGULATING A NEW SOCIETY*], which does the same; THOMAS K. McCRAW, *PROPHETS OF REGULATION* (1984), which uses portraits of Charles Francis Adams, Louis Brandeis, James Landis, and Alfred Kahn as touchstones in portraying the diversity and uniting concerns of Progressivism; and DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* (1998), which details the rise of Progressive thought with an emphasis on themes uniting British, Continental, and American reformers.
93. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 469-99 (1988) (describing the rise of reformism in the face of massive perceived and actual corruption).
94. See *id.* at 469-80 (discussing the rising idea of public interest); HAYS, *supra* note 92, at 261-76 (discussing the role of conservation in the Progressive agenda of a regulatory national state); KELLER, *REGULATING A NEW ECONOMY*, *supra* note 92, at 7-19 (discussing competing ideas of the nature of the industrial economy and the appropriate role of government in its management).
95. See, e.g., HAYS, *supra* note 92, at 261-76.
96. See RICHARD N.L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY 109-35* (2d ed. 2006) (discussing the role of public health activists in the development of the conservation movement); HAYS, *supra* note 92, at 176 (noting that a conservation “committee of 100” composed of prominent individuals in 1908 proposed a federal public health program as part of its agenda, and that the National Conservation Congress in 1909 adopted as its purpose “to seek to overcome waste in all natural, human, or moral forces” (internal quotation marks omitted)); CHARLES R. VAN HISE, *THE CONSERVATION OF NATURAL RESOURCES IN THE UNITED STATES* 359-79

a paradigm of rational, expertise-driven state action in the public interest,<sup>97</sup> drawing on conservation scientists' image of landscapes as complex systems, in which unregulated timber exploitation could cause erosion, downstream flooding, siltation, and forest collapse.<sup>98</sup> Such new understandings of both social and natural problems helped make Progressive responses seem inevitable.

The Progressives' empirical view of problems found support in their ideals of character and society. Conservationist Gifford Pinchot, President Theodore Roosevelt, and their allies believed that laissez-faire ideas taught selfishness and sapped civic energies. They set out to cultivate civic commitment, urging Americans to serve one another and future generations. They insisted that civic duty could be satisfying and dignifying, not an unwelcome burden.<sup>99</sup> The empirical and social-vision elements of Progressivism combined to support a

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(1910) (arguing for public-health measures, protective labor law, and eugenics as aspects of "the conservation of man"); Declaration of Principles, North American Conservation Congress (Feb. 23, 1909), *reprinted in* VAN HISE, *supra*, app. 2, at 385-93 (presenting Gifford Pinchot's organization's "public health" first among its priorities, ahead of forests, waters, and "lands").

97. See ANDREWS, *supra* note 96, at 136-38 (2d ed. 2006) (discussing conceptions of the public interest in the Progressive approach to conservation); HAYS, *supra* note 92, at 3-4, 122-27 (noting the centrality of the idea of the public interest in Progressive reformers' self-understanding and criticizing historians for adopting the idea uncritically); MCCRAW, *supra* note 92, at 302-05 (describing reformers' ideas of the goals of regulation and of the condition of an unregulated economy); RODGERS, *supra* note 92, at 1-93 (setting out the worldview of reformers); Gifford Pinchot, *Prosperity*, in *AMERICAN EARTH: ENVIRONMENTAL WRITING SINCE THOREAU* 173, 173-80 (Bill McKibben ed., 2008) (arguing that appropriate regulation and management of natural resources is essential to stopping destructive exploitation by individual users and instead serving long-term national interest); Theodore Roosevelt, First Annual Message to Congress (Dec. 3, 1901) [hereinafter Roosevelt, First Annual Message], available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29542> (stressing throughout the mutual consistency of all legitimate interests in a properly regulated economy); Roosevelt, *The New Nationalism*, *supra* note 91 (arguing that both economic regulation and management of natural resources must favor the public interest, not special interests, to secure progress and avert social conflict).
98. See GATES, *supra* note 34, at 548-49 (discussing early American ecologist George Perkins Marsh's influence); HAYS, *supra* note 92, at 5-26 (noting growing understanding of the relation between forest conservation and flood control); GEORGE PERKINS MARSH, *MAN AND NATURE* (David Lowenthal ed., Harvard Univ. Press 1965) (1864) (setting out complex effects of ecological interdependence).
99. See VAN HISE, *supra* note 96, at 378-79 (arguing that conservationism implies, and requires, putting the long-term success of humanity over one's own interests); James, *supra* note 91 (arguing for the importance of a view to long-term shared interests as necessary to both conservation and national success); Pinchot, *supra* note 97, at 179-80 (same); Roosevelt, *The New Nationalism*, *supra* note 91 (arguing for the importance and value of civic spirit); Roosevelt, *The Strenuous Life*, *supra* note 91 (same).

new idea of the public domain, as a permanent reserve of publicly managed federal land. Expert public management seemed both practically necessary to avoid waste and normatively appropriate as an exemplary act of government on behalf of the whole community.<sup>100</sup>

The early Sierra Club, with its largely professional and elite membership, was in part a branch of Progressive culture. The Club's members defined the aesthetic and spiritual values of nature by contrast with "materialism," which they joined other Progressives in denouncing. In a memorial for Muir, William Colby, the Club's first secretary, warned that "Muir will never be fully appreciated by those whose minds are filled with money getting and the sordid things of modern every-day life" and lamented the indifference of "those . . . engaged in making everything within reach 'dollarable.'"<sup>101</sup> Robert Underwood Johnson, editor of the *Progressive Century* magazine, opened his memorial to Muir by predicting, "Sometime, in the evolution of America, we shall throw off the two shackles that retard our progress as an artistic nation—philistinism and commercialism—and advance with freedom toward the love of beauty as a principle."<sup>102</sup> He forecast that Muir would be recognized as a prophet of that transformation.

The *Bulletin* suggests that the Club's members saw their high-minded dissent from "materialism" as essentially linked to the conservation politics that they pursued alongside their recreation. The minutes of an 1895 Club meeting set out a revealing discussion of the path-breaking proposal to create permanent national forests. Joseph Le Conte—Sierra explorer and Berkeley professor of geology—opened the meeting with an attack on "individualism . . . run mad."<sup>103</sup> He accused "individualism[']s" adherents of reducing all social endeavor to selfishness, "the maxim . . . that society and the government are made for the greatest good of the greatest number. True; but the greatest

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100. See HAYS, *supra* note 92, at 122-25 (arguing that by 1908, "the threads of resource policy had become interwoven in a single coherent approach," an ideal "new world which conscious purpose, science, and human reason could create out of the chaos of a laissez-faire economy," ushering in "[t]he Millennium . . . when humanity shall have learned to eliminate all useless waste. . . . to apply the common sense and scientific rules of efficiency to the care of body and mind and the labors of body and mind" as well as to the natural world (internal quotations omitted)); Pinchot, *supra* note 97, at 173-75 (arguing that "the real future of the Nation" depends on overcoming "waste in use" of all resources, natural and human).

101. William E. Colby, *John Muir—President of the Sierra Club*, 10 SIERRA CLUB BULL. 2, 2-3 (1916).

102. Robert Underwood Johnson, *John Muir as I Knew Him*, 10 SIERRA CLUB BULL. 9, 9 (1916).

103. Joseph Le Conte, *The National Parks and Forest Reservations*, Address Before the Sierra Club (Nov. 23, 1895), in 1 SIERRA CLUB BULL. 270 (1896).

number is Number One!”<sup>104</sup> This logical slide from utilitarianism to egoism expressed the ambivalence many Progressives, including early conservationists, felt about the utilitarian account of social life. On the one hand, they did not call it false: its axioms, that human interest was the compass of public policy and that each person must count alike, were the cornerstones of principled reformism and bulwarks against both traditional aristocracy and corrupt democracy. On the other, they doubted that utilitarian values could be self-sustaining. Without some higher civic or spiritual motive, placing human interests at the center of the moral calculus would invite unchecked selfishness.

For this reason, Club members believed, enlightened public policy depended on the personal enlightenment that they cultivated in their journeys to the High Sierra. Le Conte argued, “If we compare the cultured man with the uncultured man . . . the most striking difference” is that “the uncultured man is trying to live for the interests of the ‘now,’ but the cultured man—and in proportion as he is cultured—looks to the future as well as to the present.”<sup>105</sup> Le Conte identified this “cultured” outlook with recognition that individuals are part of a “social organism” that ties persons together across space and time, a central Progressive idea.<sup>106</sup> He concluded with a paean to scientific management: “[N]othing can save our timber land except complete reservation by the Government. Every particle of it that is yet left should be reserved . . . and used in a thoroughly rational way for legitimate uses only . . . removing only such as can be steadily replaced by fresh growth.”<sup>107</sup>

This path to expert management, as well as the utilitarian rationality that justified and guided it, ran through the moral and aesthetic revival that the Club’s members sought among themselves and throughout society.<sup>108</sup>

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104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Pinchot and other utilitarian reformers of the time also emphasized that conservationist public policy stood or fell with citizens’ commitment to the health and prosperity of future generations in the same polity. See Pinchot, *supra* note 97, at 173 (“This [marvelous] hopefulness of the American is, however, as short-sighted as it is intense.”); *id.* at 179–80 (“The vast possibilities of our great future will become realities only if we make ourselves, in a sense, responsible for that future.”); see also VAN HISE, *supra* note 96, at 379 (“Conservation means the greatest good to the greatest number—and that for the longest time.” (internal quotations omitted)).

## 2. *Conservation and the New Nationalism*

Conservation ideas were central to one of the major Progressive programs, Theodore Roosevelt's "new nationalism." Aimed at both moral and institutional reform, Roosevelt's project treated conservation as both a master-metaphor for wise governance and as a source of concrete policies for civic improvement. Roosevelt shared a worry with figures as various as Oliver Wendell Holmes and William James: that the achievements of modern life—security and prosperity—would erode the qualities of character that made such achievements possible in the first place. These included initiative, heroism, self-sacrifice, and a taste for danger and adventure.<sup>109</sup> Roosevelt believed that a society without these qualities would be demeaned, and he warned against a future of petty self-seeking and lassitude, in which the American nation would "rot by inches, [like China]." <sup>110</sup> He called for reinvigorated patriotism as a response to this decline and a solution to conflict between economic classes, which Roosevelt believed materialistic self-seeking promoted.<sup>111</sup> He warned that if such conflict prevailed, "tyranny and anarchy were sure to alternate" in a collapsed republic.<sup>112</sup> Much like the Sierra Club's mainly elite members, Roosevelt believed that utilitarian public policy was not self-sustaining but required support from the virtues of patriotism, boldness, and initiative.

Roosevelt devoted much attention to fostering these civic virtues. Several of his favored approaches centered on public lands. One was to promote shared cynosures of national imagination, projects and ideas that would make American identity stronger than sectional, class, or religious alternatives. This idea formed the heart of the patriotic "new nationalism." Roosevelt sometimes

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109. Holmes, *supra* note 91 (arguing that spiritual poverty was the result of a world of self-interest and prudence, without heroic acts of devotion and sacrifice); James, *supra* note 91 (arguing both versions—that a lack of heroic commitment is spiritually impoverishing and bad for the polity as a practical matter, while seeking to make the arguments compatible with pacifist reformism); Roosevelt, *The Strenuous Life*, *supra* note 91 (arguing that the country would decline, not least in the virility of its men and fertility of its women, if its self-interested citizens put their own concerns over national well-being and greatness).

110. Roosevelt, *The Strenuous Life*, *supra* note 91, at 6.

111. See Theodore Roosevelt, *Fellow-Feeling as a Political Factor*, *CENTURY*, Jan. 1900, reprinted in *THE STRENUOUS LIFE: ESSAYS AND ADDRESSES*, *supra* note 91, at 65, 74-75 ("[M]en are pitted against one another in accordance with the blind and selfish interests of the moment. Each is thus placed over against his neighbor in an attitude of greedy class hostility, which becomes the mainspring of his conduct, instead of each basing his political action upon . . . his own disinterested sense of devotion to the interests of the whole community as he sees them.").

112. *Id.* at 75.

proposed that war<sup>113</sup> and imperialism<sup>114</sup> could be unifying national missions. Conservation could also unite a divided polity. Land management for the “public interest,” in contrast to the wishes of the extractive industries, was a visible act of commonality transcending faction.<sup>115</sup> In other areas of policy, Roosevelt struggled mightily to portray Progressive regulation of the private economy as reconciling the interests of labor and capital in a higher public interest. The public lands seemed to present a far easier case. In declaring that “natural resources must be used for the benefit of all our people, and not monopolized for the benefit of the few,” Roosevelt could even call the ideal of reconciling economic interests in a regime of fair opportunity and fair reward, “a necessary result of the principle of conservation widely applied.”<sup>116</sup> Conservation was thus a set-piece of the ideal of a transcendent public interest pursued by national power, “set apart forever for the use and benefit of our people as a whole and not sacrificed to the short-sighted greed of a few.”<sup>117</sup> This thought seems to have motivated Roosevelt to declare, “Conservation is a great moral issue for it involves the patriotic duty of ensuring the safety and continuance of the nation.”<sup>118</sup>

Second, Roosevelt aimed to create settings where Americans could mingle and share projects across class and other divisions, developing patriotic “fellow-feeling.”<sup>119</sup> Forest reserves and parks created civic commons in which

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113. *Id.* at 66 (“The war with Spain was the most absolutely righteous foreign war in which any nation has engaged during the nineteenth century, and not the least of its many good features was the unity it brought about between the sons of the men who wore the blue and of those who wore the gray.”).

114. Roosevelt praised “the mighty lift that thrills ‘stern men with empires in their brains’” and scorned those who “shrink from seeing us do our share of the world’s work, by bringing order out of chaos in the great, fair tropic islands from which the valor of our soldiers and sailors has driven the Spanish flag.” Roosevelt, *The Strenuous Life*, *supra* note 91, at 7.

115. See HAYS, *supra* note 92, at 122-27 (setting out conservationists’ view that their program promoted a national interest in contrast to factional interests, such as those of capital and labor).

116. Roosevelt, *The New Nationalism*, *supra* note 91, at 21, 26.

117. Roosevelt, *First Annual Message*, *supra* note 97.

118. Roosevelt, *The New Nationalism*, *supra* note 91, at 22.

119. Roosevelt said,

The only way to avoid the growth of these evils is, so far as may be, to help in the creation of conditions which will permit mutual understanding and fellow-feeling between the members of the different classes. . . . if the men can be mixed together in some way that will loosen the class or caste bonds and put each on his merits as an individual man, there is certain to be a regrouping independent of caste lines.

Roosevelt, *supra* note 111, at 79-80. Even more important,

Americans could escape the class segregation that Roosevelt feared was especially pervasive in urban and industrial America<sup>120</sup>: they provided “free camping grounds for the ever-increasing numbers of men and women who have learned to find rest, health, and recreation in the splendid forests and flower-clad meadows of our mountains.”<sup>121</sup>

A third policy was to encourage vigorous character, the kind that would embrace challenge and overcome enervation and selfishness. Ways of making Americans vigorous ranged from spirit-rallying national projects to raising children (always “boys” for Roosevelt) into brave and energetic citizens.<sup>122</sup> Open lands were the ideal training ground for the masculine virtues that Roosevelt set against the lassitude that he associated with industrial-era democracy. He had remade himself as an adult to his own satisfaction by adventuring and ranching in the Dakotas, and he saw the greatest prospect for “a good American man” in “boys who live under such fortunate conditions that they have to do either a good deal of outdoor work or a good deal of what

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men who work together for the achievement of a common result in which they are intensely interested are very soon certain to disregard, and, indeed, to forget, the creed or race origin or antecedent social standing or class occupation of the man who is either their friend or their foe. They get down to the naked bed-rock of character and capacity.

*Id.* at 81.

120. [In] the larger cities . . . the conditions of life are so complicated that there has been an extreme differentiation and specialization in every species of occupation, whether of business or pleasure. The people of a certain degree of wealth and of a certain occupation may never come into any real contact with the people of another occupation, of another social standing. . . . This produces the thoroughly unhealthy belief that it is for the interest of one class as against another to have its class representatives dominant in public life.

*Id.* at 78.

121. *Id.*

122. In public writing and addresses, Roosevelt urged American parents to raise rugged and virtuous men. “If you are rich and are worth your salt, you will teach your sons that though they may have leisure, it is not to be spent in idleness . . . .” Roosevelt, *The Strenuous Life*, *supra* note 91.

Of course, what we have a right to expect of the American boy is that he shall turn out to be a good American man. . . . He must not be a coward or a weakling, a bully, a shirk, or a prig. He must work hard and play hard. He must be clean-minded and clean-lived, and able to hold his own under all circumstances and against all comers. It is only on these conditions that he will grow into the kind of American man of whom America can be really proud.

Theodore Roosevelt, *What We Can Expect of the American Boy*, ST. NICHOLAS: AN ILLUSTRATED MAGAZINE FOR YOUNG FOLKS, May 1900, at 571, 571 [hereinafter Roosevelt, *What We Can Expect*].

might be called natural outdoor play.”<sup>123</sup> The best assurance that the strenuous life would remain available and attractive was to keep open lands where all Americans could test themselves against the elements.

The strands of environmental public language that emerged in the Sierra Club and Roosevelt’s new nationalism were both like and unlike each other. Adherents to both rejected what they saw as the materialism, selfish individualism, and lack of high principle in American life at the close of the nineteenth century. They also shared an ambivalent relationship to utilitarian public policy, seeing it as on the one hand essential for conservation of public lands, but on the other hand deeply implicated in the same values they decried. Most pointedly, they saw utilitarian policy as unable to produce or sustain the commitments necessary for its own political viability—a view that was of a piece with their conviction that higher values were necessary to preserve and advance American nationhood. Both looked to the natural world, and the public lands in particular, as a source of those higher values.

Here the two strands diverged. In Roosevelt’s nationalism, the American landscape contributed to a this-worldly project of civic virtue, promoting deeper engagement in the concrete projects of national life. In the language that Sierra Club members developed and propagated, encounters with the natural world freed the mind from transient, mundane entanglements in favor of the other-worldly indifference that was typical of Muir’s attitude to political reform outside his immediate concerns. The high-country pilgrim returned to work and city renewed, but the transformation ultimately sought was inward, and political engagement was mainly instrumental to preserving that possibility by preserving beautiful places. The new nationalism was spiritually conservative, basically instrumental in its view of nature, and enthusiastically engaged in the politics of institution building and reform. The Club’s way of meeting nature was spiritually radical, inclined to suggest that nature had noninstrumental value, and, outside of the specific problems of lands preservation, politically vague. The two approaches were unmistakably products of the same era and overlapping milieus. Roosevelt, a sometimes brilliant politician, sensed as much when he recruited Muir for a two-man Yosemite expedition, tying his own persona as a progressive civic prophet to that of the prophet of American nature.<sup>124</sup> They produced, however, distinct ways for Americans to understand and dispute their relation to the natural world: as civic and utilitarian *res publica* and as a domesticated sublime, an accessible portion of divinity in an otherwise fallen world.

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123. Roosevelt, *What We Can Expect*, *supra* note 122, at 572.

124. See WORSTER, *supra* note 79, at 276-331.

**III. WILDERNESS: FROM CONSERVATION TO ENVIRONMENTALISM**

The themes and episodes discussed in the last Part are conventionally described as “conservationist,” in contrast to the “environmentalism” that developed in the 1960s and inspired statutes such as the National Environmental Policy Act, Clean Air Act, and Clean Water Act.<sup>125</sup> It is true that the 1960s brought a new set of themes to the heart of public engagement with the natural world: an “ecological” awareness of natural and human phenomena as pervasively interconnected; concern with the public-health effects of pollution; and an emphasis on the value of nature as such, not restricted to spectacular places or charismatic species.<sup>126</sup> Because of its sudden appearance and novelty, some commentators have called environmentalism “a movement without a history,” a characterization that lends support to suspicion of superficiality and faddishness.<sup>127</sup> Others aptly emphasize environmentalism’s roots in earlier public-health and good-government campaigns such as those of the League of Women Voters, but fail to account for its distinctiveness.<sup>128</sup>

The argument of this Part is that the wilderness movement formed an essential and underappreciated bridge between the two eras. This network of outdoor enthusiasts and professional conservationists, centered in the Wilderness Society and including Aldo Leopold, author of *A Sand County Almanac*, worked mainly to preserve large tracts of undeveloped public land. In

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125. See ANDREWS, *supra* note 96, at 201-26 (discussing “the rise of modern environmentalism” in the 1960s and 1970s, in contrast to earlier modes of conservation); SAMUEL P. HAYS, *BEAUTY, HEALTH, AND PERMANENCE: ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955-1985*, at 13-39 (1987) (detailing a transition “from conservation to environment”); cf. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW 47-54* (2004) (noting the conventional contrast and arguing that the role of public-health activists in both movements forms a continuity that somewhat confounds the distinction).

126. See ROBERT GOTTLIEB, *FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT 81-114* (1993) (locating the roots of modern political environmentalism in “the search for a new politics” of awareness and interconnection); HAYS, *supra* note 125, at 527-43 (discussing the transformation of new environmental values); SPETH, *supra* note 10, at 199-216 (arguing that this change represents the beginning of an unfinished revolution in human values).

127. GOTTLIEB, *supra* note 126, at 113 (“Ultimately, the environmental issue and the newly defined environmental movement was [sic] afforded instant recognition by a media suddenly discovering the issue for the first time. Environmentalism became a movement without a history, with an amorphous social base . . .”). *But see* LAZARUS, *supra* note 125, at 49 (contesting the claim, but on thinner grounds than argued for in this Article).

128. See LAZARUS, *supra* note 125, at 49-52. On the League of Women Voters in particular, see LOUISE M. YOUNG, *IN THE PUBLIC INTEREST: THE LEAGUE OF WOMEN VOTERS, 1920-1970*, at 174-77 (1989) (detailing the League’s involvement in clean-water advocacy).

doing so, they shaped new arguments for the special value of that land and, in time, for the value of the natural world as such. Beginning as a purifying offshoot of public-lands efforts such as the Sierra Club's, the Wilderness Society became an incubator of public language that entered the political mainstream in the 1960s, first in debates over wilderness preservation, then in the larger rise of environmentalism. Although by no means the whole story, its bridging role reveals some of environmentalism's allegedly missing history and highlights the interaction of continuity and innovation in environmental language across the twentieth century.

At the outset, wilderness advocates made arguments primarily from the point of view of utilitarian resource management and, awkwardly related, liberal perfectionism. The initial arguments they offered were essentially borrowed from those developed around national parks and other accessible recreational spaces: that they would invigorate the body and relieve the mind. But as these arguments came to seem like special pleading for elite tastes, or simply ill-suited to vindicating large tracts of inaccessible space, wilderness advocates began to develop new accounts of the moral significance and educative power of nature. Instead of another version of spectacular Yosemite, wilderness came to be a synecdoche for nature itself, in the full range of its processes.

In this argument, nature invited a distinctive consciousness: neither the extreme spiritual elevation of the sublime nor the simple restfulness of the beautiful (aesthetic categories which Muir and others had confounded in their case for the parks),<sup>129</sup> but ecological awareness, knowledge of one's place in schemes of interconnection and interdependence. Although premised on a

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129. Olmsted was of course well aware of the distinction and described Yosemite as representing a "union of the deepest sublimity with the deepest beauty of nature," a claim he supported with descriptions of soaring cliffs and plunging waterfalls alongside gentle streams and meadows. See FREDERICK LAW OLMSTED, *THE YOSEMITE VALLEY AND THE MARIPOSA BIG TREE GROVE* (1865), reprinted in *AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS*, at 12 (Larry M. Dilsaver ed., 1994). It is less clear whether Muir was in firm control of the theoretical distinction, but he made just the same sort of claims as Olmsted, writing of Yosemite that "[n]owhere will you see the majestic operations of nature more clearly revealed beside the frailest, most gentle and peaceful things," MUIR, *supra* note 36, at 78, and that, while "[n]early all the park is a profound solitude," it was also "full of charming company . . . a place of peace and safety," *id.* The radically benign and reassuring character of the aesthetic and emotional experience that Muir associated with nature makes it fair to say, I think, that he drew the sting of fear from sublimity. That spur of feeling was so essential to the founding accounts of the sublime that, if there is any integrity to those accounts, one might wonder whether Muir's concern to divinize nature in a thoroughly human-friendly form did not leave it a feeble God. Perhaps it was this—the power of a wild experience to induce disruption, novelty, and fear—that wilderness advocates sought in *their* wild places, which Muir's casual pilgrims could not enter.

physical and conceptual boundary between human and natural activity, wilderness came to stand for, and wilderness advocates pioneered the argument for, integration of ecological awareness into human consciousness.

Much of the Wilderness Society's early advocacy grew out of, and sought to continue, both Progressive and Romantic strands of earlier conservation efforts. Wilderness advocates ascribed to wild places many of the experiential values that Sierra Club members associated with the most spectacular landscapes. At the same time, they followed Progressives in seeking to integrate these values into a broadly utilitarian account of the preconditions of mental health and personal development in industrial modernity. This synthesis did not seem entirely satisfactory even to its proponents. By 1948, Leopold impatiently rejected utilitarian defenses of preservation as evasions that obscured the real commitments of the movement: the idea of nature's intrinsic value and a human obligation to preserve it that went well beyond instrumental considerations.<sup>130</sup> Debates memorialized in *Living Wilderness*, the journal of the Wilderness Society, suggest that Leopold's judgment arose from a larger conversation about nature's value and its place in public language. By 1960, when the Wilderness Society was at the heart of the multi-year effort to write wilderness conservation into federal statutes (culminating in the 1964 Wilderness Act), a view akin to Leopold's had come to the fore. Advocates, including senators, emphasized the spiritual and aesthetic significance of wild nature, contending that knowledge of the undisturbed natural order had restorative power for a complex and confused society. The politics of wilderness incubated a view of nature's importance that would come to the center of environmental language in the later 1960s and afterward.

### A. *From Muir's Wilderness to the Wilderness Society*

#### 1. *Thoreau's Ambiguity and Muir's Ambivalence*

John Muir's 1901 classic, *Our National Parks*, was organized around two Sierra Club values that soon came to seem mutually contradictory: preservation of beautiful places and public access to them for recreation. The

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130. See ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 246 (Ballantine Books 1970) (1949) ("No important change in ethics was ever accomplished without an internal change in our intellectual emphasis, loyalties, affections, and convictions."); *id.* at 251 ("[A] system of conservation based solely on economic self-interest . . . tends to ignore, and thus eventually to eliminate, many elements in the land community that lack commercial value, but that are (as far as we know) essential to its healthy functioning.").

book promised readers a “profound solitude . . . full of God’s thoughts,”<sup>131</sup> and assured them that thanks to highways and railroads, “in a few minutes you will find yourself in the midst of . . . the best care-killing scenery on the continent.”<sup>132</sup> Muir’s was already a house divided.

There was always ambiguity in Thoreau’s “in wildness is the preservation of the world,”<sup>133</sup> a phrase included in an essay concerned with a quality of mind and imagination available anywhere, and only symbolically connected with literal wilderness.<sup>134</sup> Writing from Glacier Bay, Alaska, in 1890, Muir committed a semiplagiarizing equivocation that perfectly expressed the relation of his writing to Thoreau’s ideas: “In God’s wildness lies the hope of the world—the great fresh unblighted, unredeemed wilderness.”<sup>135</sup> Muir and the movement of rugged aesthetes that followed him located Thoreau’s spiritual principle uniquely in the spectacular places of the natural world. In the opening passage of *Our National Parks*, Muir identified the insight of the age as this:

131. MUIR, *supra* note 36, at 78.

132. *Id.* at 17. Accessibility was a major theme of the book. Muir wrote, “All the Western mountains are still rich in wildness, and by means of good roads are being brought nearer civilization every year.” *Id.* at 2. He promised that the best destinations were “easily and quickly reached by the Great Northern Railroad,” *id.* at 17, and noted of Yosemite’s appeal that “it is . . . the most accessible portion” of the Sierra, connected to San Francisco by railways and roads that Muir listed for the tourist’s convenience, *id.* at 79.

133. HENRY DAVID THOREAU, *Walking, reprinted in WALDEN AND OTHER WRITINGS*, *supra* note 77, at 627, 644.

134. See *id.* at 644-63, in which Thoreau presents “the wild” as a literary principle associated with Shakespeare and Homer, *id.* at 649; as the pathos of mythology, *id.* at 649-51; as a principle of virtue (“all good things are wild and free”), *id.* at 652; as childlike playfulness, *id.* at 656; and as an epistemic principle connected with the revelation of one’s true nature by intuition and symbol rather than proposition claim, *id.* at 657. It seems unavoidable that in these passages, we are in the same terrain as the closing passages of *Walden*, HENRY DAVID THOREAU, *Walden, reprinted in WALDEN AND OTHER WRITING*, *supra* note 77, at 3, 300-12, in which Thoreau makes clear his allegiance to the Transcendentalist principle that exploring the world is a way of exploring one’s self, and nature a master metaphor for consciousness, while both nature and conscious body put forth a universal design. On this principle, see the discussion of EMERSON, *supra* note 74. All this being said, Thoreau did call for the conservation of primitive forests in each New England town, a proposal that does not seem to have been metaphoric. See Henry David Thoreau, *Huckleberries*, in *AMERICAN EARTH* 26, 35 (Bill McKibbin ed., 2008) (“I think that each town should have a park, or rather a primitive forest, of five hundred or a thousand acres, either in one body or several—where a stick should never be cut for fuel—nor for the navy, nor to make wagons, but stand and decay for higher uses—a common possession forever, for instruction and recreation.”). Thoreau wanted to preserve access to the symbol of a “wild” quality of mind that he believed inhered in relatively undisturbed natural areas.

135. WORSTER, *supra* note 79, at 319.

“that wildness is a necessity;”<sup>136</sup> but his concern, far from Thoreau’s conception of wildness, was with the most dramatic landscapes.<sup>137</sup>

Securing public opportunity to experience nature’s spectacular places was a major goal of parks management, an undertaking that seemed to unite Romantic goals with Progressive technique. In the 1920s, however, preservationists’ very success at persuading Americans of the value of encounters with nature seemed to threaten the future integrity, even the possibility, of those encounters. Wealth and mobility, especially the rise of the car, were creating a middle-class tourist culture eager to follow Muir’s trail and demanding roads to speed the journey. The National Park Service, alert to the benefits of increased budgets, was generally eager to comply.<sup>138</sup> The perceived overcrowding and commercial degradation that followed inspired the founders of the Wilderness Society to advocate a new class of preservation: roadless lands, free of built structures, and substantially unaffected by human activity.<sup>139</sup>

136. MUIR, *supra* note 36, at 1.

137. Suggesting a capacity for subtler thought than his writings usually expressed, Muir paused to note,

To the sane and free it will hardly seem necessary to cross the continent in search of wild beauty, however easy the way, for they find it in abundance wherever they chance to be. Like Thoreau they see forests in orchards and patches of huckleberry brush, and oceans in ponds and drops of dew. Few in these hot, dim, strenuous times are quite sane or free . . .

*Id.* at 2-3.

138. See ALLIN, *supra* note 34, at 60-68 (describing both growing tourist pressure on parks and interservice rivalry for funds and land); David Gerard, *The Origins of the Federal Wilderness System*, in POLITICAL ENVIRONMENTALISM: GOING BEHIND THE GREEN CURTAIN 211 (Terry L. Anderson ed., 2000) (tracing the competition for funding between the National Parks Service and the Forest Service through the early and middle decades of the twentieth century).

139. As Bob Marshall, a founder and icon of the Wilderness Society, put it in 1930:

I shall use the word *wilderness* to denote a region which contains no permanent inhabitants, possesses no possibility of conveyance by any mechanical means and is sufficiently spacious that a person in crossing it must have the experience of sleeping out. The dominant attributes of such an area are: first, that it requires any one who exists in it to depend exclusively on his own effort for survival; and second, that it preserves as nearly as possible the primitive environment. This means that all roads, power transportation and settlements are barred. But trails and temporary shelters, which were common long before the advent of the white race, are entirely permissible.

Robert Marshall, *The Problem of the Wilderness*, 30 SCI. MONTHLY 141, 141 (1930).

## 2. *The Wilderness Society and Its Early Arguments*

The organized response began in January 1935 with the creation of the Wilderness Society and, later in the year, the appearance of its journal, *Living Wilderness*.<sup>140</sup> The Society's platform defined wilderness as "the environment of solitude" and designated it "a natural mental resource . . . a public utility . . . [and] a human need rather than a luxury and plaything."<sup>141</sup> The value of solitude was distinct from, and sometimes incompatible with, the tourism that had come to define use of national parks: "scenery and solitude are intrinsically separate things . . . the motorist is entitled to his full share of scenery, but . . . motorway and solitude together constitute a contradiction" and car-accessible scenic areas, no matter how desirable, "should not be confused in mental conception or administration with those reserved for the wilderness."<sup>142</sup> Absent a clear definition and constituency, wilderness "is being sacrificed to the mechanical invasion in its various killing forms."<sup>143</sup>

Early efforts to establish wilderness as a viable category in public language were of a piece with conservationist precedents. Aldo Leopold, writing in early issues of *Living Wilderness*, described the wilderness idea as Muir had parks tourism: as an achievement of a mobile, prosperous, and scientific society. Unlike pioneers, he noted, "we can get in and out of [the wild]," making wilderness one of two terms in an "alternation of sociality and solitude."<sup>144</sup> Early Wilderness Society arguments were attempts, perhaps paradoxical, to integrate the somewhat rarefied attachment to wild-lands solitude into the utilitarian vocabulary of public-lands management. What sort of "human need," as the Society's platform put it, did the "mental natural resource" of wilderness solitude answer, and was it really a general need, or the eccentricity of a particular class? Bob Marshall, who cofounded the Wilderness Society and, as the Forest Service's Chief of the Division of Recreation and Lands,

140. The organization described itself as responding to "an emergency in conservation." *A Summons To Save the Wilderness*, LIVING WILDERNESS, Sept. 1935, at 1.

141. *Id.* at 2.

142. *Id.*

143. *Id.*

144. Aldo Leopold, *Wilderness Values*, LIVING WILDERNESS, Mar. 1942, at 24-25. Leopold went on to call the "value inherent in contrasting environments . . . too obvious to need discussion" and to praise "the rich contrasts between wilderness and city life" in passages showing a basic embrace of the transient encounter with nature as especially valuable and restorative. *Id.* at 24. Leopold also noted that awareness of scarcity had increased appreciation of wilderness and argued that deepened scientific understanding of nature had the same effect: "we can (if we take the pains) perceive a little of its inner workings." *Id.*

wrote the 1940 wilderness regulations that provided the operational foundation of the 1964 Wilderness Act, wrestled with these questions in a 1930 *Scientific Monthly* essay, *The Problem of the Wilderness*.<sup>145</sup> The result is an unintended *reductio* of the conceit that the Wilderness Society was engaged in an essentially utilitarian enterprise. Marshall opened by paying obeisance to utilitarian management, proposing to “balanc[e] the total happiness” of preservation against that of development.<sup>146</sup> He then offered a synopsis of wilderness values, sorting them into three sets: physical fitness and challenge, mental rest and restoration, and aesthetics.<sup>147</sup> Marshall’s aesthetic category included sublimity and, above all, ravishment by beauty.<sup>148</sup> The essay presents the civic values of Roosevelt, and the aesthetics of a Muir more intense and mystical than Muir himself, as ostensibly representing denominations of utilitarian currency.

The problem was not really that the Wilderness Society lacked a neat utilitarian calculus, for that had been true of all conservation that went beyond economic considerations. The problem, rather, was political. As Marshall conceded, most Americans were unmoved by the strenuous solitude that wilderness devotees deemed uniquely important, and many lacked the health or means to travel on foot over wild lands.<sup>149</sup> What could be the basis for a claim on millions of acres of public land by a fragment of a minority? The utilitarian argument was an attempt to get around this problem by way of an authoritative public policy discourse. In this vein, Marshall made two arguments: that wilderness devotees took an enormous quantum of satisfaction from their expeditions, swamping competing considerations; and, abandoning any consistent utilitarianism, that, at least in this case, government should provide the resources that a minority found necessary to fulfillment, on account of a general right to self-development and expression.<sup>150</sup>

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145. Marshall, *supra* note 139.

146. *Id.* at 142.

147. *Id.*

148. The purely esthetic observer has for the moment forgotten his own soul; he has only one sensation left and that is exquisiteness. In the wilderness, with its entire freedom from the manifestations of human will, that perfect objectivity which is essential for pure esthetic rapture can probably be achieved more readily than among any other forms of beauty.

*Id.* at 145.

149. *See id.* at 146.

150. “Such are the differences among human beings in their sources of pleasure, that unless there is a corresponding diversity in their modes of life, they neither obtain their fair share of happiness, nor grow up to the mental, moral and esthetic stature of which their nature is capable. Why then should tolerance extend only to tastes and modes of life which extort acquiescence by the multitude of their adherents?”

These were unavailing utilitarian arguments. Indeed, they were not really utilitarian arguments at all. Behind both of Marshall's claims lurked the argument that wilderness values were not just the pleasures of some, but *higher* satisfactions that deserved particular support. Candidly elitist expressions of the same attitude sometimes appeared in *Living Wilderness*.<sup>151</sup> At the same time, however, the Wilderness Society became the center of an effort to go beyond both utilitarian tropes and elitism, toward a defense of wilderness with broader appeal. This aim pressed the Wilderness Society toward the question of how nature as such matters, or might.

### 3. *The Value of Nature as Such*

A self-questioning and experimental conversation within the wilderness society moved its arguments from vindicating the tastes of wilderness enthusiasts to making the case that nature as such was morally important and educative. A central figure in that conversation was Howard Zahniser, the longtime editor of *Living Wilderness*, whose importance in these developments has been eclipsed by the reputation of Aldo Leopold. In the winter of 1947 to 1948, Zahniser opened *Living Wilderness* with an exchange between himself and Frederick Baker, a forestry professor at the University of California, Berkeley, who had written Zahniser a letter accusing wilderness advocates of "snobbery."<sup>152</sup> Zahniser denied the charge and recounted the Society's utilitarian arguments, insisting on the "research values" that wilderness served and the "relief and inspiration" that it provided.<sup>153</sup> Baker responded, in effect,

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It is of the utmost importance to concede the right of happiness also to people who find their delight in unaccustomed ways.

*Id.* at 147 (quoting JOHN STUART MILL, *ON LIBERTY* 40 (Longman's, Green, & Co. 1921) (1859)).

151. The journal published as an essay a letter from a reader who warned,

We can not afford to risk destroying our wilderness by encouraging a flocking thereto of a multitude, only a small portion of whom would really enjoy it because it *is* a wilderness. These would be just as happy in more accessible recreation places. . . . Were the multitudes turned loose in primitive areas . . . we would find many of them failing to receive what the wilderness has to offer, though they would undoubtedly enjoy themselves well enough. . . . We do not with special emphasis urge people to visit our art galleries, our libraries or similar places.

Olaus Maurie, Letter, *Wilderness Is for Those Who Appreciate*, *LIVING WILDERNESS*, July 1940, at 5, 5.

152. Frederick S. Baker & Howard Zahniser, *We Certainly Need a Sound Philosophy: An Exchange of Letters*, *LIVING WILDERNESS*, Winter 1947-1948, at 1, 1.
153. *Id.* at 2.

that he considered wilderness a kind of fetish, a shortcut to spiritual experience for those who could find it only *in extremis*.<sup>154</sup>

Zahniser then changed tack and made the following claim for the benefit of an encounter with literal wilderness: “many [visitors to wilderness] . . . experience a better understanding of themselves in relation to the whole community of life on the earth and rather earnestly compare their civilized living with natural realities—to the improvement of their civilization.”<sup>155</sup> This was not an instrumental argument, except in the broadest sense, in which enlightenment counts as a human interest. Nor was it the perfectionist account of an eccentric elite. Pressed past more conventional utilitarian arguments, Zahniser made a new type of claim for the morally educative effect of ecological awareness. It is revealing that Zahniser set this progression of argument in the opening pages of the Wilderness Society’s main public vehicle. He seems to have regarded it as an important moment in the organization’s advocacy for a new conception of preservation.

Zahniser’s argument was close to the one Aldo Leopold advanced two years later in the posthumous *Sand County Almanac*, which concluded in favor of the power of outdoor experience to cultivate “perception,” advancing the “job . . . of building receptivity into the still unlovely human mind.”<sup>156</sup> The receptive mind had been Muir’s goal, also, but in the Wilderness Society a new emphasis arose: less on responding rapturously to the intermingled beauty and sublimity of extraordinary places, such as Yosemite, than on apprehending the complex, interdependent character of natural systems and seeing oneself as integrated into them.<sup>157</sup> Although he did not finish the book before his sudden death, Leopold’s arguments coalesce into something like this: we can love nature because it is intelligible to us, formed out of order that we can understand ever more richly; at the same time, it awes us because it is always more complex, older, and stranger than we can understand.<sup>158</sup> Expanded knowledge and practiced attention enrich both parts of this experience, deepening both the understanding of the known and the contrasting apprehension of the

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154. *Id.* at 3.

155. *Id.* at 4.

156. LEOPOLD, *supra* note 130, at 295.

157. *See id.* at 158–59 (describing feeling a sense of wonder at a partly unknowable world); *id.* at 188–98 (arguing for ecology as a new way of thinking and seeing); *id.* at 201–02 (urging a combination of curiosity and affection as the emotional basis of a land ethic).

158. One exemplary passage, in a book full of praise for knowledge, curiosity, and abiding mystery, is Leopold’s recommendation to the reader to “sit quietly and listen for a wolf to howl, and think hard of everything you have seen and tried to understand . . . [as a way to] hear it—a vast pulsing harmony . . .” *Id.* at 158.

unknown. The world is a web of knowable relations set amid mystery, and it repays attention with deepened appreciation of both qualities. This is the formulation that the Wilderness Society's spokespersons drew out of their struggle to find a language for the value of nature as such.

Seeing Leopold in the context of the Wilderness Society debate in which he participated illuminates the real character of his work. He was not, as he is sometimes remembered, a literary prophet in the line of Thoreau and Muir (and we have already seen that Muir must be understood as a publicist and movement instigator), but a participant in the debate of a limited public, the network of wilderness advocates who together tried to create a public environmental language for a new preservation agenda.

*B. The Debate on the 1964 Wilderness Act*

The 1964 Wilderness Act set in motion a process by which about 107 million acres of federal public land to date have entered a new statutory category of wilderness, one very close to the formula Bob Marshall set out shortly before founding the Wilderness Society, and which the Society embraced in the inaugural issue of *Living Wilderness*: roadless areas of at least five thousand acres, substantially unaffected by human activity, in which motorized transport and commercial activity are prohibited.<sup>159</sup> The statute's

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159. The statute sets out the following purposes: "to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas . . . , leaving no lands designated for preservation and protection in their natural condition . . . ." 16 U.S.C. § 1131(a) (2006). Designated public lands shall be "administered for the use and enjoyment of the American people . . . as wilderness, and so as to provide for . . . the preservation of their wilderness character . . . ." *Id.* It defines a wilderness as being,

in contrast with those areas where man and his own works dominate the landscape, . . . an area where the earth and its community of life are untrammelled by man, . . . . an area of underdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, . . . which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

*Id.* § 1131(c). Note particularly the emphasis on "solitude," which the Wilderness Society from the beginning had identified as a key value, see *The Wilderness Society Platform, LIVING WILDERNESS*, Sept. 1935, at 2, 2, and the emphasis on the integrity, or apparent integrity, of natural systems "untrammelled" by human activity.

aims tracked the agenda of the Wilderness Society: its announced purpose was “to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States . . . , leaving no lands designated for preservation and protection in their natural condition . . . .”<sup>160</sup> Its definition of “wilderness” included “an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain,” and that “has outstanding opportunities for solitude or a primitive and unconfined type of recreation.”<sup>161</sup> That should be no surprise: the legislation was strongly influenced by Howard Zahniser, whose case for the urgency of preservation persuaded Senator Hubert Humphrey to become the bill’s lead sponsor in its early versions.<sup>162</sup>

The 1964 Act emerged from eight years of congressional wrangling in which pro-wilderness Senators drew on the arguments that Zahniser and other Wilderness Society figures had developed in their internal debates. Senators introduced paradigms of this language into the *Congressional Record*. One key essay, Zahniser’s 1955 *Our World and Its Wilderness* asserted that, through wilderness, Americans were “keeping ourselves in touch with true reality, the fundamental reality of the universe” and “our primeval origin, our natural home.”<sup>163</sup> Contact with this reality, Zahniser argued, underlay an ecological spirituality: recognition of the natural world as a site of intrinsic value, from which a part of the meaning of human life derives, and which we risk obliterating if we assert instrumental mastery over all things.<sup>164</sup> Zahniser argued that “access to wilderness” upheld “the humility to see ourselves truly as the dependent members of this great community of all life” and thereby “continu[ed] hope for the survival of our culture.”<sup>165</sup> The argument about

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160. 16 U.S.C. § 1131(a).

161. *Id.* § 1131(c).

162. See ALLIN, *supra* note 34, at 104-06. Zahniser’s writing, *The Need for Wilderness Areas*, directly inspired Humphrey’s decision to introduce wilderness legislation in 1956, following the lines of Zahniser’s proposal, which was roughly that of the Society’s program. Humphrey brought other organizations into the process, including the Sierra Club, the National Wildlife Federation, the National Parks Association, and the Council of Conservationists, among others. See *id.* at 105.

163. 107 CONG. REC. 18,356 (1961).

164. See *id.* (“In . . . unmodified wilderness . . . we not only can seek relief from the stress and strain of our civilized living but can seek also that true understanding of our past, ourselves, and our world, which will enable us to enjoy the conveniences and liberties of our urbanized, industrialized, mechanized civilization—and yet not sacrifice an awareness of our human existence as spiritual creatures nurtured and sustained by and from the great community of life on this earth.”).

165. *Id.*

cultural survival was a two-pronged thing and would remain that for decades. It referred on the one hand to the alleged spiritual threat of a world fully mastered, made flat by categorical obeisance to human will.<sup>166</sup> On the other hand, Zahniser claimed, “[a]s a species, . . . we actually run a risk of annihilation if we forget conservation”; and wilderness preservation, with the relinquishment of mastery that it embodied, was a lesson in “a sense of ourselves as a responsible part of a continuing community of life.”<sup>167</sup>

Participants in the Senate debate sounded the same themes in their own voices. Wayne Morse of Oregon announced that “one of the soundest reasons for the support of the wilderness bill is from the standpoint of what it will do for the spiritual needs of Americans” and echoed the Romantic-religious language of the early Sierra Club:

[Y]ou cannot go into the canyons, . . . through the primeval forests, you cannot associate with the grandeur of this great heritage which God Almighty has given the American people, and not come out of such a trip a better man or a better woman for having come that close to the spirit of the Creator himself.<sup>168</sup>

Morse even claimed, in a register of personal testimony, that primeval nature outdid organized religion as a path to spiritual insight. Recalling a visit to virgin forest, he reflected, “one knew that we were closer to the Almighty in that natural cathedral than probably ever again we would be in any artificial cathedral, . . . because we stood in God’s cathedral, in the natural beauty of that forest.”<sup>169</sup> In the language of Romantic epiphany that the Sierra Club milieu had perfected as a mode of moral insight, Morse ascribed his confident support

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166. In this spirit, Zahniser quoted Thoreau’s assertion that “we require that all things be mysterious and unexplorable, that land and sea be infinitely wild, unsurveyed, and unfathomed by us because unfathomable. . . . We need to witness our own limits transgressed, and some life pasturing freely where we never wander.” *Id.* (quoting HENRY D. THOREAU, *WALDEN OR LIFE IN THE WOODS* 333 (1899)) (internal quotation marks omitted).

167. *Id.* Zahniser continued,

From the wilderness we truly gain this sense and thus in wilderness preservation we see a key to all our conservation problems. From our contact with it and its continuing influence, comes the understanding to deal wisely with all the resources of the earth which we share now, but which will also be the need of those who come after us.

*Id.*

168. *Id.* at 18,353 (statement of Sen. Morse).

169. *Id.*

of the Wilderness Act to such experience and suggested that opponents would vote differently had they shared his experience.<sup>170</sup> Frank Church of Idaho, too, adopted the Wilderness Society version of Sierra Club language, praising “the spiritual values, the enrichment that comes from the solitude to be found in the wilderness.”<sup>171</sup> Paul Douglas of Illinois declared, “Some people may laugh, but beauty is as much a part of life as drinking water,”<sup>172</sup> and Church foreshadowed the bleak mood that would enter environmental public language in the next decade, warning, “without wilderness this country will become a cage.”<sup>173</sup>

These debates show the full emergence of a public language pioneered in voluntary associations such as the Sierra Club and which, in earlier decades, activists had struggled to shoehorn into the categories of utilitarian resource management. In these passages, the modes of experience that turn-of-the-century outdoor acolytes explored in their outings and publications have become public bases for normative claims, independent of nature’s useful power to produce virtuous citizens or return refreshed laborers to their jobs at the close of vacation. These speeches are also less beholden than earlier arguments to the tortuous wrestling with the status of subjective and idiosyncratic values that marked the writing of Bob Marshall and early issues of *Living Wilderness*.<sup>174</sup> Instead, there is a tendency here to announce wilderness

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170. If I had ever had any doubts—I have never had any, but if I had ever had any—as to whether I should do all I could to preserve that kind of an area for the spiritual benefit of future generations of American boys and girls, those doubts would have been resolved on that occasion.

*Id.*

Would that Members of the Senate could have been with me on the occasion to which I have just referred. I am satisfied that if they had been there and had experienced the thrill I experienced, standing on the platform in the midst of that natural cathedral of primeval trees, the vote in some instances would be different . . . .

*Id.*

171. *Id.* at 18,382 (statement of Sen. Church). More nearly continuing Theodore Roosevelt’s rhetoric, William Proxmire of Wisconsin, known as a fitness fanatic, praised wilderness adventure as a “test” of “spiritual attitude . . . in a nation in danger of going soft.” *Id.* at 18,365 (statement of Sen. Proxmire).

172. *Id.* at 18,382 (statement of Sen. Douglas).

173. *Id.* at 18,365 (statement of Sen. Church).

174. These strains of argument persisted, though. Senator Church acknowledged that “only a minority of our people are interested in the spiritual values [of the wilderness]” and responded, as Marshall had, that the majority should not “be entitled to trample upon the rights of the minority.” *Id.* at 18,365 (statement of Sen. Church). Church characterized development as “deny[ing] those people [the minority] their right” to “seek the sanctuary of

preservation as a self-evident national goal linked to intangible but shared “spiritual” values and national progress toward a less materialistic consciousness.

The authors of these social-movement texts and Senate speeches presented themselves as continuing a canonical tradition of American nature prophets, in which they included Thoreau, Muir, and Aldo Leopold.<sup>175</sup> This presentation was much too simple. It concealed three democratic achievements: transforming an often subjective body of literary evocation into a widely shared mode of experience of the natural world; working this experience, and the language that accompanied it within limited and specialized publics, into a set of increasingly robust programmatic commitments; and contributing this new set of terms to normative public language, the repertoire of arguments and invocations by which Americans could seek to persuade one another of the content and meaning of shared commitments. Wilderness advocates were generating, not just reciting, a moral register in which the natural world was increasingly understood as a source of intrinsic rather than instrumental value and a key to insight about the place of human beings in an interdependent world.

This argument was developed and available when members of the “new” environmentalism of the 1960s went looking for an account of the relationship between environmental commitments and a broader crisis of faith in technocratic mastery. They brought the wilderness argument, as it were, out of the wilderness and into a new idea of “the environment” as an encompassing category of problems and political commitments.

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the wilderness.” *Id.* It is probably most accurate to say that the earlier arguments persisted in a cumulative body of environmental public language.

175. See, e.g., *id.* at 18,356 (crediting appreciation of wilderness values to “the influence of such men as Henry Thoreau, Verplanck Colvin [a cartographer and poetic publicist of the Adirondacks], John Muir, Stephen Mather [first head of the National Park Service], Aldo Leopold, and Robert Marshall” (quoting Howard Zahniser, *Our World and Its Wilderness*, LIVING WILDERNESS, Summer 1954, at 36, 37)). This text devoted particular attention to Thoreau and Muir, combining their tropes in the claim that, in wilderness, “We . . . propose to maintain our access to wildness [Thoreau’s term], to what John Muir called ‘fountains of life.’” *Id.*; see also Harold C. Anderson, *The Unknown Genesis of the Wilderness Idea*, LIVING WILDERNESS, July 1940, at 15, 15 (tracing the idea to a passage of Thoreau’s in *The Maine Woods*); Benton MacKaye, *A Wilderness Philosophy*, LIVING WILDERNESS, Mar. 1946, at 1, 4 (urging readers to “emulate Thoreau” and “[i]magine ‘Henry David’ as a member of The Wilderness Society”).

#### IV. THE INVENTION OF THE ENVIRONMENT

The developments set out in this Part occurred against growing anxiety about the fate of technocratic mastery, a mood informed foremost by the threat of atomic warfare. An important anchoring simile in Rachel Carson's *Silent Spring*,<sup>176</sup> nuclear destruction stood in for the larger, Faustian idea that new powers without corresponding moral and prudential insight could destroy humanity. That shadow flits through much of the public environmental language of the 1960s and early 1970s. The association of technology with moral and ecological obtuseness and looming disaster made possible a kind of total critique of modern life. An existing sense of something gone wrong created questions—what and why—that users of new environmental public language proposed to answer. While environmental language in this period carried a sense of crisis, it only partly created that sense, and in other respects rather gave it a distinctive expression.

Temporal landmarks cannot quite capture the transition here, because there is considerable ambiguity and overlap. This era began in important ways in 1962, with *Silent Spring*. Interior Secretary Stewart Udall's 1963 *Quiet Crisis* developed Carson's warnings into an updated version of the Progressive story: Americans had long disregarded the environment in favor of a myth of plenitude and a civic religion of individualism, but now must arrive at a new moral appreciation of nature.<sup>177</sup> Congressional hearings on the public-health and environmental consequences of air and water pollution set the stage for the public and media eruptions of the late 1960s and the legislative efflorescence of the early 1970s.<sup>178</sup> Traditional civic organizations such as the League of Women Voters paid increasing attention to the human consequences of industrial and municipal effluents.<sup>179</sup> All these currents contributed to the (nonetheless abrupt) appearance of new defining themes in environmental public language.

The 1960s saw environmental language break far outside the confines of the traditional concern with specific acreage, land use issues, and recreational

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176. RACHEL CARSON, *SILENT SPRING* (1962).

177. See STEWART L. UDALL, *THE QUIET CRISIS* (1963). For a consideration of this family's role in the environmental politics of the period, see HENRY B. SIRGO, *ESTABLISHMENT OF ENVIRONMENTALISM ON THE U.S. POLITICAL AGENDA IN THE SECOND HALF OF THE TWENTIETH CENTURY—THE BROTHERS UDALL* (2004).

178. See ROBERT G. DYCK, *EVOLUTION OF FEDERAL AIR POLLUTION CONTROL POLICY 1948-1967* (1971) (setting out legislative developments of the 1950s and 1960s).

179. See YOUNG, *supra* note 128, at 174-77 (setting out the League's involvement in the press for comprehensive national clean water legislation, which had become a consensus priority of the organization by the late 1950s).

and aesthetic values. The environmental language of this period moved through more diverse movements and communities than earlier developments. It also developed in greater abstraction from those sources, often through elite cultural interpreters who proposed to make sense of youth dissent, malaise, and a perceived crisis of technological mastery by using the environment to found a master narrative of explanation and evaluation.<sup>180</sup>

A. *The New Environmental Language*

Two passages exemplify this transformation in environmental public language, not simply in what they say, but in the fact of their existence and intelligibility. The first comes from *Time* in 1968: “The false assumption that nature exists only to serve man is at the root of an ecological crisis that ranges from the lowly litterbug to the lunacy of nuclear proliferation. At this hour, man’s only choice is to live in harmony with nature, not conquer it.”<sup>181</sup> Consider that for a moment. The claim is that tossing a bottle from a car window and building weapons of planet-destroying potential are more alike than unlike, that they are two parts of the same crisis. Today, the claim that environmental problems arise from an unreflectively instrumental attitude toward the natural world is not hard to understand, though not all will endorse it. But even before engaging that diagnosis, consider the concept it relies on: *environmental problems*. That category contains everything from the beauty of a wilderness landscape to invisible chemical pollution in an urban neighborhood, from the fossil fuel energy economy to the loss of a species or the extinction of life on earth. The *environment*, so conceived, was not an idea that would have occurred to members of the early Sierra Club as uniting their aesthetic response to “wild” nature, their everyday economic activity, and whatever misgivings they had about the industrial economy. For them, a register of moral and aesthetic response elevated the wild and spectacular above the settled and mechanical, demoting the latter as ugly and uninspiring; but that common thread of judgment did not make the phenomena part of one thing, an

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180. Thus, one finds liberal establishment voices such as *Time*, *The New York Times*, and columnist Flora Lewis assessing the crisis of “technological man” and forecasting a basic change in modern values and identity. See *The Age of Effluence*, *TIME*, May 10, 1968, at 52, 52 (“[T]echnological man, master of the atom and soon the moon, is so aware of his strength that he is unaware of his weakness—the fact that his pressure on nature may provoke revenge.”); *Fighting To Save the Earth from Man*, *TIME*, Feb. 2, 1970, at 56, 62 (invoking an account of “technological man as the personification of Faust, endlessly pursuing the unattainable”).

181. *The Age of Effluence*, *supra* note 180, at 53.

“ecological crisis.” The environment had to be named, and in some measure invented, before it could be understood as endangered and available for saving.

The second passage comes from the *Sierra Club Bulletin* in 1970, a year in which the Club—this time following more than leading a larger cultural development—moved from its traditional public-lands focus to embrace the rising environmentalism. It is a single paragraph, sprawled over two pages, titled *A Fable for Our Times*. It retells, as faux-naïve allegory, the fate of “a small, beautiful, green and graceful country called Vietnam,” which “needed to be saved,” though “[i]n later years no one could remember exactly what it needed to be saved from, but that is another story.”<sup>182</sup> America sought to save Vietnam, but,

[s]adly, America had one fatal flaw—its inhabitants were in love with technology and thought it could do no wrong. A visitor to America during the time of this story would probably have guessed its outcome after seeing how its inhabitants were treating their own country. The air was mostly foul, the water putrid, and most of the land was either covered with concrete or garbage. But Americans were never much on introspection and they didn’t foresee the result of their loving embrace on the small country. They set out to save Vietnam with the same enthusiasm and determination their forefathers had displayed in conquering the frontier. They bombed. . . . Thousands of herbicide and defoliant missions were flown before anyone seriously questioned their long-range effect on humans and animals as well as on plants. By the time deformed fetuses began appearing and signs of lasting ecological damage were becoming increasingly apparent success had been achieved. Vietnam had been saved. But the country was dead.<sup>183</sup>

Set aside the plausibility (or otherwise) of the “fable,” its elision of geopolitics, domestic politics, and political ideology in favor of a single strand of technophile hubris.<sup>184</sup> Consider instead its intelligibility: environmental

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182. *A Fable for Our Times*, 55 SIERRA CLUB BULL. 16, 16 (1970).

183. *Id.* at 16-18.

184. The crisis and legislative response partook of deeply inconsistent perceptions of the same theme: Americans’ technological mastery. On one hand, from the Vietnam fable to attacks on instrumental reason and “technological man,” the environmental master narrative, particularly the portent of apocalypse, expressed a mood of discontent, even despair of rational, technological human mastery over nature. On the other, the major antipollution statutes of the 1970s reflected confidence in the capacity of government and industry to solve complex problems through technological innovation. Contemporary observers were not blind to the paradox. See *Issue of the Year: The Environment*, TIME, Jan. 4, 1971, at 21, 21

degradation had become available as a moral master narrative, able to organize vice and virtue, hubris and comeuppance, crisis and imperative response, across a variety of particulars. The *Bulletin's* fable recasts the Vietnam War as a symptom of American technophilia, then neatly ascribes an American environmental crisis to the same source, linking the two in one story of the essential problem: runaway faith in technological instruments, in defiance of nature's order, delicacy, and limits. Once invented, the environmental crisis could encompass many crises.

A set of innovations emerged together in this period and remade environmental public language. The first two were the discovery or invention of the environment as a unified phenomenon and the use of environmental crisis as a moral master narrative of modern life. The others can be understood as elaborations on these two. The first subsidiary development was apocalypse: the claim arose suddenly from every editorial board, social-movement publication, and even congressional debate that an environmental crisis threatened the survival of the species or the planet.<sup>185</sup> The literal warning of human extinction was a new theme in environmental public argument.<sup>186</sup>

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(“The relatively sudden passion about the environment seemed to spring from two different sources. On the one hand, it represented the response to a problem which American skills, including technology, might actually solve, unlike the immensely more elusive problems of race prejudice or the war in Viet Nam. On the other hand, it represented a creeping disillusionment with technology, an attempt by individuals to reassert control over machine civilization.”). That confidence found voice in media discussions, congressional debate, and the structure of the legislation itself. In hindsight, the legislation of the period seems to have arisen from a very specific, and probably paradoxical, conjunction of self-doubt and self-confidence: on the one hand, a potentially apocalyptic crisis brought on by technological hubris; on the other, a rational, technological program to cleanse the country's air and water within the decade.

185. See *The Age of Effluence*, *supra* note 180, at 52 (“[M]any scholars of the biosphere are now seriously concerned that human pollution may trigger some ecological disaster.”); *Americans Rally To Make It Again Beautiful Land*, CHI. TRIB., Apr. 23, 1970, at 3 (referring to “pollution which, according to the warnings of some scientists, threatens the very existence of life on this planet”); *Earth Day and Space Day*, N.Y. TIMES, Apr. 19, 1970, at 174 (“[T]his flowering home planet . . . may become as devoid of life as are now the mountains of the moon and the polar regions of Mars.”); *Earth Week*, WASH. POST, Apr. 20, 1970, at A20 (“American air, land, and water . . . has become . . . the world's most expensive monument to pollution . . . a monument that threatens to topple of its own weight. . . . [M]an is running out of soon faster than he runs out of issues.”); Gladwin Hill, *Activity Ranges from Oratory to Legislation*, N.Y. TIMES, Apr. 23, 1970, at 1 (referring to “ecological problems, which many scientists [sic] say urgently require action if the earth is to remain habitable”).

186. Of course, the conjoined themes of eschatological history and excoriating prophecy formed an old tradition in American public life. See HARRY S. STOUT, *THE NEW ENGLAND SOUL: PREACHING AND RELIGIOUS CULTURE IN COLONIAL NEW ENGLAND* 3-12, 67-85 (1986) (describing the genre of the election or fast-day sermon, which called a strayed people back

Second was a change in the connection between environmental problems and public health. This link had been a persistent but attenuated theme of both Sierra Club and New Nationalist strands of nineteenth-century conservation, and was even more badly stretched in the early efforts of the Wilderness Society to establish a public-health rationale for wilderness. In the 1960s, the environmental problem came to be understood as one of a “poisoned world,” a self-inflicted crisis of industrial society.<sup>187</sup> Where earlier public-health arguments had focused on the restorative power of recreation, the new environmentalism took some of its urgency from the perception of an unfolding public-health disaster.

Third was the belief—glimpsed in the fable of Vietnam—that environmental problems were rooted in distorted values and identity, and ecological renovation must work on those levels, as well as more practical ones.<sup>188</sup> The editors of *Time* wrote in 1970, “Behind the environment crisis in

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to their covenant). See generally SACVAN BERCOVITCH, *THE AMERICAN JEREMIAD* (1978) (setting out the history of this genre more generally). Their arrival in environmentalism marked an important rhetorical confluence. It also contributed to a curious symmetry of cultural dissent. Two inheritors of this tradition, evangelical Protestants and environmentalists, set themselves against what they see as the materialism and human-centered excesses of the culture, but (1) in favor of sharply different alternatives, one traditional theism, and the other, a blend of pantheism, paganism, and Romantic humanism; and (2) with quite different cultural profiles, marked for the past four decades by opposite responses to the efflorescence of the 1960s. Earlier activists had warned against the extinction of wilderness, and Howard Zahniser’s essay on untouched lands as synecdoche for life itself anticipated this development. Declensionist arguments had been a trope at least since George Perkins Marsh, and even the most pessimistic work of post-World War II environmental writing, Fairfield Osborne’s *Our Plundered Planet*, did not go much beyond Marsh. See FAIRFIELD OSBORN, *OUR PLUNDERED PLANET* (1948) (arguing on prudential grounds that human beings must adopt rational recognition of ecological constraints or face shortages of critical resources). If my initial research is accurate, Osborn seems to have been a wealthy and prominent white supremacist and anti-Semite who reinvented himself as a prophet of environmental decline after World War II. The affinity of environmental sentiment with various forms of misanthropy, antiliberalism, and antimodernity presents important and difficult questions to be taken up in another setting.

187. See *Fighting To Save the Earth from Man*, *supra* note 180, at 56 (“What most Americans now breathe is closer to ambient filth than to air.”); *Menace in the Skies*, *TIME*, Jan. 27, 1967, at 48, 52 (noting warnings that “all of civilization will pass away. . . . from gradual suffocation by its own effluents”); “*Now or Never*,” *N.Y. TIMES*, Jan. 21, 1970, at 46 (“[C]ommunities and campuses across the nation will observe ‘Earth Day’ by committing themselves to reclaim an already dangerously poisoned world.”); *To Clean the Nation’s Air* . . . , *N.Y. TIMES*, Jan. 31, 1967, at 30 (“The United States is in serious danger of running out of its most important natural resource—the air that supports life.”).
188. See Gladwin Hill, *Environmental Movement Registers Gains in 3 Years*, *N.Y. TIMES*, Apr. 9, 1973, at 1, 28 (“[T]he whole idea of growth, social and economic, an American shibboleth, has undergone skeptical scrutiny and recurrent repudiation.”); . . . *In an Urban Wasteland?*,

the U.S. are a few deeply ingrained assumptions . . . that nature exists primarily for man to conquer . . . [and] that nature is endlessly bountiful,” and ascribed “the whole environmental problem . . . [to] a dedication to infinite growth on a finite planet.”<sup>189</sup> The *Washington Post* was harsher:

The deep horror concerning the environment is not that we have ravaged and poisoned our section of the planet—but that we live with the horror so calmly. . . . Today America is under siege from its own waste, blind technology and arrogant abuse of Nature; instead of resisting these horrors, we have adjusted—like mule-beasts with a heavier and heavier load.<sup>190</sup>

The final innovation was the claim that environmental insight offered not just an account of crisis, but a formula for renovating a damaged world, a new way of understanding problems that could produce hitherto unimagined solutions.<sup>191</sup> This argument arose partly in the Wilderness Society’s arguments for the morally educative power of nature as such, developed from the Romantic and Progressive idea that specific places have revelatory or edifying effects. *Time* called for “a new way of thinking” in which “Americans must view the world in terms of unities rather than units” and declared, “The biggest need may be a change in values.”<sup>192</sup> Their solution was “[e]cology, the

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N.Y. TIMES, Apr. 22, 1970, at 44 (“The end toward which this is all dangerously tending is a technological monstrosity, a sterile monument of concrete and steel unfit for human habitation. Earth Day offers an opportunity for that embattled minority . . . who are willing to stand up for human values against the dehumanizing demands of development for development’s sake.”).

189. *Fighting To Save the Earth from Man*, *supra* note 180, at 62–63.

190. Editorial, *The Environment: Clean Up or Patch Up?*, WASH. POST, Feb. 11, 1970, at A20.

191. See *The Age of Effluence*, *supra* note 180, at 53 (“The biggest need is for ordinary people to learn something about ecology, a humbling as well as fascinating way of viewing reality . . . . [M]odern man . . . could do with some of the humility toward animals that St. Francis tried to graft onto Christianity.”); Irving S. Bengelsdorf, *Dear Students: Our Spaceship Earth’s in Trouble; So Are We*, L.A. TIMES, Apr. 16, 1970, at B7 (“[T]o survive on our spaceship, we must learn to do as nature does . . . .”); Flora Lewis, *Instant Mass-Movement*, L.A. TIMES, Apr. 29, 1970, at B7 (“The ideas themselves are so fundamentally new, so drastically opposed to the heritage of many centuries, they are painful to absorb. . . . Environmental harmony requires a much deeper review of western thought, now challenged on almost every level. It is becoming evident that, to begin, a new measure must be made of affluence . . . .”); *Issue of the Year: The Environment*, *supra* note 184, at 22 (“By changing national values, [concern for the environment] may well spur a profound advance in U.S. maturity and harmony with nature . . . .”).

192. *Fighting To Save the Earth from Man*, *supra* note 180, at 63.

subversive science [that] enriches man's perceptions, his vision, his concept of reality. In nature, many may find the model they need to cherish."<sup>193</sup>

*B. The Clean Air and Clean Water Acts as Exemplars of Their Time*

Two environmental statutes, the Clean Air Act (CAA) of 1970 and the Clean Water Act (CWA) of 1972, are widely recognized as paradigms of the law that emerged from this episode of ferment. They are also widely regarded as models of the design failure of early antipollution statutes, often expressed in rubrics such as "command and control."<sup>194</sup> This line of criticism focuses on several features of the statutes. First, they were drafted with deliberate indifference to any comprehensive cost-benefit analysis that would set their environmental goals alongside economic costs in a single master-currency.<sup>195</sup> Instead, drafters established categorical substantive goals and noneconomic

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193. *Id.*

194. Compare Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms*, 37 STAN. L. REV. 1267 (1985) (arguing that departures from uniform technology standards impose excessive information burdens on administrators), with Bruce A. Ackerman & Richard B. Stewart, Comment, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985) (rebutting Latin's claims). See generally BRUCE ACKERMAN ET AL., *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* (1974) (setting out the technocratic goal of maximizing net social benefit from environmental regulation and considering the capacity of alternative regulatory regimes to approximate this goal, in light of political and other constraints); WILLIAM F. BAXTER, *PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION* (1974) (setting out the basic economic argument that choices under constraints imply tradeoffs, and a decisionmaker must thus consider all goals, including environmental quality, in terms of their opportunity costs); Bruce A. Ackerman & William T. Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466 (1980) (surveying in detail the efficiency costs of congressional selection of regulatory instruments and failure to direct an independent agency to engage in comprehensive cost-benefit analysis; examining the special susceptibility of this strategy to review-proof legislative exacerbation by political dealmaking; engaging in a model of comprehensive cost-benefit accounting in the manner of an ideal independent agency; and identifying the efficiency failure of the CAA as the fruit of a congressional decision to select instruments rather than goals in the course of a departure from the New Deal model of independent agency); Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171, 171 (1988) (arguing that market-based incentives would improve in both economic efficiency and political accountability and transparency); Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1256 (1981) (setting out an approach to identifying and avoiding innovation costs of overly directive regulatory strategies).

195. See, e.g., ACKERMAN ET AL., *supra* note 194, at 165-207 (considering inefficiencies arising from absolutist or at least underspecified statutory valuation of environmental quality).

standards. By 1983, all United States waterways should be clean enough for fishing and swimming, and by 1985, all water pollution should have come to an end.<sup>196</sup> As for air pollution, the Clean Air Act directed the Environmental Protection Agency to create uniform national standards for six major criteria pollutants based on “public health” rather than cost-benefit analysis.<sup>197</sup> Second, the statutes specified regulatory tools that did nothing to promote incentive-based efficiency. The Clean Water Act’s effluent standards were insensitive to local variation: each facility faced the same rules, regardless of either its marginal environmental harm or the marginal cost of compliance, with no trading mechanism for reallocating pollution to reduce costs or distribute impacts.<sup>198</sup> Although the Clean Air Act later became the arena for market-based regulatory experiments, its statutory design included no means for cost-based allocation of regulatory burdens. Third, as the Clean Water Act’s deadlines suggest, the statutes set wildly unrealistic goals for overcoming industrial pollution.<sup>199</sup> Unreachable standards risked the impression of triviality and farce and, more important for regulators and the regulated, provided little help in navigating the middle ground between the existing and the impossible.<sup>200</sup>

196. See 33 U.S.C. § 1251(a)(1)-(2) (2006).

197. See Mary Rose Kornreich, *Setting National Ambient Air Quality Standards*, in THE CLEAN AIR ACT HANDBOOK 11, 11-32 (Robert J. Martineau, Jr. & David P. Novello eds., 1998) (setting out the basic regulatory strategy of the CAA). For the “public health” language, see 42 U.S.C. § 7408(a)(1)(A), directing regulation of pollutants that “may reasonably be anticipated to endanger public health”; and 42 U.S.C. § 7409(b)(1), stating that air quality standards shall be designed “to protect the public health.”

198. See, e.g., Ackerman & Hassler, *supra* note 194, at 1478-88 (surveying the context-insensitivity of uniform technology standards under the CAA); Ackerman & Stewart, *supra* note 194, at 178-84 (surveying the benefits to efficiency and innovation of proposed market-based CAA regulation).

199. See, e.g., JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 127-28 (2003) (noting unrealistic goals and the complaints and confusion they have occasioned).

200. The interpretative peregrinations of the Clean Air Act’s section 112, directing the EPA to set emission standards at a level “provid[ing] an ample margin of safety to protect the public health” exemplify this difficulty. Confronting a facially cost-insensitive statutory instruction, the EPA read into the language the authority to consider the costs of emission control technology. The D.C. Circuit upheld the EPA’s interpretation, reasoning that such cost-benefit considerations were necessary to avert the possibility of absolutist regulation inducing economic disaster. See *Natural Res. Def. Council v. EPA*, 804 F.2d 710 (D.C. Cir. 1986). The D.C. Circuit then reversed the ruling en banc and imposed its own interpretation, directing the EPA to set a level of emissions resulting in an “acceptable” level of risk to public health, then enforce limits no less strict than that level. See *Natural Res. Def. Council v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (en banc). That decision forced the EPA to revisit the foundations of its regulatory strategy for toxic pollutants. See 53 Fed. Reg.

Trenchant criticism of these statutes has organized more than a generation's worth of scholarship and reform efforts in environmental law, resulting in notable theoretical and practical achievements.<sup>201</sup> It has also produced a body of counter criticism focused on the limits of markets and cost-benefit rationality, and some efforts to integrate competing perspectives.<sup>202</sup> This Article's discussion of the 1970s statutes does not directly engage these debates. Instead, it makes two points about understanding the structure of the Clean Air Act and Clean Water Act. First, although the drafters of these statutes were aware of arguments against the approach they took, they regarded their approach as uniquely consistent with, even required by, the task of adopting environmental protection as a defining national purpose. In explaining this, they invoked the larger environmental themes of the time: ecological consciousness as a key to understanding and solving complex problems; public-health crises and apocalyptic danger; and a need for a change in national values. Whether or not the policy instruments they chose were dictated by, or even ultimately advanced, these goals, the choices reflected their idea of the undertaking. Second, the adoption of environmental values as national purposes was, ironically, invaluable in establishing the force of the criticisms that the statutes soon attracted. The argument that the statutes inefficiently pursued their purposes makes sense on its own terms, of course;

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28,496 (1988) (rulemaking). Before the EPA could complete a new rule, Congress revised section 112 substantially, establishing a technology-based standard.

201. The work cited in note 194, *supra*, is the anchor here. For recent developments, see generally DANIEL C. ESTY & ANDREW S. WINSTON, *GREEN TO GOLD: HOW SMART COMPANIES USE ENVIRONMENTAL STRATEGY TO INNOVATE, CREATE VALUE, AND BUILD COMPETITIVE ADVANTAGE* (2006); CASS R. SUNSTEIN, *WORST-CASE SCENARIOS* (2007), which applies cost-benefit analysis to issues of high uncertainty and great potential cost, including climate change; Carol M. Rose, *From H<sub>2</sub>O to CO<sub>2</sub>: Lessons of Water Rights for Carbon Trading*, 50 ARIZ. L. REV. 91 (2008); and James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607 (2000), which sets out working pieces of an attempt to integrate unpriced "ecosystem services" into a comprehensive market fully incorporating environmental benefits. On the power of interest group explanations in accounting for the political frustration of market-based reforms, see Thomas W. Merrill, *Explaining Market Mechanisms*, 2000 U. ILL. L. REV. 275, which argues ultimately for a synthesis of wealth-maximization and distributional versions of interest-based accounts.
202. See Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002) (arguing that conventional cost-benefit analysis depends on morally unacceptable premises, particularly the fungibility of human lives and the discounted value of the future); Kysar, *Discounting*, *supra* note 10 (arguing that cost-benefit analysis can encourage reckless indifference to the catastrophic potential of climate change and criticizing a "comprehensive rationality" that notionally forecloses the possibility of cultural change by seeking to account for all relevant values from the standpoint of the present). *But see* John J. Donohue III, *Why We Should Discount the Views of Those Who Discount Discounting*, 108 YALE L.J. 1901 (1999).

but it is urgent, and not just another accountant's reproach to shoddy lawmaking, because of the political and cultural status of the values being disserved. The same statutes that attracted so much meritorious economics-based criticism also helped to empower that criticism by confirming the place of environmental protection among public values.

1. *Rejection of Comprehensive Cost-Benefit Analysis*

Begin with Congress's decision to reject comprehensive cost-benefit analysis. Drafters took this choice in the face of a presidential veto of the Clean Water Act based on its projected cost and a daunting economic forecast from the recently formed Council on Economic Quality (CEQ).<sup>203</sup> They also had in hand a CEQ analysis of the pollution crisis as a product of the failure to price ecosystem services, making the air and water "free dumps," the key conceptual ingredient in a comprehensive accounting of environmental costs and benefits.<sup>204</sup> It was no surprise when the National Water Commission, a bipartisan group assembled under Lyndon Johnson, denounced the Clean Water Act for attaching "an extravagant social value to an abstract concept of water purity"—that is, implying by the refusal to weigh costs and benefits that clean water was of infinite value.<sup>205</sup>

Drafters of the legislation made both practical and moral arguments against these efforts at comprehensive cost-accounting. As a practical matter, they argued that the novelty of complex environmental and public-health threats meant vast uncertainty about the consequences of any level of pollution, making efforts to specify costs premature.<sup>206</sup> Senators also argued that

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203. See *Federal Water Pollution Control Amendments of 1972—Veto Message*, 118 CONG. REC. 36,859 (1972). For a discussion of the CEQ cost estimate, issued under Russell Train, soon to be the head of EPA, see 117 CONG. REC. 38,801 (1971) (statement of Sen. Muskie).

204. See 118 CONG. REC. 36,874 (1971) (statement of Sen. Muskie) ("The common property resources—air and water—are not included in the market exchange. They are used as free 'dumps' for consumption and production residuals. But such dumping exacts social costs—in degraded air and water, impaired health, loss of fish and wildlife, loss of recreational opportunities and aesthetic values, and added costs of treatment necessary for downstream water users. Environmental problems stem largely from this fundamental failure of the economic system to take into account environmental costs.").

205. NAT'L WATER COMM'N, *WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES* 70 (1973).

206. See 118 CONG. REC. 10,261 (1972) (statement of Rep. Vanik) ("[I]f we continue to allow harmful discharges and the waste of resources—even small amounts—we will continue to rapidly disrupt, in ways which we do not now understand, the natural balance of the world—a balance that evolved over billions of years and which supports all living things, including ourselves. . . . If we can destroy Lake Erie, we can destroy the sea. Similarly, we

projecting the cost of regulatory compliance was reckless because adopting strong goals established a national commitment that would alter the path of innovation. One could not know the cost of future compliance based on existing technology.<sup>207</sup> Drafters thus rejected the CEQ's cost projection for the CWA as an attempt to sow fear in Congress and the public.<sup>208</sup> They supported their decision by invoking the technology-forcing precedents of World War II aircraft production and the Apollo Project, and even asserted that the environmental crisis was graver and thus potentially more transformative than either the Second World War or the Space Race.<sup>209</sup> Senators also drew on the apocalyptic backdrop in public discussion: they contended that immediate threats to the survival of the species and life on earth made weighing costs and benefits irresponsible.<sup>210</sup> It is arresting, from the vantage of a time accustomed to regarding pollution control as a matter of the expert management of costs and benefits, to see it repeatedly identified in congressional debate as a question of survival.

The moral arguments expressed the noninstrumental conception of nature's moral significance that emerged in the debates of the Wilderness Society and became prominent in the late 1960s. One was the claim that it was wrong to use waterways as waste-disposal systems, full stop. This right-or-wrong classification was strikingly and repeatedly invoked as the basic concept

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can destroy the delicate balance of the world's atmosphere. That destruction is happening each hour of every day."); 117 CONG. REC. 38,801 (1971) (statement of Sen. Muskie) ("[W]hat we do not know, and what we cannot predict accurately, are the long-range effects upon man of prolonged exposure to bigger and bigger doses of pollution. Man, no less than the Peregrine Falcon and the Mountain Lion, is an endangered species.").

207. See 117 CONG. REC. 38,300 (1971) (statement of Sen. Muskie) ("The committee recognizes that there are technical limits to what can be done in order to achieve the no-discharge objective. More importantly, the committee is concerned that program administrators and enforcement officers do not know what these technical limits are.").
208. See *id.* at 38,801 ("[T]o apply a price tag . . . to a 100-percent elimination of pollutants can serve no purpose other than to frighten the people and intimidate the Congress.").
209. See 116 CONG. REC. 32,904 (1970) (statement of Sen. Muskie) ("Here, in the case of a national objective more serious than either [World War II or the Space Race]—the national health, I think that we have an obligation to lay down the standards and requirements of this bill. I think that the industry has an obligation to try to meet them. If, in due course, it cannot, then it should come to Congress and share with the Congress . . . the need to modify the policy. That is the philosophy of the bill.").
210. See 118 CONG. REC. 36,874 (1972) (statement of Sen. Muskie) ("Can we afford life itself? . . . If we entertain any serious hopes of preserving life on this planet, the water pollution bill will have to be paid—soon."); *id.* at 33,693 ("These are not merely the pious declarations that Congress so often makes in passing its laws; on the contrary, this is literally a life or death proposition for the Nation."); 117 CONG. REC. 38,801 (1971) (statement of Sen. Muskie) ("Man . . . is an endangered species.").

of the Clean Water Act.<sup>211</sup> Some supporters of pollution-control legislation also identified it as the keystone of a new kind of moral calculus, premised on the idea that ecological interdependence is the condition of first importance in assessing human interaction with the natural world, and that it must imply a comprehensive reevaluation of economic life.<sup>212</sup> This point highlights the integral connection between the practical and moral arguments: comprehensive accounting seemed impossible not just because factual knowledge was changing fast, but also because new values were emerging, which would affect the assessment of environmental health and harm alike.

These were the reasons the statutes' drafters gave for rejecting comprehensive cost-benefit accounting, specifically proposals to weigh the projected costs of compliance and assess the marginal effects of pollution on public health. The drafters' arguments reflected the broader contemporary sense that environmental problems formed a uniquely urgent and complex crisis in which important yet inchoate moral lessons resided. They understood their statutes in two concurrent ways: as instruments for pursuing certain policy ends and as existential acts committing the country to a new set of goals and values, whose significance was only beginning to come into focus.<sup>213</sup> Their

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211. See 118 CONG. REC. 36,873 (1972) (statement of Sen. Muskie) ("These policies [of the bill] simply mean that streams and rivers are no longer to be considered part of the waste treatment process."); *id.* at 10,259 (statement of Rep. Vanik) ("The basic concept of the Senate bill is that: 'The use of any river, lake, stream, or ocean as a waste treatment system is unacceptable.' In other words, no one has the right to pollute."); 117 CONG. REC. 38,798 (1971) (statement of Sen. Muskie) ("[T]he use of any river, lake, stream, or ocean as a waste treatment system is unacceptable."); *id.* at 38,722 (statement of Sen. Cooper) ("[T]he bill declares that no one has the right to use the Nation's waters as a waste disposal mechanism; that there is no right to pollute, but rather an obligation to maintain the quality of those resources traditionally looked upon as free to all, but which we now wish to protect for all.").
212. See 117 CONG. REC. 38,819 (1971) (statement of Sen. Cooper) ("[T]he bill and its purpose goes even further than asserting that a public right resides in clean water. In a way, it recognizes an even more fundamental condition. It asserts the primacy of the natural order, on which all, including man, depends. . . . [I]t does have an underlying theme, one which seems to me to rely on the natural order."); *id.* at 38,800 (statement of Sen. Muskie) ("The stated objective of the act reflects the committee's decision to recognize fundamental principles of ecology.").
213. See 118 CONG. REC. 36,874 (1972) (statement of Sen. Muskie) ("The whole intent of this bill is to make a national commitment. . . . Can we afford clean water? . . . Can we afford life itself? . . . Those questions were never asked as we destroyed the waters of our Nation, and they deserve no answers as we finally move to restore and renew them. These questions answer themselves. And those who say that raising the amounts of money called for in this legislation may require higher taxes, or that spending this much money may contribute to inflation simply do not understand the language of this crisis."); 116 CONG. REC. 36,033 (1970) (statement of Sen. Muskie) ("One of the most troubling aspects of our national

refusal to incorporate comprehensive cost-benefit accounting struck them as integral to the second purpose of the statutes.

## 2. *Unreachable Goals*

The drafters of the Clean Air Act and Clean Water Act were aware that the statutes set unattainable goals and pointed this out unprompted in floor debate. Their reasons have already been glimpsed in their comparisons of pollution control to earlier periods of innovation driven by newly adopted national purposes. They regarded technological constraints on their political goals as known unknowns: constraints whose magnitude they could assess only by running full force against them.<sup>214</sup> They argued that setting goals already known to be attainable would only make innovation beyond those goals less likely.

Another reason the drafters adopted then-unreachable goals was symbolic: they believed they were announcing a national commitment that would require civic, as well as technological, mobilization. It became a frequent refrain in debates on the Clean Air Act, in particular, that it would succeed only if the public were willing to accept new costs, reduce consumption, and take independent action to enforce pollution controls.<sup>215</sup> In an echo of the civic themes of Theodore Roosevelt's conservationism, some supporters described

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mood is the crisis in confidence which afflicts too many Americans in all walks of life. It is a crisis marked by self-doubt, by a fear that our problems may be greater than our capacity to solve them, that our public and private institutions may be inadequate at a time when we need them most.”); *id.* at 32,900 (“This legislation will be a test of our commitment and a test of our faith: in our institutions, in our capacity to find answers to difficult economic and technological problems, and in the ability of American citizens to rise to the challenge of ending the threat of air pollution.”).

214. See *supra* note 207.

215. See 116 CONG. REC. 42,394 (1970) (statement of Sen. Cooper) (“The bill will place great responsibilities on nearly every aspect in our society. . . . [I]t will place great burdens on the people generally for they will ultimately have to bear the expense and, for the first time, possibly experience inconvenience so that we might achieve clean and healthful air.”); *id.* at 33,906 (statement of Sen. Muskie) (“This bill is going to require that the American motorist change his habits, his tastes, and his driving appetites. . . . The consumer must also make sacrifices in addition to those made by the manufacturer.”); *id.* at 32,918 (statement of Sen. Cooper) (“The bill . . . establishes a very high national priority for the goal of clean air. It will not succeed without a massive effort . . . by industry and through the willingness of citizens throughout the country to make the sacrifices necessary and to pay the price of accomplishing the goals of clean air . . .”). On the background discussion, see Editorial, *Clean Air and Autos*, N.Y. TIMES, Feb. 12, 1973, at 26, stating that “New Yorkers are going to have to adjust to some possibly shocking changes in their way of life” to accommodate the goals of the Clean Air Act.

the statutes as harbingers of a new era of personal responsibility for common well-being.<sup>216</sup> The statutes of the early 1970s were thus part of a conscious reorientation of public commitments toward environmental protection. Whether or not the structure of the statutes contributed to (or impeded) that change, that structure arose partly from the attempt to achieve the change.

### 3. *Rejection of Market-Based Instruments*

In the course of floor debates on the Clean Water Act, Senator William Proxmire of Wisconsin proposed adding a Pigouvian tax to the statute's regulatory toolkit, which he presented as providing "[t]he missing ingredient [for effective enforcement]—an economic incentive."<sup>217</sup> He also noted the efficiency advantages in enabling industry to choose its own means to reduce pollution to the level established by the tax.<sup>218</sup> As he stressed in making the case for his amendment, it would have neither removed nor weakened any other

216. See 116 CONG. REC. 42,392 (1970) (statement of Sen. Randolph) ("The implementation of . . . this measure will test the determination in this country to achieve a livable environment, not only for ourselves but for future generations. In turn, the legislation will test the willingness of the citizens—not just the various levels of government, but the citizens of this country—to abate and prevent, and abate environmental pollution. And I wish to compliment [Senator Muskie] that he has emphasized the personal obligation which must be recognized—a rebirth, I should say, of responsibility on the part of the individual citizen of this country."); *id.* (statement of Sen. Muskie) ("Completely. . . . There has to be a commitment to it by every citizen, not only with respect to the activities of others, but with respect to each citizen himself . . ."). On the broader background perception, see Editorial, *Earth Week*, N.Y. TIMES, Apr. 19, 1972, at 46, stating that "a far greater sense of urgency and effort is essential"; Editorial, *supra* note 190, arguing that "[t]o keep the politicians from stalling . . . to get them to see pollution not as a 'social problem' but as a survival problem—that is the challenge the public must now take up . . . with democratic outrage"; Editorial, *Every Day an 'Earth Day,'* L.A. TIMES, Apr. 24, 1970, at C10, asserting that "[r]eclaiming the environment at this late date . . . is a task so immense and costly that only the strongest and broadest support can assure its accomplishment"; Editorial, *The Politics of Pollution*, L.A. TIMES, Nov. 7, 1969, at C6, stating that "California . . . can be saved—if the people will it. No pollution or politician can withstand the pressure of an aroused citizenry"; and Editorial, *The State of the Environment*, L.A. TIMES, Jan. 23, 1970, at C6, arguing that "what is also needed is the kind of mass understanding and commitment that is necessary to the success of any great enterprise."

217. 117 CONG. REC. 38,827 (1971) (statement of Sen. Proxmire) ("Give industry the incentive present law lacks . . . to spend the money it should on water pollution control. . . . [by] impos[ing] effluent charges on industrial water polluters, in proportion to the amount of waste discharged. This makes each polluter financially responsible for his own pollution. It says to industry, 'Pay or stop polluting.' This is a language industry understands.")

218. *Id.* at 38,828 ("It gives industry a chance to determine how best to abate its pollution.")

portion of the legislation.<sup>219</sup> Nonetheless, the bill's sponsors opposed the amendment, and the Senate defeated it.<sup>220</sup> Part of their reasoning was the practical claim that it was too difficult to identify the degree of harm produced by any unit of pollution.<sup>221</sup> Another set of arguments, however, had to do with the nature of the national commitment that the antipollution statutes represented. The bill's sponsors indignantly inquired whether Proxmire meant to suggest that citizens were moved only by the threat of tax enforcement.<sup>222</sup> The Clean Water Act was a national commitment to a new way of doing things, not a marginal adjustment in regulation: by a kind of implicit crowding-out logic, its sponsors seemed to take Proxmire's proposal as threatening to undermine the moral and civic commitments that they saw antipollution legislation as establishing.

The claim that charging for pollution amounted to issuing a "right to pollute" slipped into the debate when Senator Muskie declared that approach unacceptable and Senator Proxmire denied that his proposed tax represented such a license.<sup>223</sup> The larger debate over his proposal, and the still broader themes in which it was set, cast light on that argument. Rather than a simple charge of commodification or crowding out (though it had aspects of both), it was an objection to the idea that the country's environmental commitments had reached a resting place from which a neat calculation of costs and benefits was available. The reason behind the objection was that Congress was in the process of implementing a new set of defining commitments in response to intense public ferment. It was establishing the ideas that human interests depend on a web of ecological interdependence; the natural world matters

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219. See *id.* ("My amendment, I stress, is a supplement . . . I am proposing today that effluent charges be used as an enforcement tool, in conjunction with the procedures [in the unamended bill] . . ."); *id.* at 38,833 ("The amendment I am proposing would not delete one section of that bill. It would simply add to it.").

220. *Id.* at 38,828-34 (transcript of debate and report of defeat of the amendment).

221. See *id.* at 38,829-30 (setting out the difficulty of quantifying the harm ascribable to any unit of pollution).

222. See *id.* at 38,833 (statement of Sen. Baker) ("I do not accept the implication by the Senator from Wisconsin that the people of the United States are more willing to abide by an Internal Revenue statute than by a categorical prohibition . . . [I]t seems to me . . . that [Proxmire] is suggesting that the only laws the people of the United States really take seriously are the internal revenue laws, and that is not so.").

223. See *id.* at 38,829 (statement of Sen. Muskie) ("We cannot give anyone the option of polluting for a fee. We are saying that our aim is to have no discharge . . ."); *id.* at 38,829-38,830 (statement of Sen. Proxmire) ("I am certainly not licensing the discharge of a pollutant.").

morally as such and not only as a source of human convenience, and we disregard these complex facts at peril to both our interests and our duties.

#### 4. *The Character and Motives of the Antipollution Statutes*

The regulatory devices of the antipollution statutes were rigid: deadlines, emission limits, uniform permits. The drafters and sponsors of the statutes, however, seem to have imagined this rigidity as a way of pressing forward a fluid process: the country's adoption, definition, and pursuit of new commitments. This project was open-ended both empirically, engaging the question of just what technology and civic mobilization could accomplish, and normatively, asking what it meant to acknowledge the moral importance of the natural world. Legislators rejected more flexible instruments because they understood those as tending, ironically, to fix values that were in flux and as neglecting the novelty and importance of the commitments the country was undertaking.

In hindsight, these objections seem to rest on false binaries and an unsophisticated sense of the reach and power of market-based instruments. In one sense this is plainly true: no such antimarket reservations constrain today's discussions of climate change, in which environmental values and market instruments figure as mostly mutually reinforcing. Nonetheless, efficiency is an instrumental quality, necessarily relative to purposes. The public power of arguments that an instrument fails to achieve its ends efficiently is partly relative to the recognized importance of those ends. In this respect, the criticism of the antipollution statutes takes some of its force from the very features that the drafters believed they were defending in rejecting more market-based instruments.

Whether the drafters were helping or hurting their own cause is not the question I mean to address. They were right in recognizing the importance of the process they supposed they were assisting: adopting a new set of commitments, which would make new arguments and demands forceful in public language. Those included the acute and productive criticisms that would soon attach to the antipollution statutes themselves.

#### C. *Summary*

In the decade plus between the publication of *Silent Spring* and the passage of the Clean Water Act, a new set of claims became available in public environmental language. Ideas that would previously have been parochial, eccentric, or even unintelligible entered into the repertoire of arguments and authority by which Americans could appeal to one another in disputes over the

use of political power, the duties of citizenship, and the character of the national community. These new claims, nonetheless, had real limits. They were not asserted, refined, and implemented against sustained opposition, nor did they arise from a movement commensurate to the scale of the cultural and conceptual ambition they expressed. A crisis and shift in values routinely described as transformative, even revolutionary, was not thematized and tested by opposition in a national election, although representatives targeted as unfriendly to environmental issues proved vulnerable in the early 1970s.<sup>224</sup> The consequences of taking the new commitments seriously, as a matter of public policy or personal conduct, remain disputed at best, inspiring argument over whether the country has adopted them in any real sense.<sup>225</sup> None of this should, however, lead us to neglect that debate over their meaning continues today.

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224. Rather than produce a movement president, environmental politics benefited from the opportunistic endorsement of Richard Nixon, who for a time seized on environmental issues in hopes of outflanking liberals and claiming a potential consensus issue in a fractious country. Early in his second term, however, he gave up on claiming the issue and vetoed the 1972 Clean Water Act, a veto which a self-confident Congress overrode. Both public discussion and legislative action on the issue ran somewhat ahead of any mobilized public, let alone a coherent movement able to produce nationally visible leaders with strong and widespread support. It was not until the 1980s, when public and congressional resistance stymied Ronald Reagan's efforts to repudiate the environmentalist turn of the 1970s and, particularly, open public lands to exploitation, that a popular test emerged, and that was more in the nature of ordinary-politics trench warfare than thematized struggles over national self-definition.
225. From the start, the environmental crisis was perceived as a unifying challenge, even the occasion of a unifying change in values, for a divided country. See Editorial, *Earth Week—No Vogue*, N.Y. TIMES, Apr. 19, 1971, at 36 (“[The environment] has become deeply imbedded in politics—not in a partisan way but almost as a qualification for office.”); *Issue of the Year*, *supra* note 184, at 21 (“With remarkable rapidity [the environment] became a tenet in the American credo . . .”). This promise seemed vindicated in broadly expressed support for environmental protection in the early 1970s and thereafter, largely down to the present day. It also, perhaps, underlies a second conservative feature of the new environmental language: that people proved able to adopt its radical critique, at least nominally, without changing their behavior in serious ways. This would be compatible with the thought that the “environmental crisis” and “revolution” borrowed some of their felt urgency from authentically divisive struggles: Vietnam abroad, race at home, and the disconcerting eruption of youthful dissent from norms of respectability and success. In this view, second-generation environmental public language would be an example of the great American genre of cheap talk: frisson-inducing dissent that does not make itself too inconvenient in practice for the current arrangement of interests and ideas. See Editorial, *The Good Earth*, N.Y. TIMES, Apr. 23, 1970, at 36 (“Is the sudden concern for the environment merely another ‘nice, good middle-class issue,’ as one organizer put it, conveniently timed to divert the nation’s attention from such pressing problems as the spreading war in Indochina and intractable social injustice at home?”).

**V. PROSPECTS FOR THE NEXT ENVIRONMENTAL POLITICS**

*A. The Case Against Environmental Language, Revisited*

This Article began by challenging two claims about environmental public language. One is that “environmentalism” is unsuited to the nature and scale of today’s problems, especially climate change, because environmental values are negative and defensive on the one hand, and, on the other, reliant on a naïve and untenable contrast between humanity and nature.<sup>226</sup> The second challenged claim is that, whatever its more specific defects, such language is vague, motivationally weak, and thus a presumptively poor resource for addressing the next generation of environmental challenges.<sup>227</sup>

The first claim depends on simplistic accounts of environmental politics, which are belied by the history of environmental public language. Only two strands of the developments treated here are at all compatible with the argument that environmentalism is essentially defensive and hostile toward human aspiration: the disdain for “materialism” in early Sierra Club culture and the alarm in 1960s environmentalism that industrial society might be headed for apocalyptic crisis.<sup>228</sup> But even these strands do not support the proffered portrayal of environmentalism. The hostility toward “materialism” was not ascetic but precisely in favor of enriched experiences of rapture and awe, as well as the fellowship that Sierra Club members praised in their paeans to outdoor culture.<sup>229</sup> The apocalyptic strains of 1960s environmentalism did sometimes express a technophobic impulse, notably in the Sierra Club’s Vietnam “parable”; but most environmentalists did not simply denounce technology. Instead, they proposed to redirect it in a more ecologically responsive fashion.<sup>230</sup> The goal has nearly always been to reconcile prosperity with more qualitative satisfactions such as aesthetic inspiration and spiritual enrichment. Even the staunchest advocates of the Wilderness Society agenda presented their ideals as among the finest fruits of prosperity, not reasons to reject it.<sup>231</sup>

Furthermore, neither the utilitarian nor the Romantic strain of American environmentalism has relied on an essentialized idea of undisturbed nature.

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226. See *supra* notes 3-7 and accompanying text.

227. See *supra* note 2 and accompanying text.

228. See *supra* notes 92-108, 185-186 and accompanying text.

229. See *supra* notes 64-108 and accompanying text.

230. See *supra* notes 194-222 and accompanying text.

231. See *supra* notes 140-158 and accompanying text.

This criticism ignores the centrality of expert management to all phases of American environmental ideas. Even the leaders of the wilderness movement, who would seem the most promising targets of this charge, explicitly proposed to manage nature for a specific kind of landscape and experience. Similarly, the Sierra Club's commitment to spectacular landscapes was indeed based on an idea of harmony between nature's vitality and that of the untrammelled mind, but this idea never depended on literally primordial nature persisting in the modern world.<sup>232</sup> Muir and his cohort supported parks, readily accessible and cleansed of threats, as conduits from nature to the human mind. Precisely this tolerance for human construction of nature's "cathedrals" spurred the creation of the Wilderness Society, with its own, starker agenda for human management of public landscapes.<sup>233</sup> This tradition was based in the Romantic idea that perception importantly constitutes the world, and thus that any encounter with nature is also an encounter with one's own mind, and, ideally, part of a process of revising it.<sup>234</sup>

In answer to the second challenge, that environmental public language has negligible practical relevance, this Article recasts the problem. The question is not simply whether a static and discrete set of concerns called "environmentalism" has more or less force. Environmental public language has been thoroughly interwoven with other era-defining themes, around which citizens have sought to persuade one another of the content of their values and interests. To be a little too schematic about it, the persuasion has generally aimed at two kinds of changes. One has been to recognize substantively new purposes. The kind of aesthetic encounter with nature that the Sierra Club and Wilderness Society pioneered and moved from eccentricity to a cornerstone of environmental public language is exemplary of this sort of substantive innovation. The other kind of change involves the scope of interests outside one's self that one takes into account, rather than their content. An exemplar is Gifford Pinchot's case for utilitarian management of forests, which required not just empirical recognition of the remote effects of deforestation, but also an ethical and, perhaps, imaginative identification with the interests of Americans far away in space and time.<sup>235</sup> In both kinds of changes, environmental public language has been inseparable from broader contests about national purpose, civic dignity, and the role and scale of government.

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232. See *supra* notes 132-138 and accompanying text.

233. See *supra* notes 131-135 and accompanying text.

234. See, e.g., EMERSON, *supra* note 74, at 33.

235. See PINCHOT, *supra* note 92, at 79-88 (arguing for the necessity of a broadened moral vision of personal obligation to the nation to uphold conservation policies).

*B. The Politics of Anomaly*

These contests continue, which is one reason that the narrow view of climate politics that this Article challenges is inadequate. Consider one example that makes little sense through the lens of narrow self-interest, much more as part of an ongoing debate over environmental values: the organizing project that, at the time of writing, has led 1015 city governments, representing nearly eighty-two million Americans, to adopt the goals of the Kyoto Protocol (a seven percent reduction in greenhouse-gas emissions from 1990 levels by 2012) through an instrument called the Mayors Climate Protection Agreement.<sup>236</sup> Originally an initiative of the Seattle mayor's office, the Agreement is now managed through the United States Conference of Mayors and overlaps substantially with the Sierra Club's "Cool Cities" campaign.<sup>237</sup> A 2007 survey (with serious selection-bias problems) of 134 then-participating cities found most assuming some costs to pursue the (admittedly unrealistic) Kyoto goal.<sup>238</sup> Seattle claims to have reduced the greenhouse gas emissions of city operations by sixty percent since 2005.<sup>239</sup> While most efforts are similarly concentrated in city-government actions, Austin Energy, in Texas's capital city, has set a goal of securing twenty percent renewable energy sources and fifteen percent of net supply from efficiency efforts by 2020, and cities from Fort Collins, Colorado, to Burlington, Vermont, have been investing in wind energy and other renewables.<sup>240</sup> Residents of Marin County, California, are seeking permission

236. Mayors Climate Protection Center, List of Participating Mayors, <http://www.usmayors.org/climateprotection/list.asp> (last visited Nov. 16, 2009).

237. See CITY OF SEATTLE, SEATTLE AND CLIMATE CHANGE: A GLOBAL CITY ACTING LOCALLY (2007), available at <http://usmayors.org/climateprotection/climatesurvey07.pdf>.

238. Nearly ninety percent reported requiring, or moving to require, energy efficiency in new city buildings; almost three-quarters using alternative fuels or hybrid-electric vehicles in city fleets; over eighty percent either including or moving to include renewable energy sources; more than three-quarters "undertaking efforts to encourage" energy efficiency in private construction; and nearly all switching to energy-efficient lighting. See U.S. CONFERENCE OF MAYORS, SURVEY ON MAYORAL LEADERSHIP ON CLIMATE PROTECTION 4 (2007).

239. CITY OF SEATTLE, *supra* note 237. I do not know how Seattle generated its reduction figure.

240. On Fort Collins, see GLEN BRAND & BRENDAN BELL, SIERRA CLUB, COOL CITIES: SOLVING GLOBAL WARMING ONE CITY AT A TIME 12 (2005), available at <http://newjersey.sierraclub.org/concom/coolcities/coolcities.pdf>, noting that the city has imposed a two percent surcharge on power bills to finance its renewable-energy effort; on Burlington, see ELIZABETH KOLBERT, FIELD NOTES FROM A CATASTROPHE: MAN, NATURE, AND CLIMATE CHANGE 171-80 (2006). On Austin, see CITY OF AUSTIN, STRATEGIC PLAN 17-24 (2003), available at <http://www.austinenergy.com/about%20us/newsroom/reports/strategicplan.pdf>. For Austin's latest municipal goals, see CITY OF AUSTIN, AUSTIN CLIMATE PROTECTION PLAN (2009), available at <http://www.ci.austin.tx.us/acpp/downloads/>

to give utility customers the option of paying a higher rate to tap into a renewable and local set of energy sources, and forty-one percent of San Francisco voters in November supported a ballot initiative requiring that all city energy come from renewable sources by 2040.<sup>241</sup>

1. *Anomaly as Persuasion*

Is this behavior merely trivial or silly?<sup>242</sup> To be sure, it is fair to describe some of the efforts just sketched as low-hanging fruit and, in cases, cheap talk. But since the costs are not zero, and the benefits, in theory, are almost exactly that, the question of motivation is still fairly sharply presented. (If one says the benefits are to the politicians, then one must restate the problem for the voters who support them, who pay taxes and utility bills.) No one, of course, really doubts that those involved are acting from some combination of moral motive and self-interest as they understand it.<sup>243</sup> The aim here is to make their action more intelligible by treating it as part of the same kind of public debate treated throughout this Article, an integral part of a story about democratic self-interpretation, rather than an anomaly in a story about self-interest.

In private interviews and public statements, city officials and activists explain their efforts in several ways. They are quick to cite the advantage certain regions, such as California, hope to enjoy from early adoption and manufacture of technologies that may later become standard (a calculation that predicts effective political action on climate in the future, meaning that it is not really consistent with a larger pessimistic view of the problem).<sup>244</sup> They

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ACPP\_Annual\_Report\_5.20.09\_FINAL.pdf, setting a goal of thirty percent renewable energy for municipal use.

241. See Kate Galbraith, *A Clean Energy Uprising in California*, Green, Inc. Blog, Oct. 29, 2008, <http://greeninc.blogs.nytimes.com/2008/10/29/a-clean-energy-uprising-in-california/#more-399>; see also Heather Knight, *In S.F., Voters Defeat Prop. for City Utility*, S.F. CHRON., Nov. 5, 2008, at B1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/11/05/BATD13RC1Q.DTL>. Defeat of the San Francisco measure involved a long-standing conflict between Pacific Gas and Electric and proponents of publicly owned power, which brought out Mayor Gavin Newsom and Senator Diane Feinstein against the proposition.
242. See Engel & Orbach, *supra* note 2, at 119-20 (expressing puzzlement).
243. See, e.g., *id.* at 129-30 (describing moral motives as producing a “warm glow” but not proposing to consider them further); Sunstein, *Complex Climate Change Incentives*, *supra* note 2, at 1696-1700 (briefly noting a hodgepodge of moral motive and empirical confusion).
244. See Telephone Interview with Steve Nicholas, Former Sustainability & Env’t Dir., Seattle Mayor’s Office (Nov. 14, 2008); Telephone Interview with Jeanie Boawn, Sustainability & Env’t Adm’r., Seattle Mayor’s Office (Nov. 7, 2008); Telephone Interview with Kevin

embrace a simple public-choice motive: city governments hope to benefit from green-development block grants and, in the longer term, density-friendly economic development, and early efforts may position them to do both.<sup>245</sup>

They also regard themselves as engaged in political persuasion that they hope will induce others to take similar action.<sup>246</sup> Whether this is plausible is partly endogenous to the politics itself. This politics seeks to affect the reasons—specifically those grounded in environmental values—that people understand themselves to have for joining collective undertakings. Rather than a specimen of an independently established logic of collective action, it is an engagement with that logic itself.

What is the nature of the persuasion? In addressing this question, I am mainly concerned with how the leaders I spoke with understood their own participation and that of the people they recruited. Their opponents offered familiar arguments that local climate action can only be futile, and in their advocacy, the leaders developed a concrete sense of how to engage those arguments.

First, local climate activists appreciate that they are engaged in a symbolic politics made possible by the country's adoption of environmental commitments in the 1970s and earlier.<sup>247</sup> Before the 2008 presidential election, which brought a new emphasis on climate change to the White House, their actions invoked those commitments when the national government was seen as neglecting them. The activists sought to announce that the commitments remained vital, and, in doing so, contribute to the truth of the assertion. These symbolic actions reflect the existence of environmental commitments as national values; by adopting nominal emission limits, cities make a public argument that the federal government should do the same.

Second, these initiatives are intended as existence proofs that coordinated action can succeed in reducing greenhouse gas emissions, at least within a locality (ignoring for the moment the prospect of emitting activities fleeing to other jurisdictions).<sup>248</sup> A successful experiment is a powerful form of

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McCarty, Dir., U.S. Conference of Mayors Climate Prot. Ctr. (Oct. 31, 2008). Nicholas was the lead strategist and organizer at the time the Mayors Climate Protection Agreement was being propagated.

245. See Telephone Interview with Steve Nicholas, *supra* note 244; Telephone Interview with Kevin McCarty, *supra* note 244.

246. See Telephone Interview with Steve Nicholas, *supra* note 244.

247. See sources cited *supra* note 244.

248. See Telephone Interview with Steve Nicholas, *supra* note 244.

persuasion, establishing a concrete option for others with salience that a merely hypothetical alternative is unlikely to command.<sup>249</sup>

Third, local climate initiatives are attempts to reframe the cultural valence of climate change from an ideological flashpoint associated with left-liberal attitudes to a rallying point of pragmatic effort. Studies of public opinion on climate change show that views of both the severity of the problem and the human power to address it conform to the hypothesis that people assess facts based on whether the truth or falsehood of those facts would confirm or undercut the bases of their social status and moral vision of the world.<sup>250</sup> Those who regard the problem as serious and profess to believe that people can do something about it are also proregulatory economic and political egalitarians.<sup>251</sup> Those who profess to think that the threat is negligible and beyond human influence in any case (two views that would not seem inherently aligned but for their affinity in the cultural-meaning register) fall on the other side of those larger markers of worldview. Strategists for local initiatives emphasize practical local vulnerability to climate change. The paradigm case is Seattle's dependence on the Cascade snowpack for water and hydroelectric power, which figured importantly in the local argument for leading the conference of Mayors Agreement initiative.<sup>252</sup> This argument is available across the snowpack-

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249. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (arguing for the importance in public policy innovation of small-scale existence proofs of the viability of alternative models). Perhaps the most impressive American example of this strategy at the municipal level is that of Burlington, which has a well-established program of encouraging conservation and has seen its energy use drop by one percent since 1990, while statewide use has risen by fifteen percent. See KOLBERT, *supra* note 240, at 175. California, which has pursued an aggressive and successful energy-conservation policy over the last three decades, presents a similar example at a larger scale. California has held its per capita energy use essentially even since 1974, while nationwide per capita consumption has increased by fifty percent. California has also reduced its per capita carbon dioxide emissions by thirty percent since 1975, while national per capita emissions have changed little. See Steven Mufson, *In Energy Conservation, California Sees Light: Progressive Policy Makes It a Model in Global Warming Fight*, WASH. POST, Feb. 17, 2007, at A1.

250. See Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149 (2006) (setting out a theory of cultural cognition and evidence for its validity); Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071 (2006) (reviewing CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005)) (arguing for the appropriateness of considering cultural meaning of risks in setting and justifying public policy).

251. EDWARD MAIBACH, CONNIE ROSER-RENOUF & ANTHONY LEISEROWITZ, YALE PROJECT ON CLIMATE CHANGE & GEORGE MASON UNIV. CTR. FOR CLIMATE CHANGE COMM'C'N, *GLOBAL WARMING'S SIX AMERICAS 2009: AN AUDIENCE SEGMENTATION ANALYSIS* (2009), available at <http://environment.yale.edu/uploads/6Americas2009.pdf>.

252. See sources cited *supra* note 244.

dependent West, as is the danger of drought for already water-stressed regions in the Southwest and, in some recent droughts, the Southeast.<sup>253</sup> If it succeeds, like nineteenth-century arguments tying forest conservation to erosion prevention and future timber harvests, this effort will have made climate change a different kind of problem. This sort of change relies on both empirical knowledge and democratic self-interpretation.

Finally, the activists aim to create new norms of climate regulation within small and rather insular populations at a time when such norms have little purchase in the larger society. Ultimately, local initiatives aim to make low-carbon conduct conventional—part of a practice of membership and mutual respect.<sup>254</sup> As a starting place, the initiatives take advantage of small and dense networks, such as mayors, city officials, and environmental activists. This is an attempt to create a practice among members of a limited public, rather as the Sierra Club once created a limited public in which the Romantic experience of nature was widely shared and explored as a public language.<sup>255</sup>

The unifying aim of this activism is persuasion: to give a broader class of people reasons to believe climate change is both real and susceptible to action. Local climate initiatives engage the questions of: (1) what reasons exist to address climate change; (2) who has those reasons; and (3) what reasons would be sufficient to spur collective action. At least for their activist core of proponents, local initiatives are acts of defiance against the idea that politics is futile—against the pessimistic account of climate change and collective action sketched earlier.<sup>256</sup> If they were merely defiant, they would count only as expressive, in just the vein of a chanted slogan. The burden of the argument

253. See Jon Gertner, *The Future Is Drying Up*, N.Y. TIMES, Oct. 21, 2007, § 6 (Magazine), at 68 (describing increasingly dire forecasts for regional water shortages under current climate change models).

254. See Telephone Interview with Steve Nicholas, *supra* note 244.

255. See Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and the Law*, 102 MICH. L. REV. 71 (2003) (setting out the motivational relevance of reciprocity and nonreciprocity for sustaining collective action). For accounts of neuroscience studies suggesting confirmation of the distinct motivational character of reciprocity, see Kevin McCabe et al., *A Functional Imaging Study of Cooperation in Two-Person Reciprocal Exchange*, 98 PNAS 11,832 (2001); and James K. Rilling et al., *A Neural Basis for Social Cooperation*, 35 NEURON 395 (2002). For a fascinating historical argument that social cooperation was long regarded as normatively rational and that by this canon individuals are correct to imagine their acts as directly efficacious when they contribute to a social practice, see RICHARD TUCK, *FREE RIDING* 119-55 (2008).

256. This idea has become familiar among at least some political progressives in the last decade or so and is crystallized in the slogan of the World Social Forum: “Another world is possible.” See World Social Forum, [http://www.forumsocialmundial.org.br/index.php?cd\\_language=2&id\\_menu=](http://www.forumsocialmundial.org.br/index.php?cd_language=2&id_menu=) (last visited Nov. 16, 2009).

here is that local climate initiatives are intended rather as efforts at persuasive politics, bearing on the reasons for action that operate in the political community and its subcommunities. Those who work for local climate initiatives understand the argument that their action is necessarily futile. Proving otherwise is a project motivated precisely by an understanding of the argument and a wish to change the terms on which it rests.

## 2. *Community, Politics, Thresholds*

We have seen that throughout the history of American environmental law, intrinsically satisfying ways of interacting with the natural world have spurred instrumental political action, such as calls for conservation laws. The Sierra Club's members moved into advocacy powered by a way of experiencing the Sierra Nevada and the California redwoods. The struggle to develop and express a similarly potent experience of wilderness shaped the early work of the Wilderness Society. These motives are particularly important because politically relevant communities and movements can form around them for the sake of a satisfying shared experience, whether or not participants expect to achieve political goals. As these groups grow, they become more likely to be politically effective, even if political efficacy is not what attracts their growing membership. In this way, intrinsic motives can carry communities of conviction across thresholds of political relevance.

Implicit in pessimistic analyses of climate politics is a seldom-expressed idea that climate change presents no opportunities for intrinsic satisfactions of this sort—that carbon reduction, mitigation, and the rest are all cost and no reward, and that therefore no one would rationally undertake them without first solving the collective-action problems that dog climate politics. As Sarah Krakoff has recently argued, this may not be true.<sup>257</sup> Local carbon-reduction efforts seem to be, among other things, some citizens' effort to (1) do the ecologically right thing and (2) form and participate in communities that do the same. This development resembles both the shared aesthetic and spiritual experience that drove the early Sierra Club and the "new nationalist" strand of Progressivism, with its insistence that a share of personal meaning and worth comes from the goodness or greatness of one's polity. This development differs from early Sierra culture, though, in being less ecstatic than deliberate, closer to an atmospheric land ethic than to John Muir's aesthetic rapture. It differs

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257. See Sarah Krakoff, *Environmental Law, Tragedy, and Community* (Aug. 29, 2009) (unpublished manuscript on file with author).

from many Progressive predecessors in being, for the moment, a matter of local rather than national or global politics; but that may be momentary.

*C. Frames for Climate Change: Where Might Environmental Values Go Next?*

In light of the ways that Americans have drawn on and changed environmental values in the past, how *might* those same values develop in the politics of the coming decades? This Section moves from a specific case to general themes. It is an argument about some of the forms that the major traditions of environmental values might take in climate politics. The inquiry is shaped but not determined by past developments, and is an attempt to inform democratic activity by increasing the scope and richness of the values advocates and ordinary citizens alike can draw on as they argue over what we should do, and why.

*1. Romantic Aesthetics and the Politics of Consciousness*

As this Article has shown, it has become conventional to say that the conservation tradition associated with the Sierra Club and Wilderness Society is obsolete because it depends on naïve ideas of an unchanged and untrammled nature, which, if it ever existed, is now lost to the irretrievable past. But this is almost entirely wrong. This tradition has always been centered on *human* values and engaged in the ever-shifting politics of democratic life. It has been, in fact, a politics of consciousness, aimed at enabling people to encounter the natural world in ways that both perceive its objective features more exactly *and* induce experiences such as sublimity and harmony. Aldo Leopold's account of the purpose of public-lands management as achieving new levels of "receptivity" in the human mind captures exactly the human-centered and culturally innovative character of this program.<sup>258</sup>

What might be productive in the Romantic tradition would require making two elements of that tradition more explicit, basic, and thoroughgoing—in a word, radicalizing them. The first radicalizing development is to make explicit the idea that what is finally valuable in nature, according to this tradition, is not specific individuals, species, or places, nor even an ideal, undisturbed condition, but *qualities of natural systems*. Leopold, again, captured this idea when he made "integrity, stability, and beauty" the struts of the "land ethic" that emerged from decades of work in wilderness advocacy and other

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258. See LEOPOLD, *supra* note 130, at 295.

conservation politics.<sup>259</sup> Even though this phrase is now sixty years old, it repays careful attention. These are not qualities of unchanged, “wild” nature, but goals for active management, both of wilderness and of densely inhabited places, such as farming regions.<sup>260</sup> Moreover, these qualities blend objective characteristics of natural systems with attitudes and experiences of the human beholder. *Integrity* here means, roughly, resilience, and describes a system that can persist through both endogenous and exogenous changes. *Beauty*, by contrast, is a quality made actual only in a person’s culturally mediated encounter with a part of nature. So understood, these qualities are not at all obsolete as guides in engaging climate change. Instead, they address questions of just the kind that managing a global atmospheric system (within the considerable limitations of human competence to do so) must raise: questions of what qualities are valuable in our eyes in such a system, and what is necessary to maintain those qualities.

The second radicalizing development follows closely on the first. It is a sharp counterpoint to simplifying and nostalgic tendencies. It requires an embrace of the fact that environmental politics is centrally about a choice of futures. Such politics poses values to guide those choices, and so points, not backward to a lost idyll, but forward to human decision. It differs from more familiar techniques for steering toward the future, notably cost-benefit analysis, in that it engages not just the choice of means, but centrally the choice of ends, of *what* we value and why. Democratic politics has repeatedly changed both the set of viable alternatives and the metrics by which they are evaluated.

Carrying forward the Romantic tradition into climate politics might also require deepened engagement with another basic theme: identification of the qualities of mind and experience in which encounters with the natural world enrich human consciousness. Two issues have often made this question elusive. One is the tendency to confuse the touchstones of aesthetic experience with the values they embody and evoke, so that conservation has seemed to be *simply* about Yosemite Valley or the blue whale, rather than an attitude toward the natural world that is associated, but not identical, with conservation of such places and species. The other difficulty is that the natural world’s meaning for the human mind has figured in quite diverse ways across the history of environmental values. For the Transcendentalists and certain early Sierra Club figures, including Muir, nature’s patterns revealed those of the mind, which participated in the same ordering principles. From the Wilderness Society forward, encounters with the natural world have mainly been seen as unique

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259. See *id.* at 262.

260. See *id.* at 243–58 (discussing agriculture as a paradigm problem for a land ethic).

opportunities for insight, but not access points to metaphysical principle. The Romantic tradition itself, then, contains temptations both to lose sight of the issue of consciousness altogether and to dismiss it as intractably ambiguous.

The version of this tradition with the most to offer in climate change takes the direction of the Wilderness Society, leaving metaphysics aside in favor of the quality of mind that appreciates natural systems. This approach concentrates on two rather opposite facts. One is that the natural world is deeply intelligible, composed of principles and relationships that, once grasped, enrich perception by making it patterned and significant. The other is that the world outstrips human understanding, both at its largest and smallest scales and at the furthest reaches of complexity, so that intelligibility is always bounded by mystery. Taken together, the experience is simultaneously of beauty—an orderly world that we can understand and in which we belong—and of sublimity—a world beyond us, in which we are always in some degree alien and potentially overwhelmed.

Recall the version of this idea that emerged from the work of Aldo Leopold and the Wilderness Society: that nature is at once deeply intelligible and basically mysterious, and appreciating this enriches the mind. This account may seem abstract, but just such ideas, worked into habits of perception, have provided key motives for the major conservation episodes of the last two centuries. Moreover, it may be that climate change brings home precisely this set of qualities in the natural world: that the earth is familiar and alien, subject to our mastery but also, past a certain threshold, able to overwhelm us. This description captures changes in which the same technology that for now makes the planet so serving of human ends threatens soon to make it much less hospitable to human life. It almost surely expresses something about atmospheric processes whose basic logic a child can understand, but whose systemic implications are beyond confident prediction by a civilization's worth of computer-enhanced climate science. And, maybe most importantly, it resonates with the image of a planet astonishingly rich in life yet shielded from deadly radiative heat and endless cold by a thin layer of air that is now ineluctably something humans have made.

This attitude might provide the motive for political demands to create a carbon-neutral economy, as earlier changes in views of human beings, economics, and politics spurred demands to replace slavery with free labor, and the rise of Sierra Club culture drove a new agenda for conservation.<sup>261</sup> It might cast compliance with the strictures of such an economy as a feature of a good

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261. See DAVIS, *supra* note 1 (discussing the changes in values and imagination that accompanied abolition).

life, not just a nest of inconveniences. It might, for instance, tilt political judgments between very different alternatives, such as relatively costly carbon-neutral policies and relatively inexpensive “geo-engineering” proposals to do such things as launch orbiting mirrors to reduce the earth’s solar exposure or seed the atmosphere with sulfur particles to the same effect.<sup>262</sup> It is one thing to compare the relative expenditures for these competing approaches. It is quite another to experience a basic discomfort in imagining a carbon-thick atmosphere kept cool only by mechanically fending off solar radiation, knowing that, if the satellites failed, the planet would almost immediately enter a period of drastic and unpredictable climatic instability. That prospect, of course, represents a bundle of probability-discounted costs; but one might also experience discomfort because she believed such an engineered atmosphere lacked beauty, integrity, and stability, or whatever parallel terms emerged as public language for a healthy and desirable atmosphere. This perception of the costs of a geo-engineering solution to climate change would extend to the global atmosphere a way of valuing nature that has importantly motivated earlier conservation and environment regimes: a marriage of ethical, prudential, and aesthetic regard for a complex and resilient natural system.

## 2. *Progressives and the Charisma of Management*

The second great theme of American conservation politics, interwoven with Romanticism, is the Progressive ideal of expert management in the public interest. These two themes have sometimes seemed at odds, and they draw on contrasting aspects of the modern temper: the self-transcending and rapturous on the one hand, and the calculating and instrumentally rational on the other. The contrast is easy to overdraw, though. Romantic developments have frequently provided the goals that Progressive management has served, while managerial expertise has not been narrowly instrumental, but has engaged such purpose-guiding questions as the character and scope of national community.

Progressivism is, among other things, a tradition attached to the claim that economic life should serve certain qualitative values such as equal opportunity because those values are measures of a legitimate economic order. At least since Pinchot and Roosevelt put “conservation” at the center of a national program of economic management, environmental values have figured not just in the functionality of the economy, but also in its legitimacy. These values have

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<sup>262</sup> See Robert Kunzig, *A Sunshade for Planet Earth*, SCI. AM., Nov. 2008, at 46 (discussing these options); David G. Victor et al., *The Geoengineering Option: A Last Resort Against Global Warming?*, FOREIGN AFF., Mar.-Apr. 2009, at 64 (same).

included the intergenerational solidarity that Pinchot called for and the idea of using resources in a way that enables natural systems to reproduce themselves indefinitely. Regulation aimed at atmospheric health might play the same role as conservation-based criteria for a legitimate economy.

To develop this distinction conceptually: markets are defined by both *constitutive regulation*, which makes them what they are, and *exogenous regulation*, which adjusts them, as it were, from outside. The contrast, however, is not natural or otherwise fixed. Constitutive regulation describes those features that we regard as intrinsic to a certain form of economy, as if they were “just there,” such as the prohibition on involuntary servitude and the fixed number of estates in real property. Political developments can change the domain of constitutive regulation by putting new principles, such as atmospheric health, at the center of legitimate markets. The Progressive tradition in environmental values has done this with conservation principles in the past, however imperfectly, and the idea of an economy constituted and assessed by a standard of atmospheric health would extend that tradition.

Note that there is a basic complementarity between the Romantic and Progressive developments sketched here. The two traditions might coincide in the same set of values: systemic qualities such as beauty, health, and integrity. As argued earlier, these are the kinds of values that Americans might embrace in climate politics by drawing on the Romantic tradition. They are also the qualities that Progressive developments might place at the center of a new generation of constitutive economic regulation.

#### *D. Teaching Environmental Law*

Understanding environmental and natural resources law as a feature of ongoing political argument should affect how law professors teach these areas, as well as how we discuss them as scholars. Existing laws have the shape of the political language and values that produced them. Moreover, environmental laws are products of the democratic power to redefine values, often through fractious contests, and to open new alternatives that would once have seemed impossible. In teaching them, professors engage a tradition of argument, struggle, and change, one that inevitably contains hints of where future environmental politics might go. Environmental law is, of course, the structure and operation of statutes and regulations; but it is also a source of insight into environmental public language, a map of the political and cultural landscape on which past and future environmental challenges will play out.

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### 1. *Diverse Conceptions of Nature*

Various statutes have their origins in diverse conceptions of the natural world: how it works, what values it implicates, and what relation it has to human experience. In some measure, these differences simply reflect growing scientific knowledge: the establishment of the National Forests reflected increasing awareness of forest life-cycles and the effects of unchecked timbering; passage of the Clean Air Act expressed growing appreciation of the health effects of industrial emissions. To some degree, however, the different statutes arose from ideas about nature's value and relation to human purposes. Thus the Wilderness Act enshrines a conviction that personal encounters with complex, healthy, and relatively undisturbed natural systems confer a unique benefit on the human mind. This is neither a simple question of fact (Does it or does it not?) nor a bare assertion of value (Wild nature is good.). Rather, it is a recognition of how certain aspects of the natural world have come to figure in the experience of some Americans. For those Americans, it is true about nature that it produces certain kinds of intense experiences, and it is true that those experiences are valuable. These facts are culturally particular: they are not true in all places or in all times; but they were real for those who created the statute, and the law's embracing them helps to ensure that they remain true. Exactly the same point applies to the laws creating and governing the National Parks. More subtly, we have seen that the antipollution statutes of the 1970s took some of their impetus from burgeoning beliefs, founded in the popular reception of ecology, that the integrity of natural systems is both valuable in itself and instructive for the human mind that understands and respects it.

In light of this point, the teaching of the major environmental statutes should incorporate historical materials as keys to understanding the defining commitments of the statutes and their significance in the development of American ideas of nature. Some of the material that this Article discusses can serve as example.<sup>263</sup> Similarly, no account of the law of public lands would be complete without representative samples of what John Muir, Gifford Pinchot, and Aldo Leopold wrote on the topic, or of Theodore Roosevelt's speeches on

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<sup>263</sup> For instance, two fairly short pieces discussed earlier, *Time's The Age of Effluence*, and the *Sierra Club Bulletin's A Fable for Our Time*, would frame the generation of post-1968 statutes in the organizing themes of the time: a new conception of "the environment" as uniting previously disparate issues, a perception of environmental crisis, and a moralized cultural interpretation in which environmental crisis arose from a crisis of values, and the two required a unified response. These articles are presented and discussed in Section IV.A., *supra*.

conservation.<sup>264</sup> These would not be window-dressing. Instead, they would, as it were, form a map of changing ways of imagining and experiencing nature with new statutes as the outstanding features of its landscape.

Teaching might also incorporate reflection on comparative environmental traditions across countries. Consider this point in light of the political challenge of regulating climate change. This Article's basic argument about climate change is that the collective-action problem that the issue raises is even more complex than it at first appears. This is so because the value of nature within any polity is a matter of dispute, so that the structure of costs and benefits from cooperation or defection varies across both borders and time. Therefore, even a conventional rational-choice analysis of the issue may depend on the traditions of contest over nature's value that obtain within any polity, or at regional or global scales.

This point implies that, at a minimum, study of international environmental regimes and problems with a large international dimension should include engagement with various countries' and religious traditions' understandings of nature's value.<sup>265</sup> A similar point holds for study of the transnational social movements that now aim to affect both national and

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264. The Natural Resources textbook that is particularly sensitive to these issues nonetheless treats them mostly as clashes of value *today*, with competing positions exemplified by the arguments of law professors and moral philosophers—the trained professionals of normativity. See JAMES RASBAND, JAMES SALZMAN & MARK SQUILLACE, *NATURAL RESOURCES LAW AND POLICY* 11-28 (2004) (discussing philosophical rationales for conservation); *cf. id.* at 28-34 (summarizing some of the highlights in the development of wilderness values); 6 GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 30-33 (2007) (excerpting LEOPOLD, *supra* note 130). These textbooks are not blind to history, but they do not set the stage for teaching these areas of law as the products of a history of politically contested self-interpretation.

265. This is, of course, a daunting assignment, and few law professors would be qualified to undertake it from scratch. That said, the upshot of this argument is not that everyone teaching a course on climate change law and policy should develop ground-up mastery of Confucian approaches to nature, the importance of agrarian rural landscapes in French political culture, or the significance of the monsoon to Indian national identity. See, e.g., RAMACHANDRA GUHA, *ENVIRONMENTALISM: A GLOBAL HISTORY* 98-124 (2000) (discussing the distinctive sources and meanings of environmental politics in “the global south”); ARUNDHATI ROY, *THE COST OF LIVING* 21-48 (1999) (connecting a conservation agenda with small-scale and humanitarian features of Indian political culture, in contrast with a postcolonial attachment to grand-scale development projects); Wiener, *Climate Change Policy*, *supra* note 2, at 1819-20 (discussing the historical interweaving of natural disaster and the expectation of dynastic change in Chinese political culture). Qualified scholars would be doing all law teachers a service in engaging these questions together and producing a strong set of materials on comparative cultures of nature, suited for use by law teachers. Law teachers, in turn, would do well to call for such materials and adopt them if they became available.

international environmental law. A growing body of literature explores the networked organizations that make up these movements and asks whether they are producing new publics at a global or transnational regional scale, and, if so, whether the political culture of those publics is an extension of the domestic environmental movements of the United States and other North Atlantic countries or something new.<sup>266</sup> We have seen that the American politics of nature helped to create both the conception of a natural world worth protecting and that of a state authorized and able to protect it; teaching environmental law should include the question of whether similar changes are underway today at larger scales.<sup>267</sup>

## 2. *A Place for Imagination*

As the Introduction and Part I of this Article argue, the narrowing effect of the conventional approach to environmental questions is particularly potent in areas where the content of any future environmental law has yet to be determined, notably climate change. This is paradoxical because these may be the areas where the possibility of change is greatest. It was in past struggles over new issues that new values found sharper and more persuasive expression and entered into public language. Without the contest over the National Parks and other public lands at the end of the last century, there would likely be no political language of sublimity, no convention of invoking the spiritual value of spectacular places to justify preservation decisions. Without the subsequent drive to establish permanent wilderness areas, the cultural category of wilderness, with its connection to ecological values more generally, might never have entered public language. Imagining those issues as constrained by the public values dominant when they arose would have led to entirely wrong forecasts. As we have seen, the arguments available to wilderness advocates early in their campaign were quite ill-suited to their goals and required the labor of imagination and persuasion that the advocates undertook. A “realistic” estimate of those issues in, respectively, 1860 or 1918, would have found scant prospect for the preservationists’ success. Moreover, as this Article has argued, pessimistic forecasts can be self-fulfilling.

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266. See generally 1 ENVIRONMENT IN THE NEW GLOBAL ECONOMY: ANALYTIC APPROACHES TO THE IPE OF THE ENVIRONMENT (Peter M. Haas ed., 2003) (collecting essays on all the themes mentioned in the text accompanying this footnote); HANDBOOK OF GLOBAL ENVIRONMENTAL POLITICS (Peter Dauvergne ed., 2006) (same); MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 121–63 (1998) (describing transnational environmental movements).

267. This note refers particularly to the discussion in Section I.C., *supra*.

The upshot is that law teachers should approach emerging issues in a bifocal way: both as occasions for the play of existing interests and values, and as places where social movements and political argument might bring new values into public language and rework the mutually defining relationship between values and interests. I would argue that we are teaching responsibly only when we emphasize to our students that this field is one in which once-unthinkable ideas have become conventional, not one time only, but repeatedly, through imagination, argument, and politics.<sup>268</sup> Any student who has completed a course in environmental or natural resources law should appreciate that the field is defined not only by human solutions to a consistent set of problems and opportunities called Nature, nor simply by a set of constant political impetuses and constraints called interests, but also by the recurrent reinvention of human ways of encountering and experiencing the natural world.

## CONCLUSION

Ideas about the value of the natural world are, and have always been, integral to the repertoire of arguments that Americans use to try to persuade one another of the character and implications of common commitments. How we understand nature is part of civic identity. It has developed by interacting with other, better-trodden themes of American public language: national purpose, civic dignity, and the role and appropriate scale of government, to name those that have figured most prominently in this Article. This understanding of the natural world is anything but monolithic: it is one of the common terms that Americans interpret differently in battling over their disagreements.<sup>269</sup> The natural world has stood at various times, and for various constituencies, for the idea of infinite material progress, the possibility of

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**268.** This might mean inviting students to engage in an exercise like the one modeled in this Part: reflecting in an open-ended fashion on how existing themes in environmental public language might develop in the crucible of new problems. It might simply mean insisting, in addressing emerging problems, that the most realistic approach is not one that projects existing constraints indefinitely into the future. Instead, the most realistic approach would take history as evidence that today's constraints were yesterday's seemingly unrealistic proposals, and so that we should look among today's less obvious possibilities, even its wilder-eyed ideas, for hints of what the future might be. Teachers might develop this point in a mainly historical fashion, as this Article does. A case study on the development of Wilderness Society arguments, for instance, would convey the key role of imagination in making new kinds of arguments possible, without any need for more open-ended classroom exercises.

**269.** See Post & Siegel, *supra* note 1.

rational resource management in the public interest, and the need to redefine human flourishing beyond material mastery of nature toward a heightened aesthetic awareness and spiritual response to it. The politics of nature has contributed to the civic dignity of the free labor idea, in which the public domain must be open to citizens' settlement and exploitation; to that of Progressive reformers, in which the citizen should do her part in maintaining a social order that manages its complex and interdependent systems for health and mutual benefit; and to that of the Romantic, whose loyalty to the political community is paradoxically conditioned on its enabling him to leave its constraints from time to time, escaping into solitude, reflection, and perhaps mystical ecstasy.

More than a century of development in these themes contributed to the rise of modern environmentalism, sometimes inaptly described as an event without a history. These themes contributed mightily to the specific shape that early environmentalism gave to the anxieties of the 1960s and early 1970s. Environmentalism, in turn, gave ideas of nature's intrinsic value and moral instructiveness new reach in American public language. Understanding that era as one in which legislators joined movements and commentators in adopting this new account of the natural world casts light on the peculiarities and limits of their landmark legislation. In turn, understanding today's politics as a continuation of the politics of nature casts light on a signal anomaly of climate politics, the proliferation of local initiatives to control greenhouse-gas emissions. In a broader spirit, it also suggests the value of imaginative forecasting like that attempted in Part V, which connects today's emerging environmental problems with the themes of environmental public language.

The developments that this Article explores were acts of democratic self-interpretation. Social movements, political leaders, and public commentators repeatedly adapted ideas of the natural world to the needs of their times, and in turn recast those needs in light of new understandings of the meaning and value of nature. The philosophical and literary canon of American conservationism—Thoreau, Muir, Leopold—is badly miscast when taken as a line of prophets or an intergenerational seminar in environmental ethics. These touchstone expositors were, rather, parts of their respective worlds and times, and their intelligibility to us is partly a product of the politics of nature between then and now. Thoreau and Muir were sources of material for the self-interpretation of individuals and movements, Thoreau perhaps diffidently, Muir deliberately, as he turned his role as publicist of Romantic aesthetics into that of social-movement impresario. Leopold, for his part, was a product of the intensely practical, public-oriented argument-making of a movement culture, and his work was a response to the challenges of justifying wilderness in the terms available in the 1920s through the 1940s. None of this makes their conviction less real or reduces their literary or theoretical interest. But it does

set their meaning for environmental law and politics just where it belongs: in relation to the self-interpreting democratic community that they addressed and to which they belonged—along with millions of mostly forgotten people who gave their ideas form and life, from the weekend sojourners of the Sierra Club and the uncharismatic Wilderness Society editor, Howard Zahniser, to the federal legislators of the 1960s and mayors in the last decade. That larger community and the limited publics within it are the ultimate actors in this story.

They—we—will choose which strands of the inheritance set out here will remain a living tradition in the environmental politics of our time. Climate change comes draped in claims of apocalypse, national mission, and market-friendly technological optimism—a culturally overdetermined phenomenon if ever we have faced one. Which accounts will prevail is partly a political choice, one made of old materials in new circumstances. The choice will be the work of the next generation of the cultural innovation, political argument, and social movements that have produced American environmental public language so far.