The Fragile Menagerie: Biodiversity Loss, Climate Change, and the Law

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The Fragile Menagerie: Biodiversity Loss, Climate Change, and the Law*

JAMES MING CHEN†

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I. THE HIPPODROME OF THE GODS: RACING AGAINST ECOLOGICAL AND EVOLUTIONARY APOCALYPSE

Humanity, quite literally, is deep-sixing its planetary home. During the Phanerozoic eon, a span of 542 million years from the initial emergence of hard-shelled animals to the present, the earth has experienced at least five catastrophic losses of biodiversity: the Ordovician-Silurian, the late Devonian, the Permian-Triassic, the Triassic-Jurassic, and the Cretaceous-Paleogene extinction events. Humanity has pushed “the biological world” toward its “sixth major extinction event.” Severe enough to constitute “biological annihilation” on a global scale, this death spasm


4. Gerardo Ceballos, Paul R. Ehrlich & Rodolfo Dirzo, Biological Annihilation via the
deserves to be called the Anthropocene extinction.5

Life on Earth overcomes mass extinction events on a temporal scale spanning millions of years. Full restoration of biodiversity after mass extinction requires 10 million to 100 million years.6 By this measure, “the loss of genetic and species diversity” is probably the contemporary crisis “our descendants [will] most regret” and “are least likely to forgive.”7 Because “time is the longest distance between two places,”8 Edward Wilson has described biodiversity loss as the “scientific problem of great[est] immediate importance for humanity.”9

To this concern we must add anthropogenic climate change. Scientific evidence attributing severe, even catastrophic, climate change to anthropogenic emissions of greenhouse gases has long passed the point of reasonable doubt.10 “[W]e can no longer postpone serious consideration” of proper responses to climate change.11 American debates over climate change, scientifically and politically wretched as they are,12 have shifted from questions of causation to debates over the proper policy response.13


9. WILSON, supra note 6, at 254.


Biodiversity loss and climate change are closely related catastrophes. Indeed, within the framework of biodiversity loss, climate change represents an extreme variation on the theme of habitat destruction. Large-scale habitat destruction through climate change threatens many plant and animal species with extinction. Although “organisms respond to climate and climatic change in a variety of ways, depending on the nature, rate and duration of the change, and the range of available biological responses,” paleontology has connected “[t]he three best-studied mass extinction events” to “sharp changes in climate.” Humility about the human impact on natural history and the biosphere provides ample reason to presume “that rapid shifts in climate can reduce global diversity.”

If indeed biodiversity loss and climate change have reached apocalyptic proportions, it is fitting to describe the engines of extinction in equine terms. On the hippo drome of the gods, apocalyptic horsemen are riding roughshod over the face of the earth: “I looked, and there before me was a pale horse! Its rider was named Death, and Hades was following close behind him. They were given power over a fourth of the earth to kill by sword, famine, and plague, and by the wild beasts of the earth.” Jared Diamond characterizes the deadly horsemen of the ecological apocalypse as an “Evil Quartet”: habitat destruction, overkill, introduced species, and secondary extinctions. Edward Wilson prefers an acronym derived from the ancient Greek

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17. Id.


word for “horse.” HIPPO represents Habitat destruction, Invasive species, Pollution, Population, and Overharvesting. Although conservation biologists have identified the leading causes of biodiversity loss, legal responses often fail to address distinct sources of human influence on evolutionary change. This Article takes a modest step toward remedying that shortcoming.

Such “environmental and land-use ethics” as are “codified in law” today stem from an “era when the human population, at one-tenth its present size, tamed wilderness with axe and ox.” Before the rise of Neolithic agriculture and the spread of sedentary human settlements across much of the globe’s surface, Wilson’s deadly HIPPO took the reverse sequence: OPPIH. The transmogrification of OPPIH to HIPPO over time frames the human impact on evolution in historical as well as biological terms.

The transition from OPPIH to HIPPO can be seen at all geographical scales, from the continental to the insular. In Paleolithic times, the overharvesting of large mammals and flightless birds had a greater ecological impact than what was then “a still proportionately small amount of habitat destruction.” Whatever the precise mechanism elsewhere in the world, a human invasion bears primary responsibility for biodiversity loss in the western hemisphere. In North America, the sudden disappearance 11,000 to 12,000 years ago of large mammals such as mammoths and ground sloths, after the continent’s megafauna had survived twenty-two glacial cycles, suggests that this mass extinction may have arisen from “blitzkrieg.” Changes

20. See Greek Dictionary, supra note 1, at 164 (πιπός). Contemporary English words incorporating this root include “hippocampus” (seahorse), “hippopotamus” (river-horse), and “hippodrome” (racetrack, or literally “horse-road”).


22. See generally Michael W. Beck, On Discerning the Cause of Late Pleistocene Megafaunal Extinctions, 22 Palaeobiology 91 (1996) (presenting different hypotheses for the extinctions of large mammals and birds during the late Pleistocene epoch).

in vegetation and climate stemming from the mass slaughter sealed North America’s biological fate.28

The settlement of Polynesia, beginning 3500 to 3000 years before the present,29 introduced three domesticated species of Eurasian provenance—pigs, dogs, and chickens—that simultaneously dictated the arc of economic development on each island and spelled doom for many of the islands’ endemic species.30 The enduring prominence of the words for pigs, dogs, and chickens in the Hawaiian language—pua’a, ‘īlio, moa31—pays linguistic homage to the centrality of animal husbandry in Polynesian culture before European contact.32

Today, relative to these episodes across what is now the territory of the United States, “the principal cause of biodiversity loss is the fragmentation, degradation, and destruction of ecosystems and habitats through conversion of land to economically productive uses, especially agriculture, forestry, mineral and fossil fuel extraction, and urban development.”33 Global climate change represents an even more potent driver of ecological ruin and evolutionary change.34

Prominent controversies over the constitutionality of endangered species protection35 have established awareness in American law of the utilitarian rationales for protecting biodiversity. The red wolf, it is said, inspires tourism in the southeastern
The Delhi Sands flower-loving fly epitomizes those insects that might be conscripted as future pollinators—a prospect that becomes likelier as colony collapse disorder spreads. The dual myths of biopiracy and bioprospecting persist, even though economic gains from medicinal exploitation of endangered species are speculative at best. Dreams of economic transformation through pharmacology must be tempered by realities such as the failure of the Pacific yew to spur a biotechnology boom through the oncological exploitation of Taxol. Purely pecuniary interest in bioprospecting does tantalizingly promise the possibility of harnessing pharmaceutical companies into the business of biodiversity conservation by posing extinction as a bar to the patenting of drugs derived from species that have died out.

42. See Andrew W. Torrance, An Extinction Bar to Patentability, 20 GEO. INT’L ENVTL. L. REV. 237 (2008); Andrew W. Torrance, Patent Law, HIPPO, and the Biodiversity Crisis, 9 J.
At the same time, however, the law fails to calibrate its remedies according to the severity of the biological threat. Perversely enough, the legal understanding of extinction mechanisms remains frozen in time, like an insect in amber or, more appropriately, a Chalcolithic (Copper Age) human in ice. Legal responses to biodiversity loss take primary aim at overkill and the marketing of products derived from endangered species. These are biological concerns more closely linked to phases of human history before its great acceleration through agriculture, urbanization, and industrial production. The legal enterprise of preventing extinctions would seem likelier to succeed if it addressed the most powerful causes of biodiversity loss today. Climate change, habitat destruction, and alien invasive species should figure more prominently than overkill in the law of biodiversity protection.

Part II of this Article describes how the law seeks to preserve biodiversity by deterring overkill, habitat destruction, and the introduction of alien invasive species. The law imposes its clearest and harshest sanctions precisely where the drivers of extinction are weakest: when humans take conscious steps to capture or kill other living things for human gain.

Part III more closely examines the use of the Endangered Species Act of 1973 (ESA or “Act”) to address habitat destruction on private land and to mitigate climate change. Part IV concludes that the law’s lack of congruence with conservation biology impedes efforts to preserve biodiversity and mitigate climate change. It accordingly prescribes a wide range of responses, pragmatic as well as aspirational, that better align the law with the most daunting environmental challenges of the Anthropocene epoch.

II. ACROSS THE APOCALYPSE ON HORSEBACK:
LEGAL RESPONSES TO BIODIVERSITY LOSS

A. Overkill

In 1918, the fourth year of global warfare that would ultimately claim nine million military and seven million civilian casualties, a lethal influenza pandemic took hold. Between January 1918 and December 1920, the Spanish flu would kill between 50 and 100 million people worldwide—some three to five percent of the human population.  

See generally, e.g., BRENDA FOWLER, ICEMAN: UNCOVERING THE LIFE AND TIMES OF A PREHISTORIC MAN FOUND IN AN ALPINE GLACIER (2000); THE ICEMAN AND HIS NATURAL ENVIRONMENT: PALAEOBOTANICAL RESULTS (Sigmar Bortenschlager & Klaus Oeggl eds., 2000); Andreas Keller et al., New Insights into the Tyrolean Iceman’s Origin and Phenotype as Inferred by Whole-Genome Sequencing, NATURE COMM. (Feb. 28, 2012), https://www.nature.com/articles/ncomms1701.pdf [https://perma.cc/N5WR-TKUW]; William A. Murphy, Jr., Dieter zur Nedden, Paul Gostner, Rudolf Knapp, Wolfgang Recheis & Horst Seidler, The Iceman: Discovery and Imaging, 226 RADIOLOGY 614 (2003). All of these sources describe “Ötzi the Iceman,” who lived around 3300 B.C.E. and was found in Tyrolean Alps in 1991.


At the front and at home, death came as a pale rider astride a pale horse.46 Perhaps not coincidentally, two stories of biodiversity loss, evocative of the Edwardian excess of Joseph Conrad’s Heart of Darkness,47 bracketed the years of the Great War. Amid the human slaughter, two of America’s iconic birds disappeared forever from the planet.

In a certain sense, we have never recovered from witnessing the extermination of the Carolina parakeet and the passenger pigeon. These birds, respectively “temperate North America’s only native parrot”48 and quite probably the continent’s most abundant bird (if not also its most abundant terrestrial vertebrate),49 became extinct at the Cincinnati Zoo four years apart. Martha, the last passenger pigeon, died on September 1, 1914; Incas, a male Carolina parakeet and the last of his kind, died on September 1, 1914; Incas, a male Carolina parakeet and the last of his kind, died on September 1, 1914.

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49. One credible estimate places the number of passenger pigeons in North America at the time of European arrival between three billion and five billion, A. W. Schorger, The Passenger Pigeon: Its Natural History and Extinction 204 (1955), or twenty-five to forty percent of the continent’s avian population, accord Joel Greenberg, A Feathered River Across the Sky: The Passenger Pigeon’s Flight to Extinction 1 (2014) (“At the time that Europeans first arrived in North America, passenger pigeons likely numbered anywhere from three to five billion. It was the most abundant bird on the continent, if not the planet, and may well have comprised 25 to 40 percent of North America’s bird life.”); see also Gemma G. R. Murray et al., Natural Selection Shaped the Rise and Fall of Passenger Pigeon Genomic Diversity, 358 Science 951, 951 (2017) (“The extinct passenger pigeon was once the most abundant bird in North America, and possibly the world.”). “Whatever the number, this species enjoyed a population that may have exceeded that of every other bird on earth, and its aggregations surpassed in numbers those of every other terrestrial vertebrate on the continent.” Greenberg, supra at 7.
February 21, 1918. The 1916 treaty at issue in *Missouri v. Holland*, perhaps one of the first legal enactments in the United States (or anywhere else in the world) to treat biodiversity conservation as “a national interest of very nearly the first magnitude,” focused exclusively on “the killing, capturing or selling . . . of . . . migratory birds.”

At least with respect to the passenger pigeon, humanity’s failure to recover from the extinction of a species is true in a very tangible sense. By eliminating the principal predator of ticks in northern forests, the extermination of the passenger pigeon may be fairly blamed for the rise in the human incidence of Lyme disease.

For their part, whether birds collectively exacted revenge on humanity through the Spanish flu remains a medical mystery. Throughout the Great War, birds and humans had maintained a morbid symbiosis. While men fought in their trenches, “The larks, still bravely singing, . . . Scarce heard amid the guns below.” As the Armistice took hold on the eleventh hour of the eleventh day of the eleventh month in 1918:

[W]ithin half an hour of the guns falling silent the birds began to sing again. . . .


[U]ne demi-heure après que le silence des armes se fit, les oiseaux chantèrent à nouveau.

But not all the birds. Die Stimme mancher Vögel sind verloren worden. Pour toujours.


51. 252 U.S. 416 (1920).

52. Id. at 435.

53. Id. at 431.


56. John McCrae, in *Flanders Fields and Other Poems* 3 (1919).

“Because they are so conspicuous and appealing to the human senses of sight and sound, birds always have attracted more than their fair share of our zoological attention." To love birds is to wade in Henry David Thoreau’s “tonic of wildness;” those “marshes where the bittern and the meadow-hen lurk, and [to] hear the booming of the snipe; to smell the whispering sedge where only some wilder and more solitary fowl builds her nest.” The sandhill crane moved Aldo Leopold to observe: “Our ability to perceive quality in nature begins, as in art, with the pretty. It expands through successive stages of the beautiful to values as yet uncaptured by language.”

Environmental law hears clearly, if only belatedly, the melody that the “nightingales . . . sang within the bloody wood.”

No environmental sin is graver, and no biological loss more irreversible, than extinction. Likewise, no vector of extinction is more emotionally gripping than direct, intentional killing. The paradigmatic act of converting wildlife to personal property through capture or slaughter remains the central focus of laws designed to protect endangered species. In the United States, section 9 of the Endangered Species Act


60. Aldo Leopold, A Sand County Almanac, and Sketches Here and There 96 (1st ed. 1949); accord Cokin, supra note 50, at 13 (“[T]he Carolina Parakeet . . . was, by virtue of its beauty and its extinction, more than just a species.”).


63. See Pierson v. Post, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (awarding ownership upon actual capture of a fox, and not upon mere pursuit of it); Liesner v. Wanie, 145 N.W. 374 (Wis. 1914) (awarding ownership to the hunter who fires the shot that mortally wounds a hunted animal); Young v. Hichens, (1844) 115 Eng. Rep. 228, 230 (awarding ownership when a fisherman has attained “actual power over the fish”); cf. Geer v. Connecticut, 161 U.S. 519, 529–31 (1896) (recognizing the traditional police power of the states over hunting and fishing), overruled by Hughes v. Oklahoma, 441 U.S. 322 (1979). The Supreme Court has “expressly overrule[d] Geer;” reasoning instead “that challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources.” Hughes, 441 U.S. at 335. But cf. Baldwin v. Fish & Game Comm’n, 436 U.S. 371, 388 (1978) (holding that a state may charge differential rates to residents and non-residents for recreational elk hunting permits without offending the privileges and immunities clause of U.S. Const. art. IV, § 2, cl. 1). See generally 2 WILLIAM BLACKSTONE, Commentaries *390 (describing common law precedent before the nineteenth century on the ownership of wild animals); Dhammika Dharmapala, An Economic Analysis of “Riding to Hounds”: Pierson v. Post Revisited, 18 J.L. Econ. & Org. 39 (2002).

flatly prohibits the “tak[ing]” of any protected species.65 “The term ‘take’” in turn “means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”66 Section 9 so unequivocally condemns the killing or harassing of individual organisms that few litigated Endangered Species Act cases discuss this aspect of the statute. The killing of wolves, either with67 or without68 official sanction, dominates litigation over the deliberate targeting of individual members of protected species. One of the most prominent reported cases involving an attempt to “take” a member of a protected species69 actually arose under the Marine Mammal Protection Act of 1972.70

The Endangered Species Act reveals an overt bias in favor of preventing direct takings of large, charismatic fauna over all other threats to biodiversity.71 The Act excludes certain insects from its protective aegis,72 even though insects are so essential to human welfare that if they “and other land-dwelling arthropods . . . were to disappear, humanity probably could not last more than a few months.”73 The reverse, assuredly, is not true: If humans should ever depart the planet, “among the immediate

65. Id. § 1538(a)(1)(B)–(C).
66. Id. § 1532(19).
67. See Sierra Club v. Clark, 755 F.2d 608 (8th Cir. 1985) (invalidating Department of Interior regulations that would have permitted the sport trapping of eastern timber wolves).
68. See United States v. McKittrick, 142 F.3d 1170 (9th Cir. 1998) (upholding ESA penalties levied against a rancher who shot and decapitated a gray wolf).
69. See United States v. Hayashi, 22 F.3d 859, 863–66 (9th Cir. 1993) (holding that shooting at porpoises to discourage them from eating tuna did not fall within the Marine Mammal Protection Act’s definition of “take” under 16 U.S.C. § 1362(13)).
71. See generally PAUL COLINVAUX, WHY BIG FIERCE ANIMALS ARE RARE: AN ECOLOGIST’S PERSPECTIVE 18, 31 (1978) (explaining the relative scarcity of large animals, especially predators, as a function of thermodynamics).
72. See 16 U.S.C. § 1532(6) (2012) (excluding from “[t]he term ‘endangered species’ . . . a species of the Class Insecta determined . . . to constitute a pest whose protection . . . would present an overwhelming and overriding risk to man”).
beneficiaries of our absence will be mosquitoes.”74 An apocalyptic collapse in insect populations may have already begun: A 27-year study has revealed a decline of more than 75% in flying insect biomass throughout Germany.75

Moreover, even though “[t]he biological differences between animals and plants . . . offer no scientific reason for lesser protection of plants,”76 the Act significantly undervalues plants.77 Threatened and endangered plants are protected only insofar as they appear on federal land or are destroyed in knowing violation of state law.78 Plants receive far fewer critical habitat designations than do threatened and endangered animals.79 In so doing, the Act perpetuates, rather than corrects, the common law’s baneful practice of treating plants as private property merely because they dwell on private land.80 The law’s failure to protect plants on equal footing with animals represents a form of official “plant blindness.”81

 Trafficking in goods derived from endangered species remains the single act of biodiversity destruction on which international law has reached a punitive consensus. The Convention on International Trade in Endangered Species (CITES),82 now approaching half a century in age, would represent a major step toward conserving biodiversity, as long as one overlooks the fact that it does not work. The extension of CITES during the 1980s to “all aspects of trade and research” in orchids “immediately increased the desire for the plants, raised their market value dramatically, and led to even more collecting of rare orchid species from the wild.”83 Nothing in CITES stops developers and farmers who would “flood [critical] habitat with a hydroelectric dam, log it, level the hillsides for a road, build a golf course on the site, or burn the jungle to the ground for agricultural purposes.”84 Not surprisingly, “no reliable data” show “that CITES and similar efforts ha[ve] reduced smuggling, saved any orchid

74. ALAN WEISSMAN, THE WORLD WITHOUT US 129 (2007). “[A]mong the secondary beneficiaries will be many freshwater fish species, in whose food chains mosquito eggs and larvae form big links.” Id.
84. Id. at 17.
species from extinction, helped protect orchid habitats, or even salvaged orchid plants facing . . . certain destruction.85

The raw emotional power of overkill, especially when it involves charismatic animals such as elephants or tuna, subjects CITES and the Endangered Species Act to the cognitive biases that bedevil environmental decision making.86 For some time, controlled harvests for profit appeared to outperform direct regulation under CITES in deterring the poaching of elephants.87 Hopes that the elephant’s salvation might lie in commercialization, as it did with the American alligator88 or the Andean vicuña,89 have evaporated in 2016 with the United States’ imposition of a nearly total ban on the ivory trade.90 Meanwhile, an effort to protect the Atlantic bluefin tuna under CITES collapsed in 2010 as the European nations most heavily involved in the bluefin harvest initially supported but eventually abstained from the listing decision.91 On land and at sea, the focus on politically explosive but environmentally secondary acts of overkill and commercial exploitation has rendered CITES tragically impotent.

B. Alien Invasive Species

In an increasingly interconnected world, human ecological mismanagement often takes the form of introducing one or more invasive species.92 “[M]ost invasions have

85. Id. at 262.
91. See D.G. Webster, The Irony and the Exclusivity of Atlantic Bluefin Tuna Management, 35 MARINE POL’Y 249 (2011); see also Carl Safina & Dane H. Klinger, Collapse of Bluefin Tuna in the Western Atlantic, 22 CONSERVATION BIOLOGY 243 (2008).
92. See, e.g., David S. Wilcove, David Rothstein, Jason Dubow, Ali Phillips & Elizabeth Losos, Quantifying Threats to Imperiled Species in the United States, 48 BIOSCIENCE 607, 609
a weak impact,” but on occasion “an invasive species [is] capable of precipitating monumental changes to an ecosystem.”93 For example, introducing the Nile perch into Lake Victoria devastated endemic cichlids.94 Oceanic ecosystems fare no better. Barnacles, mollusks, worms, and hydroids leaving warmer seas on a flotilla of wooden fragments and buoyant pumice threaten the integrity of Arctic and Antarctic waters.95

North American birds face multiple threats from alien invasive species.96 Feral cats, perhaps 100 million strong, constitute “a non-native predator that is creating havoc for certain native [bird] species” in the United States.97 Starlings, a scourge to many native birds, entered North America by virtue of a single man’s perverse obsession to import all birds mentioned by Shakespeare.98 Efforts to reverse the damage by exterminating starlings have failed.99 Exotics have suppressed or eliminated native,
often endemic, species in the Everglades, the Great Lakes, the Hawaiian Islands, and Guam.100

Freed from competitive pressures in their native environment, invasive plants often thrive in particularly pernicious ways. Switching from sexual to asexual propagation has fueled the Japanese knotweed’s conquest of new terrain as far away as the British Isles.101 Dandelion, already asexually reproducing in North America upon being liberated from predators and competitors in its native Eurasia, would flourish in an atmosphere with higher levels of carbon dioxide.102

As overall biological diversity decreases, the environmental impact of invasive species will probably increase. If “simplified communities are more vulnerable to invasion,” then “we should also expect an increase in frequency of successful invaders as well as an increase in their impact.”103 Repeated cycles of extirpation and invasion, whether intentional or inadvertent, “can, and eventually will, invoke major shifts in community structure and dynamics.”104 In this game of ecological roulette, the disturbances with the “greatest ecological impact frequently incur high societal costs.”105

Existing law offers few if any answers to the problem of invasive species. The Plant Protection Act of 2000106 does enable the Department of Agriculture to restrict the movement of organisms known or suspected to have an adverse effect on agriculture.107 This law, however, serves more to regulate the proposed releases of


103. McCann, supra note 93, at 233.

104. Id.


genetically modified crops than to provide broad-based authority to restrain the spread of invasive species.

The National Environmental Policy Act (NEPA) provides a broader legal platform. Among other purposes, NEPA aspires “to promote efforts which will prevent or eliminate damage to the environment and biosphere” and “to enrich the understanding of the ecological systems and natural resources important to the Nation.” In particular, environmental impact statements issued under NEPA must address “any irreversible and irretrievable commitments of resources.” In economic theory as in legal doctrine, irreversibility warrants a precautionary exception to the otherwise risk-neutral weighing of costs and benefits.

In principle, these statutory elements could infuse NEPA with some power to counter the spread of invasive species. One federal court of appeals has noted that NEPA requires a federal agency to address how dam construction could introduce zebra mussels into previously uninfested waters. NEPA could—and should—be construed as embracing the Supreme Court’s recognition that “nonnative species . . .

108. See, e.g., Availability of Determination of Nonregulated Status for Genetically Engineered Canola, 59 Fed. Reg. 55,250, 55,250–51 (Nov. 4, 1994) (declining to restrict genetically engineered laurate canola varieties containing “sequences . . . derived from the plant pathogens A. tumefaciens and cauliflower mosaic virus” once it had been determined that these plants were no likelier than comparable, traditionally bred varieties to become weeds, to confer weedy characteristics on canola’s wild relatives, or to harm agriculturally beneficial organisms “such as bees or earthworms”).


110. Id. § 4321.

111. Id. § 4331(a).

112. Id. § 4332(C)(v).


could disturb [local] aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways,” such as the introduction of parasites.115

More typically, however, NEPA proves impotent to curb invasions. Rejecting arguments that airport expansion could dramatically increase the rate at which commercial flights (especially from Asia) would introduce alien species into Maui, the Ninth Circuit declined to find a NEPA violation.116 That court took refuge in the vagaries of airport demand projections,117 the multiplicity of invasion vectors,118 and the impossibility of determining ex ante which species would become established and, among those, which would become “economic pests.”119

The legal stance toward invasive species in other jurisdictions may be even more destructive. Even though there is no way to prevent farmed fish from escaping their pens,120 Brazil has considered “naturalizing” non-native species by decree in an effort to promote freshwater aquaculture.121 Legal and scientific safeguards against the catastrophic, irreversible effects of alien invasive species have fallen by the wayside in Brazil’s rush to develop its biologically sensitive interior.122 Such disregard for the western hemisphere’s greatest storehouse of biological diversity “makes a mockery” of legal efforts to identify environmental impacts and soften their negative consequences.123

117. See id. at 680.
118. See id. at 681 n.3.
119. Id. at 681.
Even within the inherently global challenge of biodiversity conservation, invasive species pose a daunting obstacle for legal systems rooted in geographically defined notions of sovereignty. Biodiversity loss as a “diffuse, cross-jurisdictional” crisis defies “haphazard local encouragement” and requires cooperative solutions. “[E]nvironmental interconnection has become too real to ignore”; the “existence of transboundary communities inevitably creates a drive away from localism in all spheres.” No country can seek refuge in localism, even at a continental scale, from its responsibility to engage “transboundary communities” in addressing environmental problems that ignore political borders.

In short, no single country can contain the scourge posed by alien invasive species. Within the inherently global project of biodiversity conservation, any hope of addressing alien invasive species demands especially vigorous dedication to international cooperation. The Convention on Biological Diversity exhorts its contracting parties, “as far as possible and as appropriate,” to “[p]revent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species.” The United States’ persistent refusal to sign the Convention, however, effectively short-circuits international law’s potential to spur domestic legal change. American withdrawal from the Paris Agreement on Climate Change, effective in 2020, further undermines constructive feedback between domestic and international environmental law.

C. Habitat Destruction and Public Land Management

1. Island Biogeography

Habitat destruction threatens even deeper biodiversity loss. Whereas foraging
activities—hunting, fishing, gathering—often focus on particular species of utilitarian interest (or practical inconvenience) to humans,\textsuperscript{132} comprehensive conversion of land for human use withdraws habitat indiscriminately from the full spectrum of fauna and flora. Contracting the physical range of endangered species spurs their extinction.\textsuperscript{133} Island biogeography posits that a reduction in the area of a biological island—which may consist of an island in the geographic sense or merely an isolated patch of wildlife habitat—predicts a mathematically related reduction in that area’s biological carrying capacity as measured by the number of distinct species that can be sustained.\textsuperscript{134}

The most elementary mathematical formula expressing the species-area relationship is:

\[ S = c \cdot A^z \]

where \( S \) represents the number of species, \( A \) represents the area, and \( c \) and \( z \) are empirically determined constants.\textsuperscript{135} Taking the logarithm of both sides of that equation—by any base, including \( e \) (Euler’s constant) or 10, as long as it is applied to


each side—allows the presentation of the species-area relationship in linear form on a log-log plot:

$$\log S = \log c + z \cdot \log A$$

The related semilog model found favor in the early twentieth century antecedents of island biogeography, which consolidated the work of nineteenth century pioneers such as Charles Darwin, Joseph Hooker, and Alfred Russel Wallace:  

$$S = \log(c \cdot A^z)$$

The practical difference between the logarithmic and semilogarithmic models is that the semilog model depicts area, as the independent variable, on a linear rather than a logarithmic scale along the horizontal axis. Log-log plots of the basic species-area relationship originated with Philip Darlington’s celebrated 1957 illustration of the number of amphibian and reptile species on islands of varying size in the West Indies.  

Despite considerable advances in island biogeography, including the precise connection between species and area, log-log plots continue to illustrate the species-area relationship. A more recent example illustrates the number of amphibian, avian, and mammalian species at the continental scale for the world’s five largest land masses (Africa, Eurasia, North America, South America, Australia).  

Biologically catastrophic episodes of habitat destruction recur with alarming frequency. Large-scale damming, as typified by California’s Hetch Hetchy

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Reservoir,141 Egypt’s Aswan High Dam,142 and China’s Three Gorges Dam,143 can likewise erase multiple ecological niches in a single blow. An area as large and diverse as Centinela, a diverse forest ridge in Ecuador, can fall to victim to cacao cultivation.144 Destroying large chunks of the earth’s physical infrastructure within a time frame that is effectively instantaneous by geological standards significantly accelerates the rate of evolutionary change attributable to human activity.

One study of regional extinctions of birds, butterflies, and vascular plants in Britain illustrates the effects of habitat destruction as an irreversible experiment in island biogeography.145 Earlier studies of global biodiversity had exhaustively documented extinctions among plants, vertebrates, and certain mollusks.146 These studies shed relatively little light on the global scope of biodiversity loss insofar as they did not cover organisms representing a sufficiently large sample of Earth’s described species.

Insect species, however, represent a considerable portion of all fauna.147 Decreases of 28% among native plant species, 54% of native bird species, and 71%...
of butterfly species in Britain therefore raise more serious concerns. The greater loss among British butterfly species may foreshadow similar declines in birds and plants, because insect populations typically respond more rapidly to adverse environmental change than longer-lived organisms or those with dormant propagules.

Further confirmation of declines among insect populations akin to those already documented in taxa whose species abundance is better understood will clarify the precise extent to which habitat destruction, on scales as large as Great Britain or even larger, threatens the biosphere.

2. Public Lands Management

Traditionally, much of the American legal apparatus for habitat conservation has focused on public lands. Although “[t]he Endangered Species Act of 1973 was motivated in part by the need to [regulate] beyond the limited confines of federal land,” a significant degree of habitat conservation takes place under the aegis of public land management. Pending Part III’s more comprehensive overview of the Endangered Species Act, we can profitably examine this aspect of biodiversity conservation policy in the United States as part of our broader overview of legal measures against habitat destruction.

Federal public lands law rests on the primary premise of “multiple use,” defined as a range of uses “including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values.” Because “[m]ultiple use posits that all uses from commodity extraction and production to biodiversity conservation are equal,” this principle “both supports and hinders biodiversity conservation.”

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151. Gibbs v. Babbitt, 214 F.3d 483, 494 (4th Cir. 2000); see also Davina Kari Kaile, Note, Evolution of Wildlife Legislation in the United States: An Analysis of the Legal Efforts To Protect Endangered Species and the Prospects for the Future, 5 GEO. INT’L ENVTL. L. REV. 441, 456 (1993); cf. Conservation Council for Haw. v. Babbitt, 2 F. Supp. 2d 1280, 1281 (D. Haw. 1998) (invalidating a decision not to designate critical habitat insofar as that decision was based solely on a claim that some of the species at issue were located on private land, without determining whether a decision not to designate might be appropriate when a species exists solely on private land).
153. Id. § 1702(c).
When it first appeared, the concept of multiple use represented a substantial improvement in federal land management policy. “[I]ncreased competition for forage” among cattle and sheep ranchers during the nineteenth and early twentieth centuries “led . . . to overgrazing, diminished profits, and hostility among forage competitors.”155 The Federal Land Policy and Management Act of 1976 (FLPMA)156 explicitly adopted two statutory principles: “multiple use” for recreation, range, timber, mineral extraction, wildlife and fish habitat, and natural, scenic, scientific, and historical uses;157 and “sustained yield” of renewable resources.158 At the same time, FLPMA retained “first priority” for existing grazing permit holders as long as federal land-use planning continued to leave land “available for domestic livestock grazing.”159

Although a statutory commitment to multiple use may theoretically “provide[] the legal foundation for a management decision to preserve biodiversity,”160 disputes over federal land management expose a bias favoring commercialization over conservation.161 When the Department of the Interior tried in 1995 to “accelerate[] restoration” of rangelands by making its managerial approach “more compatible with ecosystem management,”162 incumbent ranchers argued in response that the Interior Department was legally obliged to “safeguard” livestock interests’ reliance on the perpetuation of grazing privileges.163 This argument ran squarely against an explicit statutory command that neither “the creation of a grazing district [n]or the issuance of a permit . . . shall . . . create any right, title, interest, or estate in or to the lands.”164

Other decisions have demonstrated the willingness of federal land management agencies to favor grazing and other historically privileged land uses over conservation and other non-use values. A federal district court was forced to remind federal land managers in 1985 that grazing “[p]ermittees must be kept under a sufficiently real threat of cancellation or modification in order to adequately protect the public lands from overgrazing or other forms of mismanagement.”165 In spite of its statutory mandate to maintain “final control and decisionmaking authority over livestock grazing practices on the public lands,” the federal government had all but ceded jurisdiction over grazing permits.166

158. Id. § 1702(h).
159. Id. § 1752(c).
160. Tarlock, supra note 154, at 10,541.
161. See, e.g., United States v. State, 23 P.3d 117, 128 (Idaho 2001) (arguing that reservation of water for a wildlife refuge would unfairly subordinate rights to “water intended to be stored and regulated by colossal federal projects for the past 98 years” for the primary purpose of reclamation).
166. Id. at 871; see 43 U.S.C. §§ 1901–1908 (2012).
The desire to protect grazing livestock from wolves has nullified other environmental gains from habitat conservation. Setting aside public land as a wildlife preserve, while conducting government-sponsored wolf shoots from helicopters, results in net negative effects on wolf populations.167

The priority accorded to grazing and other consumptive uses is especially galling on its own terms: economic valuation. Environmental economics has long recognized that non-use values can vastly exceed gains from the direct, immediate extraction of living things.168 The Canadian polar bear population, for instance, might be worth $600,000 as bushmeat, versus $6 billion in “estimate[d] . . . value Canadians would have placed on the preservation of [this] iconic species”169—to say nothing of the bear’s potential influence on climate change policy in the scientifically intransigent country neighboring Canada.170

On the whole, federal land management policy concentrates its habitat preservation efforts on tracts designated as “wilderness.” “A wilderness, in contrast with those areas where man and his own works dominate the landscape, is . . . an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain.”171 Unlike other public lands, wilderness areas fulfill their function solely by virtue of remaining “in their natural condition.”172 Wilderness preservation helps ensure “that an increasing population, accompanied

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169. ÉCORESOURCES CONSULTANTS, EVIDENCE OF THE SOCIO-ECONOMIC IMPORTANCE OF POLAR BEARS FOR CANADA, at vi (2011); see also id. at 26 (using “the benefit-transfer method” to estimate that Canadian households “would pay approximately $508 per year” to preserve the polar bear, for an estimated total of “$6,320 million/year”); Richardson & Loomis, supra note 38. Any ambiguity in the ÉcoRessources analysis can be resolved by applying its one clear figure of $508 per household. According to the Canadian census, the population of Canada was 35,151,728 in 2016. See Population and Dwelling Counts, for Canada, Provinces and Territories, 2016 and 2011 Censuses—100% Data, STAT. CAN. http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-ft/pd-pl/Table.cfm [https://perma.cc/K4X7-D7R9] (last updated Aug. 28, 2017). In 2011, the date of the ÉcoRessources report, the country’s population was 33,476,688. See id. Dividing the population by 3 yields a reasonable estimate of 11 million to 12 million households. Multiplying that figure by $508 yields an approximate total of $6 billion—in Canadian dollars. As of November 2017, real-time currency exchange rates on http://www.xe.com [https://perma.cc/6RJZ-9BBM] report a rate of approximately 0.79 United States dollars for every 1.00 Canadian dollars. The figure in text may therefore be interpreted as $5 billion in American currency equivalent.

170. See infra Part III.C.

171. 16 U.S.C. § 1131(c) (2012); cf. e.g., Or. Nat. Desert Ass’n v. Singleton, 47 F. Supp. 2d 1182, 1192 (D. Or. 1998) (holding that “the explicit ‘protect and enhance’ language of” the Wild and Scenic Rivers Act “requires that watersheds be maintained in a primitive condition and the waters kept unpolluted”).

by expanding settlement and growing mechanization, does not occupy and modify" the entire physical surface of the earth.173

“The global extent of the human footprint,” made manifest by the sheer scarcity of truly wild places, makes humans the final “stewards of nature, whether we like it or not.”174 This responsibility includes “a commitment to conserving the last of the wild—those few places, in all the biomes around the globe, that are relatively less influenced by human beings—before they are gone.”175

Cold and high-elevation wilderness areas, however, cannot anchor a comprehensive and effective biodiversity program.176 Biodiverse “hot spots,” rich in species, typically live up to their name: most such locales lie in the tropics.177 Even a conservation strategy focused on hot spots, however, overlooks ecosystem services, phylogenetic diversity, and other forms of species richness.178 Moreover, emphasizing hot spots may take little to no account of costs available for conservation and, as a result, may fail to achieve optimal resource allocation.179

Ultimately, neither the “wilderness” principle nor broader aspects of public lands management in the United States provide adequate protection for biodiversity. The National Park Service—which is directed to “conserve the scenery, natural and historic objects, and wild life” in the most spectacular federal lands and to “leave them unimpaired for the enjoyment of future generations”180—was designed to preserve

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173. Id.
175. Id. at 903.
geological wonders, not to serve broader ecological purposes. Wilderness policy, in microcosm, reveals the overall weakness of laws addressing biodiversity loss. Laws designed to prevent biodiversity loss behave like a twisted version of Wee Willie Keeler—aiming environmental law “where they ain’t.”

III. THE ENDANGERED SPECIES ACT, FROM PRIVATE LANDS TO GLOBAL COMMONS

Having examined legal tools of varying effectiveness in addressing overkill, alien invasive species, and habitat destruction on public lands, I will now focus on the Endangered Species Act. Whatever its shortcomings, the Act deserves credit for “preventing the ultimate extinction of the vast majority of protected species.” The Act represents “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” American environmental law affords “endangered species . . . the highest of priorities.” The otherwise dismal record of biodiversity protection does reflect some progress in forestalling specific extinction and in preserving particular swaths of critical habitat.

Part III begins by outlining the mechanics of the Endangered Species Act. It then addresses two of the most important applications of this statute: preventing habitat destruction on private lands and protecting biodiversity from the effects of climate change.

186. Hill, 437 U.S. at 174; accord, e.g., Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 787 (9th Cir. 1995); Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of the Navy, 898 F.2d 1410, 1417 (9th Cir. 1990).
188. See Güven Eken et al., Key Biodiversity Areas as Site Conservation Targets, 54 BioScience 1110 (2004).
A. Endangered Species Act Mechanics

1. Listing Endangered and Threatened Species

The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (known together as the “Services”) collectively enforce the Endangered Species Act. The FWS administers the Act for terrestrial and freshwater species, while the NMFS administers the Act for most marine species.189 Maritime mammals straddle both sides of this jurisdictional divide. Polar bears, dugongs, manatees, walruses, and sea and marine otters fall on the FWS side.190 The NMFS governs whales, dolphins, porpoises, sea lions, and seals.191 A species is defined as “endangered” if it “is in danger of extinction throughout all or a significant portion of its range.”192 A

189. See 50 C.F.R. § 402.01(b) (2016); Interagency Cooperation—Endangered Species Act of 1973, 51 Fed. Reg. 19,926, 19,926 (June 3, 1986) (“Generally, marine species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior.”).

190. The Marine Mammal Protection Act of 1972, 16 U.S.C.A. §§ 1361–1421 (West 2010 & West Supp. 2017), defines a “marine mammal” as “any mammal which (A) is morphologically adapted to the marine environment (including sea otters and members of the orders Sirenia, Pinnipedia, and Cetacea), or (B) primarily inhabits the marine environment (such as the polar bear).” Id. § 1362(6); accord 50 C.F.R. § 14.102 (2016) (defining a “marine mammal” under standards for humane and healthful animal transport as “an individual of a species of the orders Cetacea, Pinnipedia, or Sirenia, or a polar bear (Ursus maritimus) or sea otter (Enhydra lutris)’’); see also In re Polar Bear Endangered Species Listing & § 4(a) Rule Litig., 818 F. Supp. 2d 240, 246 (D.D.C. 2011) (“The Secretary of the Interior has jurisdiction over most marine mammals . . . including the polar bear.”), aff’d, 709 F.3d 1 (D.C. Cir. 2013). The MMPA divides responsibility for marine mammals between the Secretary of Commerce, who is responsible for “members of the order Cetacea and members, other than walruses, of the order Pinnipedia,” and the Secretary of the Interior, who is responsible for “all other marine mammals.” 16 U.S.C.A. § 1362(12)(A)(i)–(ii) (West 2010). The Endangered Species Act likewise reflects this jurisdictional boundary between the Secretaries of Commerce and the Interior. See 16 U.S.C. § 1532(15) (2012) (defining “Secretary” as either the Secretary of Commerce or the Interior, according to Reorganization Plan No. 4 of 1970, 35 Fed. Reg. 15,627 (Oct. 6, 1970), 5 U.S.C. app. 1 (2012)).

191. In accord with statutory authorities cited supra note 190, regulations issued jointly by FWS and by NMFS assign jurisdiction to the Secretary of Commerce (who supervises NMFS) “over members of the order Cetacea and members, other than walruses, of the order Pinnipedia.” 50 C.F.R. § 403.02(f). “[T]he Secretary of the Interior,” who supervises FWS, “has jurisdiction over all other mammals.” Id. Incidentally, this regulation mistakenly cites § 3(11) instead of § 3(12) of the MMPA, which is the true source of statutory authority. See MMPA, Pub. L. No. 92-522, § 3(12), 86 Stat. 1027, 1029 (1972). Consequently, NMFS regulations define marine mammals as “Cetacea (whales, dolphins, and porpoises) and Pinnipedia, other than walruses (seals and sea lions),” 50 C.F.R. § 216.3 (2016), while FWS regulations confine themselves to the polar bear, walrus, dugong, two species of otter, and three species of manatee, see id. § 18.3; see also id. § 18.2 (deferring all regulation of cetaceans, seals, and sea lions to 50 C.F.R. part 216).

“threatened species” is one “which is likely to become an endangered species within the foreseeable future.”

Of particular interest in the context of climate change is the time frame deemed “foreseeable.” Because neither the Act nor its implementing regulations define the term “foreseeable future,” the Services determine foreseeability on a case-by-case basis. Definitions of foreseeability have varied considerably. One federal district court has declined to decide whether a risk that the coho salmon might become endangered within “30 or 100 years” satisfied the statutory definition of foreseeable future, because an administrative determination that this species “would not become endangered within the next two years” would “fall[] far short of any reasonable definition of the ‘foreseeable future.’”

Another court has noted—albeit without endorsement or rejection—the assumption that twenty-four years constitutes the foreseeable future for purposes of predicting the likelihood of endangerment. Listing decisions involving salamanders have set foreseeability at forty years. Amphibians such as salamanders have been on the forefront of biological assessments signaling catastrophic declines in diversity, since amphibians are “more threatened and are declining more rapidly than either birds or mammals.”

By contrast, one court has held that the same forty-year time horizon, from 2010 to 2050, as identified in projections of deleterious effects from climate change, was not sufficiently foreseeable to warrant the listing of the ribbon seal as a threatened species. The FWS, of its own accord, has declined to list the American pika as threatened or endangered on the basis of climate change risks beyond 2050.

197. See 12-Month Finding on a Petition To List the Siskiyou Mountains Salamander (Plethodon Stormi) and Scott Bar Salamander (Plethodon Asupak) as Threatened or Endangered, 73 Fed. Reg. 4380, 4381 (Jan. 24, 2008).
199. See Ctr. for Biological Diversity v. Lubchenco, 758 F. Supp. 2d 945 (N.D. Cal. 2010); cf. Rocky Mountain Wild v. Walsh, 216 F. Supp. 3d 1234, 1250–51 (D. Colo. 2016) (allowing FWS, in a decision not to list two species of beardtongue wildflowers as threatened or endangered, to consider both the probability and the improbability of future commercial development).
200. See 12-Month Finding on a Petition to List the American Pika as Threatened or Endangered, 75 Fed. Reg. 6438 (Feb. 9, 2010).
Listing as an endangered or threatened species is a prerequisite to protection under the Act. “The ESA’s protection of a species and its habitat is triggered only when FWS [or NMFS] ‘lists’ a species in danger of becoming extinct as either ‘endangered’ or ‘threatened.’”201 The Services’ regulations explain why listing and its mirror image, delisting, have such overriding legal significance: “[t]he principal goal” of the Act “is to return listed species to a point at which protection . . . is no longer required.”202 If, and “only if the best scientific and commercial data available indicate that [a species] is no longer endangered or threatened,” that “species may be delisted” and reassigned to the default state of nonprotection for species not listed as endangered or threatened.203

The Services must base their listing decisions on five factors:

(A) the present or threatened destruction, modification, or curtailment of a species’ habitat or range;
(B) overutilization of a species for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting a species’ continued existence.204

The decision to list rests solely on biological grounds and must be made “without reference to possible economic or other impacts of [that] determination.”205 Moreover, listing decisions must be made “solely on the basis of the best scientific and commercial data available.”206 The requirement to use the best available data is not tantamount to a command to seek and apply “the best . . . possible” data.207 Rather, this requirement prevents the Services from disregarding evidence that is better than the scientific basis on which the Services do base their listing decisions.208


203. Id.


205. 50 C.F.R. § 424.11(b) (2016).


2. Critical Habitat

After listing a species as endangered or threatened, the Services must also designate critical habitat “to the maximum extent prudent and determinable.” Critical habitat includes areas containing “physical or biological features” that are “essential to the conservation of the species and [] which may require special management considerations or protection.”

Critical habitat may also include areas outside a species’ current range if such habitat is essential to the conservation of that species. Although the designation of critical habitat must “take[] into consideration the economic impact” of designating any particular area, the Services may not deny the critical habitat designation to any area where the “best scientific and commercial data available” indicate that “the failure to designate such area as critical habitat will result in the extinction of the species.”

Because the Act aspires not merely to “halt” but also to “reverse the trend towards” biodiversity loss, the Act directs the Services to develop a recovery plan aimed at improving the status of each listed species so that listing is no longer necessary. A recovery plan must identify “management actions necessary . . . for the conservation and survival of the species,” to the point of either “recommend[ing] corrective action” or explaining why such action “is impracticable or unnecessary.” Although a recovery plan need not specify a precise timetable, it must include estimates for the time needed to perform recovery measures. The ultimate factors for delisting a species are the same as those that inform the decision to list a species as endangered or threatened.

3. Interagency Consultation

Section 7 of the Act requires each federal agency to ensure that its actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.” The jeopardy prong of section 7 addresses the impact of agency action on the survival and recovery of a listed species. By contrast, the adverse modification prong concerns critical habitat. A determination that proposed agency action “may affect” a

210. Id. § 1532(5)(A)(i).
211. Id. § 1532(5)(A)(ii).
212. Id. § 1533(b)(2).
218. 16 U.S.C. § 1536(a)(2); accord Hill, 437 U.S. at 183–84.
219. See Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434, 441 (5th Cir. 2001).
220. See id.
listed species or its critical habitat triggers the obligation to formally consult the FWS or NMFS, as appropriate. 221

Formal consultation under section 7 typically results in the issuance of a biological opinion evaluating jeopardy to a listed species’ continued existence and adverse modification of its habitat. 222 At the very least, where a biological opinion has found that proposed federal action will directly affect a listed species for reasons independent of climate change, that biological opinion must also address the cumulative effects of climate change. 223

The obligation to examine climate change in biological opinions that have already found direct, non-climate-related impacts on a listed species resembles an existing strategy for regulating greenhouse gas emissions under the Clean Air Act. The EPA has invoked its so-called “anyway” authority to require the installation of the best available control technology for greenhouse gases at facilities whose emissions of conventional pollutants would subject them to the EPA’s permitting authority under Title V and/or the Prevention of Significant Deterioration provisions of the Clean Air Act. 224

It is not statutory language, but administrative practice and judicial review, that have infused the Endangered Species Act with the power to address climate change. The text of the Act does not obligate the Services, in their discharge of their obligations under sections 4 and 7, to consider the impact of climate change. 225 Nor does the Act require that the Services account for climate change in their critical habitat designation decisions. 226 The proclamation that the Act contains “no statutory requirement” compelling the Services “to discuss climate change in [their] listing decisions” 227 echoes judicial sentiments expressed a generation earlier. In the 1990s, federal courts had opined that conservation biology—a diverse science whose concerns span “population dynamics, species turnover, patch size, recolonization problems, fragmentation problems, edge effects, and island biogeography”—need not guide federal administrative decision making. 228

More recent judicial decisions have breathed new power into the Endangered Species Act as a legal tool for addressing the effects of climate change. In 2011, the

228. Sierra Club v. Marita, 46 F.3d 606, 618–20 (7th Cir. 1995); see also id. at 623 (declining to transform even valid “general theor[ies]” of science “into a management tool unless [an agency] can apply it to a concrete situation”); Fund for Animals v. Babbitt, 903 F. Supp. 96, 106 (D.D.C. 1995) (declining to endorse specific techniques for managing “distinct geographic ecosystems . . . inhabited by grizzly bears”).
Ninth Circuit invalidated the Fish and Wildlife Service’s attempt to delist Yellowstone grizzly bears as a threatened species, on the grounds that the Service had failed to properly account for the impact of climate change on the whitebark pine, a primary source of food for grizzlies. The climate-driven loss of whitebark pine trees could foreseeably increase conflicts between bears and humans and thereby harm the bears’ prospects for reproductive success and overall survival.

Thanks to its breadth, section 7’s requirement that federal agencies must consult the FWS or NMFS if proposed action “may affect” a listed species or its critical habitat has the potential to cover “any action that results in non-trivial net increases” in greenhouse gases. As between administrative discretion and judicial review, more aggressive enforcement of the Endangered Species Act by the Services will have greater impact on efforts to mitigate climate change. Because reviewing courts are admonished “not to substitute [their] judgment for that of [an] agency,” especially where disputed matters involve “a high level of technical expertise” or lie near “the frontiers of science,” courts will hesitate to reverse agency action on the basis of challenges “amount[ing] to nothing more than competing views about policy and science.

B. Habitat Conservation on Private Lands

Section 9 of the Endangered Species Act provides: “it is unlawful for any person subject to the jurisdiction of the United States to . . . take any [endangered] species within the United States or the territorial sea of the United States [or] take any such species upon the high seas.” Section 9’s prohibition against the taking of

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229. See Greater Yellowstone Coal., Inc. v. Servheen, 665 F.3d 1015, 1026 (9th Cir. 2011).
endangered species dramatically expands the scope of the Act from agencies of the federal government to all actors, including the entire private sector.

Notably, the Act does not directly prohibit the taking of a threatened species. Section 9, however, does punish the “violation of” any regulation pertaining . . . to any threatened species of fish or wildlife listed pursuant to” section 4 of the Act. 237 By regulation, the Services have defined the taking of a threatened species as a violation of section 9. 238 Prophylactic protection of threatened species alongside more immediately endangered species supports “preventive measures before a species is ‘conclusively’ headed for extinction.” 239

The Act’s definition of “take” and its administrative interpretation are the true source of legal power in section 9’s prohibition against the taking of endangered species. The Act defines “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” a member of an endangered species. 240 In turn, regulations issued by the Services have defined the term “harm” as including “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 241

The celebrated 1995 Supreme Court case of Babbitt v. Sweet Home Chapter of Communities for a Great Oregon 242 upheld, as a “reasonable” exercise in statutory interpretation and implementation, the application of these expanded definitions of “take” and “harm” to the destruction or significant modification of critical habitat adversely affecting an endangered or threatened species, even without a demonstration of intent to injure any individual specimen. 243 If only incidentally, Sweet Home also left intact the Department of the Interior’s application of its habitat destruction rule to threatened species. 244

As a statutory and administrative law landmark, Sweet Home is regarded either as an intractably difficult battle over interpretive canons 245 or as a relatively easy case

237. Id. § 1538(a)(1)(G); see also id. § 1533(d) (“The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the case of plants, with respect to endangered species . . . .”).
238. 50 C.F.R. § 17.31 (2016).
241. 50 C.F.R. § 17.3.
243. See id. at 699–700; see also 16 U.S.C. § 1533(a)(3)(A) (authorizing the designation of “critical habitat” for endangered or threatened species).
244. See Sweet Home, 515 U.S. at 692 n.5 (observing how the parties challenging the habitat destruction rule had abandoned their attack on the threatened species variant of the rule, 50 C.F.R. § 17.31(a)).
245. See William N. Eskridge, Jr., Nino’s Nightmare: Legal Process Theory as a
that the Supreme Court converted into a pitched ideological battle over environmental and regulatory values. As a substantive exercise in environmental law, *Sweet Home* vindicated the promise that the Endangered Species Act had exhibited since the Supreme Court’s first decision interpreting that statute. In 1973, shortly after the passage of the Act, the Justices immediately displayed their understanding of the potential of habitat destruction to disrupt breeding and eliminate indispensable food sources:

> [T]he snail darter occurs only in the swifter portions of shoals over clean gravel substrate in cool, low-turbidity water. Food of the snail darter is almost exclusively snails which require a clean gravel substrate for their survival. The proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter’s habitat.

The failure of CITES to protect orchids demonstrates that similar sophistication has not migrated from American law to the international sphere.

The use of section 9 against habitat destruction triggers other provisions of the Endangered Species Act. Section 10 authorizes incidental take permits upon submission and approval of a habitat conservation plan (HCP). In turn, approval of an HCP triggers the federal government’s obligation under section 7 to “insure that any action” it undertakes “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat. Section 4(d) of the Act, which authorizes "necessary and advisable" protective regulations favoring threatened species, may also be used

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247. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 162 (1978) (alteration in original) (emphasis omitted) (quoting 40 Fed. Reg. 47,505, 47,506 (Oct. 9, 1975)); *see also* id. at 165 n.16 (quoting Tenn. Valley Auth. v. Hill, 419 F. Supp. 753, 756 (E.D. Tenn. 1976)) ("[T]he snail darter requires for its survival a clear, gravel substrate, in a large-to-medium, flowing river. The snail darter has a fairly high requirement for oxygen and since it tends to exist in the bottom of the river, the flowing water provides the necessary oxygen at greater depths. Reservoirs, unlike flowing rivers, tend to have a low oxygen content at greater depths. Reservoirs also tend to have more silt on the bottom than flowing rivers, and this factor, combined with the lower oxygen content, would make it highly probable that snail darter eggs would smother in such an environment. Furthermore, the adult snail darters would probably find this type of reservoir environment unsuitable for spawning. Another factor that would tend to make a reservoir habitat unsuitable for snail darters is that their primary source of food, snails, probably would not survive in such an environment."). *See generally* Oliver Houck, *Unfinished Stories*, 73 U. Colo. L. Rev. 867, 921—22 (2002).

248. *See supra* text accompanying notes 82–85.


250. *Id.* § 1536(a)(2); *see also* 50 C.F.R. § 402.01(b) (2016); Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 984–85 (9th Cir. 1985); Nat’l Wildlife Fed’n v. Babbitt, 128 F. Supp. 2d 1274, 1286 (E.D. Cal. 2000).

to establish the functional equivalent of HCPs for threatened species.\(^{252}\) These provisions have been interpreted as imposing an affirmative obligation to pursue an active species conservation policy.\(^{253}\)

Before HCPs became a familiar fixture of Endangered Species Act enforcement, developers and farmers facing section 9 liability often resorted to “the ‘scorched earth’ technique” of preemptively clearing wildlife habitat.\(^{254}\) Debates over the supposed inflexibility of section 9 can be resolved, at least in part, by examining the actual record of responses to ESA enforcement.\(^{255}\) The rates at which landowners “shoot, shovel, and shut up”\(^{256}\) can be tracked, for instance, by measuring whether harvesting rates in southeastern pine forests vary according to the presence of the federally protected red-cockaded woodpecker.\(^{257}\) In upholding the listing of the northern spotted owl as an endangered species and the designation of its critical habitat, the Ninth Circuit acknowledged the economic impact of these decisions and the potential for landowners to undermine the federal government’s efforts to protect that species.\(^{258}\)

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257. See Dean Lueck & Jeffrey A. Michael, Preemptive Habitat Destruction Under the Endangered Species Act, 46 J.L. & Econ. 27 (2003) (documenting higher harvest rates near woodpecker habitat and speculating that timber owners are harvesting before woodpeckers—and the land-use restrictions that follow them—move in).

258. See Seattle Audubon Soc’y v. Moseley, 80 F.3d 1401, 1403–04 (9th Cir. 1996).
Moreover, political pressure routinely pushes Congress to cripple the listing of endangered and threatened species under section 4. The political economy of biodiversity conservation enables opponents of species protection to disrupt listing decisions. Though extinctions proceed apace, Congress has been known to impose a moratorium on the expansion of the endangered species list, only to suspend such moratoria when political winds shift.

Beginning with efforts to reconcile preservation of the remaining habitat of the endangered Mission Blue butterfly with commercial development on San Bruno Mountain on the San Francisco peninsula, ESA enforcement from the 1990s onward transformed “the previously obscure and rarely used permit provision” of section 10 into “the centerpiece of endangered species and ecosystem conservation policy.” Threatened section 9 liability became merely the “opening gambit[] in a prolonged bargaining process.” HCPs today represent “perhaps the most visible example of a consensus-based, multi-stakeholder approach to resource management.” Section 10 enforcement has transformed section 9’s nominally invariant rule into a “penalty default,” a legal baseline intentionally designed to be sufficiently unpleasant to spur affected parties into negotiating more favorable alternatives.

The strategy has its limits. Like the Endangered Species Act as a whole, HCPs proceed species by species, and only after an individual species has begun to decline.

Despite well-founded doubts about the territorial and institutional suitability of states as participants in ecosystem management,268 state-law restrictions on land use can enhance the effectiveness of federal HCPs.269 California law facilitates natural community conservation plans that provide “large-scale, multi-species equivalents of HCPs.”270 That state’s active intervention is crucial because it is home to the California floristic province, the hottest of biological “hotspots” in the continental United States.271

Ultimately, however, the Endangered Species Act only indirectly addresses habitat loss and altogether ignores “other causes” of biodiversity loss “such as the invasion of exotic species and air and water pollution.”272 The Act as a whole falls far short of “promot[ing] the conservation of ecosystems on the geographic scale necessary to promote biodiversity generally.”273

C. Αρκτούρος: Climate Change in the “Last Great Wilderness”

Though the frigid polar regions may be poor in biodiversity, they exhibit some of the most dramatic effects of global warming. Climatic impacts on Arctic Ocean sea ice are among the most alarming harbingers of rising temperatures worldwide.274 In the United States alone, many legal tools are emerging as instruments of climate change policymaking. For example, the Environmental Protection Agency (EPA) has


273. Tarlock, supra note 154, at 10,540.

not only the authority but also the obligation under the Clean Air Act to regulate greenhouse gas emissions from new motor vehicles.275 The Energy Policy and Conservation Act276 and the National Environmental Policy Act277 require the National Highway Transportation Safety Administration to address carbon emissions through corporate average fuel efficiency (CAFE) standards, or at least to explain why the agency has declined to adopt more stringent CAFE standards.278

For some time, the law has contemplated the possibility that human agents of climate change might bear tort liability.279 Alaskan native villages have failed in their efforts to recover damages for climate change induced damage to human habitat. In rejecting the village of Kivalina’s suit against ExxonMobil, a federal court described “the harm from global warming” as a causally remote “series of events disconnected from the discharge” of “greenhouse gases,” which must then “combine with other gases in the atmosphere which in turn results in the planet retaining heat, which in turn causes the ice caps to melt and the oceans to rise, which in turn causes the Arctic sea ice to melt, which in turn allegedly renders Kivalina vulnerable to erosion and deterioration resulting from winter storms.”280

Another court has rejected a native village’s claim against the Bureau of Ocean Energy Management for alleged harm arising from an Arctic Ocean oil exploration plan.281 Consistent with older precedent holding that the Federal Water Pollution Control Act Amendments of 1972 displaced federal common law claims arising from a sewage discharge,282 the Supreme Court has invoked the Clean Air Act to repel federal common law claims against greenhouse gas emissions.283

Against this admittedly modest baseline, the Endangered Species Act has achieved remarkable success in addressing the seemingly relentless emission of greenhouse gases and the anthropogenic contribution to climate change. The application of the Act to species most immediately menaced by climate change offers a promising set of remedies. With a reach that exceeds that of sections 4 and 7, section

279. See Myles Allen, Liability for Climate Change, 421 NATURE 891 (2003).
9 of the Act may yet be construed to treat greenhouse gas emissions as a legally critical link in a causal chain leading to the unlawful “taking” of an endangered species.\textsuperscript{284}

The application of section 9 to climate change would represent a significant step beyond Justice O’Connor’s concurrence in \textit{Babbitt v. Sweet Home Chapter of Communities for a Great Oregon}.\textsuperscript{285} Her opinion emphasized limitations imposed “by ordinary principles of proximate causation,” including embedded “notions of foreseeability,”\textsuperscript{286} in order to curb the perceived excesses of the Ninth Circuit’s 1988 \textit{Palila} decision.\textsuperscript{287} In 1995 Justice O’Connor questioned whether section 9 could be lawfully construed to reach destruction of the palila bird’s habitat in Hawaii through sheep-grazing.\textsuperscript{288} The question today is whether section 9 may be applied to significant modification or degradation of habitat traceable to anthropogenic climate change.\textsuperscript{289}

Climate change has figured prominently in both listing and critical habitat designation decisions for species ranging from subtropical elkhorn and staghorn coral\textsuperscript{290} to sage grouse and wolverine on the North American mainland\textsuperscript{291} and bearded and

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\textsuperscript{286} Id. at 709 (O’Connor, J., concurring).
\textsuperscript{287} See Palila v. Hawaii Dep’t of Land & Nat. Res., 852 F.2d 1106 (9th Cir. 1988).
\textsuperscript{288} \textit{Sweet Home}, 515 U.S. at 709 (O’Connor, J., concurring).
ringed seals in northern seas.\textsuperscript{292} The FWS has designated the Pacific walrus as a candidate for threatened status, but has not yet listed that species.\textsuperscript{293} The record of Endangered Species Act cases addressing climate change upholds the longstanding legal preference for large, charismatic fauna over all other forms of biodiversity.\textsuperscript{294}

The signature battle over the application of the Act to climate change has involved, quite unsurprisingly, the polar bear.\textsuperscript{295} Litigation has swamped all aspects of the FWS’s efforts to protect the polar bear, from its listing as a threatened species\textsuperscript{296} to the designation of large portions of the Arctic as critical habitat\textsuperscript{297} and the application of section 9’s prohibition against takings of polar bears.\textsuperscript{298}

The English word “Arctic,” after all, stems from ἄρκτος, the ancient Greek word for “bear,” in honor of the constellation that other ancient people called Ursa Major.\textsuperscript{299} Arcturus (Ἀρκτοῦρος), the celebrated northern star, means the “guardian of

\begin{itemize}
  \item See 12-Month Finding To List the Pacific Walrus as Threatened or Endangered, 76 Fed. Reg. 7634 (Feb. 10, 2011).
  \item See In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig., 709 F.3d 1 (D.C. Cir. 2013).
  \item See Alaska Oil & Gas Ass’n v. Salazar, 916 F. Supp. 2d 974 (D. Alaska 2013).
the bear. The existential threat to the polar bear has spurred legal action against the vectors of anthropogenically induced climate change.

In 2008 the FWS listed the polar bear as threatened by the effects of climate change on the bear's Arctic habitat. Although the FWS initially declined to designate critical habitat for the polar bear, it dramatically reversed course in 2010 by Designation of Critical Habitat for the Polar Bear (Ursus Maritimus) in the United States, 75 Fed. Reg. 76,086, 76,088 (Dec. 7, 2010) (codified at 50 C.F.R. pt. 17).
Of central importance to the listing of the polar bear and to the designation of its habitat as critical is the existential threat that climate change poses to Arctic sea ice.304 The D.C. Circuit quoted the portion of the listing decision which recognized that irreversible “changes to the polar bear’s habitat will soon pose an existential threat to the species”;305

Productivity, abundance, and availability of ice seals, the polar bear’s primary prey base, would be diminished by the projected loss of sea ice, and energetic requirements of polar bears for movement and obtaining food would increase. Access to traditional denning areas would be affected. In turn, these factors would cause declines in the condition of polar bears from nutritional stress and reduced productivity. As already evidenced in the Western Hudson Bay and Southern Beaufort Sea populations, polar bears would experience reductions in survival and recruitment rates. The eventual effect is that polar bear populations would decline. The rate and magnitude of decline would vary among populations, based on differences in the rate, timing, and magnitude of impacts. However, within the foreseeable future, all populations would be affected, and the species is likely to become in danger of extinction throughout all of its range due to declining sea ice habitat.306

The parallel with TVA v. Hill’s recognition of the Tellico Dam’s existential threat to the snail darter is impossible to miss.307

The impact of climate change on the Arctic is hardly limited to polar bears. Even the color of ice itself contributes to a significant albedo effect:308 as ice melts, the darkening of the sea or land surface absorbs more solar energy and accelerates global warming even more.309 Albedo has sufficient climatic impact to warrant serious

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305. In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig., 709 F.3d 1, 6 (D.C. Cir. 2013).
consideration of geoengineering projects designed to alter the color of the earth, \textsuperscript{310} even to the point of turning the daytime sky from blue to white. \textsuperscript{311}

Federal courts have upheld most aspects of the FWS’s polar bear decisions. \textsuperscript{312} The United States District Court for the District of Alaska did invalidate the FWS’s designation of Unit 2, a stretch of northern Alaska spanning the Canadian border and the town of Barrow, because the FWS used its finding of a need to isolate polar bear dens from humans and human activities, an “essential feature” of Unit 2 that constituted only “approximately one percent of the entire area,” as an improper basis for “designat[ing] a large swath of land . . . as ‘critical habitat.’” \textsuperscript{313}

For its part, the United States District Court for the District of Columbia has rejected a challenge to the FWS’s decision to confine the protection of polar bears under section 9 of the Act according to exemptions granted by the Marine Mammal Protection Act \textsuperscript{314} and the Convention on International Trade in Endangered Species of Wild Flora and Fauna \textsuperscript{315} and to refrain from enforcing section 9 with respect to activities outside the polar bears’ range, notwithstanding those activities’ incidental impact on polar bears. \textsuperscript{316} Using its authority under the Marine Mammal Protection Act, \textsuperscript{317} the FWS has routinely authorized nonlethal, incidental takings of polar bears and Pacific walruses. \textsuperscript{318} The authority to permit incidental takings requires the Service to determine that such takings will have no more than a “negligible impact” on the affected population. \textsuperscript{319} In applying its incidental takings authority, the Service must analyze “reasonably expected” and “reasonably likely”


\textsuperscript{311} See Giovanni Pitari Valentina Aquila, Ben Kravitz, Alan Robock, Shingo Watanabe, Irene Cionni, Natalia De Luca, Glauco Di Genova, Eva Mancini & Simone Tilmes, \textit{Stratospheric Ozone Response to Sulfate Geoengineering: Results from the Geoengineering Model Intercomparison Project (GeoMIP)}, 4 J. GEOPHYSICAL RES. ATMOSPHERES 2629 (2014).

\textsuperscript{312} See, e.g., Alanna Kearney, Case Note, \textit{The Battle May Be Over, but What About the War? Examining the ESA in the Crusade Against Global Warming After In Re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation}, 25 VILL. ENVTL. L.J. 529 (2014).

\textsuperscript{313} Alaska Oil & Gas Ass’n v. Salazar, 916 F. Supp. 2d 974, 1001–02 (D. Alaska 2013).


\textsuperscript{318} See Ctr. for Biological Diversity v. Salazar, 695 F.3d 893 (9th Cir. 2012); see also Ctr. for Biological Diversity v. Kempthorne, 588 F.3d 701 (9th Cir. 2009); Incidental Take During Specified Activities, 76 Fed. Reg. 47,010 (Aug. 3, 2011) (codified at 50 C.F.R. pt. 18).

\textsuperscript{319} 16 U.S.C. § 1371(a)(5)(A)(i)(f); see Kempthorne, 588 F.3d at 710.
effects leading to a “negligible impact,” but bears no obligation to consider speculative or uncertain effects.  

320 The brief legal record of applying the Endangered Species Act to climate change has already shifted the policy-making terrain. Designation of the polar bear’s critical habitat recognizes the ecological threat that climate change poses to the biosphere. The Arctic has been justifiably described as “the last great wilderness.”

321 Wilderness areas have long offered the promise of providing refuges “where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain.”

322 Despite their low levels of biodiversity, the Arctic and other cold and/or high-elevation locales may yet prove to be pivotal legal battlegrounds in the last-ditch effort to save the earth and its diverse forms of life from anthropogenically induced climate change. Although the law offers no conclusive answer to the question of whether the Endangered Species Act “is an effective or appropriate tool to address the threat of climate change,” climate change and biodiversity conservation remain the most important things that the law can address.

IV. THE LAW OF BIODIVERSITY CONSERVATION AND CLIMATE MITIGATION IN THE ANTHROPOCENE

A. A New Epoch

Remarkably, profound biodiversity loss and accelerating climate change represent “only the tip of the iceberg.” So deep is the human footprint on the global environment that some scientists have urged the redesignation of this moment in geological time as the Anthropocene epoch. From the initial domestication of plants and animals 11,000 to 9000 years ago, through the Industrial Revolution and the “Great Acceleration” of population, affluence, and technology since World War II,
human activity has had a profound impact on every physical and biological aspect of the planet.\textsuperscript{328}

Strict notions of the human ecological footprint\textsuperscript{329} define environmental sustainability according to the physical flows of energy and matter.\textsuperscript{330} By these benchmarks, humanity is gobbling the planet. Humans now consume 20–40\% of the solar energy captured by plants.\textsuperscript{331} Humans co-opt approximately 40\% of net primary production in terrestrial ecosystems and 25\% of global net primary production, including photosynthesis in the oceans.\textsuperscript{332} Humanity currently claims 54\% of Earth’s available fresh water, and that thirst is projected to increase to 70\% by 2050.\textsuperscript{333} “[T]he world’s average human eco-footprint is about 2.3 [hectares, or 5.7 acres], even though there are only 1.9 [hectares, or 4.7 acres] of productive land and water per person on Earth.”\textsuperscript{334}

Even the mechanics of evolution have changed. Whereas island biogeography before humanity operated according to geographic area and isolation,\textsuperscript{335} the island biogeography of the Anthropocene is dominated by the economic isolation of human populations.\textsuperscript{336} Cuba, the largest land mass in the West Indies, has absorbed fewer losses of native anole lizards attributable to colonization by exotic anoles, almost entirely because trade sanctions have isolated the island’s human population.\textsuperscript{337} The

\textsuperscript{328} See Elizabeth Kolbert, Enter the Anthropocene: Age of Man, Nat’l Geographic, Mar. 2011, at 60.


\textsuperscript{331} Wilson, supra note 6, at 272.


\textsuperscript{335} See sources cited supra note 134, 138, and 139.

\textsuperscript{336} See Helmus et al., supra note 138.

renormalization of economic relations between Cuba and the United States thus bodes ill for biodiversity in an ecologically sensitive region. Peace among nations, alas, accelerates the anthropogenic vectors of biodiversity loss. In retrospect, Anthropocene revisions in island biogeography may explain weaknesses in the equilibrium theory underlying the traditional species-area relationship. Beyond the specific context of island biogeography, humanity’s alteration of ecology to suit its own needs and tastes has triggered multiple regime shifts in terrestrial and aquatic environments. If complex adaptive ecosystems are to regain their capacity to deliver services that humans prize, human institutions such as the law must work to sustain surviving ecosystems and to transform degraded ecosystems. Community-level responses to radical changes such as global warming and ocean acidification may affect different trophic levels of the ecological pyramid, including simple organisms whose extinction could trigger the collapse of entire ecosystems. Ecology, after all, involves the interaction of individuals, populations, and communities. There is no time to waste. Especially as measured by sensitive measures such as vertebrates, coral reefs, and tropical forests, the damage may be truly incommensurable. In the sweep of geological time, humanity itself is the mass extinction event. Through natural history, most mass extinction events have been attributed to

341. See id.
extraterrestrial causes, or at least abiotic factors such as mass volcanism or sealevel change. Only twice before the present have life forms been blamed for inducing a mass extinction. First, cyanobacteria converted the anoxic pre-Cambrian atmosphere by producing so much oxygen that they irreversibly poisoned the atmosphere for obligate anaerobes. Second, terrestrial plants may have triggered global cooling during the late Devonian period. We may be witnessing the first geological episode in nearly 400 million years—or perhaps even 2.2 billion years—in which the rampant success of one form of life has doomed many unrelated species.

Geologic history offers humanity the thinnest glimmer of a future. Though “there is little positive to be said about extinction,” modest hope lies in the realization that “present-day extinctions have not yet achieved the intensities seen in the Big Five mass extinctions of the geologic past, which each removed ≥50% of the subset of relatively abundant marine invertebrate genera.” On the other hand, most “[o]f the


major and minor extinctions” of the past half billion years “are associated with global warming” and its negative effects, such as marine anoxia and ocean acidification.\textsuperscript{353} “The atmosphere is the obvious linkage between” the marine and terrestrial “biospheres, and . . . atmospheric drivers of extinction . . . may hold the key to catastrophes of global scale.”\textsuperscript{354} Whatever the proper antecedents in geological history, if any,\textsuperscript{355} we are “in the midst of one of the largest experiments in the history of the Earth.”\textsuperscript{356}

At an absolute minimum, humanity should combat biodiversity loss and climate change out of crass self-interest. As biodiversity destruction, climate change, and other catastrophes “propagat[e] . . . perturbations through one or more trophic levels in an ecosystem,” organisms seemingly remote from danger become, in fact, seriously imperiled.\textsuperscript{357} In the killing fields of the Anthropocene, “[h]umans are among the most severely affected species.”\textsuperscript{358} Mortality is “the fatal flaw . . . which Nature, in one shape or another, stamps ineffaceably on all her productions, either to imply that they are temporary and finite, or that their [survival] must be wrought by toil and pain.”\textsuperscript{359}

Human domination of global ecosystems and their physical energy flows carries no inherent assurance that it will continue. Humanity’s “transient domination” neither arises from “intrinsic superiority” nor guarantees “extended survival.”\textsuperscript{3560} Panthalassa (πανθάλασσα—“universal sea”), which once designated the all-encompassing ocean that spanned the Permian extinction and the dawn of the Triassic,\textsuperscript{361}

\begin{thebibliography}{1}
\bibitem{354} Bond & Grasby, \textit{supra} note 353, at 4.
\bibitem{355} \textit{Cf.} Douglas Fox, \textit{Back to the No-Analog Future?}, 316 \textsc{Science} 823, 824 (2007) (recognizing that climate change and other ecological disruptions “are likely to reshuffle[]” biological communities “into novel ecosystems unknown today”).
\bibitem{356} Chapin et al., \textit{supra} note 105, at 241.
\bibitem{357} John Terborgh, \textit{The Big Things That Run the World—A Sequel to E.O. Wilson}, 2 \textsc{Conservation Biology} 402, 402 (1988).
\bibitem{358} Redford, \textit{supra} note 132, at 421.
\bibitem{359} Nathaniel Hawthorne, \textit{The Birthmark}, in \textit{The Complete Short Stories of Nathaniel Hawthorne} 227, 228 (1959).
\bibitem{360} Stephen Jay Gould, \textit{Full House: The Spread of Excellence from Plato to Darwin} 73 (1996); \textit{see also id.} at 19–21 (arguing that diversity in life forms, not complexity as such, is the true hallmark of evolutionary success).
\end{thebibliography}
may describe a future Earth whose ice caps have melted.362 “When the last of earth left to discover / Is that which was the beginning / . . . Not known, because not looked for / But heard, half-heard, in the stillness / Between two waves of the sea.”363

On the geological time scales by which evolution and earth science operate, nearly all species become extinct. Of the “five to fifty billion species [that] have existed at one time or another,” roughly “one in a thousand” still exists—“a truly lousy survival record” based upon “99.9 percent failure.”364 Indeed, careful evaluation of the Raup-Sepkoski “kill curve,” a histogram of biological extinctions over the 600 million years of multicellular life,365 “suggest[s] that there might be a maximum lifespan of about 350 million[ ] years” for any species.366 In stark contrast with the vulgar and misleading depiction of evolution as “survival of the fittest,”367 “extinction through bad luck” represents a crucial “element [of] the evolutionary process.”368 Biologically speaking, dominance today can dissolve into extinction tomorrow.369 “[T]he race is not to the swift, nor the battle to the strong . . . but time and chance happeneth to them all.”370

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D. Burgess, Samuel Bowring & Shu-zhong Shen, High-Precision Timeline for Earth’s Most Severe Extinction, 111 PROC. NAT’L ACAD. SCI. 3316 (2014).
364. DAVID M. RAUP, EXTINCTION: BAD GENES OR BAD LUCK? 3–4 (1991) (emphasis omitted); cf. JOHN MAYNARD KEYNES, TRACT ON MONETARY REFORM 80 (1923) (“In the long run we are all dead.”) (emphasis omitted).
368. RAUP, supra note 364, at 192.
369. See David Tilman, Robert M. May, Clarence L. Lehman & Martin A. Nowak, Habitat Destruction and the Extinction Debt, 371 NATURE 65 (1994) (describing how dominant species actually face a higher risk of extinction in the wake of habitat destruction because they have invested more in competition on a geographically circumscribed scale relative to colonization of a broader range).
370. Ecclesiastes 9:11 (King James).
Ecological and evolutionary science delivers a compelling case for legal intervention. What these environmental crises need from law is twofold—not only the mechanical tools for addressing specific vectors of biodiversity loss and anthropogenic drivers of climate change, but also abiding commitments to environmental preservation and sustainable development within fundamental law. If the law would fulfill its environmental schemes, it must first inspire environmental dreams. The environmental philosophies underlying law today are at once both obsolete and insufficiently respectful of natural history and human tradition. “A sustainable world will require an ethic that is ultimately as incorporated into culture and as long lasting as a constitutional bill of rights or as religious commandments.”

“For every constitution there is an epic, for each decalogue a scripture.” In contemporary secular society, fundamental legal charters represent “sacred symbol[s] of nationhood as well as . . . profane instrument[s] of government.” At the level of public international law, the Rio Declaration on Environment and Development has proclaimed that “[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.” Many nations around the world enshrine a similar commitment to sustainability in their constitutions.

Even more so than its constitutional counterpart, however, American environmental law prefers to play on its own turf. The mere fact that occasional citations to foreign law divide the Supreme Court suggests that the United States, at least in

371. Tilman, supra note 22, at 211.
375. See, e.g., § 41, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (granting “[a]ll inhabitants . . . the right to a healthful and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations”); INDIA CONST. art. 48A (promising “to protect and improve the environment and to safeguard the forests and wild life of the country”); KONSTYTUCJA RZECZPOSPOLITEJ POLSKIEJ [CONSTITUTION] art. 74(1)–(3), DZIENNIK ÜSTAW [Journal of Laws], Item No. 483 (no. 78, 1997) (Pol.) (committing “[p]ublic authorities [to] pursue policies ensuring the ecological security of current and future generations” and granting citizens “the right to be informed of the quality of the environment and its protection”).
376. See generally, e.g., JAMES GUSTAVE SPETH, RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT (2004); Freeman & Guzman, supra note 13; Richard J. Lazarus, A Different Kind of “Republic Moment” in Environmental Law, 87 MINN. L. REV. 999 (2003).
the first instance, might draw environmental inspiration from its own laws. The Constitution “provide[s] the scripture of a national civil religion.” The preamble to the Constitution speaks of acts that are “sacred as well as secular in character and authority, for we know that ministers are ‘ordained’ and that churches as well as constitutions are ‘established.’” Constitutions, religious creeds, and rules of environmental engagement adhere to at least one shared creed: they are all “intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”

Infusing American law with an environmental ethos is no trivial task. Despite its characterization as a “covenant running from” generation to generation, the Constitution of the United States makes no explicit pledge to protect the environment. American law nevertheless enjoys other means to secure special legal status for environmental protection.

Enshrining a quasi-constitutional environmental ethos akin to Aldo Leopold’s “land ethic” or Arne Naess’s “deep ecology” requires the less direct, but more creative, use of tools at the law’s disposal.

The balance of this Article addresses four possibilities. First, judges and other decision makers could take more direct account of advances in environmental science in wielding substantive tools directed at biodiversity loss and climate change. Second, NEPA may serve as a quasi-constitutional charter for environmental decision making. Third, even without concrete legal tools, policy makers may pursue more modest and pragmatic goals to protect biodiversity and mitigate climate change. Finally, failing all else, law should embrace appeals to the aesthetics and morality of environmental protection.

C. Environmental Protection on the Last Promontory of the Centuries

1. Revitalizing Environmental Law

Parts II and III of this Article have shown how the law has failed to keep pace with scientific understandings of biodiversity loss and climate change. Effective environmental protection demands “learning strategies” that not only withstand a “high degree of uncertainty” but also absorb “our rapidly evolving understanding” of the

Tushnet, When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law, 90 MINN. L. REV. 1275 (2006).

378. Grey, supra note 373, at 17.


382. See generally Holly Doremus, Constitutive Law and Environmental Policy, 22 STAN. ENVTL. L.J. 295 (2003) (describing the formation of law with ambitious future-regarding effects outside the drafting of constitutions and similar organic documents).

383. See LEOPOLD, supra note 60, at 201–26.

Advances in the field of conservation biology have had little or no legal impact. Federal courts routinely decline to treat innovations in conservation biology as “a necessary element of diversity analysis.”

Illustrations of judicial failure abound. In a case assaulting the government’s failure to consider “population dynamics, species turnover, patch size, recolonization problems, fragmentation problems, edge effects, and island biogeography,” the Seventh Circuit ultimately held that these concepts of conservation biology were “uncertain in application” and that the Forest Service could therefore ignore them in managing national forests. Even a valid “general theory,” the court held, “does not translate into a management tool unless one can apply it to a concrete situation.”

A federal district court similarly declined to endorse specific techniques for managing “distinct geographic ecosystems . . . inhabited by grizzly bears.” That court seemed to treat complexity as a legal excuse in its own right. The possibility that “science or circumstances could . . . change[]” the court reasoned, relieved the agency of any obligation to prepare an “exhaustively detailed recovery plan.”

Cases of this nature suggest that conservation biology, until further notice, will not govern American environmental law until federal land management agencies and the Services, charged with implementing the Endangered Species Act, decide that it does. In the meanwhile, federal judges take frequent refuge in the maxim that “a reviewing court must generally be at its most deferential” when an agency “is making predictions, within its area of special expertise, at the frontiers of science.”

Administrative and judicial passivity bode ill for biodiversity conservation. The failure to coordinate the law with scientific knowledge threatens to consign yet another environmental crisis requiring transnational cooperation to the perdition of zero-sum politics.

386. Sierra Club v. Marita, 46 F.3d 606, 620 (7th Cir. 1995).
387. Id. at 618.
388. Id. at 621.
389. Id. at 623.
391. Id. at 107.
392. Id. at 109–10.
At least in controversies involving climate change, federal courts have lost patience with expert agencies’ pleas that scientific uncertainty warrants further study before concrete action. As the Supreme Court noted in *Massachusetts v. EPA*, its landmark case on climate change, no agency can “avoid its statutory obligation” to enforce federal environmental law “by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time.” Because the relevant “statutory question is whether sufficient information exists to make an endangerment finding,” and not whether the agency “would prefer not to regulate greenhouse gases because of some residual uncertainty,” an agency wishing to defer “a reasoned judgment as to whether greenhouse gases contribute to global warming” must explicitly declare that “the scientific uncertainty is so profound” as to paralyze the agency as a matter of law.

By the same token, an agency that does proceed despite uncertainty will find ample judicial deference, especially where its statutory authority “is ‘precautionary in nature’ and ‘designed to protect the public health,’ and the relevant evidence is ‘difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge.’” Reviewing courts remain painfully aware that they lack the “training [and] experience” that a “chemist, biologist or statistician” might apply to a controversy involving biodiversity and climate change. The law often hesitates to apply science even though law itself constitutes “a formalized system for gathering and evaluating information about the world” through “observation, communication, informed criticism, and response.”

Our legal culture, alas, remains a domain whose leaders shamelessly proclaim their ignorance of the “fine details of molecular biology.” Courts run a dire risk of falling behind “the extraordinary rate of scientific and other technological advances that figure increasingly in litigation” and, for that matter, in daily life. American
law labors under an “extraordinary condition . . . which makes it possible for [someone] without any knowledge of even the rudiments of chemistry to pass upon” scientifically or technologically sophisticated questions.\footnote{Parke-Davis & Co. v. H.K. Mulford Co., 189 F. 95, 115 (S.D.N.Y. 1911) (Hand, J.).}

More than most other areas of legal endeavor, environmental law “involves policy determinations in which the agency is acknowledged to have expertise.”\footnote{Time Warner Entm’t Co. v. FCC, 56 F.3d 151, 163 (D.C. Cir. 1995) (per curiam) (quoting United States v. FCC, 707 F.2d 610, 618 (D.C. Cir. 1983)); accord WorldCom, Inc. v. FCC, 238 F.3d 449, 458 (D.C. Cir. 2001).} After all, the “principal purpose” of limitations of judicial review is “to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.”\footnote{Norton v. S. Utah Wilderness All., 542 U.S. 55, 66 (2004).} But review of administrative decisions routinely requires judges to “acquire the learning pertinent to complex technical questions in such fields as economics, science, technology and psychology.”\footnote{Ethyl Corp. v. EPA, 541 F.2d 1, 69 (D.C. Cir.) (en banc) (Leventhal, J., concurring); cf. Kassel v. Consolid. Freightways Corp., 450 U.S. 662, 670 (1981) (plurality opinion) (expressing a willingness to invalidate “marginally” effective and “substantially” obtrusive state laws despite state officials’ claimed expertise over regulations designed “to promote the public health or safety”).} Judges “should not automatically succumb” to the “acknowledged expertise” of the agencies they review, “overwhelmed as it were by the utter ‘scientificity’” of the regulatory process.\footnote{Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427, 434 (D.C. Cir. 1973).} “Restraint, yes, abdication, no.”\footnote{Ethyl, 541 F.2d at 69 (Leventhal, J., concurring).}

2. NEPA As an Environmental Charter


describes “the responsibilities of each generation as trustee of the environment for succeeding generations.” NEPA thus represents the American expression of a principle that many other nations proclaim (and protect) through constitutional law. No system of environmental ethics can command normative respect unless it preserves the interests of future generations.

Severe limitations hamper NEPA’s power as an environmental charter. The Supreme Court has barred the use of NEPA to review agency decisions on the merits. “NEPA itself does not mandate particular results, but simply prescribes the necessary process.” Indeed, a crippled NEPA has come to exemplify “soft look” review in administrative law. The Court’s admonitions that federal agencies should take a nominally “hard look” at the environmental consequences of their decisions in practice “mandat[e]” little “more than the physical act of passing certain folders and papers [among] . . . reviewing officials” and thereby threaten to “make a mockery of the Act.”

Although NEPA is best known as a source of “procedural requirements . . . analogous” to those of the Endangered Species Act, one of its critical provisions does establish an interpretive principle that could be treated as a substantive “green” canon. “Congress authorizes and directs that, to the fullest extent possible . . . the

416. See sources cited supra note 375.
422. Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985).
policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in” NEPA. This language unambiguously requires the environmental laws of the United States to be interpreted and implemented so that they address all significant environmental risks, for the benefit of future generations as well as today’s citizenry.

If this provision of NEPA has any meaning, legal ambiguities should be resolved in favor of the environment, even when—and perhaps especially when—competing economic interests might support a different answer. This sort of substantive canon resembles the very familiar canon urging the interpretation of statutes so as not to raise doubts over the constitutionality of acts of Congress. That interpretive canon in practice is a species of constitutional lawmaking. NEPA’s “green” canon has similar potential to serve as a significant source of substantive environmental principles.

Akin to section 7 of the Endangered Species Act, NEPA frames the process by which the federal government considers the environmental impact of its major decisions. NEPA directs the federal government to consider not only the “relationship between local short-term uses of [the] environment and the maintenance and enhancement of long-term productivity,” but also any “irreversible and irretrievable commitments of resources.” Environmental impact statements prepared under NEPA must consider “ecological” effects—namely, “effects on natural resources and

on the components, structures, and functioning of . . . ecosystems” affected by major federal action.\textsuperscript{429}

Perhaps NEPA’s greatest accomplishment is its establishment of the principle that the federal government take no major action without first assessing the environmental impact of its decisions.\textsuperscript{430} Today’s international efforts to assess biodiversity, climate change, and other global environmental phenomena—perhaps the most vital scientific tools in humanity’s struggle to forestall biological disaster—\textsuperscript{431} have a predecessor in one of America’s foundational environmental statutes.

3. Pragmatic Modesty

Even in the absence of aggressive legal intervention, “[t]hose of us who love nature, and who would like to ensure that nature persists for future generations to love, need to think about saving ordinary places and ordinary things.”\textsuperscript{432} Without abandoning the admitted implausibility of comprehensively reconfiguring domestic and international environmental law to address climate change, habitat destruction, and alien invasive species, advocates of biodiversity conservation can pursue a more modest reform agenda.

First, international policymakers should develop a joint framework for the regulation of commercial bioprospecting. This idea may build upon two models in international environmental law. First, a bioprospecting annex to the existing Convention on Biological Diversity may aspire to the success of the Montreal Protocol on Substances That Deplete the Ozone Layer.\textsuperscript{433} Routinely hailed as one of the most successful charters of international environmental law, the Montreal Protocol now contributes to the reduction of two greenhouse gases, hydrofluorocarbons and perfluorocarbons.\textsuperscript{434} Second, given the general flow of commercially significant genotypes from the developing world to wealthier countries, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal\textsuperscript{435}—which addresses traffic in hazardous wastes in the opposite direction, from rich

\textsuperscript{429} 40 C.F.R. § 1508.8.
\textsuperscript{430} See 42 U.S.C. § 4332.
\textsuperscript{431} See generally Walter V. Reid, Strategies for Conserving Biodiversity, ENV’T, Sept. 1997, at 16 (assessing the impact of GLOBAL BIODIVERSITY ASSESSMENT, supra note 73, and the work of the Intergovernmental Panel on Climate Change).
\textsuperscript{433} Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541.
countries to their developing counterparts—may provide useful guidance on the unavoidable, underlying questions of environmental justice.\textsuperscript{436}

International coordination on commercial exploitation of biodiversity can improve the very process of collecting rare specimens. If even casual hiking affects the distribution and population of wildlife,\textsuperscript{437} purposeful bioprospecting leaves a dramatically deeper footprint. Bioprospectors, anthropologists, or journalists may even engage in deliberate misconduct.\textsuperscript{438} Even though the collapse of global fisheries has shaken public confidence in official efforts to achieve “sustainability,”\textsuperscript{439} bitter experience teaches that the lack of coordination would be worse. The slash-and-collect approach of Victorian orchid harvesters would probably prevail.\textsuperscript{440} Rationalized harvesting would limit instances of “the wonderfully unusual accomplishment of discovering and eradicating in the same instant a new species.”\textsuperscript{441}


\textsuperscript{438} See Patrick Tierney, Darkness in El Dorado: How Scientists and Journalists Devastated the Amazon (2000).


\textsuperscript{441} Bill Bryson, A Walk in the Woods: Rediscovering America on the Appalachian Trail 92 (1998).
In addition, the international community should facilitate the professionalization of parataxonomy, especially in the developing world. Millions of species await collection and classification by properly trained field biologists. Transnational cooperation can help translate ethnobiological knowledge into terms understood by the global scientific community. Translational science provides a social bridge between formally trained biologists and the populations closest to critically endangered, biodiverse habitats.

Whatever the merits vel non of bioprospecting as a developmental strategy, the case for “codifying” traditional knowledge of all types is compelling. No less than in the law of patents and other branches of intellectual property law, the ultimate legal goal with respect to traditional knowledge should be the preservation, transmission, and encouragement of human ingenuity.

Just as the enablement requirement ensures that a patent teaches practitioners of ordinary skill to duplicate an invention, codification of traditional knowledge reflects the “ultimate goal” of patent law in more economically and legally complex societies: that of “bring[ing] new designs and technology into the public domain through disclosure.”

The economic impact of such scientific cooperation is simple, great, and immediate. “Scientific research,” to put it bluntly, “generates jobs.” The science of systematics is so labor intensive that the task of classifying 10 million species would require 25,000 professional lifetimes. Whether framed as cooperative bioprospecting or north-to-south technology transfer for the enrichment of parataxonomy, commercially oriented initiatives satisfy the Convention on Biological Diversity’s exhortation that the international community should adopt “economically and socially sound measures . . . as incentives” to conserve biodiversity and to contribute to its sustainable development. Integrating rural populations into scientific and commercial activities surrounding biodiversity conservation reflects the reality that “over a

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449. See Wilson, supra note 6, at 317–19.
450. CBD, supra note 128, art. 11.
billion rural people,” many of them abjectly poor, “are dependent for some part of their livelihood on the use and trade of wild resources." 451

The willingness to pursue a more modest agenda, however, does not weaken the need for more aggressive conservation measures. *In situ* preservation remains the only effective way to save biodiversity. Consistent with the precepts of island biogeography, the larger the tract of land set aside for conservation, the better. 452 Zoos, gene banks, and other *ex situ* strategies fall far short of the mark. 453 Despite consuming a significant portion of the capital expended on conservation, *ex situ* efforts have protected a trivial amount of biodiversity. 454 *Ex situ* conservation cannot preserve the adaptive and evolutionary value of individual species, let alone entire ecosystems. 455

Moreover, by introducing criteria designed to suit human tastes and preferences, *ex situ* preservation exerts selective pressure on those species that are targeted for protection. 456 Only *in situ* conservation can effectively preserve the “conditions where genetic resources exist with ecosystems and natural habitats,” or at least the surroundings where “domesticated or cultivated species . . . have developed their distinctive properties.” 457 Finding viable biomes, especially those that have no historical or current equivalent, for those imperiled species that might flourish in the ecosystems of the future will assume utmost urgency. 458

Finally, the academic community bears a singularly immense responsibility to educate the public. America’s wealth belies a crippling lack of political will and scientific sophistication. A country whose citizens lead the developed world in rejecting evolutionary biology 459 is ill equipped to reorient the primary focus of biodiversity

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452. See Karkkainen, supra note 33, at 10–12.


457. CBD, supra note 128, at art. 2.


conservation from preventing overkill to preserving habitat and slowing the influx of alien species.

Law, along with economics and other social sciences within the “third culture” that bridges science and the humanities in modern society, has a unique opportunity (and obligation) to address and ameliorate the conditions under which “human beings are living or have lived.” American legal culture, after all, has made it possible for at least one member of the highest court in the land to condemn habitat preservation because it allegedly “imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.” That same jurist has even derived perverse pleasure from mocking “the much beloved secular legend of the Monkey Trial.” Rhetorical stunts of this sort deliver succor to the enemies of biological enlightenment.

4. For Nowadays the World Is Lit by Lightning

In environmental protection as in “welfare economics,” all “problems . . . must ultimately dissolve into a study of aesthetics and morals.” Human civilization has changed the world beyond recovery within any timeframe capable of being contemplated, let alone managed, by our species. The project of ameliorating humanity’s environmental footprint demands humility, wonder, and above all a thorough scientific understanding of natural history and our species’ contingent, evanescent, and fragile place in it. The law’s approach to environmental ethics, as simple as it is obvious, should approach all efforts “to preserve an ecosystem and its component species . . . as if each species is sacred.”

Whether by design or by happenstance, however, civilization has trodden a different path. Much of environmental law’s internal ethos of conservation and consumption reflects the aesthetic and political philosophy expressed by the early twentieth century’s Futurist movement. “[T]he world has been enriched with a new

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Board that found that forty-four percent of Americans do not believe in an evolutionary explanation of human origins; see also Nicholas D. Kristof, Opinion, God, Satan and the Media, N.Y. TIMES (Mar. 4, 2003), http://www.nytimes.com/2003/03/04/opinion/god-satan-and-the-media.html (reporting that “Americans are more than twice as likely to believe in the devil (68 percent) as in evolution [(28 percent)])”.


beauty,” proclaimed The Futurist Manifesto in 1909, “the beauty of speed.”

Contemporary industrialized societies have affirmatively embraced “[s]peed [as] the form of ecstasy the technical revolution has bestowed on man.”

Having catapulted itself to global ecological dominance through its Great Acceleration, human society must now pay a profound, perhaps unbearable, price. “A law of acceleration, definite and constant as any law of mechanics, cannot be supposed to relax its energy to suit the convenience of man.” Contemporary life having embraced the Futurists’ “love of danger” and their “habit of energy and of temerity,” we shall “like young lions . . . run after Death, its dark pelt blotched with pale crosses as it escape[s] down the vast violet living and throbbing sky.”

Humanity’s contribution to the acceleration of natural history has triggered a correlative, awful responsibility: that of managing “eternal, omnipresent speed” on “the last promontory of the centuries.”

Framing biodiversity loss and climate change as environmental issues operating on a geological clock reverses the preference for speed expressed in the accelerated timetables of politics and technology. “Ah, where have they gone, the amblers of yesteryear? Where have they gone, those loafing heroes of folk song, those vagabonds who roam from one mill to another and bed down under the stars?” Only by tracing “feeling and myth . . . back through time past cultural history to the evolutionary origins of human nature” can we recover the magic that bewitched humanity when first it beheld “[e]very contour of the terrain [and] every plant and animal living in it.” To aspire to anything less casts us on the inexorable and tragic path of “reject[ing] the best the earth could offer.”

In a “world . . . lit by lightning,” humanity seems determined to extinguish the biosphere’s sources of diversity, inspiration, and beauty as though there were mere “candles.” Perhaps we may find in evolutionary history and aesthetic “motion


469. See generally Hibbard et al., supra note 327.


472. Id. ¶ 8.

473. Kundera, supra note 468, at 3.


476. Hawthorne, supra note 359, at 237.

477. Williams, supra note 8, at 97.
what was lost in [legal] space,”478 the better to present “truth in the pleasant disguise of illusion.”479 In an ironic twist on the more familiar political struggles over the teaching of evolution and biological literacy in the United States, “evolution has produced sentient species with a sense of purpose”—the very beings equipped and inclined to explore “the connections that might serve to reunify the scientific worldview with the religious instinct.”480 “[R]eligion and science,” as “the two most powerful forces in the world today,” have a unique opportunity—and responsibility—to become “united on the common ground of biological conservation” and agree “that we owe ourselves and future generations a beautiful, rich, and healthful environment.”481

Among creation myths vying to satisfy the human need for a compelling story of origins, especially in an emotionally challenging “age of globalization,” “none is more solid and unifying for the species than evolutionary history.”482 No other story of human beginnings boasts a more expansive narrative scope or enjoys greater scientific support.483 “The Epic of Evolution . . . beautifully suited to anchor our search for planetary consensus,” promises to unite not merely all branches of humanity, but own species with the entire tapestry of life itself.484

The tree of life, from a pivotal 1990 reorganization485 to more recent debates over the precise relationship among Archaea, bacteria, and eukaryotes,486 is now estimated to contain as many as a trillion \((10^{12})\) microbial species.487 The horses of the

478. Id.
479. Id. at 4.
482. Wilson, supra note 21, at 133.
487. See Kenneth J. Locey & Jay T. Lennon, Scaling Laws Predict Global Microbial
Anthropocene need not fulfill their calamitous destiny. Even the spiritual tradition that ends in the Apocalypse contemplates “a vision” of “red, brown, and white horses,” reporting “to the angel of the Lord . . . standing among the myrtle trees, ‘We have gone through the earth and found the whole world at rest and in peace.’”

Realining environmental law with the scientific understanding of biodiversity loss produces its own epiphany, its own spiritually satisfying path toward detecting an “echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.” So that we might “explore and learn” all that the world would teach us, “all things [must] be mysterious and unexplorable, [and] land and sea [must] be infinitely wild, unsurveyed and unfathomed by us because unfathomable.”

The project of ameliorating humanity’s environmental footprint demands humility, wonder, and above all a thorough understanding of humanity’s place in natural history. “[I]ntense spiritual feelings” arise from the “unfathomable complexity and . . . sublime beauty” of the biosphere at its fullest and most diverse. Only by recapturing the “beauty and mystery that seized us at the beginning” can the law hope to harness, perchance to halt, the horses of our ecological apocalypse.

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490. Thoreau, supra note 59, at 242.
492. Wilson, supra note 475, at 237.