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Environmentalism

EARTH DAY, April 22, 1970, is celebrated as the “day environmentalism in the United States began to emerge as a mass social and cultural movement.” Phillip Shabecoff, a former *New York Times* reporter who became a historian and voice of the movement, captured the moment: millions of people in places across the country and around the world staged “varied and often highly inventive happenings”—from students riding horses down a freeway in Tacoma to protest automobile pollution and holding up dead fish along New York’s Fifth Avenue to dramatize pollution of the Hudson River to more sedate activities such as planting trees in vacant lots or picking up plastic bottles and beer cans along local streams. They were ordinary people who harbored environmental concerns and nursed private resentments against those they identified as agents of environmental degradation—the sulfur dioxide-spewing power plant that polluted the air along the path by a river or the developer that remade rolling farmland into a shopping center. Earth Day helped turn those millions of private grievances into a powerful social and political force.¹

Although April 22, 1970, was crucial to the emergence of the movement, environmentalism did not spring forth fully formed that day. Its foundations were laid years—indeed, in some respects, generations—earlier. These include the writings of Henry David Thoreau, George Perkins Marsh, John Muir, Aldo Leopold, Rene Dubos, and Rachel Carson. They include the conservation movement, which fostered a public discourse on the importance of protecting environmental amenities and natural resources and oversaw the birth of public agencies such as the National Forest Service and National Park System and advocacy groups such as the Wilderness So-

ciety and Sierra Club. These institutions survived the transition to the modern environmental era and indeed helped drive that transition. The roots of modern environmentalism also include other social movements of the time—civil rights, antiwar, and feminist. These movements provided organizational models for environmental activists and contributed an underlying theme of the need for social change. The late 1960s and early 1970s in the United States were swirling with protest and discontent with the status quo, and it was in this ferment that environmentalism found a new and powerful voice that was to change the nation's institutions and practices—the law perhaps most prominently.

Like its sister movements, modern environmentalism in the United States sought a transformation of the national culture. I use “culture” here to mean the basic beliefs, values, and practices shared by a group of people.² This includes symbolic meanings generated by cultural practices, such as law, that confirm, advance, or contest prevailing beliefs and values.³ Culture is heterogeneous and dynamic, particularly in a postindustrial pluralistic society like the United States.⁴ Groups with differing beliefs and values mobilize into opposing cultural factions. Insurgent groups challenge the dominant culture, and institutions and practices resist, adapt, or disappear, to be replaced by others. In this ferment, law and other societal institutions have a role not only in expressing and reproducing cultural norms but also in contesting and mediating among them.

Environmentalism sounds at this level of foundational conflict. It manifests itself in arguments and policies regarding a myriad of particular issues—for example, whether to build a new highway, open a section of national forest for logging, or require reductions in greenhouse gas emissions affecting climate change. But the movement ultimately is about change at a deeper level—that of our beliefs about how nature works and how people relate to it. In 1970, the year that the first Earth Day brought the movement into broad public awareness, Michael McCloskey, executive director of the Sierra Club, wrote that “a revolution is truly needed—in our values, outlook and economic organization.”⁵ I offer a perspective on whether and to what extent that revolution has occurred in the forty years since McCloskey wrote those words.

Although the accomplishments of the movement have been impressive, by most accounts they have fallen short of the revolution that McCloskey and other activists envisioned. Perhaps some environmentalists are content with less, but others lament the movement's failure to achieve its revolutionary aims and continue to press for cultural transformation as the ultimate measure of success. Shabecoff wrote in 2003 that environmentalists

“will lose—unless there are fundamental changes in the nation’s economics, its politics, the way it deploys science and technology, and the understanding and actions of its citizens.”⁶

The Tenets of Environmentalism

People calling themselves environmentalists hold divergent beliefs and values, often strongly disagreeing about what environmentalism is and how to advance it. Nevertheless, it is possible to identify a set of tenets that within a manageable range of variation have characterized modern environmentalism and shaped the environmental concerns of the American public. These tenets appear in the work of social scientists who have studied the movement as well as in the sayings and writings of modern environmentalism’s progenitors and exponents—from Thoreau and Marsh to Carson and McKibben.

The Social Science: Environmentalism and Cultural Contest

Social scientists have spent decades exploring whether environmental concerns can be reduced to “a single underlying social construct” supporting environmental protection and what the elements of that construct might be.⁷ Among the first and most prominent efforts to isolate factors underlying environmentalist attitudes was a 1978 study by sociologists Riley E. Dunlap and Kent D. Van Liere. Their study detected an emerging “world-view,” which they called the “new environmental paradigm” (NEP).⁸ The major elements of the NEP were recognizing the “limits to growth,” preserving the “balance of nature,” and rejecting “the anthropocentric notion that nature exists solely for human use.” In 2000, these researchers added two additional elements to the NEP: the rejection of human “exemptionalism” (that humans are not subject to natural constraints) and the potential for catastrophic environmental change, or “ecocrises.”⁹ To similar effect, in the mid-1990s three anthropologists—Willett Kempton, James S. Boster, and Jennifer A. Hartley—distilled an interconnected set of values and beliefs identified with American environmentalism. This included beliefs that nature is a limited resource on which humans depend; human-natural systems are interdependent, complex, and balanced; and nature is to be valued for its own sake. Kempton and his colleagues also determined that American environmentalism, as they measured it, was a “consensus view” among the U.S. public.¹⁰ Although this conclusion was disputed, Dunlap and Aaron McCright recently came to a similar result using a dif-

ferent method: environmentalism in the United States is a “consensus movement” with a relatively stable and persistent presence.¹¹ In any event, these and similar studies offer evidence that attitudes, beliefs, and values associated with environmentalism are measurably present and durable among the American public.

The NEP opposes what Dunlap and Van Liere call the dominant social paradigm, or DSP—the collection of shared beliefs and values that form “the core of [the] society’s cultural heritage.”¹² Although the DSP is not necessarily endorsed by society as a whole, or even by a majority, it is held by dominant groups and perpetuated by prevailing institutions. Dunlap and Van Liere concluded generally that commitment to the DSP is “a *major factor* influencing environmental concern.” Political scientist and environmental scholar Lester Milbrath used a military metaphor: the NEP as a vanguard, struggling to overcome the rearguard DSP.¹³

In the world of law and policy, this conflict is waged on familiar terms. The beliefs and values of the DSP cash out as faith in material abundance and support for private property rights, a laissez-faire economy, and limited governmental regulation—all negatively correlated with environmental concern. By contrast, holders of the NEP value material restraint and support protective regulation, including limits on private property rights and economic activity—all consistent with protecting environmental public goods. Environmentalists tend to be concerned about unintentional systemic effects of economic activity; those following the DSP tend to disbelieve that such effects will occur or will be serious if they do.¹⁴

ENVIRONMENTALISM AND BASIC CULTURAL VALUES

The NEP maps onto generic value matrices that social scientists have developed to explain what lies behind very different human responses to life’s risks and challenges—including environmental risks. Prominent among these matrices is a values typology developed by anthropologist Mary Douglas and used in her work with Aaron Wildavsky on a cultural theory of risk.¹⁵ Douglas and Wildavsky’s theory holds that people assess the risks of everything from guns to premarital sex to nanotechnology in ways that advance the cultural values they hold. More recently, Dan Kahan and others have expanded on that work to claim that these values—“ways of life” or “cultural worldviews”—lead people not only to assess risks differently but also to screen information about risks selectively in ways that support their views.¹⁶

Douglas’s theory assigns values along two scales: “grid” and “group,” as shown in Figure 1.1. The grid measures values along a dimension keyed to the assignment of power, status, and other resources in society; the group,

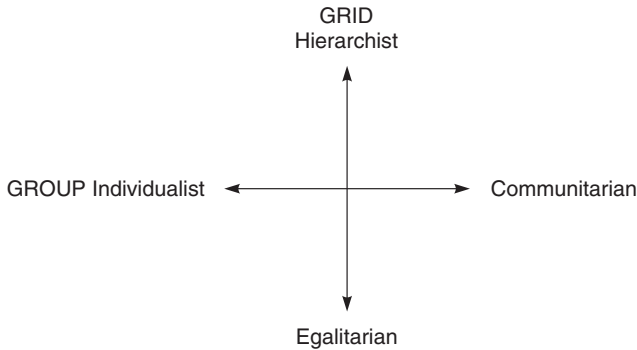


Figure 1.1

Douglas's Culture Typology (From Dan M. Kahan and Donald
Brahman, "Cultural Cognition and Public Policy," *Yale Law and
Policy Review* 24, no. 1 (2006): 151)

along a scale of individual versus group interests. Per Kahan, the contrasting grid values are hierarchy ("pervasive and stratified 'role differentiation,' " distribution of resources based on "explicit public social classifications") and egalitarianism ("egalitarian worldview," resources distributed without regard to social characteristics). The contrasting group values are individualism (competition, individuals act without collective assistance or constraint) and community (mutual dependency, society secures collective needs).¹⁷

These general values preferences are predictive of environmental concern. Kahan and his colleagues found that people with a hierarchical-individualistic worldview can be "expected to be skeptical of claims of environmental and technological risks." They will understand intuitively that crediting these risks would invite "restrictions on commerce and industry, forms of behavior that Hierarchical Individualists value."¹⁸ People with an egalitarian-communitarian worldview will likely show greater concern about the same risks. Their heightened sensitivity stems from suspicions of "commerce and industry, which [egalitarian-communitarians] see as the source of unjust disparities in wealth and power" and assertive use of environmental resources. Environmentalists are gathered largely in the lower-right quadrant of the group-grid framework—the home of what Douglas and Wildavsky called "sectarians," fighting from the "border" of society against a complacent "center."

A recent study by Kahan and others on climate change illustrates how groups with opposing cultural outlooks form contrasting assessments of environmental risks. Using assessment of the risks of climate change,

researchers compared the views of subjects subscribing to a “hierarchical individualist” worldview with those subscribing to an “egalitarian-communitarian” worldview characteristic of environmentalists. The hierarchical individualists “rated climate change risks significantly lower” than the egalitarian-communitarians. Moreover, this difference between the groups only *increased* with greater scientific knowledge and technical reasoning capacity.¹⁹

Researchers have detected similar correlations between attitudes toward climate change and ideological orientation (conservative-liberal) and political party (Republican-Democrat).²⁰ But Kahan and his colleagues found that Douglas’s cultural values scales were better predictors of views on environmental and other policy issues than were ideology or party affiliation.²¹ My analysis of the cases features this values framework because it incorporates the concepts that environmentalists themselves have used to define their own and opposing worldviews and because it gives a more nuanced analysis than do terms with less specific values content such as conservative-liberal and Democrat-Republican, although I sometimes use those labels too.

Elements of the NEP also accord with the moral foundations theory of Jonathan Haidt and others, which links attitudes on issues such as the environment with activation of distinct moral domains. Haidt identifies six of these domains, each identified with an adaptive challenge that humans faced in their evolutionary history and a virtue developed to meet that challenge. These domains include “care-harm,” which when activated evokes compassion in response to others’ harm, and “sanctity-degradation,” which produces disgust in response to perceived impurity. The NEP suggests that environmentalism is rooted in the care-harm domain, with its urgent concerns about environmental injury (“ecocrisis”). A recent survey of print and video media by Matthew Feinberg and Robb Willer found that harm- and care-based morality predominates over other moral domains in discourse on the environment.²²

Political liberals are more likely to draw on care-harm than are conservatives, making them more inclined to see the environment as a moral issue. Sanctity-degradation, which conservatives are more partial to than are liberals, is a separate source of potential environmental concern, but it is much less prominent in the environmental discourse. Feinberg and Willer have shown that switching the routes of moral appeal can increase environmental responsiveness among conservatives. In their study, proenvironmental messages calculated to trigger the sanctity-degradation response (e.g., how polluted and contaminated the environment has become) produced a level of concern among conservatives comparable to that of liberals.²³ This finding has promise in addressing the current polarization on environmental issues.

Cross-cultural studies have shown that values and beliefs associated with the DSP are particularly strong in the United States. In a comparative study covering the United States, Canada, Spain, and a number of Latin American countries, Wesley Schultz and Lynnette Zelezny found that "U.S. respondents scored lower on the New Environmental Paradigm than respondents from all countries except the Dominican Republic, Ecuador, and Peru." Lester Milbrath faults the United States for lagging behind other developed countries in recognizing the gravity of global environmental problems and taking action on them and believes that may have much to do with the way Americans see and value their world. If modern environmentalism was born in the United States, as Bill McKibben claims, it picked a particularly challenging setting.²⁴

Environmental Literature: The Culture from Inside

The U.S. environmental movement draws on a literature that spans centuries and includes writers as diverse as literary iconoclast Edward Abbey, marine biologist and nature writer Rachel Carson, and American monk and theologian Thomas Berry. Although I cannot do justice here to the richness and variety of this literature, a brief survey will help round out the portrait of environmentalism that will be useful in the analysis of the Supreme Court's decisions.

INTERDEPENDENCE: THE ECOLOGICAL PARADIGM

Environmentalists share a belief about the way the world is: that humans and the rest of nature are closely interconnected and that human intervention affecting one part of a human-natural system can be expected to have deleterious, if unintended, effects on other aspects of the system. This is the "interdependence" or "ecological" model. It stands in opposition to atomistic or disaggregated approaches that focus on substances, events, and causalities as individual and isolated.

The idea of interdependence so central to environmentalism has origins in the science of ecology. Ecology studies the interactions among life forms and physical matter in particular settings or systems. It is inevitably about relationships between and among things. Rene Dubos, an influential environmental thinker who first achieved distinction as a Nobel Prize-winning microbiologist, argued in the 1960s that science in the industrial age had been primarily concerned with "atomistic descriptions of substances and phenomena." What society needed, as the adverse effects of technological development on the environment and civilization became insupportable, was an integrated, ecological approach that could comprehend the complex in-

terplay between technological man and nature. "A sophisticated ecology" would complement the atomism and reductionism of traditional science.²⁵ Ecology's holistic perspective led to its embrace by environmentalists as a "subversive" science that challenged the "assumptions and practices accepted by modern societies."²⁶ My analysis of the Court's environmental cases will show this subversiveness at work in a range of settings—from statutory interpretation to constitutional doctrine on judicial access, federalism, and property rights.

The litany of interdependence cascades through the environmental literature. Often accorded the distinction of the first environmentalist, George Perkins Marsh wrote one of the early works of ecology, *Man and Nature*, in 1864 before the term had been coined. His densely documented account showed "how human agencies acted in and reacted on the whole web of soil and water, plants and animals." In Paris's Jardin des Plantes, Ralph Waldo Emerson marveled at the "close and compact web of mutual relations and dependence" among objects of nature, felt the "centipede in me," and vowed to "be a naturalist." Wilderness enthusiast and advocate John Muir wrote, "When we try to pick out anything by itself, we find it hitched to everything else in the universe." Aldo Leopold envisioned a complexly interdependent "land organism" or "biotic community," which included humans as well as nonhuman nature. In *Silent Spring*, Rachel Carson described diverse harms to humans and wildlife from chemical poisons as "a problem of ecology, of interrelationships, of interdependence." David Brower, perhaps the most prominent leader of the nascent environmental movement in the 1960s and 1970s, preached Muir's "gospel" of interconnectedness to groups around the country.²⁷

The interdependence or ecological model is associated with the belief that human intervention in the environment is likely to have broad-ranging effects that are serious and may be irreversible. In *Man and Nature*, Marsh identified humans as "everywhere a disturbing agent," upsetting the harmonious balances of natural systems. Natural systems were not inexhaustible or endlessly self-renewing. Epic damage could be done, as in the desertification of once-fruitful landscapes in Greece, Syria, and North Africa. And that damage might be beyond repair.²⁸

Marsh's themes of limits and of the vulnerability of natural systems to the enormous destructive capacities of *Homo sapiens* echo throughout the early environmental literature and into the present. But it was Rachel Carson's *Silent Spring* that struck a peculiarly modern variation on those themes: the "evil spell," as Carson called it, the specter of environmental apocalypse. Carson's book begins with "A Fable for Tomorrow." She asks her readers to imagine a harmonious setting, a small town in rural

America—prosperous farms, foxes, and deer in the countryside, clear streams full of trout, a place “famous for the abundance and variety of its bird life.” Then enters a “strange blight” encompassing the entire landscape: illness and death among humans and livestock and an eerie, shocking stillness—spring without the song of birds. This “fable,” Carson wrote, might easily become reality, the result of the widespread release of man-made chemical contaminants into the environment. With this fable and the scientific but vividly written exposition that supported her dire claim, Carson installed crisis and urgency in the modern environmentalist lexicon.²⁹

Carson’s second major contribution in *Silent Spring* was her focus on the potential for hazards to human life and health from environmental contamination as well as harm to natural systems. Previously, environmental health concerns had focused on contaminants such as human waste and heavy industrial emissions or chemical poisons that could cause immediate discomfort, hospitalization, or death.³⁰ Carson identified more subtle but no less serious health threats posed by agricultural chemicals that were becoming ubiquitous in the environment and that had “immense power not merely to poison but to enter into the most vital processes of the body and change them in sinister and often deadly ways.”³¹ The sinister changes included a compromised immune system and the hidden and lengthy chain of cellular mutations leading to cancer. Carson’s image of the human body as a complex system vulnerable to insidious threats from human agents mirrored the ecological model of interdependent and vulnerable nature and ushered in a new era of public fears over chemicals in the environment.

Silent Spring was assailed by critics as overwrought, but it set the tone for many environmentalists who followed with warnings of impending disastrous consequences of human action in an interconnected world.³² This “doomsayer” strain of environmentalism has spawned its own cadre of skeptics seeking to undermine the environmentalists’ predictions. Self-styled “ecopragmatist” Gregg Easterbrook argued in *A Moment on Earth* that nature is not fragile, as environmentalists believe, but “close to indestructible.” Easterbrook acknowledged that *Silent Spring*’s predictions of ecological harm would have come to pass if reforms had not been enacted in response to Carson’s warning. But he nevertheless criticized Carson’s book for the practice of “selective doomsdaying,” which he believed was common among environmentalists—emphasizing reasons to be afraid that adverse consequences will occur while failing to cite countervailing reasons to believe they won’t.³³ In the same vein, Danish statistician Bjorn Lomborg’s *The Skeptical Environmentalist*, first published in English in 2001, accused environmental groups of overstating the seriousness and extent of environmental problems and sought systematically to disprove “our doomsday concep-

tions.”³⁴ For their part, environmentalists have shown no inclination to abandon the belief that the world is facing serious risks that demand strong action, as illustrated most recently by dire warnings on the dangers of climate change. For many of them, at least, environmental crisis remains “a moral master narrative of modern life,” although communications experts caution that audiences may react to apocalyptic language with feelings of helplessness or despair, or they may be pushed to disbelief.³⁵

In *Discordant Harmonies*, ecologist Daniel Botkin sought to dispel the notion that there is an inherent equilibrium or stability in natural systems that should be protected from human disturbance. Modern ecological science shows that nature is constantly changing and in ways that cannot be entirely predicted. There is no natural “order” or ideal steady state that can be used as an obvious benchmark for limiting human interference with nature. As Botkin has acknowledged, *Discordant Harmonies* notwithstanding, the “grand idea of a balance of nature” remains deeply entrenched in our culture and among environmentalists particularly.³⁶ But assertions of the absence of a naturally ordained benchmark have stoked recent efforts to reform the movement.

The interdependence model not only embodies a belief about the way the world works, it is also associated with a sense of community with non-human nature and collective responsibility to care for the environment. Published after his death in 1949, Aldo Leopold’s “The Land Ethic” argued for extending moral consideration to an expanded “community” that includes both humans and nonhuman nature. Leopold believed that this “extension of ethics” would take root as society came to understand its essential dependency on an increasingly beleaguered land organism. “All ethics . . . rest upon a single premise: that the individual is a member of a community of interdependent parts.” In his influential history of the environmental movement, Shabecoff quoted this sentence from Leopold with the comment that “almost all else in environmentalism proceeds from that premise.”³⁷

VALUES

The environmental literature confirms the values account of Kahan and his colleagues, particularly the emphasis that environmentalists place on egalitarian and communitarian values. (I will often refer to the latter as “collectivism.”) As in Kahan’s account, these values are balanced by a set of competing values—individualism and hierarchy. Also prominent in the environmental literature is a third value dimension—mastery-harmony—which aligns with the hierarchy-egalitarianism axis in Douglas’s typology. Mastery-harmony contrasts a hierarchical view of humans in relation to nature (humans as “conquerors” of nature) with one of equality (humans

as “mere citizens” in community with nature). This extension of the hierarchy-egalitarian value opposition to relations between humans and nature distinguishes environmentalism from other modern social movements that share similar values but limit their concerns to status among humans. At its extreme, the harmony value manifests as the “biospheric egalitarianism” of the deep ecologists, but it also has more moderate expressions in environmentalist thought and practice.³⁸ (I will use the terms “hierarchy” and “egalitarian” to refer to relationships among humans but “harmony” and “mastery” to denote comparable values applied to relationships between humans and nature.)

Harmony and mastery. More than a century before the first Earth Day, Henry David Thoreau planted the seeds of the harmony-mastery opposition that was to become central to twentieth-century environmentalism. For Thoreau nature was not the “other”; it was his community, it was himself. In *Walden*, he celebrated the “sweet and beneficent society in nature” and asked, “Shall I not have intelligence with the earth? Am I not partly leaves and vegetable mould myself?” Later, in his essay “Walking,” he argued even more provocatively for a notion of humans as “a part and parcel of Nature, rather than a member of society.” This accompanied a distaste for “man’s improvements, so called”—“the building of houses and the cutting down of the forest and of all large trees, simply deform the landscape, and make it more and more tame and cheap.”³⁹

Aldo Leopold recast Thoreau’s intuitions in ecological terms, with a strongly ethical thrust. His idea of the biotic community incorporated the value of living harmoniously with nature and contrasted that with the drive to conquer, master, or dominate it. The land ethic, Leopold maintained, “changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it.” The progress is a moral one, from mastery to harmony. In delineating the “ecological conscience,” Leopold made this explicit: “conservation is a state of harmony between men and land.”⁴⁰

Leopold’s successors assured the centrality of the harmony-mastery opposition as the environmental movement emerged. In *Silent Spring*, Rachel Carson’s idyll is town life lived “in harmony with its surroundings.” The atavistic drive to mastery is the despoiler: “the ‘control of nature’ is a phrase conceived in arrogance, born of the Neanderthal age of biology and philosophy, when it was supposed that nature exists for the convenience of man.” In *So Human an Animal*, Rene Dubos wrote, echoing Leopold, that what we needed was a “new social ethic—almost a new social religion.” The essence of that religion would be “harmony with nature as well as man, instead of the drive for mastery.” The rejection of humans-over-nature unites many strains of modern environmentalism.⁴¹

Mastery values emphasize getting ahead through assertive use of the natural environment. They are associated with economic growth and material abundance and are closely linked to American individualism. But mastery values may be pursued through group action as well as individual initiative, by governmental as well as private initiatives. Some of the environmental literature's most vivid evocations of mastery values have concerned governmental undertakings.

For example, John McPhee's *Encounters with the Archdruid*, which came out in 1971 just as the movement was gaining broad momentum, recorded a classic clash between harmony and mastery values in the persons of David Brower, the "archdruid" himself, and Floyd Dominy, director of the Bureau of Reclamation in the U.S. Department of the Interior and lifelong builder of dams. The debate was over the Bureau's construction, with authorization from Congress, of the giant Glen Canyon Dam on the Colorado River. The dam flooded the canyon to create Lake Powell. Brower had belatedly opposed the construction of the dam; Dominy had pushed the dam through. By Dominy's lights, the dam had improved the river, putting it to work for humans—for water supply, electricity, recreation. For Brower, the scenic features and wilderness values of the river that were destroyed far exceeded in significance and value anything the dam offered in return. He likened the event to flooding the Sistine Chapel.⁴²

Cloaked in the language of judicial deliberation, versions of this dispute inform a number of the cases, such as *Citizens to Preserve Overton Park, Inc. v. Volpe* (routing an interstate highway through a city park with old-growth forest) and *Robertson v. Methow Valley Citizens Council* (siting a luxury ski resort in a national forest).⁴³

Collectivism and autonomy. The master narrative of the American dream stresses personal autonomy—the desirability of expressing and pursuing one's own interests as well as the freedom to do so. The aspect of autonomy most relevant to environmental concerns focuses on the manipulation of nature to advance one's self-interest, and like mastery it is strongly associated in the United States with the laissez-faire economy and material abundance. (I will use "autonomy" in this sense interchangeably with "individualism" in the Douglas-Wildavsky-Kahan framework.) This autonomy may be in conflict with group interest and opposed to collective measures to secure that interest.⁴⁴

In his 1968 essay, "The Tragedy of the Commons," American ecologist Garrett Hardin argued that individual self-interest, rationally pursued, leads to overuse of the environmental commons and other shared resources. Hardin asks us to imagine a grazing commons, to which herdsman enjoy unfettered access to graze their cattle. Initially, open access might not threaten

the productivity of the commons: the pressure represented by those partaking would be below the carrying capacity of the land. But in time, as each herdsman grazed as many cattle as possible to maximize his returns, the commons would reach a point of collapse, leaving all the herdsman worse off than they would have been had they limited their grazing. The “tragedy” occurs because in deciding whether to graze additional animals, each herdsman fully takes into account his own benefits from the sale of his animals and largely ignores costs to others from destruction of the commons. Although rational from the perspective of each autonomous herdsman, the result can be collectively disastrous.⁴⁵

Hardin’s immediate concern in his essay was overpopulation, but his metaphor applies to a wide range of abuses involving both taking too much out of the environment (using the environment as raw material for wealth creation) and putting too much into it (using the environment as a sink for the by-products of wealth creation). Garrett’s prescription for the problem of overuse was collective restraint: “mutual coercion mutually agreed to by a majority of those affected.” Mutual coercion to temper the abuse of the commons might take several forms, including the assignment of property rights in the resource. Hardin’s own preferred solution was “administrative law”—that is, regulation. This solution to the tragedy was in tension with autonomy in the assertive use of the environment for economic gain. That tension is important in environmental cases concerning not only property rights but also issues of citizens’ access to the courts and the regulatory scope of federal environmental statutes.

Although Hardin’s essay has been criticized in a number of its particulars, it enjoys canonical status as a conceptual foundation of modern environmental policy and law. In particular, it serves as a theoretical basis of environmental regulation, consistent with the communitarian or collectivist values shared by most environmentalists and antithetical to the competing autonomy values. But Hardin’s parable also has hidden within it the seeds of an economic approach to environmental policy, which many environmentalists resist: for them, the issue is not securing the optimal use of the commons but recognizing moral obligations to the commons itself as well as to other herdsmen.

Many environmentalists are uneasy with what they see as the valorization of the autonomous individual in American culture. Writing in the 1960s, not long after the publication of *Silent Spring*, environmental policy pioneer and public official Steward Udall blamed the “extreme individualism” associated with a frontier mentality for the nineteenth-century destruction of the great buffalo herds and the passenger pigeons and blamed a kind of “laissez-faire individualism” for the destructive practices of hydraulic miners and loggers. Unchecked individualism led to reckless exploitation of re-

sources that ignored sound practice and cheated future generations. Udall argued that from this sad history, we learned the importance of government action to protect the environmental commons.⁴⁶

More recently, writer and activist Bill McKibben has called for deemphasizing individualism in protecting our common interest in the environment. In his book *Deep Economy*, he writes that we have pursued “more” at the expense of “better.” “Our exaltation of the individual, which was the key to more, has passed the point of diminishing returns.” Indeed, he argues, we have passed from individualism to “hyper-individualism” and produced an economy that while enhancing monetary wealth is degrading the environment for future generations. The antidote is not socialism, McKibben writes, but a new emphasis on community.⁴⁷

At the heart of the tension between autonomy, on the one hand, and community solidarity and collective restraint, on the other, are competing notions of liberty. A landowner unchecked by regulation has broad latitude in deciding what to do with the resources on his land—sometimes called negative liberty. But his exercise of that liberty may limit the choices available to others. He may use his land in a way that involuntarily burdens neighboring landowners, thus reducing their liberty. Holding the landowner exempt from government constraints also limits the positive liberty we associate with collective self-determination—the freedom to define our community through majoritarian processes rather than have it defined through the choices of individuals acting on their own. The autonomy values associated with individualism stress the liberty of the landowner at the expense of these competing forms of liberty. Most environmentalists instead stress the value of a collective restraint that is capable of binding everyone in the interests of the common good.⁴⁸

Egalitarianism and hierarchy. Egalitarianism, which emphasizes equality, is broadly opposed to hierarchy, which accepts the legitimacy of an unequal allocation of social roles and resources. Hierarchy is linked to both mastery and autonomy because aggressive use of the natural environment, whether by individuals or groups, may generate unequal allocations of resources and power. Environmentalists vilify the powerful elites they see as having caused or sanctioned environmental harm. In *Silent Spring*, Carson traced environmental threats to the powerful chemical pesticide industry, which drove the development, distribution, and use of its products and turned a blind eye to their destructiveness. In addition to powerful corporate interests, environmentalists also implicate governmental officials and private developers as suspect elites.

The movement’s narratives often take the form of the David and Goliath tale. Environmentalists celebrate the struggle of Lois Gibbs, an ordinary

housewife in the blue collar community of Love Canal in Niagara Falls, New York, who fought the chemical industry and the government to protect her family from the effects of a toxic waste dump. Versions of this story appear in such cases as *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (local activists resisting siting of a solid waste facility by a public agency) and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* (local citizens and environmental groups protesting pollution of their watershed by a hazardous waste facility owned by a large multinational corporation). Sometimes the narrative line flips, however: in *Rapanos v. United States* and *Lucas v. South Carolina Coastal Council*, landowner-developers took on the role of David against the regulatory state's Goliath.⁴⁹

Commentators such as social critic Murray Bookchin have pressed to have egalitarian values play an even more fundamental role in the movement. Environmentalism, he argues, should be understood as a social movement; "ecology . . . has always meant *social* ecology." In this view, environmental crises are merely symptoms of the prevalent sensibility of domination, the hierarchical institutions, and the exploitative strategies of the mainstream culture. Environmentalism cannot succeed in its aims unless it addresses classism, racism, sexism, and other systemic inequalities. Bookchin's environmentalism is thus of a piece with other social justice movements that emerged in the twentieth century. His social radicalism rests uneasily at the movement's margins, but it is the model for a recent critique by prominent environmentalist Gus Speth, who contends that a progressive revolution is necessary for environmentalism's ultimate success.⁵⁰

Emerging in the late 1970s and 1980s, the environmental justice movement generated an egalitarian critique of mainstream environmentalism itself. In 1990, UCLA sociologist Robert Bullard published *Dumping in Dixie: Race, Class, and Environmental Quality*, in which he argued that African Americans, lower-income groups, and working-class people had suffered disproportionately from environmental harms and that these same groups were poorly represented in and by the environmental movement. Rather than seek redress for these groups, environmentalists redirected resources away from the concerns of the disadvantaged (e.g., toxic waste, industrial siting, housing quality) toward the priorities of the well-off (e.g., preservation, outdoor recreation, regulatory stringency). Bullard advocated a more radical social justice-based movement patterned closely on the civil rights movement, one that could correct for the lack of political and economic power among communities of color and the poor.⁵¹

Despite disputes over the strength of the data supporting its claims of disproportionate risk, the environmental justice movement has achieved so-

cial and institutional recognition. It exists now both outside mainstream environmentalism, as a critique of the movement, and within it, as a component of mainstream efforts and governmental programs. Its theme of unequal environmental burdens on the disadvantaged has broad resonance, as in *Lyng v. Northwest Indian Cemetery Protective Association* (a road-building project on federal lands threatening Indian tribes' ceremonial use of sacred lands).⁵²

THE ETHICS OF THE ENVIRONMENT: LEOPOLD'S ECOCENTRISM

The ecological model and its associated harmony values support a unique and deeply radical feature of environmentalist thought: that nature has value in itself, apart from its ability to serve human needs or preferences. This idea of nonanthropocentric moral value has numerous versions but can be roughly divided under the rubrics of "biocentrism" (which locates value in individual plants or animals) and "ecocentrism" (which locates value in aggregations such as species and ecosystems). It is opposed to "anthropocentrism," the notion that nature has no value apart from its usefulness or appeal to human beings. Nonanthropocentric approaches argue for an extension of moral consideration to nonhuman nature as the next step in the historical expansion of the moral universe from the more immediate and familiar to the more remote and foreign.

Leopold begins "The Land Ethic" with godlike Odysseus's return from Troy, at which moment he reclaimed his wife and home and "hanged all on one rope a dozen slave-girls of his household whom he suspected of misbehavior during his absence." By the lights of his time, Odysseus was entitled to do this because the slave-girls were his property, governed by expediency only, and not part of an ethical community. In the 3,000 years since, however, the ethical community has expanded, as sheer expediency has been replaced "by cooperative mechanisms with an ethical content." The next and now ecologically necessary step is an ethical relation to the land community based on "love, respect and admiration for land, and a high regard for its value." Leopold distills the new ethical obligation thusly: "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise."⁵³

Leopold was not a philosopher. His ethical precept raises interpretative, practical, and philosophical questions that he made no effort to answer. Yet commentators return again and again to these words because Leopold's influence makes them impossible to ignore for anyone advancing or opposing the independent moral status of the biotic community. His land ethic is the fountainhead of modern ecocentrism as well as a mandatory reference point for competing or emerging theories of environmental ethics.

Despite the contests over its meaning, or because of them, it offers a useful touchstone for how egalitarian-communitarians might think about the environment.⁵⁴

Leopold saw moral value in the biotic community as a whole and did not advance the notion of rights for individual organisms. Although he did refer in passing to the “right to continued existence” of the biotic community, he did not develop the concept.⁵⁵ But rights-talk moved front and center in environmentalist discourse with legal philosopher Christopher Stone’s much-publicized essay, “Should Trees Have Standing?” Stone’s article was written to influence the Supreme Court’s deliberations in *Sierra Club v. Morton*, a case brought to protect Mineral King, a glacial valley in California, from development as a ski resort. Although the case is nowhere mentioned in the piece, Stone argued that things in nature—“forests, . . . rivers and other so-called ‘natural objects’”—should be accorded some legal rights, including the right to seek legal redress on their own behalf. Stone analogized his innovation to the expansion of rights to children, women, blacks, and Indians. Extending rights to natural objects would be consistent with the “history of man’s moral development [as] a continual extension . . . of [man’s] ‘social instincts and sympathies.’” Stone’s argument was similar to Leopold’s in its extension of moral consideration to the land community, but Stone went a step further by expressing the moral development in institutional terms—the language of legal rights. Although Stone’s article was not published in time for the oral argument in *Sierra Club*, it did influence the Court’s deliberations. Along with Justice Douglas’s dissent in that case, it enjoys canonical status in the literature of the environment.⁵⁶

There are much-debated differences among nonanthropocentrists about whether the moral value in nature should attach to individual animals, species, ecosystems, or some other unit of nature and whether it should be expressed as rights, obligations, virtues, or something else. But the common notion of extending moral significance beyond ourselves gives these diverse strains of nonanthropocentrism a place of importance in the environmental movement that transcends their differences. As its advocates recognize, the notion is revolutionary: if taken seriously, it would require a thorough restructuring of our policies, priorities, and institutions. And it is correspondingly strange. Bill McKibben observed: “the idea that the rest of creation might count for as much as we do is spectacularly foreign, even to most environmentalists.”⁵⁷

But perhaps not so foreign as it might seem. Ecocentrism is most closely associated with strong versions of environmentalism, such as deep ecology or animal rights, and radical groups, such as Earth First! and the Animal Liberation Front. However, it may also have broader social currency. An-

thropologist Willett Kempton and colleagues surveyed individuals from five groups: Earth First!, Sierra Club, dry cleaners, sawmill workers, and the general public. To each group they offered the proposition that “our obligation to preserve nature isn’t just a responsibility to other people but to the environment itself.” Predictably, large majorities of the environmental groups agreed, but so did substantial majorities of the other groups.⁵⁸ Comparable majorities of each group also agreed with an alternative justice-based formulation: “Justice is not just for human beings. We need to be as fair to plants and animals as we are towards people.” This suggests that environmentalism’s most challenging idea may already be planted in the culture, although it is unclear how deeply or to what effect. Ecocentrism’s cultural standing is implicated in *Sierra Club* and other cases in which the Court has held the fate of a species or a landscape in its hands.

Environmentalists also include anthropocentrists, who base the imperative for environmental protection on the importance of healthy natural systems to human well-being. These environmentalists don’t accept the intellectual basis or wisdom of the nonanthropocentric accounts but may otherwise share key tenets of the movement—for example, living in harmony with nature (because it is good for humans) or collectivist regard for group welfare. They distinguish themselves from nonenvironmentalists as progressives who value the aesthetic and recreational benefits of nature, the conservation of resources for future generations, and strong protections for human life and health. Environmentalists may hold both anthropocentric and nonanthropocentric views in a kind of ethical pluralism. E. O. Wilson, who argues for an ethic of biodiversity preservation based on the genetic unity of life, also argues for species preservation based on human benefits such as medicinal uses, ecosystem services, and aesthetic appeal. Perhaps because they have wider or more intense public appeal, anthropocentric arguments are vastly predominant in policy debates on environmental issues; ecocentric views remain an important subtext for many environmentalists but are increasingly under fire from reformists within the movement.⁵⁹

ENVIRONMENTALISM AND RELIGION

Environmentalism and religion have had a fraught relationship, beginning with a provocative and influential essay written by historian Lynn White in 1967. White claimed that in its Western form, “Christianity is the most anthropocentric religion the world has seen.” His essay also put environmentalism in direct opposition to the nation’s predominant religion. Christianity was to blame, White argued, for draining the natural world of spiritual significance and sanctioning the human dominance over nature that had brought us environmental crisis. But he also identified a minority strain

of Christianity, based on the teachings of St. Francis, who “tried to depose man from his monarchy over creation and set up a democracy of all God’s creatures”—much as Leopold and other secular environmentalists attempted to do in their upending of the mastery narrative.⁶⁰

While many religionists rejected White’s argument as an unjustified attack on the faith, others accepted his assumption about the centrality of religion and urged changes in religious practice or doctrine to promote the cultural change necessary to meet the environmental challenge. These changes rippled through established religions. In 1979, a little more than a decade after White’s essay, Pope John Paul II designated St. Francis as the patron saint of “caretakers of ecology.” In 1990, he issued a message, “Peace with All Creation,” in which he endorsed the “new ecological awareness. . . . Theology, philosophy and science all speak of a harmonious universe, of a ‘cosmos’ endowed with its own integrity. . . . *This order must be respected.* The human race is called to explore this order . . . and to make use of it while safeguarding its integrity.” Here were shades of Leopold’s land ethic. Then-senator and environmentalist Al Gore, a Baptist, applauded the pope’s statement and urged a revival of the stewardship duties of the Judeo-Christian tradition.⁶¹

In his *The Dream of the Earth*, American monk and ecotheologian Thomas Berry argued for new spiritual practices for the modern ecological age. The first step must be to restore what Western Christianity took away, as Lynn White had it: our “sense of the sacred character of the natural world as our primary revelation of the divine.” Like others seeking expression of their environmentalism in spiritual terms, Berry looked to the American Indian as a model for this essential reconnection. “The Indian peoples of America have their own special form of mysticism. Awareness of a numinous presence throughout the entire cosmic order establishes among these peoples one of the most integral forms of spirituality known to us.” This was dangerously close to pantheism, of which White was also accused, but for Berry and others it was a tradition of broad significance to the whole human community in the cultural moment in which it found itself.⁶²

Environmentalism may be a religion of its own. Environmentalists themselves have sometimes described their ventures as religious or having religious overtones. John Muir wrote of the threatened Yosemite Park’s Hetch-Hetchy Valley that “no holier temple has ever been consecrated by the heart of man.” “Instead of lifting their eyes to the God of the mountains,” he charged, proponents of damming the valley “lift them to the Almighty Dollar.” National parks advocate Joseph Sax pictured himself and his fellow advocates as “secular prophets, preaching a message of secular salvation.” After writing “The Trouble with Wilderness,” a controversial essay that criticized the wilderness concept, environmental historian William Cronon

sought the understanding of angry fellow environmentalists by acknowledging that he too was among “those who worship at the altar of wilderness” and was only trying to reveal the problems in “[his] own” religion. David Brower, who was as crucial as anyone to the emergence of the modern movement, regularly delivered his “sermon” to the environmental faithful. Chronicler John McPhee indelibly linked Brower’s nature mysticism to the pre-Christian druids of Europe. *Lyng v. Northwest Indian Cemetery Protective Association* offers a glimpse of what environmentalism-as-religion might mean in practice.⁶³

Contemporary environmental leaders have been hesitant to advance the movement as a religion. To the extent that environmentalists do experience their beliefs as a kind of religion, that experience is largely submerged or disguised in the public discourse. Like ecocentrism, to which it is closely related, environmentalism-as-religion has a cultural strangeness that may cause unnecessary resistance among those whom environmentalists would persuade. It is a target for criticism from at least two sides: traditionalists, who see it as a false religion, worshipping nature over God and upsetting the divinely ordained relationship between humans and the rest of creation, and rationalists, who see in its devotion to nature a mysticism divorced from fact and reason. Nevertheless, if cultural critic Robert Nelson is right, “American environmental groups derive much of their moral energy, their funding, their sense of purpose, and their crusading drive from an ‘environmental fundamentalism’” that has grown out of “religious awakening.”⁶⁴ In Chapter 10, I explore what role, if any, such a fundamentalism might play in the future of a diverse and changing movement.

PRIORITIES: ENTER THE DISMAL SCIENCE

Environmentalists believe that the threats that concern them are urgent. In part this urgency is driven by the sense that humans have created environmental crises requiring immediate attention. But even in the absence of a crisis, environmentalists believe that the things they seek to protect—natural systems, human life, and health—are of special value and that addressing threats to these things deserves priority over competing claims for public attention and resources. These claims may be supported by diverse arguments—ethical, economic, scientific—but collectively they form perhaps the most universal feature of the movement. They figure prominently in public debates on policy choices about whether and how much to require protection of environmental goods, and they are reflected in the Court’s decisions on issues from preservation of biodiversity to protection of human health.

While environmentalists were developing their vision of a new relationship with nature based on harmony, equality, and community, welfare economists

were advancing their own view of the human-natural relationship. That view was thoroughly anthropocentric and accorded only as much value to things in nature as the aggregate preferences of affected human individuals justified. It had roots in the Progressive Era's commitment to scientific management for the efficient use of natural resources under Teddy Roosevelt and Gifford Pinchot. J. H. Dales offered a version of this view in his 1968 classic, *Pollution, Property and Prices*. Others such as William F. Baxter followed with simplified accounts, making the welfare economists' take on environmental issues broadly accessible. In his widely read and influential *People or Penguins*, first published in 1974, Baxter posed the question of whether humans should act to halt the use of DDT in the environment to preserve the penguin population. His answer: we should give up DDT but only if and to the extent that "the well-being of people would be less impaired by halting use of DDT than by giving up penguins."⁶⁵

Contrary to many environmentalists, Baxter and his fellow economists rejected the notion of a "right" or "morally correct" state of nature or level of pollution apart from overall human well-being. The notion of an "ought" extending beyond the human community made no sense, they argued: nature can have no rights. Also, in the welfare economist's world, everyone's preferences counted the same—no person's preferences were given more weight than another's because he or she was thought to be morally superior. There was no moral high ground in the welfare calculus.⁶⁶

For Baxter and other economists, finding the "optimal" or "efficient" level of pollution or environmental harm was a matter of balancing human preferences for the environmental good that is threatened against preferences for the goods that would be forsaken to avoid that threat. The method that welfare economists have developed for deciding the optimal level of an environmental good, such as penguins, is cost-benefit analysis (CBA), a matter of intense cultural and methodological debate. Environmentalists and other health and safety advocates argue that CBA ignores the moral importance of environmental protection and other public goods; is relentlessly antienvironmental in its design and implementation; privileges the cultural status quo; and impoverishes the political discourse.⁶⁷ On the other side, proponents of CBA argue that it is essential for balanced, welfare-enhancing regulatory decisions; is neutral as between pro- and antienvironmental outcomes; and contributes to transparency and informed political discussion.⁶⁸ This debate extends beyond the environment to other regulatory policy arenas, such as worker and consumer health and safety.

Although legal scholar and former regulatory czar Cass Sunstein has argued that the dawning of the "cost-benefit state" is at hand, most envi-

ronmentalists continue to resist CBA as systematically undervaluing their concerns and as blind to the expansion of moral community that they seek. Robert Nelson, who was himself trained as an economist, sees this conflict between economics and environmentalism in theological terms. In *The New Holy Wars*, he argues that economics, like environmentalism, is a religion in disguise, offering a progressive gospel in which efficiency is the salvation of mankind.⁶⁹ Because environmentalism has defined itself largely against this gospel, he concludes that an epochal struggle between the two is unavoidable. I test this proposition in my analysis of the cases on economic approaches and their implications for environmentalism's future.

PRECAUTION: ENVIRONMENTALIST ANTIDOTE
TO THE EFFICIENCY PARADIGM

In lieu of efficiency, environmentalists offer precaution. The precautionary principle derives from the German *Vorsorgeprinzip*, "which translates literally as the 'principle of prior care and worry.'" The precautionary approach has weaker and stronger forms. Weaker forms, such as the 1992 Rio Declaration on Environment and Development, counsel simply that measures to combat substantial environmental threats not be rejected because of a lack of scientific certainty surrounding those threats. Stronger, more controversial forms create a presumption of regulation in the face of uncertain threats.⁷⁰ The Court has dealt with statutes embodying this principle, perhaps most notably in *Massachusetts v. EPA* (Environmental Protection Agency's authority to regulate greenhouse gas emissions under the Clean Air Act).

Seeing a direct challenge to the efficiency paradigm, CBA proponents have produced a drumbeat of criticism focused particularly on strong forms of the precautionary principle. Cass Sunstein argued that these versions of the precautionary approach provide "no guidance" in making the hard trade-offs that are typical of environmental decisions and risk excessive or counterproductive regulation. To the extent that the principle depends on a concept of benevolent nature—"nature as harmonious or in balance"—it was simply wrong. There is no intrinsic or stable balance in nature, as Botkin taught us. And "what is natural may not be safe at all." For Douglas Kysar and other defenders of the precautionary principle, however, its strength is its relational emphasis, including "notions of 'caring *for* or looking *after*, fretting or worrying *about*, and obtaining provisions, or providing *for*'" that resonate with the values of caring, community, and harmony prevalent among environmentalists. "On the precautionary account, environmental, health, and safety regulation is not merely an opportunity to maximize an existing set of individual preferences or interests, but rather a moment to

consider the regulating body's obligations to its present and future members, to other political communities, and to other species."⁷¹

THERE IS PLENTY that divides environmentalists. Radical factions disdain the accommodationism of reformists; grassroots activists disdain the professionalism and interest group tactics of national organizations; environmental justice advocates separate themselves from white middle-class environmentalism. Ecocentrists argue with anthropocentrists. Environmentalists stressing limits on human action or pessimism about the future are criticized by those urging possibilities and optimism. Those embracing economic instruments and models are criticized by those who reject them. Some of these divisions will play out in the analysis of the cases, and in Chapter 10 they are explored in light of that analysis, to assess the success of the movement and consider its possible futures.⁷²

My initial emphasis, however, is on the commonalities. A coherent (though eminently contestable) set of values and beliefs informs the modern environmental movement. The evidence suggests that heightened environmental concern accords generally with a set of beliefs and values with which those calling themselves environmentalists generally identify. This environmentalism is a distinct and persistent feature of modern U.S. culture, is shared to some degree by the majority of Americans, and has proved to be relatively stable over time.

We face a paradox, however. Despite its apparently successful inroads into the culture, environmentalism is perceived widely as having failed in its basic transformative mission and lacking the strength to force further change. In the words of one of its chief expositors, Phillip Shabecoff, "environmentalism has barely scratched the skin of the old order." Environmental preferences among the public, while widespread, do not appear deep. Environmental concern chronically ranks below potentially competing concerns, such as economic progress, in public opinion surveys. In its current balkanized state, the political system is incapable of effectively addressing what environmentalists are convinced are the most critical issues facing the nation's and the world's future.⁷³

This book is an effort to understand this paradox through the deliberative institution of the Court. It explores the cultural roots of the paradox in the specialized discourse of law and legal decisions and attempts to understand not only the institutional practices that support environmentalism and the values and worldviews that underpin it but also the practices that oppose it. And finally, it draws out the implications of that paradox for environmentalism's future and for the country's ability to address major environmental challenges such as climate change.