

# Environmental Law/Environmental Literature

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*What, is truly “environmental” about environmental law? This Article is the first attempt to answer this question by integrating Law & Literature scholarship with the study of environmental law. I argue that competing narratives of nature and culture common to the American environmental imagination play a more significant role in environmental law and litigation than previously acknowledged. These competing narratives, communicated through a known set of environmental stories and tropes, are used by attorneys to establish, frame, narrate and argue their cases, and they are absorbed, reimagined, reframed and retold by judges in their written opinions, making environmental law a kind of expressive, literary event. To illustrate this process, the Article examines two important and highly visible case studies: the reintroduction of gray wolves into the Northern Rocky Mountains and the public nuisance climate change lawsuit that culminated in the Supreme Court’s decision in Connecticut v. American Electric Power. A close reading of the pleadings, legal briefs and judicial opinions in these case studies demonstrates that courts respond to and reinforce traditional environmental stories, such as wilderness tales and the environmental apocalyptic, but evince a strong preference for a less well-known story, which I call the Progressive Management Machine. The Progressive Management Machine promises reconciliation of competing environmental narratives through administrative process and science-driven decision making, but, in so doing, masks its own contravention of those same narratives. The approach developed here launches a larger project exploring the dynamic relationship between environmental law, literature and narrative. This Article, like the larger project, seeks to elucidate not only various litigators’ and judges’ rhetorical strategies but also the purposes, content and significance of environmental law.*

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## INTRODUCTION

This Article argues that narratives of nature and culture common to the American environmental imagination play a more significant role in environmental law and litigation than previously acknowledged. These narratives, communicated through a known set of environmental stories and tropes, are used by attorneys to establish, frame, narrate and argue their cases, and they are absorbed, reimagined, reframed and retold by judges in their written opinions, making environmental law and litigation a kind of expressive, literary event. In approaching environmental law and litigation *as literature*, this Article comprehends the law as a process of community- and identity-formation that plays out in acts of storytelling and persuasion<sup>1</sup>—as a “narrative way of world-making”<sup>2</sup>—and thereby seeks to explore in a new way what is at stake in arguments about meaning in environmental contexts. This new approach helps elucidate not only various litigators’ and judges’ rhetorical strategies but also the purposes, content and significance of environmental law.

The theoretical and interpretive frameworks developed here represent the first attempt to integrate Law & Literature scholarship with the study of environmental law.<sup>3</sup> While a number of scholars have sought to produce an analytic framework for environmental jurisprudence grounded in economics theory, the principles of ecology or environmental ethics, I suggest that we can see its development as something less rational, namely, an iterative response to recurrent and competing stories that seek to instantiate competing

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1. The notion of law as a literary and rhetorical performance is deeply informed by James Boyd White’s elaboration on law as “constitutive rhetoric.” See JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985), and James Boyd White, *Constituting the Culture of Argument: The Possibilities of American Law, in WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984), as well as Richard Weisberg’s construction of the “poethics” of law and lawyering in *POETHICS: NARRATIVE STRATEGIES OF LAW AND LITERATURE* (1992).

2. ALLAN C. HUTCHINSON, *DWELLING ON THE THRESHOLD: CRITICAL ESSAYS ON MODERN LEGAL THOUGHT* 14 (1988) (“The life of law is not logic nor experience, but a narrative way of world-making. . . . Like all tales, legal stories gain meaning and significance from the selective emphasis on certain features of our always complex and frequently ambiguous experience. . . . More importantly, it is the stories themselves that come to comprise the reality of our experience. In this sense, legal stories mediate our engagement in the world and with others: they provide the possibilities and parameters of our own self-definition and understanding.”).

3. At least one leading scholar has concluded that the humanities in general, and literature in particular, have little to offer environmental law beyond inspiration for activists. See Eric T. Freyfogle, *Ends and Means in Environmental Law, or the Unlikely Marriage of Law and Letters*, 24 VA. ENVTL. L.J. 263 (2006) (arguing that humanities perspectives can only influence law if humanists “direct[] their comments to the environmental movement as a whole, and through that movement, to the community itself”); see also *Environmental Letters, Environmental Law: A Cross-Disciplinary Conference Exploring the Impact of the Humanities on Environmental Law*, 24 VA. ENVTL. L.J. 231 (2006). For counterpoints, see Charles F. Wilkinson, *Language, Law, and the Eagle Bird, in THE EAGLE BIRD: MAPPING A NEW WEST* 8–21 (1992) (proposing that the language of environmental laws be altered to reflect emotional content and values); Robert R.M. Verchick, *Steinbeck’s Holism: Science, Literature, and Environmental Law*, 22 STAN. ENVTL. L.J. 1 (2003) (arguing that Steinbeck’s integration of science and compassion can be instructive for policy makers).

environmental narratives.<sup>4</sup> These stories and narratives, as much as the values they convey, mobilize parties who are deeply committed to them and become the focal point for courtroom debates. Which is to say that story, narrative and rhetoric are essential not only to environmental discourse in general, but also to environmental legal discourse in particular.<sup>5</sup>

To illustrate what this means, the Article examines two case studies: the reintroduction of gray wolves into the Northern Rocky Mountains and the public nuisance climate change lawsuit that culminated in the Supreme Court's decision in *Connecticut v. American Electric Power*. These case studies demonstrate that litigants come into court telling certain kinds of stories. These stories are familiar to readers of American literature and have been helpfully categorized by scholars in the field of literary studies known as ecocriticism. They have been divided into such groupings as the pastoral, the wilderness, the apocalyptic and the toxic.<sup>6</sup> Courts respond to and reinforce these stories but they also evince a strong preference for a different, less well-known story, which I call the Progressive Management Machine. The Progressive Management Machine is a managerial, science-based story about utilitarian

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4. The connections between narrative, rhetoric and environmental *policy* and *politics* have been broached before. See Holly Doremus, *The Rhetoric and Reality of Nature Protection: Toward a New Discourse*, 57 WASH. & LEE L. REV. 11 (2000); Marcilynn A. Burke, *Klamath Farmers and Cappuccino Cowboys: The Rhetoric of the Endangered Species Act and Why it (Still) Matters*, 14 DUKE ENVTL. L. & POL'Y F. 441 (2004). For an in-depth examination of the influence of environmental rhetoric on post-war environmental politics in Maine and Oregon, see RICHARD W. JUDD & CHRISTOPHER S. BEACH, *NATURAL STATES: THE ENVIRONMENTAL IMAGINATION IN MAINE, OREGON, AND THE NATION* (2003). For a look at how the "cowboy myth" factors into public land ranching policy, see Debra Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721 (2005). For a comparative law perspective on environmental rhetoric and politics, see Ann Brower et al., *The Cowboy, The Southern Man, and the Man from Snowy River: The Symbolic Politics of Property in Australia, the United States, and New Zealand*, 21 GEO. INT'L ENVTL. L. REV. 455, 458 (2008) (observing that parties claiming rights to resources in publicly owned lands in all three locations "mobilize public support by tying their desired privilege . . . to widely known cultural icons"). In a different vein, the emerging field of environmental communication focuses on politics, media campaigns and popular entertainment. See ROBERT COX, *ENVIRONMENTAL COMMUNICATION AND THE PUBLIC SPHERE* (2d ed. 2009); JULIA B. CORBETT, *COMMUNICATING NATURE: HOW WE CREATE AND UNDERSTAND ENVIRONMENTAL MESSAGES* (2006). Additionally, scholarship in the areas of law and psychology examines how information about the environment is framed by different speakers and received by different audiences. See Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 NOTRE DAME L. REV. 313 (2006) (analyzing the ways in which "framing effects" on public perception impact the acceptability of different environmental regulatory strategies); Dan M. Kahan et al., *The Tragedy of the Risk-Perception Commons: Culture Conflict, Rationality Conflict, and Climate Change* (Cultural Cognition Project Working Paper No. 89, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1871503](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871503). Notably, climate change has spawned a cottage industry in these areas of academia. The Center for Research on Environmental Decisions at Columbia University's Earth Institute, the Center for Climate Change Communication at George Mason University, and the Yale Project on Climate Change Communication at the Yale School of Forestry & Environmental Studies are all hubs of relevant activity.

5. On environmental discourse, see generally ROBERT J. BRULLE, *DEMOCRACY AND NATURE: THE U.S. ENVIRONMENTAL MOVEMENT FROM A CRITICAL THEORY PERSPECTIVE* (2000); MAARTEN A. HAJER, *THE POLITICS OF ENVIRONMENTAL DISCOURSE: ECOLOGICAL MODERNIZATION AND THE POLICY PROCESS* (1995).

6. See *infra* Part II.B.

governance that emphasizes the reliability and legitimacy of the modern administrative state, and promises a reconciliation of other competing stories through public process and expert reason.<sup>7</sup> The promise of the Progressive Management Machine, however, is often left unfulfilled.

One of the main things lawyers do is tell stories, a fact most obvious when looking at the ways in which facts are developed and recounted during trials. But one can also appreciate the way in which individual legal doctrines, or even all of law, can be viewed as “story.”<sup>8</sup> To talk about environmental law as literature, then, does not reduce its significance or threaten its legitimacy. Rather, it seeks to understand how our environmental law community is constituted.<sup>9</sup> It offers a way to uncover how we identify and define problems (and problem-makers), how we conceive desirable goals (and goal-achievers) and how we craft solutions. It offers a way of explaining from the perspective of participants what is at stake in environmental disputes. As James Boyd White noted, such a perspective provides an important contrast to more standard positivist accounts of law:

From the outside [law] can of course be described as a structure of rules or a set of institutions, as a tool for policy implementation, and so on, but if it is looked at from the inside . . . it is better talked about in other terms—as an art of language, as a way of creating versions of experience in cooperation or competition with others. From this point of view the law always begins in story.<sup>10</sup>

At the outset, I want to define some terms, and for the sake of simplicity, adopt simple definitions. “Story” in this Article is used in its most conventional sense, to refer to an account of an event or sequence of events that unfolds over time and whose trajectory seeks to resolve, or else call into question the

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7. The use of “progressive management” is borrowed from the characterization of the progressive era’s conceptualization of “conservation” in Jedediah Purdy, *American Natures: The Shape of Conflict in Environmental Law*, 36 HARV. ENVTL. L. REV. 169, 189 (2012), discussed *infra* notes 16–17. The use of the metaphoric “machine” is adopted from James Boyd White, *Rhetoric and Law, in HERACLES’ BOW*, *supra* note 1, at 30 (“This idea of law and legal science fits with . . . the contemporary conception of our public political world as a set of bureaucratic entities, which can be defined in Weberian terms as rationalized institutions functioning according to ends-means rationality. . . . In this way, the government, of which the law is a part . . . tends to be regarded, especially by lawyers, managers, and other policy-makers, as a machine acting on the rest of the world; the rest of the world is in turn reduced to the object upon which the machine acts.”) (emphasis added). See also Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984).

8. See Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 142 (1997) (“Legal doctrine itself may be seen as a set of stories.”). Along these lines, Keith Hirokawa has written about the narrative and rhetorical aspects of legal conceptualizations of property, the environment and ecosystem services. Keith H. Hirokawa, *Three Stories About Nature: Property, the Environment, and Ecosystem Services*, 62 MERCER L. REV. 541 (2011). Scholars have also examined the stories embedded or recounted in contract law, rape, wills, and other areas. See Baron & Epstein, *supra*, at 142–43 (citing Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155 (1989)).

9. See HAJER, *supra* note 5, at 52–53.

10. James Boyd White, *Telling Stories in the Law and in Ordinary Life, in HERACLES’ BOW*, *supra* note 1, at 168.

possibility of resolving, some trouble that intrudes upon a pre-existing state of affairs.<sup>11</sup> “Trope” refers to a figurative representation of nature, in many instances a representation that stands for a familiar story; it is used somewhat interchangeably with “story.” “Narrative” here refers to a broader entity than does “trope” or “story,” one that includes the communication of stories but is not only that. It “consists of the cumulative effects of . . . separate stories as their aggregate meaning comes to light” and “represents one collective way of knowing things, one communal mechanism for grasping the world.”<sup>12</sup> Professor Peter Brooks defines this sense of “narrative” as “one of our large, all-pervasive ways of organizing and speaking the world—the way we make sense of meanings that unfold in and through time.”<sup>13</sup> “Rhetoric,” as used in the Article, refers to language used to persuade, and not to the pejorative sense of rhetoric as empty or cynical argumentation.<sup>14</sup>

The Article proceeds as follows: Part I provides a meta-analysis of earlier and ongoing scholarly projects that seek to offer a unifying vision for environmental law. Part II develops the argument that a narrative approach can assist in this search by introducing the field of literary studies known as ecocriticism and the common stories and tropes that ecocritics find in environmental literature. Parts III and IV then examine how these stories and tropes appear in the “litigation literature” surrounding the reintroduction of gray wolves into the Northern Rocky Mountains and the public nuisance climate change lawsuit mentioned above. I conclude by noting that environmental stories and tropes continue to emerge and evolve, and offering some preliminary suggestions for future work that further documents the phenomenon of Environmental Law/Environmental Literature.

## I. THE SEARCH FOR ENVIRONMENTAL VISION IN ENVIRONMENTAL

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11. See Baron & Epstein, *supra* note 8, at 147–48; ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW: HOW COURTS RELY ON STORYTELLING, AND HOW THEIR STORIES CHANGE THE WAYS WE UNDERSTAND THE LAW—AND OURSELVES 46 (2000) (“[A] story typically moves from an anterior steady state . . . through some setback, reversal, or disruption . . . through strivings to correct or cope with the Trouble . . . to either a restoration of the old steady state or the establishment of a new one.”).

12. Baron & Epstein, *supra* note 8, at 148.

13. Peter Brooks, *Law as Narrative and Rhetoric*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 14 (Peter Brooks & Paul Gewirtz eds., 1996).

14. My simple definition of rhetoric is informed by Colin Starger’s description of the classical elements of rhetoric—logos (reason-based argument), pathos (emotion- or audience response-based argument) and ethos (credibility or speaker-based argument)—and his suggestion that logos itself has different several aspects—formal, empirical, categorical and narrative. See Colin Starger, *The DNA of an Argument: A Case Study in Legal Logos*, 99 J. CRIM. L. & CRIMINOLOGY 1045 (2009). In Starger’s taxonomy, the narrative aspect of logos represents “the logic of storytelling,” in which chosen stories lead ineluctably to certain endings. *Id.* at 1062–63. For descriptions of the pejorative sense of rhetoric, see, for example, White, *supra* note 7, at 31–32 (describing understandings of rhetoric as a “failed science” and an “ignoble art”); J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, in LAW’S STORIES, *supra* note 13, at 211–12 (describing how a negative view of rhetoric results in neglect of classical tradition); John Hollander, *Legal Rhetoric*, in LAW’S STORIES, *supra* note 13, at 176–86 (describing various lay and technical uses of the term “rhetoric”).

## LAW

Environmental law suffers from a complexity that makes it hard to pin down.<sup>15</sup> The diversity of scientific and technical authorities applicable in any given case and the variety of regulatory approaches adopted by environmental statutes to similar types of pollution problems pose real obstacles to conceptualizing environmental law as a coherent, uniform field. Nonetheless, scholars have long sought a coherence or uniformity that might make environmental law sensible.

Law and economics analyses represent what may safely be called the dominant approach. Here, commentators offer self-interested decision making and the resultant market failures as causal explanations for polluting behavior and despoliation. Commentators then leverage the idealized welfare-maximizing utility derived from their explanation to argue for measures that could, theoretically, achieve greater efficiency in environmental law and regulation. The hypothetical rational actors at the center of these stories—whether they be polluters, regulators, environmentalists, judges, or the public-at-large—have come to serve as the subjects of, and imagined audiences for, a great deal of environmental law scholarship. Yet, many find this approach unsatisfying.<sup>16</sup> The assumption that this is what public law in general, and environmental law in particular, does or ought to do, is incomplete; viewed more critically, it is unrealistic and inaccurate. As both a descriptive and prescriptive matter it ignores less quantifiable but equally prevalent sources of motivation and conflict that drive the development of environmental law and policy.

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15. See, e.g., Richard Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 624–27 (1994) (describing environmental law variously as “a barely manageable agglomeration of statutory and administrative trivia,” “complicated,” “a tangled field” and possessing “mind-numbing complexity”). For a discussion of how this complexity is implicated in teaching the subject of environmental law, see Michael Burger, *Teaching Intrapersonal Intelligence as a Lawyering Skill: Introducing Values Systems into the Environmental Law Syllabus*, 2 PACE ENVTL. L. REV. ONLINE COMPANION 1, 7–8 (2011), available at <http://digitalcommons.pace.edu/pelroc/vol2/iss1/1>; Joseph L. Sax, *Environmental Law in the Law Schools: What We Teach and How We Feel About It*, 19 ENVTL. L. REP. (ENVTL. LAW INST.) 10,251 (1989).

16. See, e.g., Purdy, *supra* note 7 (arguing for a more general understanding of environmental law as the site of clashes among competing values); William Boyd, *Ways of Seeing in Environmental Law: How Deforestation Became an Object of Climate Governance*, 37 ECOLOGY L.Q. 843 (2010) (arguing that scientific and technological knowledge practices play a constitutive role in shaping the form and substance of environmental law); Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405 (2005) (arguing cost-benefit analysis exacerbates power disparities between diffuse noneconomic interests and concentrated economic interests). For a direct attack on the economic approach, see Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393 (1981); MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* (2d ed. 2008); Douglas Kysar, *Law, Environment, and Vision*, 97 NW. U. L. REV. 675 (2003). For the particular problem with calculating values of human life in cost-benefit analysis, see LISA HEINZERLING & FRANK ACKERMAN, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 8–11 (2004). For a good summary of the justifications for and the problems with intergenerational discounting, see Richard L. Revesz & Matthew R. Shahabian, *Climate Change and Future Generations*, 84 S. CAL. L. REV. 1099 (2011).

The law and economics approach ignores the stories people tell about nature and culture, and how these stories are wrapped up in worldviews that people cherish.<sup>17</sup> Accordingly, there has long been a countervailing movement to reckon with these issues of personal and political identity and meaning, and to articulate sources of environmental law's unity and coherence outside of and beyond economic rationales.

One approach has sought to tackle the question directly, asking whether environmental law sustains an underlying set of principles or purposes sufficient for it to cohere as a field of law.<sup>18</sup> Professor David Westbrook made an early attempt, organizing the “jumble” of environmental law into an “ideal history” that traced an evolution from common law through the creation and operation of the administrative state to the more recent structuring of market-based mechanisms.<sup>19</sup> However, Professor Westbrook's history, illuminating as it was, failed to provide a unifying environmental principle; rather, the study placed an almost anti-environmentalist political liberalism at the center of environmental law.<sup>20</sup> More recently, Professor Dan Tarlock concluded that it is simply impossible to establish core principles that categorically define the field.<sup>21</sup> Instead, he argued that environmental review, the polluter pays principle, the precautionary principle and the goal of sustainable development can serve as rebuttable presumptions in individual cases to structure a science-based, dynamic, “but inevitably ad hoc” decision making process.<sup>22</sup> In his book *Regulation from Nowhere*, Professor Douglas Kysar reached the opposite conclusion, offering a renovated precautionary principle as a unifying concept that ought to be encoded in law, first in statute and, over time, in the U.S. Constitution.<sup>23</sup>

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17. See Purdy, *supra* note 7, at 172 (“[D]ifferent conceptions of nature have been tied up with, and often essential to, sources of dignity and meaning in both private and civic life.”).

18. See Todd Aagard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 225 (2010) (arguing that the conceptualization of environmental law as a legal field is defined by four “constitutive dimensions”: factual context, policy trade-offs, values and interests, and legal doctrine).

19. Westbrook, *supra* note 15, at 621–23.

20. In Westbrook's ideal history, the evolution of environmental law is driven by the ongoing attempt to make the illiberal, “outward-looking” orientation of environmental law conform to the rhetoric and political demands of liberalism. *Id.* at 622–24; see also *id.* at 680–92.

21. A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE 213, 241 (2004) (“[E]nvironmental law is an unstable blend of science-informed ethical postulates.”).

22. *Id.* at 219–20. More recently, Professor Tarlock has taken a different analytic angle, challenging the prospect of discovering anything to environmental law beyond the rules set forth in statutes. See A. Dan Tarlock, *Is a Substantive, Non-Positivist United States Environmental Law Possible?*, 1 MICH. J. ENVTL. & ADMIN. L. 159 (2012).

23. Professor Kysar argues that the dominant approaches to environmental regulation fail to account for the collective values that inspired the invention of environmental law and the ethical imperatives motivating engagement with environmental issues, and offer no useful guidance on how to define three important relationships that will prove determinative of our environmental future, namely our relationships with “other states,” “other generations” and “other forms of life.” As Professor Kysar recasts it, the precautionary principle is big enough to account for economic considerations *and* values, ethics and engagements with critical “others.” DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* 12–16 (2010).

A second, related approach has asked whether the Supreme Court treats environmental law as a distinct field of law. Professors Richard Levy and Robert Glicksman studied cases from 1960–1989, and concluded that the Court often reached results at odds with congressional preferences for environmental protection.<sup>24</sup> Professor Richard Lazarus offered a different examination of decisions from 1969–1999, and concluded that the Court and its Justices have neither “fully appreciated environmental law as a distinct area of law” nor “embraced either environmental law’s ends or the importance of the values it emphasizes.”<sup>25</sup> Professor Jay Wexler recently followed up on Professor Lazarus’s extensive study by asking a more generic question: *Should* courts treat environmental law cases differently than other kinds of cases?<sup>26</sup> His answer of “No” is grounded in the argument that environmental law is properly understood and treated as a subspecies of administrative law.<sup>27</sup>

The debate over the Court’s treatment of environmental cases has found a renewed salience in light of recent litigation that has sought to persuade both lower courts and the Supreme Court that the common law origins of environmental law provide the underlying principles necessary to address the problems of climate change. While commentators have sought coherence and unity in analytic frameworks and theory, environmental activists and their lawyers have advocated that coherence can be found in common law public

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24. Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court’s Environmental Law Decisions*, 42 VAND. L. REV. 343 (1989).

25. Richard Lazarus, *Restoring What’s Environmental about Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 706 (2000). Professor Lazarus’s argument is that the Supreme Court’s disregarding environmental aspects of environmental law is wrong; his suggestion is that environmental law is defined, first and foremost, by its focus on ecological injury. Ecological injury is itself defined by a number of features, including: the possibility of irreversible, catastrophic or continuing harm; injuries that occur in places and to people who may be either physically or temporally distant from their ostensible causes; uncertainty and risk; complex and multiple causes; and the nonhuman, noneconomic nature of some harms. *Id.* at 744–48. To the extent Professor Lazarus characterizes individual Justices as comprehending environmental law as a unique field of law requiring a different set of analytic tools, it is because they employ language that refers to these elements. *See id.* at 709–12 (distinguishing Justice White’s “dispassionate, dry, and formalistic” opinions, which make “little effort to elaborate any particular philosophical vision” with Justice Marshall’s dissenting opinion in *Chemical Mfrs. Ass’n v. Natural Res. Def. Council*, 470 U.S. 116 (1985), which “discussed how factors such as scientific uncertainty, possible ‘irreversible or catastrophic results’ and the presence of ‘thresholds’ in environmental problems should influence the Court’s legal analysis”). To “restore what’s environmental about environmental law,” Professor Lazarus recommends that judges bring these features to bear in making decisions not only in the standard environmental-administrative law case but also in critical cross-cutting areas such as standing, property law, dormant commerce clause and corporate law. *Id.* at 749–59.

26. Jay Wexler, *The (Non)Uniqueness of Environmental Law*, 74 GEO. WASH. L. REV. 260 (2006).

27. *Id.* Robert Adler provides a persuasive counterpoint to the “environmental law is only administrative law” argument in his article *The Supreme Court and Ecosystems: Environmental Science in Environmental Law*, 27 VT. L. REV. (2003). In that piece, Professor Adler examines the Supreme Court’s deployment of ecological principles in a broad range of prominent decisions and concludes that “neutral principles of administrative law, standing alone, do not adequately explain the range of results in environmental cases.” *Id.* at 355.

nuisance<sup>28</sup> and the public trust doctrine.<sup>29</sup> In each of these instances, the plaintiffs conceived of and presented their respective doctrine as embodying a principle of environmental protection that transcends the limitations of any individual statute.

A third approach has sought to identify and define a degree of coherence and uniformity by examining the aspirational ethics, cultural values and social meanings that have historically infused environmental debates.<sup>30</sup> Some have

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28. In *American Electric Power v. Connecticut*, the attorneys general of eight states, the City of New York and three private land trusts filed suit against four private utility companies and the Tennessee Valley Authority, alleging that their greenhouse gas emissions contribute to climate change and therefore constitute a public nuisance under both federal and state law. 131 S.Ct. 2527 (2011). *See also infra* Part III. Two other climate change public nuisance cases are also making their way through the lower courts. In *Comer v. Murphy Oil USA*, plaintiff property owners alleged that certain power and chemical companies' GHG emissions contributed to climate change, which in turn exacerbated the harmful effects of Hurricane Katrina, constituting a public nuisance. 607 F.3d 1049 (5th Cir. 2010), *petition for writ of mandamus denied sub nom.*, In re *Comer*, 131 S. Ct. 902 (2011). The case has a convoluted procedural history, featuring a dismissal in district court, a reversal at the Fifth Circuit, an en banc decision to vacate the reversal due to failure to muster a quorum, plaintiffs' filing a writ of mandamus asking the Supreme Court to reinstate the panel decision, the denial of the writ, and plaintiffs' re-filing their case in district court. *See Comer v. Murphy Oil USA*, 839 F. Supp. 2d 849, 855–68 (S.D. Miss. 2012) (dismissing re-filed complaint on preemption, political question, standing, res judicata and collateral estoppel grounds). In *Native Village of Kivalina v. ExxonMobil Corp.*, a federally recognized tribe claimed that several large energy companies' greenhouse gas emissions constituted a public nuisance as they have contributed to the sea level rise that threatens the continued existence of the tribe's island village. 696 F.3d 849 (9th Cir. 2012) (finding federal common law nuisance action seeking damages displaced by Clean Air Act).

29. In May 2011, a coalition calling itself Our Children's Trust filed lawsuits against the federal government, eleven separate state governments, and the government of the Ukraine, claiming that the governments were obligated under the public trust doctrine to take action on climate change in order to protect future generations. *See* Felicity Barringer, *Suit Accuses U.S. Government of Failing to Protect Earth for Generations Unborn*, N.Y. TIMES, May 4, 2011, <http://www.nytimes.com/2011/05/05/science/earth/05climate.html>. For archived copies of the organization's complaints, see *Federal Lawsuit*, OUR CHILDREN'S TRUST, <http://ourchildrenstrust.org/page/51/federal-lawsuit> (last updated June 28, 2012). As of October 30, 2012, a federal district court had dismissed a lawsuit against EPA for failure to state a federal claim. *See Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012). State courts in Alaska, Arizona, Colorado, Minnesota, Montana, Oregon and Washington all dismissed complaints against their respective states on various grounds. *See generally Lawsuits By State*, OUR CHILDREN'S TRUST, <http://ourchildrenstrust.org/page/52/lawsuits-state> (last visited Jan. 21, 2013) (providing links to summaries and status updates of individual state cases). Courts in both New Mexico and Texas denied defendants' motions to dismiss and found that the public trust might extend to atmospheric impacts. *Id.* In Iowa, plaintiffs lost an appeal of an administrative decision to deny their petition for rulemaking and have appealed that decision to the Iowa Supreme Court. *See Iowa*, OUR CHILDREN'S TRUST, <http://ourchildrenstrust.org/state/iowa> (last updated May 1, 2012). In California, plaintiffs voluntarily withdrew their complaint without prejudice. *See California*, OUR CHILDREN'S TRUST, <http://ourchildrenstrust.org/state/california> (last visited Jan. 21, 2013).

30. Professor Westbrook's analytic adventure in the history of environmental law anticipates the more recent endeavors noted just below in at least two important ways. First, he grants an early recognition to the central importance of Bill McKibben's *The End of Nature*, the challenge posed by climate change and human engineering to notions of "Nature," and the possibilities of wilderness and wildness. Second, his investigation of "the invention of Nature" and "the American environmental consciousness" is a direct antecedent to future attempts to implicate cultural conceptions of the environment in the development of environmental law. Westbrook, *supra* note 15, at 674–80. Westbrook's view that the preservationist ethic, tied as it is to a recognition of the intrinsic value of nature, is politically weak, a "commitment . . . [that] underwrites very little environmental law," and that

focused on the regulatory and management side of environmental law: Professor Alejandro Camacho asked how the ecological and wilderness values at the heart of natural resources law can be reconciled with assisted species migrations induced by climate change.<sup>31</sup> Professor Jared Goldstein, examining the related issue of the law's response to invasive species, asked whether the nationalization of nature that emerged from the Transcendentalist tradition presents unintended discriminatory overtones.<sup>32</sup>

Others have focused on judicial treatments: Professor Jonathan Cannon cast a series of Supreme Court cases on constitutional issues and statutory interpretation as battlegrounds where the prevalent values that characterize environmentalism as a social movement—including the recognition of interconnectedness or interdependence, a sense of urgency or “ecocrisis,” and ecocentric, other-regarding values—come into conflict with autonomy and free-market values that characterize the “dominant social paradigm” or mainstream American perspective.<sup>33</sup>

Yet others have focused on intellectual history. In two recent articles, for example, Professor Jedediah Purdy addressed the thematic of the American environmental imagination. In one, he mapped four historical conceptions of the natural world onto different environmental laws and natural resources to show how conflicting values and ideas of nature have shaped the law.<sup>34</sup> In the other, he argued that understanding the history of these conceptions is important for understanding how to advance the climate change agenda because

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the conservationist, management-based approach predominates, comports with much of the literature that followed. *Id.* at 676–77.

31. Alejandro Camacho, *Assisted Migration: Redefining Nature and Natural Resource Law Under Climate Change*, 27 YALE J. ON REG. 171 (2010). As Professor Camacho explains, “[a]ssisted migration is controversial because it challenges foundational tenets of conservation law and ethics that seek to preserve and restore preexisting biological systems and shield them from human interference.” *Id.* at 176. Indeed, “assisted migration ignites long-smoldering tensions in American natural resources policy” by “commit[ing] natural resource management to active and long—term human manipulation and control, running counter to imbedded conservation ideals that aim to allow natural systems to function apart from human interference.” *Id.* at 210. It also places species diversity values against native ecosystems values, and the predictive capacity against a usually backward-looking management regime. *Id.* Thus, Camacho concludes pointedly that the entire issue raises the foundational question of “what does ‘natural’ mean anymore?” *Id.* at 224.

32. Jared Goldstein, *Aliens in the Garden*, 80 U. COLO. L. REV. 685 (2009).

33. Jonathan Cannon, *Environmentalism and the Supreme Court: A Cultural Analysis*, 33 ECOLOGY L.Q. 363 (2006). See also Jonathan Cannon, *Words and Worlds: The Supreme Court in Rapanos and Carabell*, 25 VA. ENVTL. L.J. 277 (2007).

34. Each of these conceptions is tied to specific figures in particular historic periods. Providential Republicanism is associated with the appropriation of land from Native Americans and the disbursement of federal land to individuals that accompanied westward expansion through the late nineteenth century. Progressive Management is associated with the turn-of-the-century thinking of Gifford Pinchot, President Theodore Roosevelt and Walter Weyl, the editor the *New Republic*. Romantic Epiphany is most closely associated with John Muir's writing, and with the preservationist movement represented by the Sierra Club and the Wilderness Society. Ecological Interdependence is associated with contemporary environmentalism, from Rachel Carson's *Silent Spring* through the passage of the major environmental statutes and through the technocratic implementation of those statutes that continues today. See Purdy, *supra* note 7, at 178–210.

these conceptions, translated by social movements into the political arena, have always been integral to national debates about meaning and identity.<sup>35</sup>

This Article adds another dimension to the search for environmental vision in environmental law. Purdy's quartet of American imaginaries, Cannon's New Environmental Paradigm, Goldstein's nationalized nature and Camacho's post-romantic, new-ecological ethics each touch to a degree on the narrative and/or rhetorical aspects of environmental law, but they give those aspects less than fulsome treatment. Moreover, they make little to no reference to the literature on the relationship between law, rhetoric and narrative.<sup>36</sup> By opening up the analysis of environmental law to the narrative and rhetorical choices made at various stages in actual litigation, and thereby invoking a new way of *reading* environmental law, I hope to illuminate the living languages and imaginations fueling and informing today's conflicts. Indeed, in contrast to previous efforts—which defined environmental law as a body of law pertaining to actions that affect the environment, or that have the purpose of protecting the environment, or that reflect a particular environmental ethic<sup>37</sup>—I define environmental law as a battle among well-defined, well-known and competing stories.<sup>38</sup>

## II. ENVIRONMENTAL LAW AS ENVIRONMENTAL LITERATURE

Law & Literature is often divided into two primary categories: law *in* literature and law *as* literature. Studies of law *in* literature generally examine representations of lawyers, the legal process and the law in works of fiction. Work in this area often endorses the notion that reading and interpreting texts in this way has certain beneficial effects for law students, lawyers and legal scholars, such as instigating the examination of one's ethical stance and professional identity, provoking a more critical engagement with the law or re-humanizing law.<sup>39</sup> Studies of law *as* literature break down along two lines: the

35. Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1129 (2010).

36. Professor Tarlock is the most dismissive of rhetoric, considering the kinds of values that predominate in environmental rhetoric as at best secondary to the practice of environmental law: "Environmentalism has deep roots in the aesthetic and emotional appeal of nature worship as well as in rationality. However, the environmentalism that drives policy and law is a product of the Enlightenment's faith in reason and knowledge, as opposed to theology, to benefit society." Tarlock, *supra* note 21, at 243. Lazarus and Wexler each advocate for the judicial use of rhetoric in environmental law cases, but their "rhetoric" referring to language used solely for persuasive effect, independent of any substantive content or constitutive force. *See, e.g.*, Lazarus, *supra* note 25, at 739; Wexler, *supra* note 26, at 274–76.

37. *Cf.* Aagard, *supra* note 18, at 261 nn.173–75 and accompanying text (identifying "three main types" of definitions of environmental law and citing to articles).

38. *See* Douglas E. Abrams, *Lochner v. New York (1905) and Kennedy v. Louisiana (2008): Judicial Reliance on Adversary Argument*, 39 HASTINGS CONST. L.Q. 179 (2011) (examining the central role of lawyers' advocacy in shaping judicial outcomes in two prominent Supreme Court decisions).

39. *See, e.g.*, Weisberg, *supra* note 1; ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW (LAW, MEANING, AND VIOLENCE) (1994); RICHARD POSNER, LAW & LITERATURE 305–44 (rev. ed. 1998) (discussing the "edifying school of legal scholarship"); James Boyd White, Book Review, *What Can a*

interpretation of appellate court opinions using methodologies familiar to literary criticism and theory,<sup>40</sup> and the evaluation of the role of storytelling, narrative and rhetoric in the law.<sup>41</sup> This Article falls into the law *as* literature camp, adopting an ecocritical vocabulary in order to understand the role of storytelling, narrative and rhetoric in environmental law. This Part connects the present study to the broader discourse on law, narrative and rhetoric, and then introduces the field of ecocriticism and the environmental stories and tropes that are most relevant to the case studies that follow in Parts III and IV.

### A. Law, Narrative, Rhetoric

Studies of law *as* literature often constitute a form of historical criticism<sup>42</sup> and seek to expose marginalized meanings.<sup>43</sup> Two key assumptions behind these studies are that legal claims are necessarily narrative<sup>44</sup> and that narratives are the means through which different values are expressed.<sup>45</sup> In this view, law becomes literary, a producer of meanings and an avenue for self-expression, rather than solely a mechanism for enforcing rules or resolving disputes. And legal processes—pleadings, briefs, oral arguments and opinions on the judicial side, and petitions, denials, rulemakings, technical studies and public comments on the regulatory side—become expressive, literary performances.

In contrast to criminal cases, where there is inevitably an inherent moral drama and a transparently human story,<sup>46</sup> it is less intuitive to look for

*Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014 (1989) (reviewing the first edition of Judge Posner's *Law & Literature*). Professor Daniel Solove maintains a useful website with an evolving bibliography for those interested in reading examples of law in literature. See Daniel J. Solove, *Law & Literature*, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, <http://docs.law.gwu.edu/facweb/dsolove/Law-Humanities/Law-Literature-Syllabus.htm> (last visited Jan. 21, 2013).

40. See, e.g., Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201 (1990); Judith Resnik, *Constructing the Canon*, 2 YALE J.L. & HUMAN. 221 (1990); John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447 (2001); Ino Augsberg, *Reading Law: On Law as a Textual Phenomenon*, 22 LAW & LITERATURE 369 (2010).

41. For an overview of the storytelling and narrative strain of scholarship, see Nancy Levit, *Reshaping the Narrative Debate*, 34 SEATTLE U. L. REV. 751, 753–59 (2011) (describing history of legal scholarship on storytelling and narrative). For rhetoric, see generally INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988).

42. Robert Weisberg, *Proclaiming Trials as Narratives: Premises and Pretenses*, in LAW'S STORIES, *supra* note 13, at 61 (“[T]o tell a story about law, or to suggest that legal texts have underlying narratives, is to engage in a species of historical criticism of law . . .”).

43. Peter Brooks, *The Law as Narrative and Rhetoric*, in LAW'S STORIES, *supra* note 13, at 16 (determining that studies of storytelling in law seek to “convey meanings excluded or marginalized by mainstream legal thinking”).

44. GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 208–09 (2000) (finding that “legal claims necessarily narrate transactions, moral dramas of condemnation and rectification, and institutional histories”).

45. Weisberg, *supra* note 42, at 63 (noting that “certain ethical, political, and legal values manifest themselves or operate only in the medium of narratives by which a culture or nation defines itself”).

46. See, e.g., BINDER & WEISBERG, *supra* note 44, at 261–64 (discussing Kim Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2085–94 (1989) (interpreting rape trial as contest of narratives)); Alan Dershowitz, *Life Is Not a Dramatic Narrative*, in LAW'S STORIES, *supra* note 13, at

narratives in environmental law cases, where a multiplicity of actors convene to debate economics, science, risk assessments, cost-benefit analyses, the proper role of administrative agencies and the appropriate degree of deference they should be afforded. Yet, narrative is essential to environmental discourse. The interpretation of law as a means to policy ends such as optimal environmental regulation, the preservation of biodiversity or the protection of fishable and swimmable waters, necessarily deploys narratives that bridge the authorizing statute, the administrative action and the goal.<sup>47</sup> This rhetorical purpose is essential to the role narrative plays in law. Legal narratives do not tell stories for the sole purpose of telling stories, nor do they simply entertain, educate and edify; they are always what Professor Robert Cover characterized as “violent” events, intended to persuade audiences to enact power in particular ways.<sup>48</sup> Thus, while a novel or short story is susceptible to analysis as a form of persuasive rhetoric,<sup>49</sup> a story told to a court demands such a perspective.<sup>50</sup>

Therefore, in approaching environmental law as literature, I do not attempt to deconstruct its legitimacy or to transform it from an authored enactment of power into a decentralized cultural meme.<sup>51</sup> Indeed, the project here is to examine and comprehend the tropes, stories and narratives embedded in environmental law, and the identities and institutions with which they engage.

### B. *Ecocriticism*

Ecocriticism is the study of the relationship between literature and the

99–105 (arguing that the role of a defense lawyer is primarily to disrupt narrative form); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994) (questioning strategy of presenting lay jury with overly postmodern view of story and event); Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992) (analyzing narratives in competing arguments in murder trial).

47. BINDER & WEISBERG, *supra* note 44, at 265.

48. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–10 (1983).

49. See BINDER & WEISBERG, *supra* note 44, at 219–24.

50. This offers an opportunity for what Sanford Levinson and Steven Mailloux term a “positive rhetorical project,” one that focuses on “rhetorical strategies displayed within the ongoing practices of legal and literary interpretation.” *Introduction to Section III: Rhetorical Politics*, in INTERPRETING LAW AND LITERATURE, *supra* note 41. Levinson and Mailloux, however, have a more normative project in mind than my own largely descriptive endeavor. Their aim is to construct a formal hermeneutics for interpreting law that displaces a “foundationalist” or “absolutist” view of law—which holds that there is some definitive norm against which alternative interpretations must be measured—and replaces it with a “rhetorical line that precedents, models, convictions, and values are relative to a specific discipline and a specific environment and can vary in time and in space.” *Id.* at 341–42 (internal quotations omitted). Thus, in their view, “one analyzes legal reasoning, not by measuring interpretations against texts or a set of formal rules, but by examining how interpreters justify meaning through informal argumentation within a given cultural setting.” *Id.* at 343. Such an approach does have significance for this project, though. In particular, this approach counters the emphasis in environmental law scholarship on environmental ethics by bracketing the question of whether, for instance, preservation of wildness is good, whether ecosystems represent the proper scale, whether distributional consequences and justice concerns must be considered, and instead looks at the historically contingent values of American environmental law.

51. See BINDER & WEISBERG, *supra* note 44, at 22–23.

physical environment.<sup>52</sup> As an intellectual discourse, it seeks to synthesize literary criticism with both the natural sciences (especially ecology) and environmental ethics and philosophy.<sup>53</sup> As a field of study, it has been defined as much by its environmentalist purposes as by any particular theory or methodology.<sup>54</sup> Thus, the eco-critic Glen A. Love once pronounced: “The most important function of literature today is to redirect human consciousness to a full consideration of its place in a threatened natural world.”<sup>55</sup> Unsurprisingly, there are plenty of Deep Ecologists to be found among the ecocritical cohort.<sup>56</sup> Yet, the utility and purposes of ecocriticism are not limited to ideological advocacy.

Traditionally, ecocriticism focused primarily on works by the British Romantic poets and the American Transcendentalists, as well as on wilderness stories, travelogues and nature writing.<sup>57</sup> As it has matured, it has broadened to provide readings of popular culture, architecture, land use and artificial intelligence. Its scope continues to expand into other areas implicating the relationship between nature and culture.<sup>58</sup> Little ecocritical attention, however, has been given to the cultural processes and products of environmental law.<sup>59</sup>

52. Cheryll Glotfelty, *Introduction: Literary Studies in an Age of Environmental Crisis*, in *THE ECOCRITICISM READER: LANDMARKS IN LITERARY ECOLOGY* xix (Cheryll Glotfelty & Harold Fromm eds., 1996).

53. Serpil Oppermann, *Theorizing Ecocriticism: Toward a Postmodern Ecocritical Practice*, 13 *ISLE: INTERDISC. STUD. IN LITERATURE & ENV'T* 103, 105 (2006).

54. *Id.* at 107 (quoting JOHN TALLMADGE & HENRY HARRINGTON, *READING UNDER THE SIGN OF NATURE* ix (2000) (“[E]cocriticism is really less a method than an attitude, an angle of vision, and a mode of critique.”)). See also LAWRENCE BUELL, *THE FUTURE OF ENVIRONMENTAL CRITICISM: ENVIRONMENTAL CRISIS AND LITERARY IMAGINATION* 44–47 (2005) (discussing differing views on persuasive ends of ecocriticism).

55. Glen A. Love, *Revaluing Nature: Toward an Ecological Criticism*, in *THE ECOCRITICISM READER*, *supra* note 52, at 237.

56. Oppermann, *supra* note 53, at 107 (noting that the purposes of ecocriticism include “a move toward a more biocentric world-view, an extension of ethics, a broadening of humans’ conception of global community to include nonhuman life forms and the physical environment” (quoting *READING THE EARTH: NEW DIRECTIONS IN THE STUDY OF LITERATURE AND THE ENVIRONMENT* xiii (Michael P. Branch et al. eds., 1998))).

57. GREG GARRARD, *ECOCRITICISM: THE NEW CRITICAL IDIOM* 4 (2011).

58. This comports with Richard Kerridge’s description of an ecocritic as one who sets out “to track environmental ideas and representations wherever they appear, to see more clearly a debate which seems to be taking place, often part-concealed, in a great many cultural spaces.” Richard Kerridge, *Introduction*, in *WRITING THE ENVIRONMENT: ECOCRITICISM & LITERATURE* 5 (Richard Kerridge & Neil Sammells eds., 1998). Recent works that exemplify this trend incorporate social ecology, urban environmental issues, cultural studies, and feminist, postcolonial and literary theories. See DAVID W. GILCREST, *GREENING THE LYRE: ENVIRONMENTAL POETICS AND ETHICS* (2002); *THE GREENING OF LITERARY SCHOLARSHIP: LITERATURE, THEORY AND THE ENVIRONMENT* (Steven Rosendale ed., 2002); *BEYOND NATURE WRITING: EXPANDING THE BOUNDARIES OF ECOCRITICISM* (Karla M. Armbruster & Kathleen R. Wallace eds., 2001); *THE ISLE READER: ECOCRITICISM, 1993–2003* (Michael P. Branch & Scott Slovic eds., 2003); GLEN A. LOVE, *PRACTICAL ECOCRITICISM: LITERATURE, BIOLOGY, AND THE ENVIRONMENT* (2003); *Special Forum on Ecocriticism and Theory*, 17 *ISLE: INTERDISC. STUD. IN LITERATURE & ENV'T* 754–99 (2010) (compiling statements from prominent ecocritics on new directions for theory).

59. There may be any number of reasons for this, including the institutional and theoretical difficulties in critically challenging the science and scientism that drive environmental decision making.

Yet, environmental law deploys a number of stories and tropes that, as recognized by ecocriticism, are evident in environmental literature and have come to define environmental discourse in the United States. These include the pastoral, the apocalyptic, wilderness and wildness, animal stories, toxic tales, the global commons as icon and artificial intelligence/cyborg literature.<sup>60</sup> Several of these—the pastoral, the apocalyptic, wilderness and wildness, and the toxic tale—appear in the case studies that follow. Here, I pause to introduce the stories relevant to this study, and how they are thought to function in literature. In Parts III and IV, I examine the deployment of wilderness and wildness and the environmental apocalyptic in the context of two case studies.

### 1. *The Pastoral*

The pastoral trope dates to classical times and adapts to any number of political perspectives and uses. The term “pastoral” may itself refer to representations that fall into any one of three categories: the literary pastoral, which involves a literal retreat from city to country; the more general notion of a literature that distinguishes between country and city; and the pejorative sense of an idealization of rural life that obscures the reality of labor, animal use and environmental harms.<sup>61</sup> Arguably, ecology represents a contemporary pastoral type, at least insofar as it continues to depend on notions of homeostasis and equilibrium that establish the environment first encountered as the best or most natural one.<sup>62</sup>

The pastoral project is to craft an image and a myth for the natural world.<sup>63</sup> It operates by situating people in what theorist Leo Marx termed the “middle landscape,” a pasture bordered on one side by the city and on the other by the wilderness, but spared the “deprivations and anxieties” of both.<sup>64</sup> So

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Indeed, it is one thing for an ecocritic to say that ecstatic enthusiasts such as Henry David Thoreau or John Muir, or even more scientifically grounded advocates such as Aldo Leopold or Rachel Carson, are “imagining” nature; it is quite another thing to say that environmental agencies and Article III courts are. Nonetheless, there have been a number of attempts to describe the direct influence of nature writing on the social movement of environmentalism and environmental politics. See, e.g., DANIEL J. PHILIPPON, *CONSERVING WORDS: HOW AMERICAN NATURE WRITERS SHAPED THE ENVIRONMENTAL MOVEMENT* (2004); DANIEL G. PAYNE, *VOICES IN THE WILDERNESS: AMERICAN NATURE WRITING AND ENVIRONMENTAL POLITICS* (1996); PAUL BROOKS, *SPEAKING FOR NATURE: HOW LITERARY NATURALISTS FROM HENRY THOREAU TO RACHEL CARSON HAVE SHAPED AMERICA* (1980); SUSAN L. FLADER, *THINKING LIKE A MOUNTAIN: ALDO LEOPOLD AND THE EVOLUTION OF AN ECOLOGICAL ATTITUDE TOWARD DEER, WOLVES AND FORESTS* (1994); M. Jimmie Killingsworth, *Maps and Towers: Metaphors in Studies of Ecological Discourse*, 13 *ISLE: INTERDISC. STUD. IN LITERATURE & ENV'T* 83, 83–89 (2006). At the same time, there is a long history of critical thinking about the role science plays in environmental law and policy. See, e.g., Boyd, *supra* note 16, at 848–54 nn. 9–28 and accompanying text (discussing dynamics between environmental science and policy and citing to foundational sources).

60. See generally LAWRENCE BUELL, *THE ENVIRONMENTAL IMAGINATION: THOREAU, NATURE WRITING, AND THE FORMATION OF AMERICAN CULTURE* (1996); GARRARD, *supra* note 57.

61. GARRARD, *supra* note 57, at 33.

62. *Id.* at 34.

63. See BUELL, *supra* note 60, at 31–33.

64. LEO MARX, *THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* 22 (1964).

situated, the pastoral simultaneously casts its view backwards and forwards in time; as a consequence, pastoral stories may be inflected with nostalgia (an idealization of some older past), or else with prolepsy (a sense of prophesy or utopianism).<sup>65</sup> These differing but often overlapping orientations are reflected in the generic forms the pastoral adopts: the elegy, which looks back to a lost history; the idyll, which celebrates an abundant present; and the utopia, which looks forward to an idealized future.<sup>66</sup> Each of these orientations and forms plays a role in environmental law stories.

## 2. *Wilderness and Wildness*

In this country, the idea of wilderness has achieved a religious or quasi-religious quality. It expresses core values such as authenticity, freedom and purity, while holding out the possibility of refuge from the modern/post-modern world.<sup>67</sup> Though it shares some of the pastoral's anthropocentric and humanist values, the wilderness idea emphasizes the importance of non-human nature.<sup>68</sup>

The literary origins of the American wilderness can be traced to Henry David Thoreau's account in *The Maine Woods* of his experience on the peak of Mount Ktaadn.<sup>69</sup> The experience of this place, and of the profound *difference* between civilization and wilderness, is for Thoreau a sublime and overwhelming immediacy.<sup>70</sup> This experience was subsequently popularized by John Muir, whose *My First Summer in the Sierra* and other writings defined for so many the ecstatic experience and the intrinsic value of nature.<sup>71</sup> Edward Abbey's writings are perhaps the most perfect modern literary exemplar of the

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65. GARRARD, *supra* note 57, at 37.

66. *Id.*

67. *Id.* at 59 (Wilderness "holds out the promise of a renewed authentic relation of humanity and the earth, a post-Christian covenant, found in a space of purity, founded in an attitude of reverence and humility.")

68. Importantly, the idea of wilderness also has a distinct lineage, with its origins found not in poetry or fiction but in nonfictional forms, including the personal essay, nature writing, and philosophy. *Id.* at 59–84. Much has also been written in law reviews and legal scholarship concerning the idea of wilderness, much of it stemming from Roderick Frazier Nash's enormously influential work, *WILDERNESS AND THE AMERICAN MIND* (1967). Any list is bound to be incomplete, but several good starting points may be found at Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62 (2010); John Copeland Nagle, *The Spiritual Values of Wilderness*, 35 ENVTL. L. 955 (2005); Sarah Krakoff, *Settling the Wilderness*, 75 U. COLO. L. REV. 1159 (2004).

69. HENRY DAVID THOREAU, *THE MAINE WOODS* 70 (Princeton Univ. Press 1983) (1864) ("It is difficult to conceive of a region uninhabited by man. We habitually presume his presence and influence everywhere. And yet we have not yet seen pure Nature, unless we have seen her thus vast and drear and inhuman . . . Nature here was something savage and awful, though beautiful. . . . This was that Earth of which he have heard, made out of Chaos and Old Night.")

70. *Id.* at 71. ("What is this Titan that has possession of me? Talk of mysteries! —Think of our life in nature, —daily to be shown matter, to come into contact with it, —rocks, trees, wind on our cheeks! the *solid* earth! the *actual* world! the *common sense*! *Contact!* *Contact!* *Who* are we? *where* are we?")

71. GARRARD, *supra* note 57, at 67–68.

wilderness experience, and of that profound sense of otherness.<sup>72</sup>

The wilderness idea is also connected to the ways in which wild animals, including wolves, have been understood.<sup>73</sup> For those who love or admire them, wild animals are, like wilderness, linked with notions of authenticity, freedom and purity; but unlike wilderness, animals are often understood as metaphors for human beings, and as symbolic of aspects of human character or human spirit.<sup>74</sup> In this way, wild animals—whether they are the subject of a hunter’s target or a photographer’s lens—are prized for their wildness and how that reflects on the human condition.<sup>75</sup> At the same time, this wildness provokes fear, distrust and a range of other rational and irrational responses that have always fueled the eradication instinct.

### 3. *The Environmental Apocalyptic*

Apocalyptic narrative has for many years served as a standard feature of environmentalist arguments,<sup>76</sup> appearing in everything<sup>77</sup> from book-length

72. Explaining his purposes in moving into a trailer in Arches National Monument in Utah (the life experiment/sojourn described in *Desert Solitaire*), Abbey wrote:

I am here not only to evade for a while the clamor and filth and confusion of the cultural apparatus but also to confront, immediately and directly if it’s possible, the bare bones of existence, the elemental and fundamental, the bedrock which sustains us. . . . To meet God or Medusa face to face, even if it means risking everything human in myself. I dream of a hard and brutal mysticism in which the naked self merges with a nonhuman world and yet somehow survives still intact, individual, separate. Paradox and bedrock.

EDWARD ABBEY, *DESERT SOLITAIRE: A SEASON IN THE WILDERNESS* 6 (1968). Like the pastoral, the idea of wilderness has come under critical scrutiny, perhaps most famously by the environmental historian William Cronon. See William Cronon, *The Trouble with Wilderness; or Getting Back to the Wrong Nature*, in *UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE* 69 (William Cronon ed., 1995).

73. Though it may prove overly reductive, one can divide animal discourse along a “wild-domestic” axis. Some critics tend to focus on representations of wild animals, others on domestic animals. See GARRARD, *supra* note 57, at 137–40. The divide along this axis roughly corresponds to the divide between those who espouse environmental ethics as the reason for greater protections for animals and those who espouse animal rights as the reason. *Id.* at 140.

74. *Id.* at 140 (noting the “play in likeness and difference in the relationship of humans and animals . . . may be analyzed in terms of the distinction of metonymy and metaphor”). See also LAWRENCE BUELL, *WRITING FOR AN ENDANGERED WORLD: LITERATURE, CULTURE, AND ENVIRONMENT IN THE U.S. AND BEYOND* 201–04 (2001) (describing “big creature bias” in American environmentalism).

75. For many years, the emphasis in animal representations and animal advocacy was on individuals and species, and the mode of representation was highly anthropomorphic, or “Disney-fied.” In the 1980s, audiences began demanding more accurate, more scientifically grounded representations in film and documentary. GARRARD, *supra* note 57, at 152–53. The move from pastoral, Disney-fied representations to scientific, objective ones—a process that would conceptually be linked to the same “maturation” presumed to accompany a move from pantheism to ecology—reached its most recent stopping point in the concept of biodiversity. *Id.* at 158. Animals are no longer thought to be important because they are like us or different from us in revealing ways, nor because they live lives that are aesthetically pleasing to observe, but because they participate in a larger scientific reality, “biodiversity,” which is critical to another environmentalist goal: “sustainability.” *Id.*

76. M. Jimmie Killingsworth & Jacqueline S. Palmer, *Millennial Ecology: The Apocalyptic Narrative from Silent Spring to Global Warming*, in *GREEN CULTURE: ENVIRONMENTAL RHETORIC IN CONTEMPORARY AMERICA* 21 (Carl G. Herndl & Stuart C. Brown eds., 1996).

polemics<sup>78</sup> to commercial science fiction<sup>79</sup> to self-consciously literary fiction<sup>80</sup> to documentary film.<sup>81</sup> Though the apocalyptic narrative fell out of favor during the 1970s, when widespread environmentalism appeased the rhetorical needs of the environmental movement, and the 1980s, when the environmental movement was responding to a series of attacks from the Reagan Administration and the wise use movement, climate change has revived its use.<sup>82</sup> Climate change is particularly appealing to the environmental imagination because it blurs the boundary between nature and culture, posing specific threats to our understandings of place, wilderness, seasonality, natural phenomena and human values seeded deep in the American consciousness by Henry David Thoreau.<sup>83</sup> By now, its potentially world-altering effects are widely understood, and we have moved into imagining not only the end of the world as we know it, but also how to re-conceptualize the post-climate change environment<sup>84</sup> and adapt to it.<sup>85</sup>

The environmental apocalyptic is rooted in the Christian prophetic tradition and remains “the single most powerful master metaphor that the contemporary environmental imagination has at its disposal.”<sup>86</sup> Its imaginative appeal transcends logical force, including the logic one might apply to determine the probability of an actual apocalypse.<sup>87</sup> The environmental apocalyptic operates on the imagination along several dimensions. Most

77. For a comprehensive overview of apocalypse in the environmental imagination, see FREDERICK BUELL, *FROM APOCALYPSE TO WAY OF LIFE: ENVIRONMENTAL CRISIS IN THE AMERICAN CENTURY* (2003).

78. See, e.g., RACHEL CARSON, *SILENT SPRING* (1962); PAUL R. EHRLICH, *THE POPULATION BOMB* (1968).

79. See, e.g., T.C. BOYLE, *A FRIEND OF THE EARTH* (2001); KIM STANLEY ROBINSON, *FORTY SIGNS OF RAIN* (2005).

80. See, e.g., CORMAC MCCARTHY, *THE ROAD* (2006); LESLIE MARMON SILKO, *CEREMONY* (1977).

81. *AN INCONVENIENT TRUTH* (Lawrence Bender Productions & Participant Productions 2006).

82. Killingsworth & Palmer, *supra* note 76, at 37–40. The reality of biodiversity loss has also generated its own apocalyptic literature. See, e.g., Jim Chen, *Across the Apocalypse on Horseback: Imperfect Legal Responses to Biodiversity Loss*, 17 WASH. U. J.L. & POL’Y 13 (2005).

83. BUELL, *supra* note 60, at 280.

84. See BILL MCKIBBEN, *THE END OF NATURE* (1989); Westbrook, *supra* note 15; Camacho, *supra* note 31.

85. The literature on adaptation is already vast and is growing. Some salient samples include J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENVTL. L. 343 (2009); Alejandro Camacho, *Adapting Governance to Climate Change: Managing Uncertainty through a Learning Structure*, 59 EMORY L.J. 1 (2009); Robert L. Glicksman, *Climate Change Adaptation: A Collective Action Perspective on Federalism Concerns*, 40 ENVTL. L. 1159 (2009); Robin Kundis Craig, “Stationarity Is Dead”—*Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENVTL. L. REV. 9 (2010); Jessica Owley, *Conservation Easements at the Climate Change Crossroads*, 74 LAW & CONTEMP. PROBS. 199 (2011).

86. BUELL, *supra* note 60, at 285.

87. *Id.* (“Of no other dimension of contemporary environmentalism . . . can it be so unequivocally said that the role of the imagination is central to the project; for the rhetoric of apocalypticism implies that the fate of the world hinges on the arousal of the imagination to a sense of crisis.”).

obviously, it is a “shock tactic” designed to win over its audience.<sup>88</sup> Its features are iconoclastic,<sup>89</sup> seeking to instigate change in individuals’ stances toward the status quo. At the same time, it is tied to a “pastoral logic” that “rests on the appeal to the moral superiority of an antecedent state of existence when humankind was not at war with nature in the way that prevails now.”<sup>90</sup> This logic produces a “doubleness,” in which the writing appeals to nostalgia by invoking a sense of a world that is soon to be lost.<sup>91</sup> But, it is not yet lost and the environmental apocalyptic leaves open the possibility that human intervention can still avoid the looming catastrophe.<sup>92</sup>

This possibility has helped popularize the form most closely associated with the environmental apocalyptic: the jeremiad.<sup>93</sup> The narrative structure of the jeremiad, whose origins can be traced back to the Puritan preacher Jonathan Edwards and his contemporaries, includes four central elements: 1) identification of a chosen people that has failed to keep covenant with key values or principles, 2) the threat that the people will suffer calamity as a result of this failure, 3) the possibility that calamity may yet be avoided by a return to the righteous ways of the covenant, and 4) the promise that “through proper action the chosen people shall recapture their favored status and avoid ruin.”<sup>94</sup> The jeremiad form has proven important to bridging the distance between the aesthetic/spiritual and management-centered orientations that play into the environmental movement, balancing “the need for anxiety with the need for efficacy and the need for awe with the need for functionalism” to sustain collective action.<sup>95</sup>

#### 4. *Toxic Tales*

Toxic tales—such as Rachel Carson’s *Silent Spring*, Terry Tempest Williams’s *Refuge* and Don DeLillo’s *White Noise*—can at their most generic scale be defined as “expressed anxiety arising from perceived threat of

88. Killingsworth & Palmer, *supra* note 76, at 22. For a counterpoint, see the counterintuitive reading of the post-climate change film *The Day After Tomorrow* in Michael Salvador & Todd Norton, *The Flood Myth in the Age of Global Climate Change*, 5 ENVTL. COMM. 45 (2011) (arguing that the film’s rhetorical structure undermines rather than supports calls for public action to curb global climate change).

89. Killingsworth & Palmer, *supra* note 76, at 41.

90. BUELL, *supra* note 60, at 300–01.

91. *Id.*

92. *But see* Christina R. Foust & William O’Shannon Murphy, *Revealing and Reframing Apocalyptic Tragedy in Global Warming Discourse*, 3 ENVTL. COMM. 151 (2009) (discussing the tragic variant of apocalyptic rhetoric, in which human efforts are futile, and analyzing both comic and tragic variations on the apocalyptic frame of climate change discourse).

93. *See generally* Scott Slovic, *Epistemology and Politics in American Nature Writing*, in GREEN CULTURE, *supra* note 76; Killingsworth & Palmer, *supra* note 76; Amy Patrick Mossman, *Apocalyptic or Precautionary? Revisioning Texts in Environmental Literature*, COMING INTO CONTACT: EXPLORATIONS IN ECOCRITICAL THEORY AND PRACTICE 141 (Annie Ingram et al. eds., 2007).

94. Salvador & Norton, *supra* note 88, at 47.

95. *Id.* at 49.

environmental hazard due to chemical modification by human agency.”<sup>96</sup> The stories are marked by four common characteristics: 1) they recount stories of a “rude awakening” from the naïveté of simpler times to the complexity of modern or post-modern society;<sup>97</sup> 2) they convey images of a “world without refuge from toxic penetration;”<sup>98</sup> 3) they tell a moral tale of David versus Goliath, usually in the form of victimized communities versus unchecked corporate power;<sup>99</sup> and 4) they tend to transform into gothic stories that give a guided tour of an underworld, always cast in terms of good and evil, and designed to “instill shock and compassion in uninitiated readers.”<sup>100</sup> The tales both “reinforce the deromanticization and [] urge the expansion of ‘nature’ as an operative category.”<sup>101</sup> Thus, nature is important not in its invocation of a particular pastoral idea, nor in its manifestation as a wilderness refuge, but precisely because of its impacted nature, because it is already always a “second nature.”<sup>102</sup>

### III. THE WOLF WARS

The reintroduction of gray wolves into the Northern Rocky Mountains is one of the most visible and powerful events in the history of American environmental management.<sup>103</sup> For more than two decades, the controversies in Montana, Idaho and Wyoming have captivated local and national audiences.<sup>104</sup> Throughout this time, wolf politics has played a central role in legal and regulatory decision making,<sup>105</sup> the scientific judgments that inform wolf

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96. BUELL, *supra* note 74, at 30–31.

97. *Id.* at 37.

98. *Id.* at 38.

99. *Id.* at 40. Professor Buell notes that this trope has been integral to the development of the environmental justice movement, effectively promoting “a self-conscious, informed sense of local self-identification, victimage, and grassroots resistance encapsulated by the image of ‘communities’ or ‘neighborhoods’ nationwide combatting ‘unwanted industrial encroachment and outside penetration.’” *Id.* at 41.

100. *Id.* at 43.

101. *Id.* at 45.

102. *Id.*

103. See Martin A. Nie, *The Sociopolitical Dimensions of Wolf Management and Restoration in the United States*, 8 HUM. ECOLOGY REV. 1, 1 (2001) (explaining that reintroduction of wolves represents “one of the most important stories that will be told about wildlife policy and American environmentalism”).

104. See, e.g., Frank Clifford, *Wolves and the Balance of Nature in the Rockies*, SMITHSONIAN MAGAZINE, Feb. 2009, available at <http://www.smithsonianmag.com/science-nature/Howling-Success.html>; James William Gibson, *Cry, Wolf*, EARTH ISLAND J., Summer 2011, available at [http://www.earthisland.org/journal/index.php/article/cry\\_wolf/](http://www.earthisland.org/journal/index.php/article/cry_wolf/) (depicting “culture war” over gray wolves in the Northern Rockies).

105. Wolf politics have factored into everything from the design of the wolf recovery program, see generally HANK FISCHER, WOLF WARS: THE REMARKABLE INSIDE STORY OF THE RESTORATION OF WOLVES TO YELLOWSTONE (1995), to state gubernatorial elections, see *Ray Hunkins Opposes Litigation of State and Fish and Wildlife Service*, CAMPAIGNS & ELECTIONS, May 1, 2006, at 39, to Congressional appropriations negotiations, see, for example, Phil Taylor, *Wolf Delisting Survives Budget Fight, as Settlement Crumbles*, ENV'T & ENERGY DAILY, Apr. 11, 2011, available at <http://www.eenews.net/public/EEDaily/2011/04/11/5>.

management<sup>106</sup> and the judicial process.<sup>107</sup>

In this Part, I examine the appearance of wilderness and wildness stories in the sprawling litigation that has enveloped the Northern Rocky Mountain (NRM) wolves, with the hope of demonstrating how myths, mystifications and other narrative constructions inform the legal disputes. I look at several aspects of parties' and courts' narrative construction of the wolves: 1) how wolves are characterized and how parties' interests in and concerns about the wolf are defined; 2) how the courts have corralled the parties' radically different stories into the court-preferred story of the Progressive Management Machine; and 3) how politics has trumped law, marking an unexpected triumph of myth over management. To set the stage for the analysis, I begin with a short history of the NRM wolves.

A. *A Brief History of Wolves and Wolf Management in the Northern Rocky Mountains*<sup>108</sup>

Prior to settlement by Europeans and their descendants, the gray wolf occupied the entire North American continent, with the exception of the extreme Southeast, which was occupied by the red wolf, and certain uninhabitable desert environments in California. It has been estimated that there were somewhere between 150,000 and 750,000 wolves on the continent, including some 35,000 in the area in and around Yellowstone National Park. Upon the Europeans' arrival, wolves were forced into retreat, as fears, superstitions and religious beliefs shaped negative attitudes toward the New World wilderness and the wolves who inhabited it.<sup>109</sup> Although the first

106. See Dale D. Goble, *The Endangered Species Act: What We Talk About When We Talk About Recovery*, 49 NAT. RESOURCES J. 1, 33–39 (2009); Edward A. Fitzgerald, *Defenders of Wildlife v. Salazar: Delisting the Children of the Night in the Northern Rocky Mountains*, 31 PUB. LAND & RESOURCES L. REV. 1 (2010).

107. Rob Dubuc, *The Northern Rocky Mountain Wolf Delisting: What Would Leopold Think?*, 32 ENVIRONS ENVTL. L. & POL'Y J. 215, 220 (2009) (noting that when it comes to litigation over the Northern Rocky Mountain wolves, "where those courthouse doors are located plays a very big factor in the final outcome of any legal challenge").

108. The story I tell is redacted from a number of sources. For the sake of convenience I rely primarily on a handful of law review articles: Julie S. Thrower, *Ranching with Wolves: Reducing Conflicts Between Livestock and Wolves Through Integrated Grazing and Wolf Management Plans*, 29 J. LAND RESOURCES & ENVTL. L. 319, 329–43 (2009); Dubuc, *supra* note 107, at 222–26; Jennifer Li, *The Wolves May Have Won the Battle, But Not the War: How the West Was Won Under the Northern Rocky Mountain Wolf Recovery Plan*, 30 ENVTL. L. 677 (2000); Dale D. Goble, *Of Wolves and Welfare Ranching*, 16 HARV. ENVTL. L. REV. 101, 101–06 (1992); Valerie M. Fogleman, *American Attitudes Towards Wolves: A History of Misperception*, 13 ENVTL. REV. 63, 64 (1989); Holly Doremus, *Restoring Endangered Species: The Importance of Being Wild*, 23 HARV. ENVTL. L. REV. 1 (1999). These articles, in turn, synthesize a number of earlier primary and secondary studies, including, most notably, BRUCE HAMPTON, *THE GREAT AMERICAN WOLF* (1997), and BARRY HOLSTUN LOPEZ, *OF WOLVES AND MEN* (1978). The articles also incorporate much history gleaned from case law and U.S. Fish and Wildlife Service's voluminous contributions to the Federal Register.

109. Goble, *supra* note 108, at 101 ("European cultures traditionally have viewed wolves as darkness incarnate, the devil barely disguised. For the past 400 years, Euro-Americans have sought to exterminate the beast."). See also Li, *supra* note 108, at 681–82 ("Early European immigrants brought

trappers and hunters on the Western frontier mostly left wolves alone, in the 1850s and 1860s, a trade in wolf pelts developed.

In the 1870s, livestock were introduced into the Rocky Mountain West, and the tension between ranchers and wolves took hold. With buffalo and wild ungulate populations decreasing, wolves turned to cattle herds. Though wolves were only one of many causes of livestock loss, by the end of the nineteenth century, ranchers claimed as much as 50 percent of their herds were being lost to wolf depredations. In the 1870s and 1880s, ranchers hired private guns to hunt wolves, and enlisted the aid of state governments, who passed legislation establishing wolf bounties. In 1914, the eradication of the wolf became official U.S. policy; Congress appropriated funds to the Biological Survey, the predecessor agency to the U.S. Fish and Wildlife Service (FWS), for the specific purpose of killing wolves. By 1930, the gray wolf was eliminated from the Northern Rocky Mountains. By 1945, only lone wolves were known to exist anywhere in the lower forty-eight states.

The change in social perceptions of the wolf, which has led to efforts at its recovery, is often attributed to the environmentalist movement and the 1973 passage of the Endangered Species Act (ESA), but reconceptualization of the wolf actually began much earlier. First, Horace Albright, director of the National Park Service from 1929–1933, established a policy that recognized the wildlife value of top predators and prohibited the trapping or poisoning of wolves within National Parks.<sup>110</sup> Then, in 1933, George Wright, an early ecologist, wrote that wolves and other rare predators ought to be considered the “special charges of the national parks.”<sup>111</sup> In 1944, Aldo Leopold first articulated the idea of reintroducing wolves into Yellowstone.<sup>112</sup> And in 1963 Leopold’s son, Starker Leopold, issued a government report that suggested that wolves were necessary to control Yellowstone’s out-of-control elk herd and the destructive consequences it had on the ecosystem. Starker Leopold’s suggestion was, like the wilderness movement with which it coincided, informed by an Edenic vision of the American wilderness and the story of the Fall that came with settlement.<sup>113</sup> In the report, he charged the National Park Service to “recreate the ecologic scene as viewed by the first European visitors.”<sup>114</sup>

Ten years later, after passage of the ESA, FWS listed the NRM gray wolf

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folklore and superstitions which were fashioned into a deep-seated prejudice against wolves. Medieval tales of wolves feeding on children, solitary travelers, and corpses from wars and plagues were common throughout France, Spain, and Russia. This background led to an immense fear of and aversion to anything wolf-like, and people suspected of being werewolves were often executed.”)

110. Dubuc, *supra* note 107, at 223.

111. *Id.* at 224.

112. *Id.*

113. See generally CAROLYN MERCHANT, *REINVENTING EDEN: THE FATE OF NATURE IN WESTERN CULTURE* (2003).

114. A.S. LEOPOLD, ET AL., ADVISORY BOARD ON WILDLIFE MANAGEMENT, *Summary, in WILD MANAGEMENT IN NATIONAL PARKS: THE LEOPOLD REPORT* (1963), available at [http://www.cr.nps.gov/history/online\\_books/leopold/leopold.htm](http://www.cr.nps.gov/history/online_books/leopold/leopold.htm).

subspecies (*Canis lupus irremotus*) as an endangered species.<sup>115</sup> In 1978, FWS moved away from subspecies distinctions and listed the gray wolf (*Canis lupus*) as an endangered species throughout the lower forty-eight, except in Minnesota where it was listed as threatened.<sup>116</sup> In 1980, the Northern Rocky Mountain Wolf Recovery Team issued a plan for wolf recovery in the area,<sup>117</sup> but no action was taken until 1987 when FWS signed a revised plan.<sup>118</sup> The 1987 plan called for repopulation of gray wolves in three areas: Glacier National Park in northwest Montana, the massive wilderness areas in central Idaho and Yellowstone National Park in Wyoming.<sup>119</sup> Recognizing that a population of gray wolves had already migrated south from Canada into Glacier National Park, the plan called for the “natural” recolonization of Montana and Idaho; because Yellowstone was geographically remote from the Montana population, the planners determined that wolves would have to be artificially reintroduced there.<sup>120</sup>

In 1992, FWS initiated an environmental review process for the 1987 plan. By all accounts, the public meetings were contentious.<sup>121</sup> The final environmental impact statement (FEIS), issued in 1994, endorsed several critical choices that differed from the 1987 plan:

It called for reintroducing wolves into both Idaho and Yellowstone.

It established a biological recovery goal of ten breeding pairs and approximately one hundred wolves for three consecutive years in each of the three target areas.<sup>122</sup> It also concluded that genetic exchange among the populations, and the establishment of a “metapopulation,” was a critical element of recovery.<sup>123</sup>

It reintroduced wolves as “nonessential, experimental populations” under the newly created section 10(j) of the ESA.<sup>124</sup> The section 10(j) designation provides that subject populations be treated as “threatened,” rather than “endangered.”<sup>125</sup>

115. Amendments to List of Endangered Fish and Wildlife, 38 Fed. Reg. 14,678 (June 4, 1973) (codified at 50 C.F.R. pt. 17).

116. Reclassification of the Gray Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9607 (Mar. 9, 1978) (codified at 50 C.F.R. pt. 17).

117. U.S. FISH & WILDLIFE SERV., NORTHERN ROCKY MOUNTAIN WOLF RECOVERY PLAN (1980).

118. U.S. FISH & WILDLIFE SERV., NORTHERN ROCKY MOUNTAIN WOLF RECOVERY PLAN (1987).

119. *Id.* at v.

120. *Id.*

121. See, e.g., FISCHER, *supra* note 105, at 145–49.

122. The FEIS also noted that this was a “somewhat conservative” goal, and “should be considered minimal.” U.S. FISH & WILDLIFE SERV., *Appendices to THE REINTRODUCTION OF GRAY WOLVES INTO YELLOWSTONE NATIONAL PARK AND CENTRAL IDAHO, FINAL ENVIRONMENTAL IMPACT STATEMENT 42* (1994) [hereinafter FEIS].

123. *Id.* (“Thirty or more breeding pairs comprising some 300+ wolves in a metapopulation (a population that exists as partially isolated sets of subpopulations) with genetic exchange between subpopulations should have a high probability of long-term persistence.”)

124. *Environmental Consequences*, in FEIS, *supra* note 122, at 32.

125. Amendments to the Endangered Species Act of 1982 § 10(j)(2)(C), 96 Stat. 1411 (current version at 16 U.S.C. § 1539(j) (2006)).

It defined a “problem wolf” and the appropriate means of managing it under section 10(j).<sup>126</sup> FWS has since issued several iterations of regulations to manage “problem” wolves under section 10(j).<sup>127</sup>

In 1995 and 1996, the recovery program began. So did the litigation.

### B. Representations of the Wolf in the Litigation Literature

When lawyers and judges talk about wolves, we are talking about two things at once: real wolves and imagined wolves.<sup>128</sup> The real wolf is an actual creature, beyond our perceiving her, naming her, describing her, categorizing her or otherwise defining her.<sup>129</sup> In contrast, the imagined wolf is a symbol, a product of our invention defined by the context in which we place it.<sup>130</sup> Yet, lawyers and judges do not acknowledge that the latter is involved in our evaluation of how to deal with the species.

In this Part, I argue that the pleadings, briefs and judicial opinions involving the NRM wolves are populated with three types of imagined wolves: the Scientific Wolf, the Historic Wolf and the Mythic Wolf, which may manifest either as the transcendent spirit of wildness and ecological order or else as the threatening force of darkness encroaching on economic interests and the rancher’s way of life.<sup>131</sup> Given the extent of the litigation,<sup>132</sup> I focus on a few examples: *Wyoming Farm Bureau Federation v. Babbitt*, an early case from the mid-1990s challenging the original reintroduction of wolves into Idaho and Wyoming;<sup>133</sup> *Defenders of Wildlife v. Hall (DOW v. Hall I)*, a 2008

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126. *Alternatives*, in FEIS, *supra* note 122, at 4.

127. See Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252 (Nov. 22, 1994); Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Central Idaho and Southwestern Montana, 59 Fed. Reg. 60,266 (Nov. 22, 1994); Endangered and Threatened Wildlife and Plants; Regulation for Nonessential Experimental Populations of the Western Distinct Population Segment of the Gray Wolf, 70 Fed. Reg. 1285 (Jan. 6, 2005); Revision of Special Regulation for the Central Idaho and Yellowstone Area Nonessential Experimental Populations of Gray Wolves in the Northern Rocky Mountains, 73 Fed. Reg. 4720 (Jan. 28, 2008); Reinstatement of Protections for the Gray Wolf in the Western Great Lakes and Northern Rocky Mountains in Compliance With Court Orders, 73 Fed. Reg. 75,356 (Dec. 11, 2008).

128. See generally S.K. ROBISCH, WOLVES AND THE WOLF MYTH IN AMERICAN LITERATURE (2009).

129. *Id.* at 15–16.

130. *Id.* at 16.

131. These categories are adopted from Robisch’s discussion of “the Corporeal Wolf,” the “Eradicated Wolf” and the “Ghost Wolf.” See generally *id.*

132. Between 1995 and 2011 no fewer than nine lawsuits were filed challenging various aspects of the federal government’s management of the NRM wolf recovery program. See, e.g., *Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224 (10th Cir. 2000); *Defenders of Wildlife v. U.S. Dep’t of Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005); *Nat’l Wildlife Fed’n v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005); *Defenders of Wildlife v. Hall (DOW v. Hall I)*, 565 F. Supp. 2d 1160 (D. Mont. 2008); *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010); *Wyoming v. U.S. Dep’t of Interior*, No. 09-CV-118J, 2010 WL 4814950 (D. Wyo. Nov. 18, 2010); *Wyoming v. U.S. Dep’t of Interior*, 360 F. Supp. 2d 1214 (D. Wyo. 2005).

133. See *Wyo. Farm Bureau Fed’n v. Babbitt*, 987 F. Supp. 1349 (D. Wyo. 1997).

case where a coalition of environmentalist plaintiffs and wolf advocates successfully enjoined a FWS rule that would have delisted the NRM gray wolf;<sup>134</sup> and *Gordon v. Norton*, a 2003 Tenth Circuit case involving a claim that the NRM wolf recovery program was an unconstitutional taking of an historic ranch in Wyoming.<sup>135</sup>

### 1. *The Scientific Wolf*

The Scientific Wolf is a wolf defined by its biological, morphological, ethological and ecological characteristics.<sup>136</sup> The Scientific Wolf always appears in legal documents because every party and judge must describe the subject of the litigation, and the Scientific Wolf is what the ESA deals with.<sup>137</sup> Descriptions of the Scientific Wolf in the NRM litigation commonly focus on the same mix of elements: taxonomy, diet and predation, range, breeding patterns, pack size, pack behavior, dispersal, ecological function and economic impact. Naturally, parties and courts emphasize different elements to different degrees, depending on the specific issue at hand and the desired rhetorical affect.

For example, in *DOW v. Hall I*, environmental groups challenged an FWS rule that would have designated and delisted a NRM distinct population segment, effectively devolving management authority to all three states, opening up local hunting seasons on the wolf, and subjecting wolves to Wyoming's largely unregulated predator control program.<sup>138</sup> In their complaint, the plaintiffs described the wolves as "the largest wild member of the dog family (Canidae)," with "fur [that] ranges from white to shades of gray to coal black."<sup>139</sup> They are "social animals that normally live in packs of 2 to 12 wolves that have strong social bonds with each other," in part because they are "usually family groups consisting of a breeding pair (the 'alpha male' and the 'alpha female'), their offspring from previous years, and an occasional unrelated wolf."<sup>140</sup> The wolves' "most common prey are elk, white-tailed deer, mule deer, moose, pronghorn antelope, and bison," and though they prefer the wild prey they "sometimes also prey on domestic livestock, including sheep and cattle."<sup>141</sup> However, "[w]olf predation on livestock represents a relatively minor source of total livestock mortality in Montana, Idaho and Wyoming."<sup>142</sup> By contrast, the risk wolf removal poses to the survival of the species is severe:

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134. *DOW v. Hall I*, 565 F. Supp. 2d at 1160.

135. *Gordon v. Norton*, 322 F.3d 1213 (10th Cir. 2003).

136. ROBISCH, *supra* note 128, at 16.

137. Cf. Andrew Long, *Defining the "Nature" Protected by the Endangered Species Act: Lessons from Hatchery Salmon*, 15 N.Y.U. ENVTL. L.J. 420 (2007).

138. See *DOW v. Hall I*, 565 F. Supp. 2d at 1175.

139. Complaint for Declaratory and Injunctive Relief ¶ 34, *DOW v. Hall I*, 565 F. Supp. 2d 1160 (D. Mont. 2008) (No. 908CV00056), 2008 WL 2896197.

140. *Id.* ¶ 35.

141. *Id.* ¶ 34.

142. *Id.*

“Research demonstrates that when one alpha wolf is removed from a pack, the probability that the pack will successfully breed the following year is generally halved. When both alpha wolves are killed the short-term reproductive potential of the pack is approximately destroyed.”<sup>143</sup> What’s more, “[t]his impact is exaggerated for smaller or less concentrated wolf populations” such as the experimental populations in the NRM zone.<sup>144</sup>

What plaintiffs describe here is a Scientific Wolf whose characteristics correspond to the “sacred wolf of environmentalist America,”<sup>145</sup> a wild yet tender and curiously familiar animal of minimal adverse consequence whose existence hangs by the thread of ESA protections. Contrast this with the description put forward in the Department of Justice’s opposition to plaintiffs’ motion for a preliminary injunction:

Pack sizes in the NRM average about ten wolves in protected areas, but a few substantially larger complex packs have formed in Yellowstone National Park. Packs typically occupy large distinct territories from 200–500 miles, which they defend against other wolves and wolf packs. Once occupied by resident wolf packs, an area becomes saturated and wolf numbers within the area are regulated by available prey, dispersal, intra-species conflict, and other forms of mortality. Wolves can disperse extremely long distances in their search to join another pack or form a pack of their own. Pack social structure is highly adaptable and resilient. Although typically only the top ranking male and female in a pack breed and produce pups, breeding members can be quickly replaced, either by other wolves within the pack or by wolves outside the pack, and pups can be reared by other pack members if their parents die. As a result, wolf populations can rapidly recover from severe disruptions, including very high levels of disease or human-caused mortality. After severe declines, wolf populations can more than double in just two years if mortality is reduced, and increases of nearly 100 percent have been documented in low density suitable habitat. In fact, pup production and survival increase when density is lower and food availability increases.<sup>146</sup>

Here, the wolf is portrayed as a potentially violent, readily adaptable and highly resilient beast whose population numbers depend not on ESA protections but on other presumably “natural” factors. The DOJ’s wolves possess no personal or individual characteristics, such as fur color, that might humanize them. They are not described in familial terms—instead of living in “family groups” with “strong social bonds” they live within the “social structure” of “packs.” Nor are they described in ecological terms—instead of a description of their role as top predator within the ecosystem DOJ emphasizes only that the “packs” “occupy” large areas that they “defend” against competitors. Finally, the pack as depicted by DOJ consists of easily replaceable parts; the loss of an alpha wolf is almost

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143. *Id.* ¶ 36.

144. *Id.*

145. ROBISCH, *supra* note 128, at 20.

146. Opposition to Motion for Preliminary Injunction at 2–3, *DOW v. Hall I*, 565 F. Supp. 2d 1160 (D. Mont. 2008) (No. 908CV00056), 2008 WL 2896202 (citations omitted).

immaterial, posing no threat whatsoever to the pack. According to the plaintiffs, the loss of an alpha wolf “destroys” short-term reproduction, a problem that is amplified for small populations such as the experimental populations in the NRM.

Presented with these competing images what is an arbiter to do? Here is the judge’s rendering:

The gray wolf is the largest wild member of the dog family. Wolves generally live in packs of 2 to 12 animals and have strong social bonds. Wolf packs consist of a breeding pair (the alpha male and alpha female), their offspring from previous years, and an occasional unrelated wolf. Generally, only the alpha male and alpha female of a pack breed. Litters are born in April and average around 5 pups. All pack members help feed and protect the pups as they grow. Pups are weaned at 5 to 6 weeks and then are mature enough to travel with the pack by around October. Packs typically occupy territories from 200 to 500 square miles. Each pack will defend its territory against other wolves and wolf packs.<sup>147</sup>

In this short description, the judge does not adopt either side’s version of the wolf, preferring instead an independent construction that relies on an earlier federal rule. The judge does employ some of the same familial language advanced by the plaintiffs, and though he does not refer to fur color he does note that “litters . . . average around 5 pups,” and that care for the “pups” is a collective endeavor. The judge also uses some of the same language as DOJ in referring to the wolves’ territoriality. Notably, the judge avoids the controversy surrounding the pack’s resilience upon loss of one or both alpha wolves.

Of course, none of these descriptions is sufficient to accurately or fully describe the real wolves involved. How could they be? For one thing, lawyers and judges describe in a few paragraphs what biologists take books to render. For another, much of the diversity and individuality of wolf behavior is necessarily lost in these purposive redactions—first by the biologists, and second by the lawyers—as are those behaviors that are inexplicable, yet perhaps nonetheless definitive.<sup>148</sup> Further, the construction of the Scientific Wolf, in confining the living and breathing animal inside the pen of what we know about it and how we know it, subverts the very wildness that is so prized and reviled by litigants. This wildness remains an aspect of the Scientific Wolf, but it plays a far greater role in the other types of imagined wolf, the Historic Wolf and the Mythic Wolf.

## 2. *The Historic Wolf*

The Historic Wolf refers to the wolf made virtually extinct from the

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147. *DOW v. Hall I*, 565 F. Supp. 2d at 1164.

148. Robisch challenges the scientific approach to understanding wolves in two informative and entertaining chapters on “intermediate corporeality” and “advanced corporeality.” See ROBISCH, *supra* note 128, at 89–122.

contiguous United States in the early twentieth century.<sup>149</sup> This wolf appears in nearly all accounts of the history of wolves in the United States; the fact that the wolf was made nearly extinct and is managed under the ESA is an important piece of the story, no matter who is telling it. But who eradicated the wolf, to what extent, and to what effect depends to a great degree on who is writing. The stories told in *Wyoming Farm Bureau Federation v. Babbitt* provide the most striking depictions.

In their 1994 complaint challenging the reintroduction of wolves into Yellowstone and central Idaho, the farm bureau plaintiffs described the history in this way: “The Northern Rocky Mountain Wolf (*canis lupus irremotus*) once inhabited and/or occupied both the Yellowstone and central Idaho areas. The Northern Rocky Mountain Wolf is believed to be extinct. However, some people believe that the Northern Rocky Mountain Wolf still inhabits and/or occupies the Yellowstone and/or central Idaho areas.”<sup>150</sup>

A second complaint, filed by James and Cat Urbigkit, two Wyoming residents who claimed to have since 1988 been studying, reporting and making presentations on remnant wild NRM gray wolves of the subspecies *remotus*, went a step further—they were among the people who believed the NRM gray wolf still existed.<sup>151</sup>

By contrast, a third complaint filed by the Audubon Society, the Predator Project and other environmental and wolf advocates described the history as follows:

The historic range of the gray wolf stretched from the east to west coast and south to what is now Mexico City. During the late 19<sup>th</sup> and early 20<sup>th</sup> centuries the gray wolf was the victim of a concerted extermination campaign by federal, state, and local authorities who viewed the wolf as a threat to their citizenry and to livestock interests. Man’s elimination of native ungulates (the wolf’s prey base) and his conversion of wildlands to agricultural use also hastened the animal’s demise.<sup>152</sup>

The three descriptions tell fundamentally different stories. The farm bureaus’ complaint provides no context for the cause of extinction, and posits the possibility that the subspecies of the NRM wolf may never have been fully extinct. The story thus evokes an apparition of the wild wolf, the possibility of its lurking in the forests beyond the range. The Urbigkits complaint claims that the wild, native NRM subspecies really does still exist and that they have seen it, and rests its argument on the emotional appeal of this apparition. The Audubon plaintiffs present a story that emerges from a radical environmentalist ethos. In this telling, the elimination of wolves had definite causes, and these causes were not merely a matter of poor policy choices or ecological ignorance, nor even of a fearful lashing out at a threatening force; rather the eradication of

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149. See *id.* at 17.

150. Complaint ¶ 23, *Wyo. Farm Bureau Fed’n v. Babbitt*, 987 F. Supp. 1349 (D. Wyo. 1997) (No. 94-CV-286D).

151. *Wyo. Farm Bureau Fed’n*, 987 F. Supp. at 1356.

152. Nat’l Audubon Soc’y Complaint ¶¶ 17–18, *Wyo. Farm Bureau Fed’n*, 987 F. Supp. 1349.

the wolf is depicted as a symptom of the agricultural revolution's emergence on the American continent and its spread west across it. The problem, then, is systemic, ingrained as much in the sweep of historical forces as in societal worldviews and individual consciousness. In this context, the importance of the world's remaining wildness cannot be overstated.

Presented with these competing stories, the district court judge relayed the information in this way: "The gray wolf (*canis lupus*) was extirpated from the western portion of the United States in the early 1900's."<sup>153</sup> The Tenth Circuit did not even bother mentioning this history; instead, the court referred back to the district court opinion's "detailed facts" and set forth "only a summary of salient facts" that began with the 1973 listing of the gray wolf as an endangered species.<sup>154</sup> Thus, the judges did away with the competing narratives animating the parties' concerns and looked at the issue solely within the frame of the Progressive Management Machine.

### 3. *The Mythic Wolf*

The Mythic Wolf refers to the "totemic, unconscious, and symbolic images" of the wolf represented in everything from folk tales to Hollywood movies.<sup>155</sup> The Mythic Wolf may manifest as either a malevolent or a benevolent force.<sup>156</sup> The malevolent Mythic Wolf is Teddy Roosevelt's "beast of waste and desolation," the evil spirit that frightened the Pilgrims and plagued the pioneers, and, as I argue, the depredating wolf that continues to haunt the stockmen and ranchers of the American West. The benevolent Mythic Wolf is the environmentalist's wolf, the wolf pictured in calendars tromping through the snow or set on a ridge against a moonlit sky, the wolf that Americans long to see thriving in wilderness areas and national parks as a symbol of the remaining wildness of the world. This wolf is portrayed as nonthreatening, human-like and wise; it represents a potential savior, "not merely oppressed but transcendent."<sup>157</sup>

Images and imaginings of both the malevolent and benevolent Mythic Wolf have figured prominently into the politics of wolf management, from the era of eradication through the era of recovery. More than a few people have

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153. *Wyo. Farm Bureau Fed'n*, 987 F. Supp. at 1353. Interestingly, this rendition differs significantly from another Wyoming district court decision, penned some eight years later:

By the early 1900s the demographic collapse of the gray wolf in the western portion of the United States was at its apex. Nearly the entire population of gray wolves had disappeared. The near extermination of the gray wolf had many causes, including westward expansion of the population of the United States, rampant hunting and anti-wolf government policies. It is generally accepted that the cause of the wolf's demise in the coterminous United States was a direct result of human depredation.

*Wyoming v. U.S. Dep't of Interior*, 360 F. Supp. 2d 1214, 1218 (D. Wyo. 2005).

154. *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1228–29 (10th Cir. 2000).

155. See ROBISCH, *supra* note 128, at 17.

156. *Id.*

157. *Id.* at 18.

argued that the malevolent Mythic Wolf drove the nation's attempt to eliminate the wolf.<sup>158</sup> Similarly, many have noted that the malevolent Mythic Wolf has also, from the outset, informed the development of the federal management regime.<sup>159</sup> Indeed, the definition of the "problem" wolf pervades the FEIS, the section 10(j) regulations and the entire recovery program; in fact, it was the federal government's acknowledgment of the power of this image that forged the necessary compromise to enable the recovery program to move forward.<sup>160</sup>

If the malevolent Mythic Wolf drove people to exterminate the Real Wolf in the Rocky Mountains, the benevolent Mythic Wolf drove the nation's attempt to recover it. In the period leading up to the passage of the ESA and the subsequent listing of the wolf as an endangered species, public perceptions and political attitudes shifted toward the benevolent Mythic Wolf.<sup>161</sup> During that time, wolves "began to symbolize wild nature, a lost heritage, and were considered a keystone species—the missing link—to a functioning ecosystem."<sup>162</sup> These two positive symbolic functions are central to the construction of the benevolent Mythic Wolf. First, wolves serve as a symbol of wildness and wilderness for some and as a symbol of a pastoral lifestyle on the frontier of the wilderness for others. Second, wolves serve as a symbol of a restored ecology and, even beyond that, a return to the presettlement Eden of the Rocky Mountain West.<sup>163</sup>

Other scholars have examined how the entrenchment of parties along the axis formed by the Mythic Wolf's two faces informs the socio-political discourse.<sup>164</sup> But the Mythic Wolf also informs the legal process, and it is to

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158. See *supra* note 108 and accompanying text.

159. Goble, *supra* note 108, at 112 ("The authors of the *Wolf Recovery Plan* use an odd combination of language. Mixed in with descriptive statements on population biology and habitat ecology are prescriptive statements of moral censure. The language suggests a persistence of mythology, a continuance of 'wolf' as moral category in what was to be a strictly biological document.")

160. See Dubuc, *supra* note 107, at 226–27 (arguing that the section 10(j) compromise was developed to defuse political opposition to the reintroduction of wolves into wilderness areas).

161. See, e.g., Li, *supra* note 108, at 685 (determining that wolf control programs stopped because "of changing public, scientific, and governmental perceptions and because the public no longer viewed wolves as monsters and cold-blooded killers, but instead as a symbol of the 'freedom and independence' of the wilderness"). See also Goble, *supra* note 108, at 106 ("The wolf remains a mythic category. Once the very essence of lust, greed, and violence, it is now the latest emblem of environmentalism—an 'endangered species.'")

162. Thrower, *supra* note 108, at 319.

163. Peter Coates, *Chances with Wolves: Renaturing Western History*, 28 J. AM. STUD. 241, 241 (1994) ("[T]he wolf's supreme value resides in how it symbolizes a prelapsarian wilderness that was once the entire continent.")

164. Nie, *supra* note 103, at 2–3 ("The wolf continues to be an animal symbolizing larger cultural values, beliefs and fears. . . . While a deeply-seated animosity towards the wolf remains strong among a minority of Americans, for others, the wolf and its restoration now symbolizes our last chance to atone and make amends with wildlife and wilderness."). See also PETER STEINHART, *THE COMPANY OF WOLVES* (1995); BARRY LOPEZ, *OF WOLVES AND MEN* (1978); BRUCE HAMPTON, *THE GREAT AMERICAN WOLF* (1997); Matthew A. Wilson, *The Wolf in Yellowstone: Science, Symbol, or Politics? Deconstructing the Conflict Between Environmentalism and Wise Use*, 10 SOC'Y & NAT. RESOURCES 453 (1997). Recently, psychology studies have confirmed the role of the sub- or unconscious in informing individuals' positions in regards to wolves. In one recent Swedish study, for example,

that dynamic that I now turn.

a. *The Benevolent Mythic Wolf*

“Gray wolves are a living embodiment of the remaining wildlands of the American West.”<sup>165</sup> So begins a complaint filed in 2008 in *Defenders of Wildlife v. Hall (DOW II)*, in which environmentalists challenged the environmental review behind one of FWS’s attempts to designate and delist the NRM distinct population segment. This is probably the plainest possible expression of the wolf’s status as a positive symbol for wilderness and wildness in the American West. The wildness of the wolf, however, has been at the heart of the controversy since *Wyoming Farm Bureau Federation v. Babbitt* was litigated in the mid-1990s.

The narrow legal question in that early case was whether the reintroduction of wolves into Idaho and Yellowstone violated the ESA because the introduced wolves would not be “wholly geographically separate” from a “population” of wild wolves, as required by section 10(j).<sup>166</sup> Yet, the narrative frame deployed by all three sets of plaintiffs was about wildness. The farm bureau plaintiffs invoked the oppositional problematics of the purity of wildness and the impurity of the feral hybrid, alleging that the introduction of what they called “Canadian wolves” violated the ESA because the relocated “pure gray wolves . . . are likely to disperse without forming packs and are likely to mate with coyotes or feral dogs and produce hybrid offspring.”<sup>167</sup> This hybridization would “decrease the genetic purity of wolves, to the detriment of the species.”<sup>168</sup> The Urbigkits focused on the potential impacts on another, even more wild wolf—the mythic native NRM gray wolf. The Audubon plaintiffs also pled purity and wildness, though along a different vein. Rather than focusing on the impacts on the wildness and purity of the introduced wolves or the native NRM gray wolves, they focused instead on the known existence of lone dispersers from Canada and Montana, and argued that the conflation of these “naturally occurring” wild wolves with introduced wolves

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researchers found that people whose animal fear was directed particularly towards large carnivores were less likely to be willing to pay, or were likely to be willing to pay a lower amount of money, for protection of those species. Runar Brännlund, et al., *Beware of the Wolf: Is Animal Fear Affecting Willingness to Pay for Conservation of Large Carnivores?* (Ctr. for Envtl. and Research Econ., Working Paper No. 2010:9, 2010), available at <http://ssrn.com/abstract=1601847>. An earlier study of sheep farmers, wildlife managers and research biologists in Norway revealed that though the different groups all endorse general ecocentric values, there were nonetheless positive associations between anthropocentrism and negative attitudes toward carnivores, and between ecocentrism and positive attitudes toward carnivores for all three groups, with sheep farmers holding the most anthropocentric views. Tore Bjerke & Bjorn P. Kaltenborn, *The Relationship of Ecocentric and Anthropocentric Motives to Attitudes Toward Large Carnivores*, 19 J. ENVTL. PSYCHOL. 415 (1999).

165. Complaint for Declaratory and Injunctive Relief ¶ 1, *Defenders of Wildlife v. Hall (DOW II)*, 807 F. Supp. 2d 972 (D. Mont. 2011) (No. CV-08-14-M-DWM), 2008 WL 896802.

166. See *infra* notes 182–95 and accompanying text.

167. Complaint ¶ 92, *Wyo. Farm Bureau Fed’n v. Babbitt*, 987 F. Supp. 1349 (D. Wyo. 1997) (No. 94-CV-286D).

168. *Id.* ¶ 93.

would result in weaker protections under the section 10(j) regime than would otherwise apply. This change in protection would threaten not only the existing wild wolves but also future existing wolves, wolves in populations that include both artificially introduced and naturally occurring wild wolves, and the descendants of those packs.<sup>169</sup> In a sense, wildness, and the protections it warrants, would be lost forever. The court's response to these representations is discussed in Part III.C of this Article.

As noted above, wolves' second positive symbolic function is to represent a restored ecology, or, on a more symbolic level, a recovered Eden.<sup>170</sup> Wolves achieve this functionality primarily through their role as top predators within an ecosystem. The following description from the complaint in *DOW II* is emblematic, and seems to have become something of a template:

[W]olves have restored a more natural balance to northern Rockies ecosystems. Wolves benefit the health of elk and deer populations by virtue of their selection of prey animals, as they primarily take the old, the very young, the injured, and the diseased, leaving the healthiest animals to produce the next generation. In Yellowstone National Park, the renewed presence of wolves has altered the behavior of the elk, which now tend to avoid browsing in areas such as stream banks where they are most vulnerable to predation, and in turn have reduced destruction of young aspen shoots. The restoration of shrubs and trees in riparian areas controls stream erosion, and supports native bird communities, beavers, and other wildlife. Wolves aggressively predate on coyotes within wolves' home territory. By reducing the number of coyotes in the area, the presence of wolves has also benefited populations of small rodents, birds of prey (who feed on the rodents), and pronghorn antelopes (who are often preyed on by coyotes).<sup>171</sup>

This description of the wolves' ecological function harkens back to a vision of undisturbed, stable mountain ecology. It evinces an internally regulated, almost Disney-fied mountain environment that pre-dates the intrusions of domesticated livestock and human-caused wolf extirpation. Wolves help the elk by picking off the old, infirm and weak, ensuring only the strongest survive to consume limited resources and to reproduce. The threat wolves pose to elk allows stream banks to recover from the prevalence of elk, and their predation of coyotes helps all the other animals coyotes prey on achieve greater abundance. In place of a degraded stream overrun with elk and a degraded mountain-and-range environment overrun with coyotes, wolves ensure a "more natural" balance. This description is fully consistent with the visions that inspired reintroduction in the first place. None of which is to say that any of this is not *true*, that this is not the actual role played by real wolves. The point is only that these depictions in litigation are consistent with other stories, told elsewhere, and that these wolf stories are what the law must contend with in reaching its resolutions.

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169. Nat'l Audubon Soc'y Complaint ¶ 1, *Wyo. Farm Bureau Fed'n*, 987 F. Supp. 1349.

170. See Coates, *supra* note 163; MERCHANT, *supra* note 113.

171. Complaint for Declaratory and Injunctive Relief ¶ 37, *DOW II*, 807 F. Supp. 2d 972.

b. *The Malevolent Mythic Wolf*

The malevolent Mythic Wolf appears in a number of ways in the legal literature, including as an acknowledged cause of the eradicated Mythic Wolf,<sup>172</sup> but the malevolent presence appears most commonly in the form of the depredating wolf.<sup>173</sup> The case of *Gordon v. Norton*, provides an example.<sup>174</sup> The plaintiff in *Gordon* paints a picture of what I will call the “rancher pastoral,” relying on old images of wildness and wilderness as an uncontrollable and dark force that threatens the simple, respectable life of commerce and care on the edge of the Western wilderness. The issue is one of saving the “town,” transformed from the European or New England village to the loose settlement of a large swath of land by a few noble ranchers.<sup>175</sup> In this way, the story harkens back to the history of the earliest rancher-wolf conflicts, state-sponsored bounties, and the federal wolf eradication programs.

In *Gordon*, a Wyoming rancher claimed that the NRM wolf recovery program was an unconstitutional taking, as well as a violation of the ESA. Here is how plaintiff framed the story:

This action seeks to enjoin the Government’s mismanagement of reintroduced wolves that have killed as many as 159 calves, 11 dogs, and 2 horses on the Diamond G Ranch in northwest Wyoming. Plaintiff Stephen Gordon’s ranch is no longer economically viable and cannot operate as the working cattle ranch it has been for a century. Wolf depredation prompted Mr. Gordon to sell off two-thirds of the Ranch’s herd and sell a farm used by the Ranch. Wolves threaten pets, children, and people generally, and have destroyed a lifestyle based upon the quiet enjoyment of the Dunoir Valley.<sup>176</sup>

The numbers here are notably higher than those eventually accepted by the court, which described a handful of cattle kills and two dog kills.<sup>177</sup> And the economic harm is expressed in extreme terms. But the kills and the economic

172. See *Wyoming v. U.S. Dep’t of Interior*, 360 F. Supp. 2d 1214, 1218 n.1 (D. Wyo. 2005) (“The human-wolf dynamic has a sordid history that is by no means a modern issue. The ancient Greeks offered bounties on wolves. Europeans also harbored animosity toward wolves, an animosity brought over to North America by the early European settlers. See Aesop, *The Wolf in Sheep’s Clothing*, circa 7th century B.C.E.”).

173. For example, in *Wyoming Farm Bureau Federation*, the Farm Bureau plaintiffs alleged, “[w]olves are known to kill cattle, sheep and other livestock. In every area where wolves are known to occur farmers and ranchers experiences livestock losses from wolves.” Complaint ¶ 25, *Wyo. Farm Bureau Fed’n*, 987 F. Supp. 1349.

174. *Gordon v. Norton*, 322 F.3d 1213 (10th Cir. 2003).

175. In response, FWS tells a story of level-headed and reasonable management based on observation, science and deliberate decision making, where the outcome is determined by statutory mandate, rather than almost supernatural forces. The word “lifestyle” does not appear in their brief. Neither does the word “business.” They do not even address the idea that the loss of these unquantifiable values can constitute a constitutional taking. Brief of Appellee-Respondent, *Gordon*, 322 F.3d 1213 (10th Cir. 2003) (No. 01-8102), 2002 U.S. 10th Cir. Briefs LEXIS 57, at \*\*5–12.

176. Brief of Plaintiffs-Appellants, *Gordon*, 322 F.3d 1213, 2002 U.S. 10th Cir. Briefs LEXIS 56, at \*2.

177. *Gordon*, 322 F.3d at 1215–17.

harm are only half the story. As the paragraph explains, there is threat to children and pets, to adults, and, ultimately, to the entire rancher lifestyle. As the narration proceeds, these threats grow more intense, and far more pervasive:

While the impact on the Diamond G's business was extreme, the effect on daily life was worse. In the fall of 1997, with the herd gathered into closer proximity of the Ranch buildings, Mr. Robinett stayed awake nights monitoring the wolves with radio telemetry equipment and chasing them out of the cattle by slamming the doors to his truck, shining lights on them, and shouting. During one stretch that fall, he stayed up with the cattle for 39 consecutive nights. Wolves killed three of the Gordons' family pets and attacked and severely injured one of the Robinetts' herding dogs. Wolves stalked Diamond G personnel and neighbors. Mrs. Robinett, an avid nature photographer, was warned by Government officials not to venture out to take pictures with her dogs. The Robinetts, the Gordons, and their neighbors kept children under close watch and, often, indoors. Parents told older children to carry guns when they went out.<sup>178</sup>

The story being told here is one of a long-standing ranch not only subject to economic harm but also to mortal threat. The drama is cinematic: women, children and pets are told to stay inside. One of the protagonists, Mr. Robinett, loses an astounding amount of sleep, or else transforms into a nocturnal creature, while keeping vigil for the wolf. Assuming the events did happen, the scene is nonetheless reminiscent of a fairy tale. Yet, even this state of constant threat is not the end of it. Monetary damages cannot satisfy justice, in this circumstance, because what is at stake is not an operating business but an entire way of life:

The Diamond G's greatest losses cannot be quantified. Mr. Gordon, Mr. Robinett, and their families have lost a lifestyle. Mr. Gordon cannot ranch on land that has been a cattle ranch for the past century. Mr. Robinett spends countless hours hazing wolves and herding cattle back to their proper location on the Ranch and its allotment. Children and dogs cannot roam freely on the Diamond G, and guests carry firearms. In sum, the Government has deprived Mr. Gordon and the Diamond G of the quiet enjoyment of their property through impacts on lifestyle, personal safety, and their business.<sup>179</sup>

### C. *The Triumph of the Progressive Management Machine*

If choice depictions of the Scientific Wolf, echoes of the Historic Wolf and portraits of the benevolent and malevolent Mythic Wolf comprise inputs into the court system, the output is more often than not the trope of the Progressive Management Machine. The Progressive Management Machine refers to the science- and technology-based, politically expedient operation of

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178. Brief of Plaintiffs-Appellants, *Gordon*, 322 F.3d 1213, 2002 U.S. 10th Cir. Briefs LEXIS 56, at \*7-8.

179. *Id.* at \*13.

the environmental bureaucracy in accordance with its statutory mandates, made subject to judicial review. This figure of the environmental imagination is not much discussed by ecocritics, but it does have its literary forbears—Aldo Leopold, chief among them—and it is dominant in the law. Like other environmental tropes, the Progressive Management Machine communicates both a story and a narrative. The story involves a condition of environmental health that is disturbed by a market failure that results in a public goods problem. The disturbance can only be resolved by the application of the mechanisms of the administrative state. The narrative involves the ideal of utilitarian governance, and the possibility of reconciliation. It is legitimated by the application of the well-established principles of deference and judicial review in administrative law.

Here, I look again at *Wyoming Farm Bureau Federation*, which pitted three different conceptions of nature against each other: the farm bureaus' rancher pastoral, the environmentalists and wolf advocates' wilderness/wildness stories and the FWS's Progressive Management Machine story. In the rancher pastoral, all wolves are problematic, and ranchers are granted special procedural rights, perhaps even actual control, in wolf management.<sup>180</sup> In the wilderness/wildness story, imported "Canadian" wolves threaten to intrude on the purity of naturally-occurring NRM wolves. In the FWS's story, the distinction between the NRM gray wolf and the "Canadian" gray wolf becomes irrelevant because the NRM gray wolf is gone, and the wildness of the lone dispersers is simply not a persuasive enough image to counteract the biological imperative of restoring a population. The overall recovery of the species *Canis lupus* is the paramount goal.

The district court was asked to decide whether the potential overlap between the experimental populations and the lone wolves coming down from Montana and Canada, and the treatment of lone wolves in experimental areas as members of the experimental population, was permissible under the ESA. Under section 10(j)(1), experimental populations must be kept "wholly separate geographically from nonexperimental populations of the same species."<sup>181</sup> Under section 10(j)(2), experimental populations may only be introduced "outside the current range of such species."<sup>182</sup> FWS argued that there were no known populations of naturally occurring wolves in the experimental areas, only individuals, and that the geographically separate requirement only applied to populations.<sup>183</sup> The district court judge deferred to FWS's definition of

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180. The farm bureaus claimed that language in section 10(j) regulations required that landowners affirmatively sign off on any wolf management regulation. *Wyo. Farm Bureau Fed'n v. Babbitt*, 987 F. Supp. 1349, 1365 (D. Wyo. 1997). The court found that neither the language of the regulations nor the legislative history behind the enactment of section 10(j) supported a finding that FWS is required to obtain the ranchers' "agreement." *Id.* at 1365–66.

181. Endangered Species Act § 10(j)(1), 16 U.S.C. § 1539(j)(1) (2006).

182. *Id.* § 1539(j)(2).

183. *Wyo. Farm Bureau Fed'n*, 987 F. Supp. at 1370.

populations,<sup>184</sup> but determined that the “wholly separate geographically” and “outside the current range” requirements required that there be no overlap whatsoever between experimental populations and *individuals* from nonexperimental ones.<sup>185</sup> The lumping of the introduced with the wild would, in the judge’s opinion, impermissibly lessen the protections for the wild by operating as a “de-facto delisting” of the “naturally occurring” wolves.<sup>186</sup> Thus, the judge disassembled the critical mechanism that had enabled the wolf recovery effort to move forward—the ability to kill depredating wolves under section 10(j) regulations—and enjoined the program, all because of the potential impact on lone wolves coming down from Montana and Canada.<sup>187</sup>

The district court judge premised his statutory interpretation of section 10(j) on a comment in the Merchant Marine and Fisheries Committee House Report that refers to the committee’s expectation that where and so long as experimental populations overlap with natural populations the experimental populations will be afforded the higher protections of the natural populations.<sup>188</sup> The Committee Report makes no mention of what the committee’s expectations were in regard to overlap between experimental populations and individuals, but the district court judge nonetheless interpreted it to do just that. It is impossible from the text alone to say whether the judge was buying into an archetypal image of the lone wolf as a totem of the human spirit without saying so, or else using the power of the image to intentionally subvert the program and issue an otherwise antiwolf decision, or else simply basing his construction of the statute on the Merchant Marine and Fisheries Committee Report. The opinion is thoroughly couched in statutory language and the relevant standards of judicial review, and presents itself as the law’s respectful, if not quite deferential, response to agency action.<sup>189</sup>

Yet, the interpretive stretch is hard to ignore. Importantly, its plausibility depends entirely on the power of the image of the lone wolf. Indeed, it is hard to imagine a judge making a similar decision if the experimental-wild individual overlap were to occur between, say, experimental populations and a stray individual arroyo toad, or between re-introduced populations and individuals of one or another subspecies of steelhead trout. The only way the decision makes sense is if an individual member of the species *means* something important. The lone wolf means different things to different people, but there is no question that it possesses something more than biological

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184. *Id.* at 1371–72.

185. *Id.* at 1372–75.

186. *Id.* at 1375.

187. *See id.* at 1372 (noting that that the section 10(j) provisions were designed to limit public opposition to the reintroduction of top predators, and that the statute allows for relaxed restrictions on takings of endangered or threatened species managed under the program; these relaxed restrictions, however, were not intended to reduce protections for non-experimental populations, or individuals).

188. *Id.* at 1372–73.

189. *Id.* at 1376 (“Mindful of the dedication, talents and money which have been expended in the development and implementation of the wolf recovery program, the Court reaches this decision with the utmost reluctance.”).

significance.

The Tenth Circuit appears to have suspected that there was special treatment being afforded the wolf. In a telling moment, the court quotes from an amicus brief that explains that other experimental programs have been populated exclusively by trans-located, ESA-protected individuals.<sup>190</sup> The effect of this is to de-emphasize the particularities of the wolf and to place the question of management within a more widespread praxis that also includes the sea otter, red wolf, whooping crane, California condor, Guam rail and Colorado squawfish.<sup>191</sup>

Having demystified the wolf, the Tenth Circuit recast section 10(j) as being about political compromise,<sup>192</sup> and criticized the lower court's reliance on a "single piece of legislative history" in crafting its statutory interpretation.<sup>193</sup> Accordingly, the court reversed, finding FWS's interpretation reasonable.<sup>194</sup> The reversal divorced the judicial resolution of the matter from the stories presented by parties in a way that the lower court's decision did not. In their place the court installed the Progressive Management Machine, a story about the relationships among the state, the bureaucrats employed by it, the subject of the regulation and the courts, rather than about the people who came to court telling their far-out stories.

#### *D. A Reversal of Fortune: The Reintroduction of the Wolf Myth through Political Engineering*

In the last few years, the politics of wolf management have again emerged as paramount, demonstrating how political forces, moved by anti-wolf rhetoric, can conspire to overwhelm even the Progressive Management Machine. Wolf politics has factored into continuing litigation,<sup>195</sup> but it made a far more visible

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190. *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1237 n.10 (10th Cir. 2000); *see also id.* at 1231 (reasoning that under section 7(a)(1) the Secretary of Interior is already authorized to trap and translocate individual members of endangered species to areas outside the species' present range).

191. *Id.*

192. *Id.* at 1233 (section 10(j) was enacted to address "agencies' frustration over political opposition to reintroduction efforts perceived to conflict with human activity . . . Congress hoped the provisions of section 10(j) would mitigate industry's fears [that] experimental populations would halt development projects").

193. *Id.* at 1232.

194. *Id.* at 1234. The issue of "wholly geographically separate" also comes up in *United States v. McKittrick*, a prosecution against a man who had killed and taken home a member of the experimental population who had wandered from Yellowstone into Red Lodge, Montana. 142 F.3d 1170 (9th Cir. 1998). The Ninth Circuit found that regulations were not improper because: 1) FWS can relocate unlisted animals from Canada as those animals would be protected as soon as they came into United States; and 2) the experimental population is "wholly separate" because FWS determined that there were no breeding pairs in Wyoming. *McKittrick*, 142 F.3d at 1173–75, 1179 ("A single straggler does not a population make.") (O'Scannlain, J., concurring).

195. Inside the courtroom, politics were at the core of Wyoming's second challenge to FWS's disapproval of its wolf management plan; Wyoming claimed that FWS "relied on information other than the best scientific and commercial data available in making its decision not to approve Wyoming's proposed wolf management plan" and that "FWS allowed political and public relations considerations and speculative concerns about post-delisting lawsuits to influence its decisions." The court there did not

and controversial appearance when, in April 2011, Congress passed a rider to a defense appropriations bill co-written by Senators Jon Tester (D-Mont.) and Mike Simpson (R-Idaho) that installed a 2009 FWS rule that had been vacated by the district court in *Defenders of Wildlife v. Salazar*.<sup>196</sup> The Tester/Simpson rider, legislatively designated a NRM distinct population segment, delisted the wolf in Montana and Idaho and insulated the reissued rule from judicial review. Several environmental groups challenged the rule on separation of powers grounds.<sup>197</sup> The opinion dismissing the constitutional challenge, penned by Judge Molloy of the district court in Montana, who has overseen much of the wolf litigation in recent years, ripped into the politics behind the rider.<sup>198</sup> But even beyond the politics was the threat to Progressive Management Machine, as held in check by the judiciary.<sup>199</sup>

Under the Tester/Simpson rider, Montana and Idaho wildlife authorities now manage wolves in those states.<sup>200</sup> Each state authorized and held a wolf-hunting season in fall 2011. Additionally, in September 2012 FWS delisted the NRM gray wolf in the state of Wyoming.<sup>201</sup> The wolf hunting season opened less than a month later.<sup>202</sup> A lawsuit quickly followed.<sup>203</sup> Undoubtedly, there will be more to come.

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address the allegations of extra-legal considerations, but nonetheless found the agency's decision that the entire state must be designated a "trophy game" area rather than a "predator" area was arbitrary and capricious. *Wyoming v. U.S. Dep't of Interior*, No. 09-CV-118J, 2010 WL 4814950, at \*45 (D. Wyo. Nov. 18, 2010).

196. Department of Defense and Full Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, § 1713, 125 Stat. 38 (2011).

197. *Alliance for the Wild Rockies v. Salazar*, 800 F. Supp. 2d 1123, 1124-25 (D. Mont. 2011) (describing plaintiffs' claim that because at the time of the rider the district court decision in *Defenders of Wildlife v. Salazar* was on appeal the rider, which did not amend the ESA, amounted to an unconstitutional Congressional directive to the judiciary).

198. *Id.* at 1125 ("The way in which Congress acted in trying to achieve a debatable policy change by attaching a rider to the Department of Defense and Full-Year Continuing Appropriations Act of 2011 is a tearing away, an undermining, and a disrespect for the fundamental idea of the rule of law.").

199. *Id.* at 1125 ("Political decisions derive their legitimacy from the proper function of the political process within the constraints of limited government, guided by a constitutional structure that acknowledges the importance of the doctrine of Separation of Powers. That legitimacy is enhanced by a meaningful, predictable, and transparent process.").

200. Importantly, Judge Molloy's decision prompted him to also find in favor of the government in a pending case, *Defenders of Wildlife v. Hall (DOW II)*, in which environmentalists had challenged the environmental review behind the designation and delisting of the NRM distinct population segment that was the subject of *Alliance for the Wild Rockies v. Salazar*, 800 F. Supp. 2d 1123 (D. Mont. 2011).

201. 77 Fed. Reg. 55,530 (Sept. 10, 2012).

202. Christine Peterson, *Wyoming Wolf Hunt Begins Today*, CASPER STAR-TRIB., Oct. 1, 2012, [http://trib.com/news/state-and-regional/wyoming-wolf-hunt-begins-today/article\\_26618da9-0b08-5d5e-84bf-89ec6931814a.html](http://trib.com/news/state-and-regional/wyoming-wolf-hunt-begins-today/article_26618da9-0b08-5d5e-84bf-89ec6931814a.html).

203. Environmental groups have again filed suit. See Christine Peterson, *Environmental Groups Sue Over Wyoming Wolf Listing*, CASPER STAR-TRIB., Nov. 14, 2012, [http://trib.com/news/state-and-regional/groups-sue-over-wyoming-wolf-delisting/article\\_40aba16c-f330-5bdf-8677-a8c9c1bf7299.html](http://trib.com/news/state-and-regional/groups-sue-over-wyoming-wolf-delisting/article_40aba16c-f330-5bdf-8677-a8c9c1bf7299.html).

## IV. CLIMATE CHANGE AND ENVIRONMENTAL APOCALYPSE

As discussed above,<sup>204</sup> the environmental apocalyptic provides a reliably offensive narrative and rhetorical strategy with which to expand the frontiers of environmentalism.<sup>205</sup> The litigation in *Connecticut v. American Electric Power* provides an on-point case study.<sup>206</sup> In this case, plaintiffs tried to persuade the judiciary to expand federal common law public nuisance doctrine to cover global warming, and to thereby shift federal decision making from the political branches to the judicial.<sup>207</sup> To accomplish this task, the plaintiffs relied on the persuasive force of the environmental apocalyptic.<sup>208</sup>

The litigation was initiated in July 2004, when two separate but well-coordinated groups of plaintiffs—one a coalition of the States of Connecticut, California, Iowa, New York, New Jersey, Rhode Island and Vermont, and the City of New York (“the States”), the other a coalition of private conservation

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204. See *supra* notes 76–95 and accompanying text.

205. See Killingsworth & Palmer, *supra* note 76, at 41 (noting that apocalyptic appears “in those moments of history when the [environmental] movement is seeking to expand, to appeal to new segments of the general public, to annex new territories in a kind of rhetorical imperialism.”).

206. In the interest of full disclosure, I was one of several counsel of record for plaintiff City of New York in both the district court and the Second Circuit. Nothing in this analysis, however, reveals anything about plaintiffs’ actual case planning, nor does it reflect any conversations among counsel or between counsel and clients, nor does it disclose any privileged information. My interpretation of the Complaint is entirely my own, as are my readings of the briefs and opinions that followed it.

207. The history, science, law and policy of climate change have been the subject of a tremendous amount of scholarship, and even a summary account is beyond the scope of this Article. For the primary source on the science, see INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE FOURTH ASSESSMENT REPORT: CLIMATE CHANGE (2007). For an excellent resource to track ongoing legal developments, see the various resources available through Columbia Law School’s CENTER FOR CLIMATE CHANGE LAW, <http://web.law.columbia.edu/climate-change> (last visited Mar. 4, 2013).

208. There are interesting comparisons to be drawn among the different approaches taken in *American Electric Power*, *Village of Kivalina*, *Comer*, and the Our Children’s Trust litigation. None of the other public nuisance cases shares the *American Electric Power* plaintiffs’ narrative orientation. The story told by the *Kivalina* plaintiffs includes an element of apocalypse—the destruction of an indigenous community’s village on Alaska’s Arctic coastline—but, as a damages action, the emphasis is on changes in the Arctic region, specific harms to the village, defendants’ polluting activities, and defendants’ knowledge. See Complaint for Damages Demand for Jury Trial, *Native Village of Kivalina v. Exxonmobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. 08-1138), 2008 WL 594713. The story told by the *Comer* plaintiff goes even further in divorcing itself from an apocalyptic narrative, claiming only “the Earth’s climate has ‘demonstrably changed’ as a result of Defendants’ greenhouse gas emissions.” Class Action Complaint at 13, *Comer v. Murphy Oil USA*, 839 F.Supp.2d 849 (S.D. Miss. 2012) (No. 00220), 2011 WL 2947582. The Our Children’s Trust campaign, in contrast, takes the apocalyptic narrative arguably further than the *American Electric Power* plaintiffs’ Complaint, discussed *infra*. The campaign includes many different administrative petitions for rulemaking, state public trust lawsuits, and a federal complaint; I view the federal complaint as exemplary of the strategy. See First Amended Complaint, *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012) (No. 02235), available at [http://ourchildrenstrust.org/sites/default/files/2011-07-27%20AMENDED\\_COMPLAINT.pdf](http://ourchildrenstrust.org/sites/default/files/2011-07-27%20AMENDED_COMPLAINT.pdf). The complaint states that the consequences of climate change are already proving severe, but “our children and our children’s children will surely face even more dire circumstances if the tipping point of climate change is reached and our impact becomes irreversible.” *Id.* at 1. What’s at stake is “a livable future” for future generations, as we confront “a changed world that threatens human existence as we know it.” *Id.* at 2. “Earth’s atmospheric climate emergency” and the “signs” of that the emergency is reaching the tipping point are spelled out in great detail. *Id.* at 18–32.

land trusts (“the land trusts”)—filed separate complaints in the Southern District of New York, claiming that the carbon dioxide (CO<sub>2</sub>) emissions from four private power companies (American Electric Power, Cinergy Corporation, Southern Company and Xcel Energy) and the Tennessee Valley Authority (“TVA”) (collectively, “the power companies”) contribute to global warming and therefore constitute a public nuisance. The number and identities of the parties was cause for a good deal of lawyering—different States suffered different types of harms, New York City is not a state, the land trusts are private parties, TVA is a federal entity with its own peculiar legal status and some of the defendants have no substantial presence in New York State, all of which gave rise to numerous motions and arguments over personal jurisdiction and standing. To simplify things I will treat the land trusts and the States as a single group of plaintiffs and the power companies and TVA as a single group of defendants; I will concentrate on the States’ pleadings and briefs, the power companies’ challenges to the States and the courts’ opinions regarding the States.<sup>209</sup>

### A. *The Complaint*

The first paragraph of the complaint tells much of the story in a simple, linear fashion:

Defendants’ power plants emit large quantities of carbon dioxide and are contributing to an elevated level of carbon dioxide in the atmosphere. Carbon dioxide is the primary “greenhouse gas.” Greenhouse gases trap atmospheric heat and thus cause global warming. There is a clear scientific consensus that global warming has begun, is altering the natural world, and that global warming will accelerate over coming decades unless action is taken to reduce emissions of carbon dioxide. This Complaint seeks an order requiring defendants to reduce their emissions of carbon dioxide, thereby abating their contribution to global warming, a public nuisance.<sup>210</sup>

The story presented here is a conventional tale of environmental disruption: defendants are industrial actors causing environmental harms. The harms are linked to an interdependent ecology (involving both “the atmosphere” above and “the natural world” here below), are scientifically verifiable and are ongoing, with increasingly dramatic repercussions looming on the horizon. The harms affect not just people but also “the natural world,” in which people live, or possibly even of which we are a part. The plaintiffs are here to challenge the status quo. They, however, are not the ones empowered to effect the necessary change; rather, the court is the hero-in-waiting, the one in the position to draw the story to its only proper conclusion by providing the order necessary to abate

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209. Matt Pawa, a private attorney whose firm represented the land trusts, has given an interesting, if inevitably filtered, account of the history of planning and coordination among the States and land trusts and their attorneys that led to and went into the litigation. Matthew F. Pawa, *Global Warming: The Ultimate Public Nuisance*, 39 ENV. L. REP. 10,230 (2009).

210. Complaint at 1, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (No. 104-05669), 2004 WL 5614397.

the nuisance.<sup>211</sup> Within the universe of the complaint such redress is both necessary<sup>212</sup> and pragmatic.<sup>213</sup>

Further examination of the complaint, however, reveals a divergence from the conventional nuisance story into the environmental apocalyptic. The harms alleged, and their progression, are particularly telling. At first, the plaintiffs summarize the harms in broad, almost generic, though nonetheless quite striking, terms:

increased heat deaths due to intensified and prolonged heat waves; increased ground-level smog with concomitant increases in respiratory problems like asthma; beach erosion, inundation of coastal land, and salinization of water supplies from accelerated sea level rise; reduction of the mountain snow pack in California that provides a critical source of water for the State; lowered Great Lakes water levels, which impairs commercial shipping, recreational harbors and marinas, and hydropower generation; more droughts and floods, resulting in property damage and hazard to human safety; and widespread loss of species and biodiversity, including the disappearance of hardwood forests from the northern United States.<sup>214</sup>

The complaint later details other present and threatened harms, including the loss of Arctic sea ice; the thawing of permafrost; a later freezing and earlier break-up of ice on rivers and lakes; the retreat of mountain glaciers throughout the world, including Glacier National Park, which had at the time of the complaint already lost two-thirds of the more than 150 glaciers it had in the nineteenth century; dramatic impacts on animal and plant ranges; and the bleaching of coral reefs.<sup>215</sup> Still later, the previously summarized harms are spelled out, in greater and greater detail, from the approximate doubling of heat-related deaths in New York City and Los Angeles in a 2–3°C temperature increase scenario, to the inundation of thousands of miles of coastal property and the flooding of tunnel vent shafts and wastewater treatment plants, to reduced interlake flow among the Great Lakes adversely impacting the economies of Green Bay and Milwaukee, to reduced crop yields for Iowa's

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211. See AMSTERDAM & BRUNER, *supra* note 11, at 110–42 (discussing narrative coherence); Starger, *supra* note 14, at 1062 (defining “narrative logos”).

212. Complaint, *supra* note 210, at 2 (“The risks of injury to the plaintiffs and their citizens and residents from global warming increase with the speed and magnitude of global warming. The speed and magnitude of global warming is primarily dependent, in turn, upon the level of carbon dioxide emissions. Thus, reducing carbon dioxide emissions reduces the risks of injury to the plaintiffs and their citizens and residents from global warming.”).

213. Complaint, *supra* note 210, at 2 (“Defendants have available to them practical, feasible and economically viable options for reducing carbon dioxide emissions without significantly increasing the cost of electricity to their customers. These options include changing fuels, improving efficiency, increasing generation from zero- or low-carbon energy sources such as wind, solar, and gasified coal with emissions capture, co-firing wood or other biomass in coal plants, employing demand-side management techniques, altering the dispatch order of their plants, and other measures.”).

214. *Id.* at 1–2.

215. *Id.* at 23.

90,000 farms, and so on.<sup>216</sup>

The recitation of this litany of impacts would have been sufficient for the strictly legal purposes of setting forth a cause of action and alleging concrete and particularized injuries that establish standing. But a story needs to cohere, and one means of achieving narrative coherence is to connect the story to another, more recognizable one.<sup>217</sup> Here, that more familiar story is one of environmental apocalypse. Thus, the predicted temperature increases associated with climate change “will constitute an extraordinary shift in world climate that is unprecedented in thousands of years of human civilization” and “will have harmful consequences worldwide.”<sup>218</sup> Ultimately, the alleged injuries “are more than a collection of disparate harms. Together they constitute a threat of a fundamental transformation.”<sup>219</sup>

The complaint, then, includes all of the “ingredients” of the American environmental apocalyptic vision.<sup>220</sup> First, it dramatizes the principle of interconnectivity or interdependence, making the science of global warming emotional, its impacts tangible and personal. Second, it implies egalitarianism among species within the biotic community, placing ecosystemic harms and the loss of biodiversity under the same umbrella as human health impacts and the loss of human life. Third, it participates in the Emersonian “aggrandizement of the minute and the conflation of near and remote”<sup>221</sup> by making each of the alleged injuries emblematic of the types of injuries that will be suffered everywhere. Finally, it communicates the sense of imminent environmental disaster. As the complaint states, “[g]lobal warming already has begun to alter the climate of the United States,”<sup>222</sup> and the “risks of injury to the plaintiffs and their citizens and residents from global warming increase with the speed and magnitude of global warming.”<sup>223</sup>

The complaint also incorporates elements of other tropes common to environmental literature. For instance, the villains in this story are the conventional villains in the environmental apocalyptic, as well as in the gothic

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216. *Id.* at 1–42.

217. This point is made with remarkable clarity and panache by the magazine writer and author Janet Malcolm in *Iphigenia in Forest Hills*, an article—and later a book—covering a murder trial in Queens, in which she pinpoints the prosecution’s narrative strategy of connecting the accused to a storyline and set of character motivations familiar from the times of Greek tragedy. See Janet Malcolm, *Iphigenia in Forest Hills*, THE NEW YORKER, May 3, 2010. See also Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 7 (“[J]urors come to their task equipped not only with the narrative process as a mode of thought but with a store of specific narratives channeling that process. Stock scripts and stock stories accreted from exposure to the accountings and recountings that continually bombard us—through television, movies, newspapers, books, the internet, and word of mouth from our earliest childhood perceptions into happenings, happenings into events, events into stories; and our narrative expectations tell provide all of us with walk-through models of how life is lived, how crimes are committed, how reality unfolds.”).

218. Complaint, *supra* note 210, at 25.

219. *Id.* at 41–42.

220. BUELL, *supra* note 60, at 303–05.

221. *Id.* at 304.

222. Complaint, *supra* note 210, at 1.

223. *Id.* at 2.

tales of toxic discourse: industrial polluters. They are not just any polluters, but particularly egregious and important ones, the “five largest emitters of carbon dioxide in the United States and . . . among the largest in the world.”<sup>224</sup> They have been at it for a long time (in one instance since 1837, and in four others since the first decade of the twentieth century)<sup>225</sup> and they both know about the potential harms and have done nothing to mitigate them.<sup>226</sup> The protagonists, by contrast, are somewhat different than one might expect—they are the States, claiming “an assault on their sovereign and quasi-sovereign interests,”<sup>227</sup> as well as their proprietary interests, rather than workers in a factory subject to hazardous working conditions or a local community upended by nearby pollution. Yet, like these more familiar protagonists, the States are victimized by the industrial polluters, and like the workers and local residents, they represent “the people,” if on a far greater scale.

Finally, like wilderness/wildness stories, the complaint depends on a “pastoral logic” emanating from an image of a fixed ecology, set in an idealized past that coincides with representations of white settlers’ first encounters: Glacier National Park in the nineteenth century, average annual temperatures in the nineteenth and twentieth centuries, the Arctic as it has been seen for the last few hundred years, the general state of the world that led to our existing coastal land use patterns. Like the NRM wolves, who represent the possibility of a restored ecology or Eden, the protagonists-victims here stand for a lost world, though the pastoral logic is complicated by timing. The past is both past and present, and the loss is largely projected into the future.

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224. *Id.* at 1.

225. Complaint, *supra* note 210, at 27–28. (“Defendants and their predecessors in interest have emitted large amounts of carbon dioxide from the combustion of fossil fuels for many years. For example, AEP has been in continuous operation since 1906, when it incorporated in New York State under the name American Gas and Electric Company. Southern has been in continuous operation since its incorporation in 1945. Southern acquired its major power-generating subsidiaries in 1949, which have been in continuous operation since the period 1906–1930. TVA incorporated in 1933 and has been producing electric power through fossil fuel combustion since the 1940s. Xcel has been in continuous operation since its incorporation in 1909. Cinergy, incorporated in 1993, owns all the outstanding common stock of The Cincinnati Gas & Electric Co., which has been in continuous operation since its incorporation in 1837. Because the planet’s natural systems take hundreds of years to absorb carbon dioxide, defendants’ past and present emissions will remain in the atmosphere for many decades, or even centuries, into the future.”)

226. Matt Pawa, one of the lawyers involved in the case, has gone even further: “Despite the overwhelming evidence provided by the science of global warming, the coal, oil, and electric industries conducted a well-heeled campaign of deception and denial.” Pawa, *supra* note 209, at 10,234. *See also* Class Action Complaint ¶ 41, *Comer v. Murphy Oil USA*, 839 F. Supp. 2d 849 (S.D. Miss. 2012) (No. 00220), 2011 WL 2947582 (alleging civil conspiracy). The denial was in regard to the science. The deception was in regard to the costs of mitigation. Pawa, *supra* note 209, at 10,234–35. And indeed, at the same time that they were defending this lawsuit, power companies were arguing EPA did not have authority to regulate GHGs in court and lobbying against action on climate change at the White House and in Congress. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497 (2007); Jim Snyder, *Millions Spent to Lobby Climate Bill*, THE HILL (July 21, 2009), <http://thehill.com/business-a-lobbying/51333-millions-spent-to-lobby-climate-bill> (reporting that American Electric Power and Southern Co. spent \$4.6 million and \$6.3 million respectively lobbying against the climate bill in 2009).

227. Complaint, *supra* note 210, at 41.

*B. The Motion to Dismiss and the District Court Ruling: Reframing Apocalypse as a Political Question*

Rather than answer the Complaint, the power companies filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a cause of action.<sup>228</sup> The motion took two parallel avenues of attack. First, the motion sought to reframe the issue of the impending apocalypse as one of institutional competence, filtered through a separation-of-powers lens.<sup>229</sup> Second, the motion took on the apocalyptic narrative head-on, challenging plaintiffs' constitutional standing and the sufficiency of their alleged injuries, the purported causation and the possibility of redress through court injunction.<sup>230</sup>

The power companies' attempt to reframe climate change as a separation-of-powers issue was itself marked by a dual strategy. On the one hand, they assured the judge that other branches were the appropriate ones to act on this matter and that they had done so.<sup>231</sup> On the other hand, they tried to frighten the judge away from creating a "new" kind of common law cause of action specifically for global warming that would invade both congressional and executive branch functions;<sup>232</sup> this "new" cause of action was contrasted with the "simple type[s]" of traditional common law nuisances which purportedly did not raise issues of national and foreign policy.<sup>233</sup> Thus, the power companies presented a counter-narrative, one that focused on political actors dutifully pursuing a well-informed, multi-pronged approach to resolving an obviously complex and uncertain environmental problem that lies well beyond the scope of the federal judiciary.<sup>234</sup>

The opposition to plaintiffs' standing more directly challenged their apocalyptic narrative, endeavoring to temper the sense of doom and gloom and to allay the fear of catastrophe communicated by the complaint. Importantly, the power companies never claimed that climate change is not happening or that the alleged harms are not real. Rather, they argued that "[a]lthough

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228. Given the tricky politics of climate change and the various stances the power companies were taking in relation to it, reaching consensus on how to answer the allegations would have proved more than a little difficult.

229. Memorandum of Law in Support of Defendants' Motions to Dismiss the Complaints at 12–17, *Am. Elec. Power Co. v. Connecticut*, 131 S.Ct. 2527 (2011) (No. 104-CV-05670), 2004 WL 5614410.

230. *Id.* at 28–38.

231. *Id.* at 5–7, 12–17.

232. *Id.* at 1.

233. *Id.* at 19–21.

234. In this way, the power companies told a story about the case law and the nature of federal public nuisance, rather than about the facts of the case. See AMSTERDAM & BRUNER, *supra* note 11, at 139 (noting how narrative is "essential to . . . establishing the continuity of a line of precedent"). In one instance, the defendants' attorneys cited to the case of *Diamond v. Chakrabarty* in support of their nuisance story. Motion to Dismiss, *supra* note 229, at 13. The citation presents an ironic twist, as the majority in that case claimed that any decision on the patentability of genetic research was a matter of "high policy" left for other branches while at the same time extending patent protection to living organisms in a manner that quite plainly was inconsistent with existing statutory regime. See Michael Burger & Paul Frymer, *Property Law and American Empire*, U. HAW. L. REV. (forthcoming 2013).

plaintiffs' complaints are replete with claims about the adverse consequences of global warming, they fail to identify a single *actionable* injury."<sup>235</sup> In this way, the power companies reduced and subjected the States' carefully crafted apocalyptic vision to a mundane standing analysis. The States, the companies argued, failed to allege injury-in-fact because they claimed no "current injury,"<sup>236</sup> and because the alleged increased risk of harm transpired within an indefinite timeframe.<sup>237</sup> In addition, though not blameless for global warming, the power companies were not the villains the States made them out to be; they were not the *legal* cause of the States' injuries because their emissions do not lead directly to the alleged harms. For the same reasons that the power companies could not be considered the cause of the harms, the harms could not be considered redressable: a federal nuisance suit was, in short, just not going to solve the problem of global warming.<sup>238</sup>

The States' opposition to the motion to dismiss adopted the power companies' reframing and largely abandoned the narrative and rhetorical pleas embodied in the Complaint. First, they tried to assure the court that though climate change itself represents an extraordinary threat to human civilization their legal action "fits comfortably within the federal common law of public nuisance established by more than 100 years of Supreme Court precedent."<sup>239</sup> Thus, they argued that climate change is the product of both "ambient" and "interstate" pollution,<sup>240</sup> and its effects include the exact types of effects that have always been considered nuisances: threats to public health and safety; damage to vegetation; interference with navigation, water supplies and comfort; and inundation of land.<sup>241</sup> That there are many contributors to the problem is irrelevant from a legal standpoint, as the principles of joint-and-several liability apply.<sup>242</sup> In addition, they defended against the potential politicization of their lawsuit by engaging in reframing and legalization, narrowing the scope of the power companies' separation-of-powers argument and tying it to specific legal doctrines, namely the political question doctrine, foreign policy preemption, and displacement of federal common law.<sup>243</sup> As for institutional competence the States endeavored to shift the judge from the heroic, expansionist role implied by the complaint's narrative deployment of the environmental apocalyptic to the heroic, duty-bound role of a federal judge: "The judiciary has a duty to decide cases. That duty cannot be lightly divested."<sup>244</sup> In regards to standing, the States' emphasized their status as *parens patriae*, pointed to the

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235. Motion to Dismiss, *supra* note 229, at 28 (emphasis added).

236. *Id.* at 28.

237. *Id.* at 29–31.

238. *Id.* at 33–38.

239. Plaintiffs' Memorandum of Law In Opposition to Defendants' Motions to Dismiss at 1, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (No. 104-CV-05669), 2004 WL 5614405.

240. *Id.* at 9.

241. *Id.* at 8–9.

242. *Id.* at 13–15.

243. *Id.* at 1–2.

244. *Id.* at 17.

alleged current injuries to California's snowpack and pitted their seventy-seven million residents against the power companies' more limited interests.<sup>245</sup>

Judge Loretta A. Preska's opinion granting the motion to dismiss is a testament to the rhetorical efficacy of the power companies' narrative reframing.<sup>246</sup> The opinion fully adopts the separation-of-powers principles introduced in the motion to dismiss, grounding a straightforward political question doctrine analysis in the authority of "the Framers" and the Constitutional system of "checks-and-balances."<sup>247</sup> According to Judge Preska, the States improperly sought to resolve a matter of "high policy,"<sup>248</sup> an issue of "transcendently legislative nature,"<sup>249</sup> in the courtroom. Given the complexity of policy choices to be made, she decided that the political branches were the proper venue, holding that an initial policy determination must be made prior to judicial intervention.<sup>250</sup> To the extent that Judge Preska admitted the apocalyptic vision set forth in the complaint, it was at something more than an arm's length distance. While she accepted the facts alleged in the Complaint as true, as required, she couched each and every fact recited as one that plaintiffs "allege," "assert," or "say,"<sup>251</sup> an obvious way of discounting their importance. Ultimately, she found the facts alleged and the relief sought "extraordinary,"<sup>252</sup> concluding that she was "without power to resolve them."<sup>253</sup>

### C. In the Second Circuit

Judge Preska's decision to rule on political question grounds allowed her to avoid ruling on several difficult questions posed by the Complaint and the motion to dismiss: 1) whether the claimed injuries were sufficient to confer plaintiffs with standing to bring their suit; 2) whether federal common law public nuisance can accommodate global warming; and 3) whether any potential common law claim had been displaced by congressional or federal agency action. On appeal to the Second Circuit, each of these three issues was fully briefed, as was the question of whether the political question doctrine barred a nuisance claim. The appellate briefs are stellar examples of the craft of lawyering, telling fascinating and tightly-woven stories about the origins and contours of *parens patriae* standing, about the nature and history of public nuisance, about what the federal government had and had not done to date

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245. *Id.* at 1, 32–35.

246. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

247. *Id.* at 267. It bears noting that the political question doctrine was not emphasized by either side in the briefings or at oral argument. Judge Preska acknowledges as much: "Defendants argue that 'separation-of-powers principles foreclose recognition of the unprecedented 'nuisance' action plaintiffs assert,' which I take to be an argument that Plaintiffs raise a non-justiciable political question." *Id.* at 271 (internal citation omitted) (emphasis added).

248. *Id.* at 271.

249. *Id.* at 272.

250. *Id.* at 272–74.

251. *Id.* at 267–70.

252. *Id.* at 271 n.6.

253. *Id.* at 267.

about global warming and about the scope of the political question doctrine. The States continued to insist “[g]lobal warming is causing serious, and potentially devastating, consequences for Plaintiffs’ essential resources,”<sup>254</sup> and the sense of urgency remained as an overarching motif, but the tone was far more subdued than in the complaint. The debate had been moved away from the apocalyptic threat of global warming and into the far narrower world of doctrinal analysis.

Nonetheless, a two member panel of the Second Circuit—some three years after oral argument on the case was heard and only weeks after the third member of the panel, now-Associate Justice Sonia Sotomayor, had been elevated to the Supreme Court—issued a 140-page opinion that addressed each of the issues. The Second Circuit panel’s opinion represents, in my opinion, one of the most environmental, environmentalist and pro-environment decisions ever issued by an appellate court. This is not only because the Second Circuit determined that the States had standing to sue and that the problems associated with climate change fall well within the outer limits of public nuisance doctrine, but also, and even more so, because the Second Circuit largely adopted the States’ original, apocalyptic story. Indeed, the plaintiffs’ jeremiad found a receptive and influential audience in the Second Circuit, whose environmental imagination appears to have been fully alive in its decision making.

### 1. *Standing and the Transformational Impacts of Global Warming*

From the outset of the Second Circuit panel’s opinion it is clear that the court bore a fundamentally different relationship to the litigation and its subject matter than did Judge Preska. The opinion begins:

In 2004, two groups of Plaintiffs, one consisting of eight States and New York City, and the other consisting of three land trusts . . . separately sued the same six electric power corporations that own and operate fossil-fuel-fired power plants in twenty states . . . seeking abatement of Defendants’ ongoing contributions to the public nuisance of global warming.<sup>255</sup>

Contrast this with Judge Preska’s second paragraph, which notes that plaintiffs had brought their suits “under federal common law or, in the alternative, state law, to abate *what Plaintiffs describe as the ‘public nuisance’ of ‘global warming’*.”<sup>256</sup> In the Second Circuit, both public nuisance and global warming have been liberated from the skeptical frame of Judge Preska’s quotation marks, and the two terms are put together into a singular whole: the public nuisance of global warming. This legal beast is not “what Plaintiffs describe,” but what the court does.

The court’s adoption of the States’ theory of the case depended on its

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254. Brief for Plaintiffs-Appellants at 1, *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009) (No. 05-5104), 2005 WL 5792737 at \*1.

255. *Am. Elec. Power Co.*, 582 F.3d at 314.

256. *Am. Elec. Power Co.*, 406 F. Supp. 2d at 271 (emphasis added).

acceptance of global warming's dire impacts. The court's acceptance of these impacts is plainly communicated in the first instance in an expansive recitation of the present and predicted harms to the States and the land trusts.<sup>257</sup> In this account, the plaintiffs not only "allege," "assert," and "say," they also "contend," "posit," "caution," "predict," "detail[] the harms," "spell out the expected future injuries" and "categorize[] in detail a range of injuries the States expect will befall them within a span of 10 to 100 years if global warming is not abated."<sup>258</sup> The court's acceptance of the impacts is also premised in its acceptance of global warming science. As the court noted, the States "cite[] reports from the Intergovernmental Panel on Climate Change and the U.S. National Academy of Sciences"<sup>259</sup>—Judge Preska made no mention of these reports, though they were referenced in the complaint.<sup>260</sup> The court also noted that the States and the NAS caution about the "the risk of an abrupt and catastrophic change in the Earth's climate when a certain, unknown, tipping point of radiative forcing is reached."<sup>261</sup> Nothing stimulates the apocalyptic imagination so much as the concept of an end-date, a point of no return. For global warming, the "tipping point" provides that marker.<sup>262</sup>

In addressing at length the standing arguments, the Second Circuit conveys a radically different perception of the States and their role than did Judge Preska—the States have recovered their protagonist status.<sup>263</sup> Rather than intrusive busybodies seeking to compel the courts to overstep their bounds with overblown hyperbole, they are cast as informed and informative victims seeking to fill a regulatory gap with a procedurally proper, substantively legitimate legal action. The States' *parens patriae* status reveals their beneficent motives: They are not just "nominal parties," but representatives of the people.<sup>264</sup> The court goes so far as to repeat the States' argument that in other times injuries such as those enumerated in the complaint would have been cause for war, and that their standing to sue is necessitated by the original republican compromise that formed the United States.<sup>265</sup> The *casus belli* argument is plainly legal fiction, far removed from the facts of the case, but it is a convenient way to underscore the severity of the harms, and to justify pushing the law to its limits.

The courts' authentic acceptance of the alleged injuries as facts, its

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257. *Am. Elec. Power. Co.*, 582 F.3d at 315–19.

258. *Id.* at 317–18.

259. *Id.* at 317.

260. Complaint, *supra* note 210, at 22, 40.

261. *Am. Elec. Power. Co.*, 582 F.3d at 317.

262. The relationship between the "tipping point," global warming and the apocalyptic trope is the subject of both a documentary film and a related book. See BEYOND THE TIPPING POINT? (2010); FUTURE ETHICS: CLIMATE CHANGE AND APOCALYPTIC IMAGINATION (Stefan Skirminshire ed. 2010).

263. *Am. Elec. Power. Co.*, 582 F.3d at 332–39 (where the court treats the States' *parens patriae* standing); *id.* at 339–49 (where the court treats the States and land trusts' proprietary and Article III standing).

264. *Id.* at 338.

265. *Id.* at 334.

validation of the predictive science and its grant of standing on *parens patriae* grounds all reflect the efficacy of the environmental apocalyptic trope and, in a way, reinvent the imaginative construction as legal reasoning. Thus, the opinion is a truly environmentalist one—it embraces not only the logos of ecology and the ethos of interdependence but also the pathos of environmental apocalypse. The import of this environmentalist ideology is evident in the court’s reversal of Judge Preska’s ruling on political question grounds.

## 2. *Handling Political Questions, Public Nuisance Doctrine and Complexity in the Face of Apocalypse*

The Second Circuit panel’s elucidation of the political question doctrine and its detailed analytic performance under *Baker v. Carr*<sup>266</sup> amounts to a reprimand of the lower court and a call to arms in the face of climate change. The political question doctrine, the panel notes, must “be cautiously invoked. . . . [S]imply because an issue may have political implications does not make it non-justiciable.”<sup>267</sup> Following the Fifth Circuit, the court warns that *Baker* “is not satisfied by ‘semantic cataloguing’ of a particular matter as one implicating ‘foreign policy’ or ‘national security.’ Instead, *Baker* demands a ‘discriminating inquiry into the precise facts and posture of the particular case’ before a court may withhold its own constitutional power to resolve cases and controversies.”<sup>268</sup> Accordingly, the Second Circuit walks carefully through the *Baker* test, factor by factor, finding that none of the factors weigh in favor of finding the public nuisance claim non-justiciable.<sup>269</sup>

The Second Circuit’s *Baker* analysis, and its decision to reverse, hinges on a relatively straightforward acceptance of the States’ argument that federal common law of public nuisance accommodates their action. According to the Second Circuit, the absence of federal action under statutory environmental law “does not mean that Plaintiffs cannot bring an action and must wait for the political branches to craft a ‘comprehensive’ global solution to global warming”: a common law federal nuisance claim is readily available as “such claims have been adjudicated in federal courts for over a century.”<sup>270</sup>

The availability of the federal common law public nuisance claim further reflects the courts’ embrace of the apocalyptic story and the environmentalist ideology, and its acceptance of the challenge to *do something* in the face of the gathering storm. The power companies’ primary challenge to the existence of the nuisance claim was that federal common law public nuisance only applied to “simple” types of nuisances, that is, ones where the sources are clearly

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266. *Baker v. Carr*, 369 U.S. 186 (1962).

267. *Am. Elec. Power Co.*, 582 F.3d at 323 (citing *Baker*, 369 U.S. at 217 (cautioning that the doctrine “is one of ‘political questions,’ not one of ‘political cases’” and that, in the foreign relations sphere, “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance”)).

268. *Id.* at 323 (quoting *Lane ex rel. Lane v. Halliburton*, 529 F.3d 548, 558 (5th Cir. 2008)).

269. *Id.* at 323–31.

270. *Id.* at 331.

identifiable and lead directly to the complained of harms. This argument represents the political question issue, raising the possibility that there are matters that are just too complex to deal with in court and that must instead be worked out in the political arena. The Second Circuit's rejection of this argument, and its affirmation that public nuisance can accommodate the extraordinary degree of ecological, economic, ethical and political complexity that define global warming pushes the common law perhaps as far as it has ever gone.

### 3. *Displacement of Common Law*

There is no easily articulated standard for determining when federal legislation displaces federal common law. The standard resembles the field preemption test familiar to federal-state preemption analysis, but it remains distinct.<sup>271</sup> To construct an approach to the question of displacement, the Second Circuit relied on various formulations from *Milwaukee v. Illinois II*,<sup>272</sup> *Matter of Oswego Barge Corp.*,<sup>273</sup> and *County of Oneida v. Oneida Indian Nation of N.Y. State*,<sup>274</sup> settling on an amalgamated sense of displacement that considers whether Congress has spoken *directly* to the *particular* issue at bar or whether Congress has left some gap for the courts to fill. Placed within the Law & Literature frame of this Article, the question reduces to something akin to an equivalency test: What have the political branches been doing about the world-threatening problem of global warming, and is it enough to excuse the courts from getting involved?

By the time of the Second Circuit's decision, there had been two important developments in climate change law in the United States. First, the Supreme Court had decided in *Massachusetts v. EPA* that carbon dioxide is an air pollutant subject to potential regulation under the Clean Air Act.<sup>275</sup> Second, on remand from the Court, the Environmental Protection Agency (EPA) had

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271. *Id.* at 371 n.37 (noting that "the appropriate analysis in determining whether displacement of the federal common law has occurred is not the same as that employed in deciding if federal law preempts state law") (internal quotes and citation omitted).

272. *Id.* at 371 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 315 n.8 (1981) ("[T]he question [of] whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law."); *id.* at 374 (quoting *Milwaukee*, 451 U.S. at 324 ("The question is whether the field has been occupied, not whether it has been occupied in a particular manner."))).

273. *Id.* at 374 (quoting *Matter of Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981)) (noting that the Second Circuit has previously interpreted *Milwaukee* to provide a strict test for determining the preemptive effect of a federal statute; instead of inquiring whether "Congress ha[s] affirmatively proscribed the use of federal common law," courts conclude that federal common law has been preempted as to every question to which the legislative scheme "spoke directly," and every problem that Congress has "addressed.").

274. *Id.* (quoting *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236–37 (1985) (Courts ask "whether the federal statute '[speaks] directly to [the] question' otherwise answered by federal common law. As we stated in *Milwaukee II*, federal common law is used as a 'necessary expedient' when Congress has not 'spoken to a particular issue.'")).

275. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

issued a draft endangerment finding for greenhouse gas (GHG) emissions from new motor vehicles.<sup>276</sup> The Second Circuit panel properly understood that these two developments implied that GHG emissions from stationary sources would probably be regulated *if emissions from new motor vehicles were*.<sup>277</sup> The court, however, focused on the draft status of the endangerment finding and concluded that EPA had not as yet made any final decisions on GHG emissions regulation.<sup>278</sup> Indeed, the court found that EPA regulation of GHG emissions from stationary sources would have to be at an advanced stage before federal common law would be displaced: “Until EPA completes the rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact ‘speak[] directly’ to the ‘particular issue’ raised here by Plaintiffs, which is otherwise governed by federal common law.”<sup>279</sup>

The facts before the Second Circuit made for an extraordinarily close call on displacement. The Supreme Court had determined that a federal statute provided for regulation of GHG emissions, and EPA had initiated efforts, at a preliminary and draft stage, to go ahead and regulate. It is not difficult to imagine a different panel, or a different circuit court, reaching the opposite conclusion. But the Second Circuit’s decision was compelled by and consistent with its receptivity to the apocalyptic narrative. The sense of urgency evident in the earlier portions of the court’s opinion demanded judicial intervention. Had the court been more skeptical of climate change science or the accuracy of predicted impacts, or had the court taken more comfort in the political branches’ action on the climate change front, it probably would have found the claim displaced. Thus, the opinion provides at least some evidence of the efficacy of environmental narrative as legal rhetoric.

#### D. *The Administrative State Arises to Combat Climate Change*

In June 2011, when the Supreme Court issued its decision in *Connecticut v. American Electric Power*, the regulatory lay of the land had changed. EPA had issued its final endangerment finding for greenhouses gas emissions from motor vehicles; together with the Department of Transportation the agency had issued a final rule regulating emissions from light-duty vehicles and initiated a rulemaking covering medium- and heavy-duty vehicles. EPA had also begun regulating GHG emissions from industrial facilities, phasing in best available control technology requirements for new or modified “major emitting

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276. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,886 (Apr. 24, 2009).

277. *Am. Elec. Power. Co.*, 582 F.3d at 377–78.

278. *Id.*

279. *Id.* at 380. The power companies also argued that the Clean Air Act and a number of other statutes establishing programs and providing funding for climate research displaced the common law nuisance claim. Taking these statutes individually and as a group, the Second Circuit determined that none of them actually regulated GHG emissions and therefore could not displace the common law. *Id.* at 381–88.

facilities,” and initiating a Section 111 rulemaking to set limits on GHG emissions from new, modified, and existing fossil-fuel fired power plants, with a final rule due to be issued by May 2012.

EPA’s activity fundamentally transformed the case. The Supreme Court, and thus the federal judiciary, was essentially let off the hook. The case became one about the Court’s institutional legitimacy in the face of its own past decisions and the operation of the administrative state rather than a case about at least *some* branch of the federal government stepping up in the face of environmental apocalypse. Three of the four issues addressed at great length by the Second Circuit basically disappeared. On standing, the eight-member court (Justice Sotomayor did not rule on the case) split along party lines to uphold *Massachusetts v. EPA*, allowing the Second Circuit’s decision to remain untouched.<sup>280</sup> The outcome of the political question doctrine is less clear. The opinion noted that in addition to finding standing, the four justices also found “that no other threshold obstacle bars review;”<sup>281</sup> there is no mention of how the four opposing standing came down on the political question issue. As for the existence of a federal common law public nuisance claim, the court punted, not having to reach the issue, declaring that the question of whether or not there exists a federal common law of nuisance for the impacts of climate change had become “academic.”<sup>282</sup>

Thus, the Court was left to address its two key areas of concern in relation to displacement, the sole remaining issue: the precedent set by *Massachusetts v. EPA* and the comparative competence of courts and administrative agencies to handle the problem of GHG emissions and climate change. As a matter of precedent, those members of the Court who *might* have been sympathetic to a nuisance claim had to find satisfaction in the decision in *Massachusetts v. EPA*. Justice Ginsburg, writing for the Court, roots the opinion firmly in that precedent decision, and frames the displacement issue as a linear progression typical of and defined by administrative law: The Supreme Court held that EPA has the authority to regulate GHG emissions under the Clean Air Act. EPA, in response, was doing just that. If the States proved unsatisfied with the outcome, they could seek judicial review. There was no room for a parallel common law track.<sup>283</sup>

With the Progressive Management Machine finally operational, the Court was free to indulge in the common tropes of comparative institutional competence familiar to so many administrative law cases. First, Justice Ginsburg resituated the global warming problem within the “high policy” frame, though without raising the specter of the political question doctrine.<sup>284</sup>

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280. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2535 (2011).

281. *Id.*

282. *Id.* at 2537.

283. The lawsuits themselves “began well before EPA initiated the efforts to regulate greenhouse gases,” and therefore were presumably excusable, or else cert-worthy. *Id.* at 2533.

284. *Id.* at 2539 (“[T]he appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international

Then, she reinforced the basic rationale underlying the administrative state:

It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.<sup>285</sup>

The Court's resort to an administrative law analysis was predictable.<sup>286</sup> Yet, the way in which it disengaged from the environmental story is revealing. The Court both voiced and disavowed any vulnerability to the influence of the apocalyptic narrative. It gave voice to the story by couching it in the presumably well-balanced authority of the federal government, noting that "EPA concluded that 'compelling' evidence supported the 'attribution of observed climate change to anthropogenic' emissions of greenhouse gases," and that climate change could include the dire consequences detailed by the plaintiffs.<sup>287</sup> As for its own position, the Court cautioned that it "endorses no particular view of the complicated issues related to carbon-dioxide emissions and climate change."<sup>288</sup>

Despite the apparent finality of the decision, and despite Justice Ginsburg's refined neutrality, most of the underlying legal questions remain unresolved. The Supreme Court sidestepped the appellate court's environmentalist readings of standing and nuisance law, and it barely addressed the relevance of the political question doctrine. As for displacement, it is now clear that federal common law public nuisance claims are displaced where the Supreme Court finds that legislation delegates authority to a federal agency to regulate a given pollutant, provides a means for citizens to petition the agency for a rulemaking and submits the agency's decision on the petition to judicial review.<sup>289</sup> This judgment, then, constitutes a legal fiction, one whose meaning

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policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance.").

285. *Id.* at 2539–40.

286. *See* Lazarus, *supra* note 25; Levy & Glicksman, *supra* note 24; Cannon, *supra* note 33.

287. *Am. Elec. Power Co.*, 131 S. Ct. at 2533 (internal citations omitted).

288. *Id.* at 2533 n.2.

289. Recently, the Ninth Circuit, following the Supreme Court's holding, determined that the damages action in *Native Village of Kivalina* was also displaced. *See* *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012); *see also* *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010), *petition for writ of mandamus denied sub nom.*, *In re Comer*, 131 S. Ct. 902 (2011).

has been and will continue to be determined through interpretations by the parties to the litigation, the agencies involved in GHG emissions regulation, political decision makers, other litigants, other judges and many other as-yet-unknown readers. Such an end is unavoidable, given the narrative nature of the law: “What the judgment will mean after all, the judgment that pretends to end the story, is still open, as the trial and judgment themselves become the elements of a story: perhaps in a court of appeals, perhaps just in the neighborhood.”<sup>290</sup>

#### CONCLUSION

This Article attempts to illustrate the contribution a Law & Literature approach can make to environmental law scholarship. Several projects are now in progress that further develop the methodology, the data set and the sense of their significance. One essay tests the utility and limits of the approach by undertaking an investigation into the role of the imagined Arctic in the litigation surrounding attempts to drill exploratory wells in the Beaufort and Chukchi seas.<sup>291</sup> Another paper applies forward my conclusion that environmental stories matter to environmental law by identifying emerging storylines that are beginning to prove influential and by reckoning with the possibility that new narratives may be necessary to respond to the post-climate change era.<sup>292</sup>

The present study suggests that courts can and do respond to the tropes of American environmental literature categorized in definitive works of ecocriticism. Indeed, the occasional short-term victories for wilderness stories and apocalyptic visions in the courts and the power of administrative law principles to subordinate these narratives to the Progressive Management Machine both imply that environmental lawyers and environmental law scholars should consider the dynamics between narrative, rhetoric and legal advocacy. Of course, an easier conclusion to reach is that environmental stories do not *particularly* matter because they are not demonstrably effective at persuading judges to decide one way or another; that environmental lawyers would do fine to reserve their stories for the occasional rhetorical flourish and for satisfying clients who want to see and hear their voices represented in court; and that attention is best paid to perfecting the art of the appeal of administrative decisions. This may well be true, but I do not see the added value in it. The practice of environmental law as a specialized form of administrative law is already fully developed. Lawyers in the field know how to practice that craft.

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290. James Boyd White, *Telling Stories*, in HERACLES' BOW, *supra* note 1, at 186.

291. Michael Burger, “*The Last, Last Frontier*,” in LAW’S IDEA OF NATURE: A CONSTRUCTIVIST APPROACH (forthcoming 2013).

292. Michael Burger, *Recovering from the Recovery Narrative: On Glocalism, Green Jobs and Cyborg Civilization*, 46 AKRON L. REV. (forthcoming 2013).

The conclusion that stories matter to environmental law exposes and opens to debate the value systems embedded in the dominant modes of environmental scholarship—primarily science and economics, with ethics as a distant third. Herein lies perhaps the most potent critique a Law & Literature approach poses. It is not that these other approaches are false, it is that they are incomplete, and that they actively suppress and subordinate the emotive and intuitive understandings and personal experiences that inspire environmental activists, wolf advocates, Western ranchers, industrial capitalists, government bureaucrats, scientists, politicians, judges, juries and everyone else. This is not to say that it represents a better approach to solving environmental problems, but that it is an inevitable one, and that recognition of its inevitability can more deeply inform our understanding of environmental law.

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