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"In Standing is the Preservation of His World": Justice Scalia and the Varieties of Natural-Religious Experience

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“In Standing Is the Preservation of His World”: Justice Scalia and the Varieties of Natural-Religious Experience

By Don Ellinghausen Jr.

I. JUSTICE SCALIA AND THE ENVIRONMENT 476

II. RELIGIOUS ROOTS OF THE CRISIS 481

III. THE GAIAN REFORMATION 489

 A. *The Perennial Philosophy* 490

 B. *Native American Beliefs`* 492

 C. *Buddhism, Deep Ecology, and the New Physics* 496

 D. *Protestant & Evangelical Christian Environmentalism* 504

 E. *Contemporary Catholic Environmentalism*..... 506

IV. IV. STANDING ON A BURNING GAIAN DECK 509

INTRODUCTION:

Nature lies outside the collectivity, which is why the state of nature remains incomprehensible to the language invented in and by society....Science enacts laws without subject in this world without men: its laws are different from legal laws.¹

Foreboding forecasts of the effects of global climate change increasingly recall biblical jeremiads, but rather than “doomsday prophets or the scientifically under-informed,” it is leading research scientists who “have been at the forefront in sounding the alarm in regard to global environmental crisis.”² Nobel Laureate and climate activist Al Gore’s assessment of a “planetary emergency” reflects a recognition that “the

¹ MICHAEL SERRES, THE NATURAL CONTRACT 85 (Elizabeth MacArthur & William Paulson trans., University of Michigan Press 1995).

² JOHN BELLAMY FOSTER, ECOLOGY AGAINST CAPITALISM 72-73 (Monthly Review Press 2002).

scale of the environmental crisis now goes beyond any individual's capacity to imagine it."³

Courts still labor within an outdated paradigm in trying to comprehend this frenetic assault on the environment. They have hesitated to acknowledge ecological insights, and key concepts such as watersheds and ecosystems have failed to make headway against textualist-parsing and originalism. Systems thinking concepts exemplify how "a new way of talking about the world threatens to displace established ideas and groups that espouse them, so it encounters vigorous opposition."⁴ This is particularly so given that the systems view "calls for a much more comprehensive response to environmental concerns than do traditional views," challenging activism-averse judicial conservatism.⁵ In the systems paradigm "there is no such thing as objectivity. We cannot eliminate ourselves from the picture."⁶ Systems theory directly confronts the avowed "objectivity" of textualists, as "it strikes down the term 'observer' of classical theory, the man who stands behind the thick glass wall and watches what goes on without taking part."⁷ Instead, "the vital act is the act of participation," an "incontrovertible new concept" which undermines the value-free pretensions of strict constructionists.⁸

Ecologists also impugn the above-the-fray tone of textualism, pointing out that "vocabularies are never neutral. Things that are included in a vocabulary gain a familiar reality; things that are left out are ignored or even have their existence denied."⁹ Yet textualism is not the only anti-ecological barrier erected by the courts; many conservative jurists, notably

³ Felicity Barringer & Andrew C. Revkin, *Gore Warns of "Planetary Emergency,"* N.Y. TIMES, March 22, 2007 at A20; DHARMA RAIN: SOURCES OF BUDDHIST ENVIRONMENTALISM 1 (Stephanie Kaza & Kenneth Kraft eds., Shambhala Publications 2000).

⁴ ERNEST CALLENBACH, ECOLOGY: A POCKET GUIDE 143 (University of California Press 1998).

⁵ STEPHANIE KAZA, MINDFULLY GREEN: A PERSONAL & SPIRITUAL GUIDE TO WHOLE EARTH THINKING 39 (Shambhala Publications 2008).

⁶ GARY ZUKAV, THE DANCING WU LI MASTERS: AN OVERVIEW OF THE NEW PHYSICS 33 (Perennial Classics 2001).

⁷ *Id.* at 31 (quoting physicist John Wheeler).

⁸ *Id.*

⁹ Callenbach, *supra* note 4, at 143.

Supreme Court Justice Antonin Scalia, envision themselves as Judeo-Christian stalwarts fending off a pernicious, pervasive secularism. Yet their recourse to "traditional religious values" often appears as opportunistic as their applications of textualism or originalism, and nowhere is this disparity more evident than in Justice Scalia's response to environmental plaintiffs. Although his dismissal of Native American sacred land concerns reflects a greater lack of appreciation and respect in contemporary culture, his intransigent resistance to ecological realities now swims against a current of renascent ecological consciousness in mainstream religions and his Roman Catholic faith in particular. His pre-Vatican II *weltanschauung* reflects an anachronistic, anti-scientific bent woefully out of step with both modern science and contemporary faiths. This essay will examine the roots of his philosophy, the emerging ecumenical environmentalism that challenges it, and the consideration that judicial conservatives may be in thrall to a new "world religion"—the market—at the expense of a divinely-inspired earth. It will reveal that, as Aldous Huxley observed, "The best that can be said for ritualistic legalism is that it improves conduct. It does little, however, to alter character and nothing of itself to modify consciousness."¹⁰

I. JUSTICE SCALIA AND THE ENVIRONMENT

I mean, when is the predicted cataclysm?

Justice Antonin Scalia¹¹

Justice Scalia's legal reputation reflects his espousal of originalism as an interpretive tool for constitutional analysis, his markedly restrictive application of the standing requirement, and his often forceful advocacy of religious values against an intellectual establishment he depicts as ridden with elitist, condescending disregard for the faithful. While championing

¹⁰ ALDOUS HUXLEY, *THE PERENNIAL PHILOSOPHY* 23 (Harper & Brothers Publishers 1945).

¹¹ Robert Barnes, *Court Hears Global Warming Case: Justice to Decide Challenge on Greenhouse Gas Emissions*, WASH. POST, Nov. 30, 2006 at A03.

these causes, Scalia has also emerged as an inveterate opponent of efforts to redress the environmental crisis.

Scalia's critics have observed that "revival of 'originalism' as a popular constitutional rhetoric" resembles "a deeper revivalism among the broader public."¹² They analogize how "literal interpretation of the religious Bible" mirrors Scalia's originalist insights into the Constitution, and also note that the "self-assurance toward discerning God's intent displayed by fundamentalist interpreters of the Bible bears striking similarities" to Scalia's confidence in "discovering" the intent of the Founders.¹³ Scalia portrays his unerring insights into the Founding Fathers' mindset as the "result of a neutral political methodology," but his critics assert that "his value choices are not defended, but rather hidden behind a claim that the results have been discovered but not chosen."¹⁴ While Scalia contends that "he alone on the court has a consistent judicial philosophy," comprised of "ideological purity and judicial restraint," skeptics note that his approach frequently consists of "choosing among conflicting conservative principles in order to reach a conservative result."¹⁵

Closer examination of Scalia's "value-free" applications of the law have, unsurprisingly, found them to be "less neutral and apolitical than he fashions himself."¹⁶ Professor Erwin Chemerinsky asks "Is it mere coincidence that in virtually every case Justice Scalia discerns from the Constitution the conclusion is consistent with his conservative personal ideology?"¹⁷ This "consistency" supports the inference that "the original meaning of the Constitution and the Republican platform are remarkably similar."¹⁸

¹² George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1309-10 (1990).

¹³ *Id.* at 1310.

¹⁴ Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 385 (2000).

¹⁵ JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES & RIVALRIES THAT DEFINED AMERICA* 181-82 (Times Books 2006).

¹⁶ Peter Manus, *Wild Bill Douglas's Last Stand: A Retrospective on the First Supreme Court Environmentalist*, 72 TEMP. L. REV. 111, 134 (1999).

¹⁷ Chemerinsky, *supra* note 14, at 391.

¹⁸ *Id.* at 392.

Justice Scalia's opinions in environmental cases starkly reveal how his espousal of value-free textualist neutrality unsuccessfully endeavors to mask "conscious and open combat against a generation of opinions through which environmentalism has attempted to establish itself."¹⁹ Scalia has often employed standing, "a doctrine that accommodates a large dose of judicial discretion," as a cudgel against environmental plaintiffs, most notably in the *Lujan* cases, in which "the Court erected significant obstacles" to suits asking for more rigorous enforcement of the Endangered Species Act.²⁰ In 1990's *Lujan v. National Wildlife Federation* decision, Scalia pointedly refuted the foundational environmental concept of interconnectedness, in which all elements of a natural region "are ecologically interrelated such that harm to any of that area injures all of it."²¹ Scalia's logic-chopping partition of nature dramatized his marked "insensitivity to the holistic nature of environmental injuries."²² In 1992, Scalia and the Court utilized standing to rebuff environmental plaintiffs in *Lujan v. Defenders of Wildlife*, a decision replete with antipathy toward ecological concerns, and manifesting an "unspoken anti-environmentalist premise that the law will recognize no personal interest in the environment except where the environment is cast as private property."²³

Also in 1992, Scalia's majority opinion in *Lucas v. South Carolina Coastal Council* again demonstrated his persistent penchant "to recognize environmental sentiments only when they harm environmentalists."²⁴ Criticism of *Lucas* focused on how it effectively "expanded protection for private property owners and cost constraints on legislatures seeking to protect public resources."²⁵ Upon joining the Court in 1986, Scalia "became the property rights movement's strongest ally on the bench," and he "defined for himself a central role" as "the Court began regularly to

¹⁹ Manus, *supra* note 16, at 136.

²⁰ James Salzman, *Environment: Earth in the Judicial Balance*, THE NATION, Oct. 9, 2000, at 32; *Lujan v. Nat'l Wildlife Fed'n.*, 497 U.S. 871 (1990); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

²¹ Manus, *supra* note 16, at 126.

²² *Id.* at 136.

²³ *Id.* at 131.

²⁴ *Id.* at 121; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

²⁵ Salzman, *supra* note 20.

grant property owners petitions that raised the question whether government land use regulation violated federal constitutional protections for private property rights.”²⁶ Overall, Scalia “has produced a relentless record of upholding private property rights against the government’s police power,” providing a “reliable defense of even speculative property rights against government regulation.”²⁷

His critics have pursued the philosophical basis for Scalia’s anti-environmentalism in originalism, textualism, and neo-conservatism, yet given the Justice’s frequent allusions to his Catholic faith, uncovering the roots of his antipathy instead requires “a less secular approach.”²⁸ Scalia is a public figure “upon whom the influence of his religious education is particularly well-attested,” who “seems to believe strongly that a person’s religious faith is something that he or she ... must take whole from church doctrine and obey.”²⁹ Further, Scalia, on the bench and off, “has scorned the notion of a strict separation of church and state, arguing that the 1st Amendment was intended only from supporting an official national religion.”³⁰ He endeavors “to rally the devout against democracy’s errors,” advising them that their civic response to secular government “should not be resignation to it, but the resolution to combat it as effectively as possible.”³¹

In these efforts, Scalia and his ideological cohort, Justice Clarence Thomas, reflect what has been termed “theoconservatism,” or “the unprecedented rise of public religiosity in our time.”³² Both Justices have striven “to develop a jurisprudence that permits and encourages a substantial role for religion in American public life.”³³ Scalia also

²⁶ Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759, 783, 767 (2006).

²⁷ Manus, *supra* note 16, at 134, 133.

²⁸ Kannar, *supra* note 12, at 1310.

²⁹ *Id.* at 1311; Sean Wilentz, *From Justice Scalia, a Chilling Vision of Religion’s Authority in America*, N.Y. TIMES, July 8, 2002, at A19.

³⁰ David G. Savage, *Supreme Court’s New Tilt Could Put Scalia on a Roll*, L.A. TIMES, Feb. 20, 2007, available at <http://articles.latimes.com/2007/feb/20/nation/na-scalia20>.

³¹ Wilentz, *supra* note 29.

³² DAMON LINKER, *THE THEOCONS: SECULAR AMERICA UNDER SIEGE* 4, XII (2006).

³³ *Id.* at 10.

maintains an ideological affinity with the arch-conservative Catholic sect Opus Dei, which is described as “a spiritual path that aims at the sanctification of the secular world.”³⁴ This controversial religious offshoot of Fascist Spain has been depicted as “a so-called religious order whose slogan might be ‘A preferential option for the rich and powerful.’”³⁵ Opus Dei’s recent prominence reflects the merger of political and religious fundamentalism, of how a “political faction has degenerated into a quasi-religious sect (that) believes America is in the early stages of an ideological civil war. It promotes its core beliefs as if they were impervious to reason.”³⁶

Scalia dramatized this conflict of faith and reason in a 2001 speech at a Catholic church in Indiana, where he argued that “people who report miracles should not be dismissed as irrational or poorly educated.”³⁷ He excoriated the secular media, and claimed that “Even if a miracle occurred under their noses, they would not believe,” because their condescending disregard for “traditional Christians” reflects the anti-religious scorn of “the sophisticated in modern society.”³⁸ An honors graduate of Harvard Law, Scalia implored the audience “to have the courage to reject the sophisticated world.”³⁹ His speech demonstrated his continuing frustration with “what he perceives to be the hostility of cultural elites,” as well as his “apocalyptic sense of having lost the culture wars.”⁴⁰

Scalia’s cultural warrior persona reflects his conservative, Old World Catholic upbringing, Jesuit schooling, and a very visceral reaction to the 1960s counterculture’s perceived destruction of an imagined socio-religious Eden. For those coming of age in the 1950s, a “textbook” Catholic education inculcated “an exceptionally strong respect for ‘the

³⁴ JOHN L. ALLEN: OPUS DEI: AN OBJECTIVE LOOK BEHIND THE MYTHS AND REALITY OF THE MOST CONTROVERSIAL FORCE IN THE CATHOLIC CHURCH 1 (Doubleday 2005).

³⁵ MATTHEW FOX, A NEW REFORMATION: CREATION SPIRITUALITY AND THE TRANSFORMATION OF CHRISTIANITY 15 (Inner Traditions 2006).

³⁶ AL GORE, THE ASSAULT ON REASON 68 (The Penguin Press 2007).

³⁷ *Belief in Miracles Should Not Be Dismissed, Justice Scalia Says*, 54 CHURCH & STATE 11, 18 (Dec. 31, 2001).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ ROSEN, *supra* note 15, at 199, 180.

rules laid down,” and established “a world of quaint legalisms.”⁴¹ An analysis of Scalia’s High Court tenure noted his “powerful need to bind himself in advance to rigid rules.”⁴² His inflexible, doctrinaire mindset resists the unique and holistic perspectives required to properly comprehend and evaluate the environmental crisis, which requires the “dissolution of boundaries” and acknowledgement of interconnectedness.⁴³ “Nature is not necessarily arranged in accordance with the system of mutually exclusive alternatives” so characteristic of pre-Vatican II Catholicism.⁴⁴ Further, “wild” nature is not as black-lettered as Jesuit logic; it “is not given to us in a classified form, in cans with labels.”⁴⁵ The deep, spiritually-imbued commitment exhibited by environmental plaintiffs further illustrates that “religious” attitudes “may or may not be mediated through existing institutions,” and are “not limited to the layers of social customs and history surrounding organizational expression.”⁴⁶ Further, while “The best science we have evinces increasing humility toward the unknown,” it has failed to humble the notoriously self-assured Justice.⁴⁷ Flustered by a majority opinion in 1996, Scalia grumbled that “The Court must be living in another world.”⁴⁸ Yet it is Justice Scalia who resides in another world, clinging to a scientifically-discredited and nature-destructive anthropocentrism, made manifest in his indefatigable efforts “to prevent environmental realities from subverting the law.”⁴⁹

II. RELIGIOUS ROOTS OF THE CRISIS

⁴¹ Kannar, *supra* note 12, at 1314-15.

⁴² ROSEN, *supra* note 15, at 182-83.

⁴³ TOM HAYDEN, *THE LOST GOSPEL OF THE EARTH: A CALL FOR RENEWING NATURE, SPIRIT AND POLITICS* 22 (Ig. Publishing 2007 rev. ed.).

⁴⁴ ALAN W. WATTS, *NATURE, MAN AND WOMAN* 6 (1991).

⁴⁵ *Id.* at 35.

⁴⁶ WADE CLARK ROOF, *A GENERATION OF SEEKERS: THE SPIRITUAL JOURNEYS OF THE BABY BOOM GENERATION* 258 (Harpercollins 1993).

⁴⁷ DAVID JAMES DUNCAN, *THE FUTURE OF NATURE: WRITING ON A HUMAN ECOLOGY FROM ORION* MAGAZINE 214, 222 (Barry Lopez ed. Milkweed Editions 2007).

⁴⁸ ROSEN, *supra* note 15, at 180.

⁴⁹ Manus, *supra* note 16, at 127.

How can modern Christianity have so solemnly folded its hands while so much of the work of God was and is being destroyed?

Wendell Berry⁵⁰

Justice Scalia's eco-phobic mindset reflects four philosophical influences that serve to rationalize humankind's "taming" and developing nature. These are a Cartesian paradigm, in which man alone possesses consciousness; a Christian theological universe, in which man must escape the snares of his earthbound existence to achieve salvation; an emerging alliance of fundamentalist faith and globalized corporatism; and an urban-centric intellectual perspective that denies nature any spiritual presence capable of counteracting a triumphant industrialism. These rationales "all appear to be symptoms of a fundamental misunderstanding of the nature of nature and of a tendency to exclude nature from moral concern or consideration."⁵¹ They have facilitated our contemporary climate crisis, in which "human beings have stepped out of the flow of creation...and have assumed the position of outside observers, of beings who live *on* the planet but are not *of* it."⁵²

Descartes' paradigm posited that "Man is rational, whereas Nature is brutal, and Man strives to make nature amenable to his idea of rationality."⁵³ Cartesian thought positioned mankind as "the cosmic pass toward and through which all life must make its way."⁵⁴ It encouraged a "radical discontinuity between the human and other modes of being and

⁵⁰ Wendell Berry, *Christianity and the Survival of Civilization*, in SEEING GOD EVERYWHERE: ESSAYS ON NATURE

AND THE SACRED 29, 52 (Barry McDonald, ed., 2003).

⁵¹ J. BAIRD CALLICOTT & ROGER T. AMES, NATURE IN ASIAN TRADITIONS OF THOUGHT: ESSAYS IN ENVIRONMENTAL PHILOSOPHY 3 (State University of New York Press 1989).

⁵² BRUCE SANGUIN, DARWIN, DIVINITY, AND THE DANCE OF THE COSMOS: AN ECOLOGICAL CHRISTIANITY 13 (2007).

⁵³ D. T. SUZUKI, ZEN BUDDHISM: SELECTED WRITINGS OF D. T. SUZUKI 276 (William Barrett, ed., 2006).

⁵⁴ PAUL SHEPARD, *On the Significance of Being Shaped by the Past*, in THE ONLY WORLD WE'VE GOT: A PAUL SHEPARD READER 109, 123 (1996).

the bestowal of all rights on the humans.”⁵⁵ This anthropocentric worldview espoused a divinely-ordained exceptionalism, which exempted humankind from nature’s laws, and reflected “a kind of ultimate manifestation of that deep inner rage of Western society against its earthly condition as a vital member of the life community.”⁵⁶

Modern science has effectively rebutted the Cartesian paradigm by establishing that “the evolution of mind is not like a great river of species, emptying only into us.”⁵⁷ Instead, as biologist Edward O. Wilson notes, “our relationship to nature is primal,” as “much of human nature was genetically encoded during the long stretches of time that our species lived in intimacy with the rest of the living world.”⁵⁸ Accordingly, “the natural world is still embedded in our genes and cannot be eradicated.”⁵⁹

Religious traditions attempting to orient man in the cosmos greatly facilitated this disenchantment with nature as well, so that today “we are the first collectivity in the history of humanity to fail to see the Reality of the Creator in His creation, and to draw the consequences of that vision.”⁶⁰ Christianity encouraged abandoning immanence for transcendence, “the idea that the truly sacred is removed from nature but designs and controls it.”⁶¹ Lynn White’s seminal analysis implicating Christianity in environmental degradation argued that nature-phobic attitudes “deeply grounded in Christian dogma” enabled the despoliation of the earth, sea and sky.⁶² “The fact that most people do not think of these attitudes as Christian is irrelevant,” he claimed, as “no new set of

⁵⁵ THOMAS BERRY, *THE GREAT WORK: OUR WAY INTO THE FUTURE* 4 (Three Rivers Press 2006).

⁵⁶ *Id.* at 165.

⁵⁷ PAUL SHEPARD, *On Animals Thinking*, in *THE ONLY WORLD WE’VE GOT: A PAUL SHEPARD READER* 21, 24 (1996).

⁵⁸ EDWARD O. WILSON, *THE CREATION: AN APPEAL TO SAVE LIFE ON EARTH* 62, 69 (2006).

⁵⁹ *Id.* at 68.

⁶⁰ BARRY McDONALD, *Introduction* to *SEEING GOD EVERYWHERE: ESSAYS ON NATURE AND THE SACRED* xiv (McDonald ed., 2003).

⁶¹ ROGER S. GOTTLIEB, *A GREENER FAITH: RELIGIOUS ENVIRONMENTALISM AND OUR PLANET’S FUTURE* 33 (2006).

⁶² Lynn White, *The Historical Roots of Our Ecologic Crisis*, 155 *SCIENCE* 3767, at 1207.

basic values has been accepted in our society to displace those of Christianity.”⁶³

Ecologists concur that “our dominant theological models paved the way for the (later) secular domination of creation,” as “rejection of the spiritual power of Nature can be seen in biblical stories that influenced the most basic thought” of Western religions.⁶⁴ Also, since “our sense of the divine is so extensively derived from verbal sources, mostly through the biblical structures, we seldom notice how extensively we have lost contact with the revelation of the divine in nature.”⁶⁵ White contends that “Christianity is the most anthropocentric religion the world has seen.”⁶⁶ The “deep and quite extraordinary incompatibility between the atmosphere of Christianity and the atmosphere of the natural world” has its roots in the biblical command in Genesis 1: 28 for humans to “subdue” and “have dominion” over the Earth, to construct “a kingdom of God on earth by and for human beings.”⁶⁷ As non-human life forms “exist in a realm separated from God and are not created in the image of God, they possess instrumental but not intrinsic value (and) are not part of the moral community.”⁶⁸ Christianity erected “a hierarchically structured pyramid with humanity atop it as its ruler in God’s image, exercising dominion over Earth and being the ultimate and appropriate beneficiary of Earth’s goods, which were provided by the Creator to serve humanity.”⁶⁹ In this “theistic cosmology, God is portrayed as being almost exclusively concerned with the dream of the human species.”⁷⁰

The medieval Catholic Church purposefully placed barriers between man and the environment “that gave a special urgency to the biblical injunctions to subdue and control nature.”⁷¹ Thomas Aquinas’

⁶³ *Id.*

⁶⁴ Sanguin, *supra* note 52, at 67; ED MCGAA, NATURE’S WAY: NATIVE WISDOM FOR LIVING IN BALANCE WITH THE EARTH 56 (2005).

⁶⁵ THOMAS BERRY, THE DREAM OF THE EARTH 80 (2006 ed.).

⁶⁶ White, *supra* note 62, at 1205.

⁶⁷ WATTS, *supra* note 44, at 27; STEVEN C. ROCKEFELLER & JOHN C. ELDER, EDS., SPIRIT & NATURE: WHY THE ENVIRONMENT IS A RELIGIOUS ISSUE 148 (1992).

⁶⁸ Rockefeller, *supra* note 67, at 148.

⁶⁹ GOTTLIEB, *supra* note 61, at 34 (quoting Roman Catholic theologian John Hart).

⁷⁰ SANGUIN, *supra* note 52, at 67.

⁷¹ Rockefeller, *supra* note 67, at 149.

Summa Theologica defined sin as acts between humans, or humans and God; there was no mention of “sinning against nonhuman animals or against the natural world.”⁷² Although nature existed as evidence of God’s handiwork, “any sense of it as a presence with its own reality and importance was largely expunged from the Catholic sense of the sacred.”⁷³ Any ritual honoring nature became “a terrible, a blasphemous mistake.”⁷⁴

White contended that by eradicating pagan nature- rituals, “Christianity made it possible to exploit nature in a mood of indifference to the feelings of natural objects.”⁷⁵

He asserted that:

To a Christian, a tree can be no more than a physical fact. The whole concept of the sacred grove is alien to Christianity and the ethos of the West. For nearly 2 millennia Christian missionaries have been chopping down sacred groves, which are considered idolatrous because they assume spirit in nature.⁷⁶

Additionally, creation of Catholic saints, who supplanted earlier nature-spirits, eroded ecological fealties, as “the saint is not *in* natural objects; he may have special shrines, but his citizenship is in heaven.”⁷⁷ The medieval church presaged Justice Scalia’s present-day dismissal of Native American sacred land claims, by designating sites as sacred only after clerical certification. Finally, the Church is doctrinally rooted in denial of nature’s laws, as “the historical facts upon which it insists are miracles, betokening a state of mind for which the transformation of the physical world is of immense importance.”⁷⁸

⁷² PETER SINGER, WRITINGS ON AN ETHICAL LIFE 89 (Harper Perennial 2000).

⁷³ GOTTLIEB, *supra* note 61, at 90.

⁷⁴ DERRICK JENSEN, LISTENING TO THE LAND: CONVERSATIONS ABOUT NATURE, CULTURE AND EROS 167 (2004) (quoting Frederick Turner).

⁷⁵ White, *supra* note 62, at 1205.

⁷⁶ *Id.* at 1206.

⁷⁷ *Id.* at 1205.

⁷⁸ WATTS, *supra* note 44, at 52.

Contemporary Christian fundamentalism eschews environmental thinking as irrelevant, given mankind's potential for ultimate escape from earthly concerns. They epitomize the transition in the belief-community "from a dominant creation mystique to a dominant redemption mystique," in which the "essential thing is redemption out of the world through a personal savior relationship that transcends all (planetary) concerns."⁷⁹ In this worldview, "all earthly affairs are considered microphase concerns relative to the spiritual concerns that determine our destiny in some other transcendent world."⁸⁰ This suggests that "religious environmentalism and fundamentalism will always be in opposition," as the latter remains "anthropocentric in the extreme, treasuring the most human-centered, scriptural, or culturally based aspects of a faith."⁸¹ Nature is merely "a backdrop to the unfolding drama of human salvation," encouraging an outlook in which "the earth is expendable."⁸²

Fundamentalists view environmentalism as a Trojan Horse for biblical-deniers, "that anyone who becomes too close to the environment worships creation instead of the Creator."⁸³ Ecologists' "assertion of the divinity of the earth, with its overtones of idolatry or paganism" fuel fundamentalist fears that "a semiconscious, deeper-than-rational conviction that closeness to nature is not an attribute of a conventional person of faith."⁸⁴ Grim climate prognoses also "challenge the notion of a personal and omnipotent God who knows and has preordained the future...(Who) can perform miracles that defy the laws of nature."⁸⁵

Nature-averse fundamentalists have politically allied with corporate America, creating a "pervasive combination of religious and secular ideology of a kind that sees little or no harm in the destruction of

⁷⁹ BERRY, *supra* note 65, at 129.

⁸⁰ BERRY, *supra* note 55, at 102.

⁸¹ GOTTLIEB, *supra* note 61, at 223.

⁸² SANGUIN, *supra* note 52, at 68.

⁸³ Fletcher Harper, *Religion and the Earth on the Ground: the Experience of Green Faith in New Jersey*, in ECOSPIRIT: RELIGIONS AND PHILOSOPHIES FOR THE EARTH 504, 508 (Laurel Kearns & Catherine Keller, eds., 2007).

⁸⁴ *Id.*

⁸⁵ Laurel Kearns, *Cooking the Truth: Faith, Science, the Market, and Global Warming* in ECOSPIRIT: RELIGIONS AND PHILOSOPHIES FOR THE EARTH 97, 112 (Kearns & Catherine Keller, eds., 2007).

the Creation.”⁸⁶ In this worldview, “economic convenience and normalized greed combine, ironically, with ancient codes that trigger cravings not for the things of this world, but for a supernatural world, a world beyond decay and death.”⁸⁷ In this “ruling religion” of “market fundamentalism,” the “social values of conservative Christianity are combined with economic service to the corporate elite.”⁸⁸ This Consumer Christianity presumes that “Americans would live by a Chamber-of-Commerce Creationism that declares itself satisfied with a divinely presented Shopping Mall.”⁸⁹

Contemporary Americans are geographically as well as spiritually alienated from the land. For many, “outdoors” means a congested traffic-snarl of commuting, then a return to a suburban/exurban existence in which “nature” is relegated to home improvement megastores. Americans increasingly

(L)ive in an insulated cell, completely cut off from any kind of sensory information or sensory experience that is not of our own manufacture. Everything we see, hear, taste, smell, touch is a human artifact. All the sensory information we receive is *fabricated*, and most of it is mediated by machines.⁹⁰

British climate scientist James Lovelock argues that urbanization’s rapid ascent meant that “the proportion of information flow from the biosphere to the pool of knowledge which constitutes the wisdom of the city decreased,” resulting in a narrow focus “almost entirely centered on the problems of human relationships.”⁹¹

⁸⁶ WILSON, *supra* note 58, at 82.

⁸⁷ LAUREL KEARNS & CATHERINE KELLER, *Preface* to ECOSPIRIT: RELIGIONS AND PHILOSOPHIES FOR THE EARTH XII (2007).

⁸⁸ VANDANA SHIVA, EARTH DEMOCRACY: JUSTICE, SUSTAINABILITY, AND PEACE 132 (2005); GOTTLIEB, *supra* note 61, at 224.

⁸⁹ GARY SNYDER, THE PRACTICE OF THE WILD 152 (2004 ed.).

⁹⁰ JENSEN, *supra* note 74, at 61 (quoting John Livingston).

⁹¹ JAMES LOVELOCK, GAIA: A NEW LOOK AT LIFE ON EARTH 126 (2000 rev. ed.).

Religious historian Mircea Eliade concluded that the transition to urban life lead to a "gravely impoverished" spiritual sensibility, as "the mystery of nature's participation in the Christological drama" has "become inaccessible to Christians living in the modern city."⁹²

As a result, "even for a genuine Christian, the world is no longer felt as the work of God."⁹³

This reflects the milieu of Christianity's ascent, "when, as today, the big city was the center of economic and cultural attraction," which unquestionably "had a deep influence upon the whole character of the religion," which displays "a decidedly urban style."⁹⁴

The Catholic Church in America evinces this urban-centric ethos, as it "has been dominated in its culture by an urban and immigrant focus that has historically been removed from the land, removed from nature."⁹⁵ The only child of immigrant parents, Scalia's New York upbringing typifies the subway straphanger, as opposed to rural wayfarer motif of American Catholicism. A Catholic ecologist notes that "it's a lot easier if you live in rural America to have a vision of God's communion with humankind through creation."⁹⁶ Catholic disregard for nature is abetted "by the idea that the only holy place is the built church. It is clearly impossible to assign holiness exclusively to the built church without denying holiness to the rest of Creation."⁹⁷ Justice Scalia's Jesuit schooling was in an immigrant Catholicism "closer to the peasant roots of its practitioners than to the high intellectual traditions of Catholic theology and philosophy."⁹⁸ Today, however, Catholics are among those of many faiths who are rediscovering a sense of sacred nature.

⁹² MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* 178-79 (1957).

⁹³ *Id.* at 179.

⁹⁴ WATTS, *supra* note 44, at 25.

⁹⁵ John E. Carroll, *Catholicism and Deep Ecology*, in *DEEP ECOLOGY AND WORLD RELIGIONS: NEW ESSAYS ON SACRED GROUNDS* 169, 173 (David Landis Barnhill & Roger S. Gottlieb, eds., 2001).

⁹⁶ Jeffrey J. Guhin, *Where Are the Catholic Environmentalists*, AMERICA, Feb. 13, 2006, at 10 (quoting David J. Andrews).

⁹⁷ BERRY, *supra* note 50, at 58-60.

⁹⁸ Kannar, *supra* note 12, at 1315.

III. THE GAIAN REFORMATION

We take from nature what we cannot see.

Theodore Roethke⁹⁹

Writing in 1967, Lynn White charged that “our present science and our present technology are so tainted with orthodox Christian arrogance toward nature that no solution for our ecologic crisis can be expected from them alone.”¹⁰⁰ He asserted that since the environmental crisis *originated* in religious attitudes toward nature, then “the remedy must also be essentially religious, whether we call it that or not.”¹⁰¹ His analysis reflects the insight that “nature is always understood in religious terms, even where (it) is apparently secularized through technological meanings. The religious meanings that frame the understanding of nature do not disappear over time—they just alter.”¹⁰² The paradigm shift necessary for halting ecological devastation “seems to require a root change of human outlook, a mutation of collective philosophy, a spiritual phase transition.”¹⁰³ Ecologists contend that “environmental problems provide less the occasion for the exercise and application than for the criticism and recasting of Western moral and metaphysical assumptions.”¹⁰⁴ They echo Ralph Waldo Emerson’s belief that “the problem of restoring to the world original and eternal beauty is solved by the redemption of the soul.”¹⁰⁵ Father Thomas Berry suggests expanding our parameters of “religious,” given that “traditional Western spiritualities have not enabled their followers to understand or protest the terrifying assault of American society on the natural world.”¹⁰⁶ The Dalai Lama concludes that “we need a moral compass we can use collectively without getting bogged down in

⁹⁹ THEODORE ROETHKE, *STRAW FOR THE FIRE: FROM THE NOTEBOOKS OF THEODORE ROETHKE 1943-63* 127 (David Wagoner, ed., 2006).

¹⁰⁰ WHITE, *supra* note 62, at 1207.

¹⁰¹ *Id.*

¹⁰² BRONISLAW SZERSZYNSKI, *NATURE, TECHNOLOGY, AND THE SACRED* xi (2005).

¹⁰³ KEARNS & KELLER, *supra* note 87, at xi.

¹⁰⁴ CALLICOTT & AMES, *supra* note 51, at 2.

¹⁰⁵ RALPH WALDO EMERSON, *NATURE AND SELECTED ESSAYS* 79 (Larzer Ziff, ed., 2003).

¹⁰⁶ BERRY, *supra* note 65, at 113.

doctrinal differences.”¹⁰⁷ The compass’s directions might include nature mysticism (or the perennial philosophy); Native American lifeways; the coalescing insights of Buddhism, Deep Ecology, and Ecopsychology; and emerging environmental ethics within both fundamentalist Christianity and Roman Catholicism.

A. *The Perennial Philosophy*

Nature mysticism is an enduring current of religious thought, whether embodied in Chinese monastic mountain poets, St. Francis of Assisi, or John Muir. As the “de facto religion of native peoples everywhere,” it remains “a powerful but neglected current in the Judeo-Christian tradition.”¹⁰⁸ It posits that “God’s spirit is not a distant abstraction but a living being who subsists in and through the natural world.”¹⁰⁹ In this perennial philosophy, “The sacred precedes human existence and contains an inherent value apart from human calculation.”¹¹⁰ In contrast to scripturally-given deities, “nature mysticism senses a tapestry of holiness, including the human, the animal, and the plant realms, all woven together by an underlying creative power that can be called God.”¹¹¹ In nature mysticism, “Our inner life is complete when it merges into Nature and becomes one with it.”¹¹²

American environmentalism originated in this search for “salvation through an individual relation to nature,” and Transcendentalism inaugurated the quest of “seeking spiritual fulfillment in American environmentalism.”¹¹³ Emerson’s unease with “the emphasis Christianity

¹⁰⁷ DALAI LAMA, *THE UNIVERSE IN A SINGLE ATOM: THE CONVERGENCE OF SCIENCE AND SPIRITUALITY* 198-99 (2005).

¹⁰⁸ HAYDEN, *supra* note 43, at 55.

¹⁰⁹ Mark I. Wallace, *Sacred-Land Theology: Green Spirit, Deconstruction, and the Question of Idolatry in Contemporary Earthen Christianity*, in *ECOSPIRIT: RELIGIONS AND PHILOSOPHIES FOR THE EARTH* 291, 301 (Laurel Kearns & Catherine Keller, eds., 2007).

¹¹⁰ HAYDEN, *supra* note 43, at 3.

¹¹¹ *Id.* at 56.

¹¹² SUZUKI, *supra* note 53, at 307.

¹¹³ Thomas Dunlap, *Communing with Nature*, *HISTORY TODAY* 52, March 2002, at 36, 33.

placed upon an afterlife at the expense of what seemed a proper reverence for life on earth,” motivated his advocacy of a new ethic in which nature would “conspire with spirit to emancipate us.”¹¹⁴ He “imagined that the world is held together by a spirit that is not of the church, and certainly not of Reason, but of a direct experience of the world.”¹¹⁵ For Transcendentalists, “nature thus replaces Christ as the revealed image of God that offers salvation to those that follow it.”¹¹⁶ Emerson’s friend Henry David Thoreau chronicled his “emancipation” in *Walden*, and “both saw nature pointing beyond itself to an unconditioned infinite.”¹¹⁷ They believed that “the creator was present in nature, that enlightenment was more possible in a forest than a cathedral, and that the preservation of wilderness was essential to human creativity.”¹¹⁸ Transcendentalism insisted that “Nature in all her complexity is the place where the secrets of existence and being are to be found.”¹¹⁹

The renascent environmentalism of the 1960s was hugely influenced by Transcendental thought, and “inherited this belief in Nature as the door to spiritual truth and the place of ultimate reality.”¹²⁰ Countercultural back-to-nature trekkers sought to “rediscover enchantment as the spiritual foundation for an ecological ethic.”¹²¹ Their prominence (or notoriety) surely influenced Chief Justice Warren Burger’s opinion in *Wisconsin v. Yoder*, when he contrasted the Amish’s religiously-founded lifeway with Thoreauvian nature mysticism, to the obvious detriment of the latter.¹²² Critics challenge Burger’s distinction, asserting that ecologists’ “basic orientation” not only “reaches the level of religion,” but that their spiritual focus demonstrates that “they are dealing with the

¹¹⁴ EDWARD HOAGLAND, HOAGLAND ON NATURE: ESSAYS 450 (2003); EMERSON, *supra* note 105, at 64.

¹¹⁵ CURTIS WHITE, THE SPIRIT OF DISOBEDIENCE: RESISTING THE CHARMS OF FAKE POLITICS, MINDLESS CONSUMPTION AND THE CULTURE OF TOTAL WORK 105 (2007).

¹¹⁶ SZERSZYNSKI, *supra* note 102, at 87.

¹¹⁷ *Id.* at 86.

¹¹⁸ HAYDEN, *supra* note 43, at 150-51.

¹¹⁹ RICHARD C. GODDARD, ED., THE ESSENTIAL TRANSCENDENTALISTS 251 (2006).

¹²⁰ Dunlap, *supra* note 113, at 34.

¹²¹ SANGUIN, *supra* note 52, at 66.

¹²² *Wisc. v. Yoder*, 406 U.S. 205 (1972).

ultimate questions.”¹²³ “Environmentalism can function as a religion,” they contend, “because it begins with religious emotions and connects them to an articulated set of beliefs about our place in the universe.”¹²⁴ They conclude that “until we restore a spiritual covenant with the earth, we will forever roll the environmental stone up a mountain of frustration.”¹²⁵ Justice Scalia’s skepticism toward and dismissal of venerable natural-spiritual traditions presents a truly Sissyphean challenge for environmental plaintiffs.

B. Native American Beliefs

Native American languages do not contain a word for “religion,” instead offering “innumerable metaphors for the spiritual path, luminous expressions for the right road to take in life.”¹²⁶ Their spirituality is indistinguishable from their *lifeway*, and is not “compartmentalized,” but “integrated into the totality of life.”¹²⁷ Tribes believe that “the well-being of people and nature are inextricably linked.”¹²⁸ Holistic Native American spiritualities have struggled to achieve judicial recognition and respect, due to the employment of Western criteria for what is, and what is not, a “religion.”

Courts have largely resisted recognizing Native Americans’ abiding fealty to a pre-Cartesian paradigm, an “animated world,” in which “mountains, forests, rivers, lakes, winds and the sun may all have their presiding deities, while each tree, stone and animal may have, or be, a spirit.”¹²⁹ An ethnographer noted that “one need not romanticize Indian attitudes toward nature in order to acknowledge that attitudes and ethics

¹²³ Dunlap, *supra* note 113, at 37.

¹²⁴ GOTTLIEB, *supra* note 61, at 160.

¹²⁵ HAYDEN, *supra* note 43, at 1.

¹²⁶ Phil Cousineau, *Introduction to A SEAT AT THE TABLE: HUSTON SMITH IN CONVERSATION WITH NATIVE AMERICANS ON RELIGIOUS FREEDOM* xix (Cousineau, ed., 2006).

¹²⁷ *Id.* at 30; Elizabeth Roberts, *Gaian Buddhism*, in *DHARMA GAIA: A HARVEST OF ESSAYS IN BUDDHISM AND ECOLOGY* 147, 152 (Allan Hunt Badiner, ed., 1990).

¹²⁸ GOTTLIEB, *supra* note 61, at 142.

¹²⁹ DAVID SUZUKI, *THE SACRED BALANCE: REDISCOVERING OUR PLACE IN NATURE* 188 (2002).

about beings and forces that reside in the natural environment and the wider universe were and remain a bedrock of (their) belief systems.”¹³⁰ Given that “there is no such thing as an ‘inanimate object’ in many North American cosmologies,” sentience abounds.¹³¹ Disdaining the pyramid paradigm of existence—with mankind at the pinnacle—“every culture that has managed to sustain itself over the course of many centuries without destroying the land that supports it” resists demarking “a distinction between animals and inanimate matter.”¹³² Science’s “discovery” of the integral interconnectedness of ecosystems has punctured the arrogance and condescension with which Western culture relegated tribal beliefs to “the childhood of the human race.”¹³³ Native Americans presciently respected “the autonomy and integrity of the nonhuman part of the world, an ‘other’ we are barely beginning to know.”¹³⁴ However, American culture remains amenable to incorporating “elements of traditional Native knowledge about nature (only if) they are suitably couched in sentimental, romantic, or culturally subordinate terms,” but resists philosophical equality for beliefs considered “culturally superseded and displaced.”¹³⁵

Native Americans remain wary of efforts to assimilate their locale-specific Earth spirituality. Chief Luther Standing Bear observed that “the white man does not understand the Indian for the reason that he does not understand America. He is too far removed from its formative processes.”¹³⁶ Although the “interweaving of ecological and religious themes is a constant among most native peoples across North America,” these ancient faiths “are not directly translatable across cultures,” as tribal

¹³⁰ PETER NABOKOV, *WHERE THE LIGHTNING STRIKES: THE LIVES OF AMERICAN INDIAN SACRED PLACES* xiii (2006).

¹³¹ DONALD A. GRINDE & BRUCE E. JOHANSEN, *ECOCIDE OF NATIVE AMERICA: ENVIRONMENTAL DESTRUCTION OF INDIAN LANDS AND PEOPLES* 16 (1995).

¹³² DERRICK JENSEN, *HOW SHALL I LIVE MY LIFE: ON LIBERATING THE EARTH FROM CIVILIZATION* 220 (2008) (quoting David Abram).

¹³³ Roberts, *supra* note 127, at 152.

¹³⁴ GARY SNYDER, *A PLACE IN SPACE: ETHICS, AESTHETICS, AND WATERSHEDS* 168 (1995).

¹³⁵ DAVID SUZUKI & PETER KNUDTSON, *WISDOM OF THE ELDERS: SACRED NATIVE STORIES OF NATURE* 5 (2002).

¹³⁶ T.C. McLuhan, *TOUCH THE EARTH: A SELF-PORTRAIT OF INDIAN EXISTENCE* 107 (Outerbridge & Diefenfrey 1971).

legal challenges concerning "land" demonstrate.¹³⁷ Native claims are "resisted by the dominant culture and the courts" as their spirituality "remains virtually incomprehensible to Euro-Americans."¹³⁸ American culture's "self-congratulatory *ignorance* of the natural world" suggests that "no real progress can be made in environmental law unless some of the insights of the sacredness of land derived from traditional religions become basic attitudes of the larger society."¹³⁹

Native American sacred ground beliefs elude ready ideological—and legal—categorization. Even establishing the *origin* of sacred places presents difficulty, as "a natural site can be *made* sacred through various rituals, or it can be *recognized* as sacred."¹⁴⁰ Sacred places are "habitats permeated with what lies *within* or *beneath* what the eye can see."¹⁴¹ Further, tribal cultures believe that "all of their mutually owned territory holds life and spirit."¹⁴² These places are "invested with belief," but "conventional jurisprudence denies the mere possibility of land itself being sacred as opposed to being a place where religious rituals take place."¹⁴³ The Supreme Court has stymied Native American plaintiffs with "its insistence on analyzing tribal religions within the same conceptual framework" as mainstream faiths, which substantially disadvantages them.¹⁴⁴ Insisting upon the production of corroborating archival/scriptural writings and visible hierarchies, the Court has failed to recognize that the necessary "authorization to perform ceremonies comes from higher spiritual powers and not by certification by an institution or even by any formal organization."¹⁴⁵ Ironically, many Christian

¹³⁷ GRINDE & JOHANSEN, *supra* note 131, at 43.

¹³⁸ SNYDER, *supra* note 89, at 87.

¹³⁹ *Id.* at 100; VINE DELORIA JR., FOR THIS LAND: WRITING ON RELIGION IN AMERICA 213 (Routledge 1999).

¹⁴⁰ Harry Oldmeadow, "The Firmament Showeth His Handiwork: Reawakening a Religious Sense of the Natural Order 29, 36, in SEEING GOD EVERYWHERE: ESSAYS ON NATURE & THE SACRED (McDonald, ed., 2003).

¹⁴¹ NABOKOV, *supra* note 130, at xiv.

¹⁴² SNYDER, *supra* note 89, at 100.

¹⁴³ CORMAC CULLINAN, WILD LAW: A MANIFESTO FOR EARTH JUSTICE 161 (Green Books 2003).

¹⁴⁴ DELORIA, *supra* note 139, at 205.

¹⁴⁵ *Id.* at 206.

cathedrals and shrines reside over the remains of pre-Christian sites "where human beings have always gone to communicate and be with higher spiritual powers."¹⁴⁶ However, "within North America these sacred sites have been revealed only to Native Americans."¹⁴⁷

But with exclusive knowledge comes the arduous task of convincing courts that sacred sites, existing without commemorative edifices or written documentation, deserve recognition. Unlike Christendom's holy shrines, Native American sacred sites "are perceived to be of a high spiritual density because of plant or animal habitat intensities, or associations with legend, or connections with human totemic ancestry, or because of geo-morphological anomaly, or some combination of qualities."¹⁴⁸ The Euro-American "aesthetic of the sublime" has dominated landscape appreciation, and contributed to judicial confusion in acknowledging Native American sites which "do not always conform to our ideas of what a sacred place is like."¹⁴⁹ Courts remain resistant to the notion that America "is teeming with holy places, sacred sites that are far more diverse even than those in the Middle East, sites that predate the writings of the Bible and the Koran."¹⁵⁰

The High Court's 1988 *Lyng* decision exemplified its reluctance to incorporate non-Christian conceptions of sacred ground and recognize that tribal spiritual sites are not characterized by edifices, signage, written histories or the daily arrival of tour buses.¹⁵¹ In refusing to protect a Northern California sacred grove, the majority failed to heed dissenting Justice William Brennan's exhortation to think outside of Western religious parameters. *Lyng* was only one of a series of legal setbacks for Native Americans, who often must pay "visitor" fees to access their sacred grounds; religious scholar Huston Smith noted that "I'm trying to imagine

¹⁴⁶ *Id.* at 210.

¹⁴⁷ *Id.*

¹⁴⁸ SNYDER, *supra* note 89, at 100.

¹⁴⁹ John Rodman, *Four Forms of Ecological Consciousness Reconsidered*, in THE DEEP ECOLOGY MOVEMENT: AN INTRODUCTORY ANTHOLOGY 242, 247 (Alan Drengson & Yuichi Inoue, eds., 1995).

¹⁵⁰ Walter Echo-Hawk, *Five-Hundred Nations Within One: the Search for Religious Justice*, in A SEAT AT THE TABLE: HUSTON SMITH IN CONVERSATION WITH NATIVE AMERICANS ON RELIGIOUS FREEDOM 24, 37 (Phil Cousineau, ed., 2006).

¹⁵¹ *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

what would happen if a Christian pilgrim were required to pay a permit fee to pray at one of her holy places, such as Notre Dame Cathedral, but it's almost unimaginable."¹⁵² San Carlos Apaches in Arizona expressed consternation that their challenge to planned construction on Mount Graham required "archaeological or documentary proof," to establish sacredness.¹⁵³ Given the Vatican's involvement in the project, the tribe contrasted Catholic belief in angel-visitors to Earth with judicial denials of philosophically-similar tribal claims, asking "why is it that our faith has to be mediated through the church and verified to be made credible?"¹⁵⁴

Lyng illustrates a proclivity toward doing "exactly what the Supreme Court avows is not be done—it allows the courts to rule on the substance of religious belief and practice."¹⁵⁵ Tribal religions "are land-based theologies whose effectiveness is dependent upon access to specific sacred sites," and when tribal access is circumscribed, religionists "are effectively denied their constitutionally guaranteed rights."¹⁵⁶ These exclusionary decisions illustrate that "courts will protect a religion if it shows every symptom of being dead but will severely restrict it if it appears to be alive."¹⁵⁷ A Lakota tribe activist noted that "when nations say that one of their primary constitutional principles is respect for religion, they must mean respect for the religion of every tradition."¹⁵⁸

C. Buddhism, Deep Ecology, and the New Physics

Buddhism has taken root with a growing number of Americans seeking a faith tradition free of the cultural baggage of an acquisitive,

¹⁵² Quoted in Charlotte Black Elk, *The Homelands of Religion: the Clash of Worldviews Over Prayer, Place, and Ceremony*, in *A SEAT AT THE TABLE: HUSTON SMITH IN CONVERSATION WITH NATIVE AMERICANS ON RELIGIOUS FREEDOM* 58, 66 (Phil Cousineau, ed., 2006).

¹⁵³ Anthony Guy Lopez, *The Fight for Mount Graham: Looking for the Fingerprints of God*, in *A SEAT AT THE TABLE*, 147, 153.

¹⁵⁴ *Id.* at 155.

¹⁵⁵ DELORIA, *supra* note 139, at 211.

¹⁵⁶ MCLUHAN, *THE WAY OF THE EARTH: ENCOUNTERS WITH NATURE IN ANCIENT AND CONTEMPORARY THOUGHT* 378 (Simon & Schuster 1994).

¹⁵⁷ DELORIA, *supra* note 139, at 211-12.

¹⁵⁸ Charlotte Black Elk, *supra* note 152, at 72.

materialistic society; “just as once before Reformation Protestantism was the transformation of Christianity in the shift from medievalism to modernism, so now is Reformation Buddhism part of the transformation from European to planetary culture.”¹⁵⁹ Today, it “presents a new face to the environmental crisis—which is, on a deeper level, a crisis of character and cultural integrity.”¹⁶⁰ Like Native American beliefs, Buddhism lies outside the Judeo-Christian consensus, as it “contains no covenant with an externalized deity, and no dimension of divinity outside the basic stuff of the universe.”¹⁶¹ Accordingly, a number of notable environmentalists “have turned to Buddhism as a conceptual resource for a new ecological ethics.”¹⁶²

Buddhism embraces what Emerson termed “largeness,” or seeing value in all elements of nature.¹⁶³ Buddhism “never made the sharp separation between the human and the rest of biological nature that is formalized in the ‘religions of Abraham’—Judaism, Christianity and Islam.”¹⁶⁴ It provides “a very powerful counterweight to the fragmenting, separating views so entrenched in Western approaches.”¹⁶⁵ Buddhists contend that “to treat nature as something irrational and in opposition to human ‘rationality’ is a purely Western idea.”¹⁶⁶

Buddhism exhibits “a fundamental reluctance to postulate a transcendent being as the origin of all things.”¹⁶⁷ It is more amenable to incorporating new scientific insights because “in Buddhism, spiritual authority cannot outweigh an understanding based on reason and

¹⁵⁹ CALLICOTT, *supra* note 51, at 25 (quoting William Irwin Thompson).

¹⁶⁰ Bill Devall, *Ecocentric Sangha*, in DHARMA GAIA: A HARVEST OF ESSAYS IN BUDDHISM & ECOLOGY 155, 158 (1990).

¹⁶¹ HAYDEN, *supra* note 43, at 127.

¹⁶² Duncan Ryuken Williams, *Introduction* to BUDDHISM AND ECOLOGY: THE INTERCONNECTION OF DHARMA AND DEEDS xxxv (Mary Evelyn Tucker & Williams, eds., 1997); see also the Forum on Religion and Ecology website at <http://environment.harvard.edu/religion/main.html>.

¹⁶³ EMERSON, *supra* note 105, at 244.

¹⁶⁴ GARY SNYDER, BACK ON THE FIRE: ESSAYS 27 (Shoemaker & Hoard, 2007).

¹⁶⁵ KAZA, *supra* note 5, at 40.

¹⁶⁶ SUZUKI, *supra* note 53, at 281.

¹⁶⁷ DALAI LAMA, *supra* note 107, at 84.

experience.”¹⁶⁸ Both Buddhism and ecology maintain “the commitment to keep searching for reality by empirical means and to be willing to discard accepted or long-held positions.”¹⁶⁹ But ecological science has *validated* the integral Buddhist insight of interconnectedness, or “dependent co-origination,” which lies “at the heart of Buddhist understanding.”¹⁷⁰ This posits that “all things—objects and beings, exist only interdependently, not *independently*,” so that “nothing has a separate existence (and) everything is alive, and influences everything else.”¹⁷¹ The Dalai Lama sees “a direct connection between the correct understanding of ecology and the natural environment” and interdependence “in terms of causes and effects, parts and wholes, factors and aggregates.”¹⁷² He echoes Aldous Huxley’s adage that “elementary ecology leads straight to elementary Buddhism.”¹⁷³

In contrast to Justice Scalia’s daunting standing threshold, requiring *direct* injury from environmental damage, Buddhism envisions a global ecosphere, a “network of complex interrelations (in which) anything that exists and has an identity does so only within the total network of everything that has a possible or potential relation to it.”¹⁷⁴ In such a “seamless unity,” it is “impossible to consider man apart from nature, as an exiled spirit who controls this world by having its roots in another.”¹⁷⁵ While Scalia regards ecosystem elements as independent, stand-alone entities, Buddhists portray nature as “through and through relational, and interference at one point has interminable and unforeseeable effects.”¹⁷⁶ Buddhism’s “boundary of community does not

¹⁶⁸ *Id.* at 24.

¹⁶⁹ *Id.* at 25.

¹⁷⁰ Allan Hunt Badiner, *Introduction to DHARMA GAIA: A HARVEST OF ESSAYS IN BUDDHISM AND ECOLOGY* xvi (Badiner, ed., 1990).

¹⁷¹ *Id.*

¹⁷² Dalai Lama, *A Tibetan Buddhist Perspective on Spirit in Nature*, in *SPIRIT AND NATURE: WHY THE ENVIRONMENT IS A RELIGIOUS ISSUE* 109, 114 (Steven C. Rockefeller & John Elder, eds., 1992).

¹⁷³ ALDOUS HUXLEY, *ISLAND* 261 (HarperCollins 2002).

¹⁷⁴ DALAI LAMA, *supra* note 107, at 64.

¹⁷⁵ WATTS, *supra* note 44, at 4.

¹⁷⁶ *Id.* at 61.

stop with the human realm.”¹⁷⁷ Accordingly, “the most important single ethical teaching of the Buddhist tradition is nonviolence to all of nature, *ahimsa*.”¹⁷⁸ A Buddhist environmentalist emphasizes that “when we realize the interdependent universe, there’s no way to avoid responsibility for it; it becomes unavoidably clear that what we do and what happens to us are the same thing.”¹⁷⁹

Buddhist naturalist-poet Gary Snyder was “one of the first Westerners to recognize the rich potential of the interface between Buddhism and ecology,” and personifies “a cross-fertilization of ancient Buddhist tradition and current ecological strategies.”¹⁸⁰ He “crystallized the Eastern influence on the Pacific side of North America” and “helped to inspire the back to the land movement.”¹⁸¹ Snyder sought a spiritual alternative to “an American ethos that still viewed the natural world as raw material for industrial growth,” and found in Buddhism “a view of nature in which all beings—human and non-human—were bound together in a sacred web.”¹⁸²

Buddhism contravenes Western philosophy’s contention that “human beings enjoy a unique existential status.”¹⁸³ It regards humanity as “a product of an impersonal universe and not a special creation. The universe was not created for human beings nor are human beings the highest form of intelligence.”¹⁸⁴ Buddhists do not “recognize any *essential* difference between human beings and lower animals; the differences are considered to be qualitative rather than absolute.”¹⁸⁵

¹⁷⁷ Joan Halifax, *The Third Body: Buddhism, Shamanism, and Deep Ecology*, in DHARMA GAIA: A HARVEST OF ESSAYS IN BUDDHISM AND ECOLOGY 20, 25 (Allan Hunt Badiner, ed., 1990).

¹⁷⁸ SNYDER, *supra* note 164, at 52.

¹⁷⁹ JOHN DAIDO LOORI, TEACHINGS OF THE EARTH: ZEN AND THE ENVIRONMENT 27-28 (2007).

¹⁸⁰ Williams, *supra* note 162, at xxxviii; TIMOTHY GRAY, GARY SNYDER AND THE PACIFIC RIM: CREATING COUNTERCULTURAL COMMUNITY 283 (2006).

¹⁸¹ Alan Drengson, *Introduction to THE DEEP ECOLOGY MOVEMENT: AN INTRODUCTORY ANTHOLOGY* xv (Drengson & Yuichi Inoue, eds., 1995).

¹⁸² ROD PHILIPS, “FOREST BEATNIKS” AND “URBAN THOREAU’S” 13 (Peter Lang 2001).

¹⁸³ DALAI LAMA, *supra* note 107, at 106.

¹⁸⁴ DANIEL H. HENNING, BUDDHISM AND DEEP ECOLOGY 91 (2002).

¹⁸⁵ *Id.*

Buddhist environmentalism is premised "first and foremost on the grounds of the intrinsic value of animals, plants, rivers, mountains, and ecosystems rather than simply on the basis of their utilitarian value or benefit to humans."¹⁸⁶ Accordingly, "Nature cannot be conceived as a merely passive substance upon which Man works."¹⁸⁷ Even as they recognize that "change is inherent in nature, Buddhists believe that natural processes are directly affected by human morality," so that "our relationship to the natural environment is intrinsically moral."¹⁸⁸

The late Norwegian philosopher Arne Naess coined the term "deep ecology" to describe "the ethical and religious attitude of valuing nature for its own sake."¹⁸⁹ The symmetry between deep ecology and Buddhism stems from similar "acceptance and compassion for all living things."¹⁹⁰ Both Deep Ecology and Zen Buddhism "claim to provide an unmediated access to truth, grounded in experience rather than dogma and ritual."¹⁹¹ Snyder was one of the "harbingers of the deep ecology movement and its philosophical and literary development," and influenced deep ecologists' embrace of Buddhism "in their attempt to articulate and support their vision of the structure of reality."¹⁹² Naess's "platform" for deep ecological action "is grounded in religion or philosophy."¹⁹³ Deep Ecology comprises an "ecospirituality—a form of contemporary religion which does not just concern itself with environmental matters, but is completely structured around ideas of ecological interdependence (and) the monistic desire for a fusion between self and cosmos."¹⁹⁴ Deep

¹⁸⁶ ROCKEFELLER, *supra* note 67, at 143.

¹⁸⁷ SUZUKI, *supra* note 53, at 280.

¹⁸⁸ Donald K. Swearer, *Principles and Poetry, Places and Stories: the Resources of Buddhist Ecology*, DAEDALUS (Fall 2001), available at http://www.accessmylibrary.com/coms2/summary_0286-10283821_ITM.

¹⁸⁹ David Landis Barnhill & Roger S. Gottlieb, *Introduction* to DEEP ECOLOGY & WORLD RELIGIONS: NEW ESSAYS ON SACRED GROUNDS 1 (Barnhill & Gottlieb, eds., 2001).

¹⁹⁰ HENNING, *supra* note 184, at 12.

¹⁹¹ SZERSZYNSKI, *supra* note 102, at 126.

¹⁹² David Landis Barnhill, *Relational Holism: Huayan Buddhism & Deep Ecology*, in DEEP ECOLOGY & WORLD RELIGIONS 77-78 (2001).

¹⁹³ Arne Naess, *The Apron Diagram*, in THE DEEP ECOLOGY MOVEMENT 11 (Drengson & Inoue, eds., 1995).

¹⁹⁴ SZERSZYNSKI, *supra* note 102, at 126.

ecologists “receive sacred truths from the natural world” as other faiths “see themselves receiving The Truth from scripture or direct encounters with God.”¹⁹⁵ Thus, deep ecology merges with spirituality because the experience of being connected with all of nature...is the very essence of spirituality.”¹⁹⁶ Naess believes that “deep ecology has a religious component, and those people who have done the most to make societies aware of the destructive way in which we live in relation to natural settings have had such religious feelings.”¹⁹⁷

Deep ecology’s bedrock tenet is valuing “all organisms and entities in the ecosphere as parts of the interrelated whole (and) equal in intrinsic worth,” thus recognizing a “core democracy in the biosphere.”¹⁹⁸ In this egalitarian biosphere, “Human and nonhuman entities are in constant spiritual interchange,” so that any environmental action embodies “a moral question, not one simply of efficiency or property rights.”¹⁹⁹ While “property owners appeal to the absolute quality of their right to do what they want with what they own,” deep ecologists insist that “the value of the ecosystem takes precedence over that right.”²⁰⁰

Deep ecology’s insights complement Lovelock’s “Gaia Hypothesis,” which “postulates that the physical and chemical condition of the surface of the Earth, of the atmosphere, and of the oceans has been and is actively made fit and comfortable by the presence of life itself.”²⁰¹ Lovelock’s “message of a self-regulating Earth” reveals that “the exquisitely delicate receptivity of living beings to their surroundings acts as an environmental sensor for the planet as a whole.”²⁰² His hypothesis “represents a unique moment in scientific thought: the first glimpse, from within the domain of pure and precise science, that (Earth) might best be

¹⁹⁵ Roger S. Gottlieb, *Spiritual Deep Ecology and World Religions: a Shared Fate, a Shared Task* in DEEP ECOLOGY & WORLD RELIGIONS 17, 19.

¹⁹⁶ FRITJOF CAPRA, THE TAO OF PHYSICS: AN EXPLORATION OF THE PARALLELS BETWEEN MODERN PHYSICS AND EASTERN MYSTICISM 7 (4TH ed., 2000).

¹⁹⁷ BILL DEVALL & GEORGE SESSIONS, DEEP ECOLOGY 76 (1985) (quoting Interview with Arne Naess, in L.A., Cal. (April 1982)).

¹⁹⁸ *Id.* at 67, 75.

¹⁹⁹ Barnhill & Gottlieb, *supra* note 189, at 6.

²⁰⁰ *Id.* at 7.

²⁰¹ LOVELOCK, *supra* note 126, at 144.

²⁰² STEPHAN HARDING, ANIMATE EARTH: SCIENCE, INTUITION AND GAIA 74 (2006).

described as a coherent living entity.”²⁰³ It suggests that nature cannot wisely be controlled in the same way in which it has been studied—piecemeal. Nature is through and through relational, and interference at one point has interminable and unforeseeable effects.”²⁰⁴ Lovelock notes that “Evolution is not just a property of organisms—what evolves is the whole Earth system with its living and non-living parts existing as a tight coupled entity.” Thus, “Earth is a living organism and should be treated and understood accordingly.”²⁰⁵ Lovelock’s hypothesis reinforces the sense that “nature is our community...not separate from us but rather...the fundamental existential context of our lives.”²⁰⁶ When we condone environmental damage, we “diminish our own existence,” for “what we do to our surroundings we are doing to ourselves.”²⁰⁷

The New Physics opens the dustbin of history for traditional conceptions of nature and cosmology, which “viewed the world as a collection of discrete entities or substances.”²⁰⁸ Instead, it supplants independence with interdependence, depicting the natural world “as a constant flux or flow of energy transformations.”²⁰⁹ Heisenberg’s Uncertainty Principle holds that “at a quantum level, the universe is indeterminate.” It replaces the concept of independent entities “with a relational universe in which everything is hitched to everything else.”²¹⁰ Systems theory “focuses on understanding anything by looking at its context or role within a larger system, rather than by dissecting the system and analyzing the component parts in isolation”—as is Justice Scalia’s tendency in environmental cases.²¹¹ Unlike Justice Scalia’s “weekend gardener” approach to ecology, systems theorists stress that “the nature

²⁰³ David Abram, *The Perceptual Implications of Gaia*, in DHARMA GAIA: A HARVEST OF ESSAYS IN BUDDHISM AND ECOLOGY 75, 75 (Allan Hunt Badiner, ed., 1990).

²⁰⁴ WATTS, *supra* note 44, at 61.

²⁰⁵ DEVAL & SESSIONS, *supra* note 197, at 89.

²⁰⁶ David Landis Barnhill, *Great Earth “Sangha”*: Gary Snyder’s View of Nature as Community,” in BUDDHISM AND ECOLOGY: THE INTERCONNECTION OF DHARMA AND DEEDS 187, 188 (Tucker & Williams, eds., 1997).

²⁰⁷ BERRY, *supra* note 65, at 81; SUZUKI, *supra* note 129, at 179.

²⁰⁸ DEVAL & SESSIONS, *supra* note 197, at 88.

²⁰⁹ *Id.*

²¹⁰ SANGUIN, *supra* note 52, at 217.

²¹¹ CULLINAN, *supra* note 143, at 47.

and behavior of a part is determined by the whole rather than the other way around.”²¹² Quantum physics and deep ecology share an “insistence that things cannot be separated from what surrounds them without smaller or greater arbitrariness.”²¹³ As the great naturalist John Muir observed, “When we try to pick out anything by itself, we find it hitched to everything else in the universe.”²¹⁴ Systems-rooted Gaia theory holds that “seemingly insignificant changes can be amplified beyond all recognition into huge effects,” debunking the “notion that it is possible to control nature, at least in anything but limited ways.”²¹⁵

Systems theory discloses that “the way we have been looking at nature is no longer comprehensive enough to explain all that we can observe,” and directs us “to develop a more inclusive view.”²¹⁶ Physicist Fritjof Capra notes how “the two foundations of twentieth-century physics—quantum theory and relativity theory—both force us to see the world very much in the way a Hindu, Buddhist, or Taoist sees it.”²¹⁷ The Dalai Lama concurs, noting that if “matter is revealed to be less solid and definable than it appears, then it seems to me that science is coming closer to the Buddhist contemplative insights of emptiness and interdependence.”²¹⁸ His insight reflects how “ecology and physics (Quantum Theory) converge toward the same metaphysical notions and that the concepts used in both complement each other.”²¹⁹ Thus, the New Physics “can be seen as providing an account of creation that is the equal of any myth-ological, religious, or speculative philosophical account in terms of scale, grandeur, and richness of detail.”²²⁰ Yet Scalia and judicial conservatives persist in “trying to apply the concepts of an outdated world

²¹² *Id.*

²¹³ THE ECOLOGY OF WISDOM: WRITINGS BY ARNE NAESS 72 (Alan Drengson & Bill Devall, eds., 2008).

²¹⁴ KAZA, *supra* note 5, at 35 (quoting John Muir).

²¹⁵ HARDING, *supra* note 202, at 187, 33.

²¹⁶ ZUBAV, *supra* note 6, at 20.

²¹⁷ CAPRA, *supra* note 196, at 18.

²¹⁸ DALAI LAMA, *supra* note 107, at 50.

²¹⁹ BILL DEVAL, SIMPLE IN MEANS, RICH IN ENDS: PRACTICING DEEP ECOLOGY 19 (1988) (quoting J. Baird Callicott).

²²⁰ Warwick Fox, *Transpersonal Ecology and the Varieties of Identification*, in THE DEEP ECOLOGY MOVEMENT 136, 140 (Drengson & Inoue, eds., 1995).

view—the mechanistic worldview of Cartesian-Newtonian science—to reality that can no longer be understood in terms of those concepts.”²²¹ “Historians of the future may look back in some astonishment,” Theodore Roszak observes, “wondering why so few thinkers registered the full importance of the revolution in cosmology that took place in their lifetime.”²²² If systems theory has ushered in the Great Turning—“the recognition of our essential non-separateness from the world”—Justice Scalia’s environmental analysis might be termed the Great Returning—to an archaic paradigm that has fallen into both scientific *and* religious disrepute.²²³ As Lovelock observes, “We are no more qualified to be stewards or developers of the Earth than are goats to be gardeners.”²²⁴

D. Protestant & Evangelical Christian Environmentalism

“Perhaps Christians need a new Sermon on the Mount,” Lovelock offers, “that sets out the human constraints needed for living decently with the Earth, and which spells out the rules for its achievement.”²²⁵ Despite legacies of involvement in civil rights and antiwar causes, Christian congregations “have only recently begun to redefine social justice to include the whole planet and all its creatures as members of a community in need.”²²⁶ The National Religious Partnership for the Environment recognizes that “caring for creation is a fundamentally religious imperative that transcends denominational differences and partisan politics.”²²⁷ The National Association of Evangelicals released an “Evangelical Climate Initiative,” supporting Bill Moyers’ contention that

²²¹ FRITJOF CAPRA, *THE TURNING POINT: SCIENCE, SOCIETY, AND THE RISING CULTURE* 15-16 (1983).

²²² THEODORE ROSZAK, *THE VOICE OF THE EARTH: AN EXPLORATION OF ECOPSYCHOLOGY* 17 (2001 ed.).

²²³ JOANNA MACY, *WORLD AS LOVER, WORLD AS SELF: A GUIDE TO LIVING FULLY IN TURBULENT TIMES* 140 (2007 ed.).

²²⁴ JAMES LOVELOCK, *THE REVENGE OF GAIA: EARTH’S CLIMATE CRISIS AND THE FATE OF HUMANITY* 137 (2007).

²²⁵ *Id.*

²²⁶ Trebbe Johnson, *The Second Creation Story*, SIERRA, Nov./Dec. 1998 at 50, available at <http://www.sierraclub.org/sierra/199811/second.asp>.

²²⁷ *Id.*

“It’s no longer possible to avoid what’s obvious. It’s reality intruding on (their) ideology that has brought so many evangelicals to think about global warming.”²²⁸

The omnipresent climate crisis is eroding an evangelical mindset which “had long been allergic to anything like environmentalism, associating it with ...nature-worshipping hippies.”²²⁹ Once viewed as “surreptitiously idolatrous,” earth-friendly beliefs are now incorporated into a “deep ecumenism,” in which creation is a continuing process requiring humankind’s active assistance.²³⁰ In the New Creation Ethic, “the earth itself is an embodiment of the divine,” representing “a source of divine wisdom,” which can be considered “sacred revelation.”²³¹ In this new eco-theological paradigm, “God’s spirit is not a distant abstraction but a living being who subsists in and through the natural world.”²³² Creation theology proposes that “God is not a dispassionate and distant potentate...who exercises dominion over the universe from some far-removed place,” but an active presence in our natural environment.²³³ As Father Matthew Fox notes:

During the Newtonian era a miracle consisted of divine meddling into the universe’s machinery, an interruption of the absolute mathematical laws of the universe. But in a creation theology, a miracle is not about interfering with nature’s laws. It’s the opposite. It’s about realizing that nature’s laws...are miracles.²³⁴

Creation theology echoes a core concept of deep ecology, in which mankind assumes a more humble and cooperative attitude toward the rest

²²⁸ Karen Breslau, *How Green Is My God?: Bill Moyers Discusses Why the Evangelical Right Has Begun to See the Light on Environmental Issues*, NEWSWEEK, Oct. 5, 2006, available at <http://www.newsweek.com/id/57645>.

²²⁹ Laurie Goodstein, *Living Day to Day by a Gospel of Green*, N.Y. TIMES, Mar. 8, 2007.

²³⁰ Wallace, *supra* note 109, at 293; MATTHEW FOX, CREATIVITY: WHERE THE DIVINE AND THE HUMAN MEET 176 (2004 ed.).

²³¹ SANGUIN, *supra* note 52, at 36.

²³² Wallace, *supra* note 109, at 301.

²³³ *Id.* at 312.

²³⁴ JENSEN, *supra* note 74, at 68.

of creation; it “decenters humans amidst the vastness of the universe and recenters us as part of, not apart from the great community of life. In particular, it highlights our role as a species among other species, all radically dependent on the earth for our sustenance and well-being.”²³⁵ Creation theology essentially re-positions humanity from aspiring for escape from a flawed Earth toward anticipating a “return to the garden as part of our original blessing.”²³⁶ Returning to the garden, however, obligates reversing the ecologically-destructive path of development, since as “God and the earth, Spirit and nature, share a common reality, the loss and degradation of the earth means loss and degradation for God as well.”²³⁷ Accordingly, our assault on nature “is the most horrid blasphemy. It is flinging God’s gifts into His face, as if they were of no worth beyond that assigned to them by our destruction of them.”²³⁸

E. Contemporary Catholic Environmentalism

Catholics are also beginning to “rethink how they relate to the Earth and to reevaluate their role in the ecological balance.”²³⁹ Although American bishops earlier launched anti-poverty and antiwar efforts, only recently have they addressed ecological concerns. The Church’s past reluctance to support ecological concerns might stem from the fact that “their religious worldview encouraged a sense of sacredness among a community of people rather than with nature.”²⁴⁰ Catholic environmentalists have rediscovered “a sense of kinship with nature” that was often evident “in pre-modern Catholic teachings.”²⁴¹

Until recently, Church teachings on nature “recalled ideas and an ideology from centuries ago: a dominion perspective in which humans were at the top of a pyramid,” and all other life forms “were intended for

²³⁵ Mary Evelyn Tucker, *Ethics and Ecology: a Primary Challenge on the Dialogue of Civilizations*, in ECOSPIRIT:

RELIGIONS AND PHILOSOPHIES FOR THE EARTH 495, 499 (Kearns & Keller, eds., 2007).

²³⁶ HAYDEN, *supra* note 43, at 77.

²³⁷ Wallace, *supra* note 109, at 292-93.

²³⁸ Berry, *supra* note 50, at 57.

²³⁹ Guhin, *supra* note 96, at 8.

²⁴⁰ *Id.*

²⁴¹ GOTTLIEB, *supra* note 61, at 90.

human use.”²⁴² This anthropocentric perspective highlighted “how far the culture of Catholicism has separated itself from the earth, from nature, from the key theological doctrine of immanence, of the Creator in the created, of God in all.”²⁴³ Catholic environmentalists now emulate Saint Francis, the “greatest spiritual revolutionary in Western history,” who strove to “substitute the idea of the equality of all creatures, including man, for the idea of man’s limitless rule of creation.”²⁴⁴ Lakota Indian Black Elk’s visionary message has influenced people of many faith traditions, yet most Catholics remain unaware that he was a coreligionist (baptized in 1904).²⁴⁵ He “integrated traditional Lakota spirituality and Christian beliefs as related perspectives on sacred reality,” stating that “We know we are related and are one with all the things of the heavens and the earth and we know that all things that move are a people as we.”²⁴⁶

Cistercian monk Thomas Merton’s immersion in Eastern religious thought furthered Catholic ecological thought as his “blending of Asian Buddhism with Western spiritual traditions” remains an indispensable resource.²⁴⁷ He mused about living “as something of a hermit-priest of the woods or the deserts or the hills, devoted to a Mass of pure adoration that would put all of nature on my paten in the morning and praise God more explicitly with the birds?”²⁴⁸

The Roman Catholic hierarchy has responded to the entreaties of environmental activists within the Church. The late Pope John Paul II’s 1990 World Day of Peace message criticized a “lack of deep respect for nature” and the “plundering of natural resources.”²⁴⁹ He noted that “Our very contact with nature has a deep restorative power,” and portrayed the

²⁴² JOHN HART, WHAT ARE THEY SAYING ABOUT ENVIRONMENTAL THEOLOGY 100 (2004).

²⁴³ Carroll, *supra* note 95, at 169.

²⁴⁴ White, *supra* note 62, at 1207.

²⁴⁵ HART, *supra* note 242, at 61-62.

²⁴⁶ *Id.* at 63.

²⁴⁷ HAYDEN, *supra* note 43 at 137; *see also* MERTON & BUDDHISM: REALIZING THE SELF (Bonnie Bouman Thurston, ed., 2007).

²⁴⁸ THOMAS MERTON, WHEN THE TREES SAY NOTHING: WRITINGS ON NATURE 168 (Kathleen Deignan, ed., 2003).

²⁴⁹ HART, *supra* note 242, at 12.

global climate threat as "a moral issue (that) has assumed such proportions as to be the responsibility of everyone."²⁵⁰ In 1999, the Pope warned that "The world's present and future depend on the safeguarding of creation because of the endless interdependence between human beings and their environment."²⁵¹ The Church now acknowledges the ecocentric premise that "People are immersed in the natural world, not transcendent to it or enthroned over it."²⁵² As Father Berry asserts, "Every being has rights to be recognized and revered. Trees have tree rights, insects have insect rights, rivers have river rights, mountains have mountain rights. So too with the entire range of beings throughout the universe."²⁵³

The striking similarity between these sentiments and those of Native Americans is not coincidental as the Church acknowledges its past culpability in suppressing tribal religions. The Bishops' 1992 Quincentenary Statement "recognized an important aspect of Indian/Native American traditions: the relationship between Earth and Native spirituality (implicitly recognizing that Native religions embody much of the respect for creation proclaimed by Catholic Church leaders)."²⁵⁴ It reflected "a heightened respect...for non-Christian and non-Western cultures and spirituality."²⁵⁵

However, this ecological ecumenism has not swayed Justice Scalia. His troubling "insensitivity to the Native American milieu" was evident in preliminary discussions before 1990's *Smith* decision, when he crudely analogized a Klamath Indian's taking peyote in a religious setting to Aztec human sacrifices.²⁵⁶ In the 1992 *Defenders of Wildlife* decision, he showed little tolerance for "the ecosystem nexus theory as well as its more anthro-po-centrally cast companions, the animal nexus and vocational nexus theories," summarily dismissing all three as 'beyond all reason,' 'beyond the limit,' and 'pure speculation and fantasy.'²⁵⁷

²⁵⁰ *Id.* at 13; Guhin, *supra* note 96, at 8.

²⁵¹ HART, *supra* note 242, at 15.

²⁵² *Id.* at 142.

²⁵³ *Id.* at 76.

²⁵⁴ *Id.* at 34.

²⁵⁵ *Id.* at 35.

²⁵⁶ GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 213 (2001); *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

²⁵⁷ Manus, *supra* note 16, at 128.

Catholicism's increasing ecocentric message will most likely irritate rather than inspire Scalia, who "has been known to leave churches where the religious teachings and practices are perceived as too liberal."²⁵⁸

IV. IV. STANDING ON A BURNING GAIAN DECK

Troposphere, whatever. I told you before I'm not a scientist. That's why I don't want to have to deal with global warming, to tell you the truth.

Justice Antonin Scalia²⁵⁹

So much of nature as he is ignorant of, so much of his own mind he does not yet possess.

Ralph Waldo Emerson, *The American Scholar*²⁶⁰

Conservatives fear that ecological ecumenism may undermine the corporate-globalist paradigm, as "the debate over business rights versus the rights of citizens is claiming public attention again."²⁶¹ There is increasing recognition that "There can be no sustainability when institutions whose primary purpose is to create money are dictating the standards."²⁶² Climate concern "drives religious groups to the political left," as they perceive that "the climate-changing elite assumes a divine right to alter the very cycles of nature on which human life depends."²⁶³

Environmentalists assert that "The real threat to liberty and the environment now stems from commercial institutions, and there is nothing" in classic liberal thought to effectively "handle this danger."²⁶⁴ They argue that "Free market rules for corporate freedom are increasingly

²⁵⁸ JAMES B. STAAB, *THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA: A HAMILTONIAN ON THE SUPREME COURT* 4 (2006).

²⁵⁹ Barnes, *supra* note 11.

²⁶⁰ EMERSON, *supra* note 105, at 87.

²⁶¹ PAUL HAWKEN, *BLESSED UNREST: HOW THE LARGEST MOVEMENT IN THE WORLD CAME INTO BEING AND WHY NO ONE SAW IT COMING* 67 (2007).

²⁶² *Id.* at 135.

²⁶³ GOTTLIEB, *supra* note 61, at 107; HAYDEN, *supra* note 43, at 167.

²⁶⁴ JENSEN, *supra* note 74, at 17 (quoting Christopher Manes).

rules which exclude real people from the economic and political affairs of society and disenfranchise them from nature.”²⁶⁵ Justice Scalia’s standing interpretations comprise disenfranchisement efforts diametrically opposed to an Emersonian worldview that “imagined religion, science, and nature as one field of thought, with no lacunae or elisions.”²⁶⁶ His textualist parsing divides while an ecologically-ruinous globalization conquers.

Environmentalists portray the globalized market as “the prime engine of landscape destruction,” in which “living processes become invisible externalities.”²⁶⁷ They note that it “is based on an impossible imperative—limitless increase in corporate profits,” with a “trajectory (that) leads to collapse,” as “No system can endure which seeks to maximize a single variable. No possibility exists for unlimited growth in a finite planet.”²⁶⁸ In contrast to nature’s diversity, “There’s nothing weaker than a global system that becomes a single unit. A single law corresponds to sudden death.”²⁶⁹ This “Ecological Tyranny of the Bottom Line,” ignores our ultimate dependence on nature for more than “resources.”²⁷⁰ Even globalization proselytizer Thomas Friedman now characterizes it as “a monster truck with the gas pedal stuck.”²⁷¹

Globalization’s excesses have in turn given rise to a new planetary consciousness, “moving from viewing earth as commodity to earth as community.”²⁷² The Great Turning emphasizes “recognition of our essential non-separateness from the world,” and “calls us from private property as an exclusive right to embracing the public trust of land and water and air for future generations as a sacred trust.”²⁷³ As Snyder observes, “Respect for nature comes with knowledge and contact, but attention to the observable order of nature is rarely practiced by those who

²⁶⁵ SHIVA, *supra* note 88, at 15.

²⁶⁶ HAWKEN, *supra* note 261, at 73.

²⁶⁷ ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 269 (2003); SHIVA, *supra* note 88, at 14-15.

²⁶⁸ MACY, *supra* note 223, at 142.

²⁶⁹ SERRES, *supra* note 1, at 41.

²⁷⁰ FOSTER, *supra* note 2, at 26; PETER G. BROWN, *THE COMMONWEALTH OF LIFE: ECONOMICS FOR A FLOURISHING EARTH* 100 (2ND ed., 2008).

²⁷¹ Thomas Friedman, *It’s Too Late for Later*, N.Y. TIMES, Dec. 16, 2007, at WK10.

²⁷² Tucker, *supra* note 235, at 500.

²⁷³ MACY, *supra* note 223, at 140; Tucker, *supra* note 235, at 500.

think that wealth is purely a creation of human organization, labor, or ingenuity.”²⁷⁴ In contrast, ecologists note that “Restraint in resource use and living within nature’s limits are preconditions for social justice,” and that “Social Justice and attending to the planet proceed in parallel; the abuse of one entails the exploitation of the other.”²⁷⁵ Environmental, religious, and civil rights elements now coalesce in legal-ecological claims, illustrating that “From social justice to eco-justice, the movement of human care and ethics is now part of ever-widening concentric circles.”²⁷⁶

Critics of this emerging ecumenical paradigm, in business-funded think tanks and faux-populist advocacy groups, depict ecologists as “threatening the sacred values of free enterprise and global capitalism, and seek to undermine the claims of scientific authority as ground for any significant response by relegating it to a matter of belief.”²⁷⁷ These deniers-for-hire strive to “corporatize how science is perceived and understood by the public, creating doubt and fear whenever possible.”²⁷⁸ In 2007 the American Enterprise Institute (Scalia’s mid-1970s employer) enticed academics with \$10,000 stipends to discredit a UN climate report.²⁷⁹ Similarly, the Acton Institute for the Study of Religion and Liberty provides its corporate sponsors with “greenwashing,” or “the ecological painting of economic interests under the guise of political and economic freedom.”²⁸⁰ Acton substitutes “the maxim of the separation of church and state (with) the separation of market and state, in which any

²⁷⁴ Gary Snyder, “Wild” in *China*, in *THE GARY SNYDER READER: PROSE, POETRY, AND TRANSLATIONS, 1952-1998*, 287, 291 (Snyder, ed., 2000).

²⁷⁵ SHIVA, *supra* note 88, at 50; HAWKEN, *supra* note 261, at 22.

²⁷⁶ Tucker, *supra* note 235, at 495.

²⁷⁷ Kearns, *supra* note 85, at 115-16.

²⁷⁸ HAWKEN, *supra* note 261, at 65.

²⁷⁹ Ian Sample, “Scientists Offered Cash to Dispute Climate Study,” *GUARDIAN*, Feb. 2, 2007, at Top Stories 1, available at

<http://guardian.co.uk/environment/2007/feb/02/frontpagenews.climatechange>.

²⁸⁰ Nicole A. Roskas, *Felling Sacred Groves: Appropriation of a Christian Tradition for Anti-Environmentalism*, in *ECOSPIRIT: RELIGIONS AND PHILOSOPHIES FOR THE EARTH* 483, 486 (Kearns & Keller, eds., 2007).

state should not negatively interfere with the practice of global free-market capitalism."²⁸¹

Theologian Harvey Cox observes that older, earth-revering religions are now rising in opposition to this "religion of the global market," because the spirit traditions emphasize man's place in an ecosystem, "while in the market's eyes all places are interchangeable."²⁸² Think-tanks' encomiums for globalization confirm Cox's contention that "The Market is becoming more like the Jahweh of the Old Testament—not just one superior deity contending with others, but the Supreme Deity, the only true God, whose reign must now be universally accepted and allows for no rivals."²⁸³ David Loy maintains "the Market is becoming the first truly world religion, binding all corners of the globe more and more into a worldview and set of values whose religious role we overlook only because we insist on seeing them as secular."²⁸⁴ Environmentalists characterize "the stamp of legitimacy the market imposes on individual behavior," as a "new civil religion of conspicuous consumption, surrendering any sense of the transcendent in favor of the imminent sacrality of consumer capitalism."²⁸⁵ As Wal-Mart trumps God's-Start, "The destruction of ecosystems and the alteration of the world's climate itself are readily sacrificed on the twin altars of GDP and employment growth."²⁸⁶

Globalization proponents demand that "Neither science, nor science linked with religion, should be allowed to challenge the dominant economic model, which does not allow for externalities like natural limits."²⁸⁷ The pro-growth *Cornwall Declaration on Environmental Stewardship* states that "Humanity alone of all the created order is capable of developing other resources and can thus enrich creation, so it can properly be said that the human person is the most valuable resource on

²⁸¹ Kearns, *supra* note 85, at 121.

²⁸² Harvey Cox, "The Market as God," ATLANTIC MONTHLY, Mar.1999, at 18, 23.

²⁸³ *Id.* at 20.

²⁸⁴ David R. Loy, *The Religion of the Market*, 65 JOURNAL OF THE AMERICAN ACADEMY OF RELIGION 275, 275 (Summer 1997).

²⁸⁵ SZERSZYNSKI, *supra* note 102, at 115.

²⁸⁶ BROWN, *supra* note 270, at 67.

²⁸⁷ Kearns, *supra* note 85, at 122.

earth.”²⁸⁸ Greenwashing ignores the historical record in which “Human dominance—or management—over earth’s systems is something that has happened in recent evolution, and is therefore not necessarily a basic right inherent in the structure of the world.”²⁸⁹ Justice Scalia’s ecosystem-parsing interpretations ignore Gaian/historical reality, in which “No power has been given by nature the right to decide on the relative importance and the respective hierarchy of entities that compose, at any given moment, the common world.”²⁹⁰

Only corporate “deciders” merited seats when Vice President Dick Cheney’s 2001 energy task force “recommended opening more federal land to oil, natural gas, and coal development [including] the remote Arctic National Wildlife Refuge.”²⁹¹ Scalia refused to recuse himself from deciding a subsequent suit seeking access to the task force’s meeting minutes, despite accompanying Cheney on a pre-decision duck hunting trip; he answered critics with, “Quack, quack.”²⁹² In the early 1980s Scalia founded the journal *Regulation*, which a critic suggested “might more accurately have been called *Anti-Regulation*.”²⁹³ However, corporate capture of regulatory agencies in the George W. Bush presidency alleviated judicial conservatives’ anxieties over the administrative state, as

²⁸⁸ Roskas, *supra* note 280, at 487.

²⁸⁹ Kevin J. O’Brien, *Toward an Ethic of Biodiversity: Science & Theology in Environmental Dialogue*, in ECOSPIRIT: RELIGIONS & PHILOSOPHIES FOR THE EARTH 178, 188 (KEARNS & KELLER, EDS., 2007).

²⁹⁰ BRUNO LATOUR, *THE POLITICS OF NATURE: HOW TO BRING THE SCIENCES INTO DEMOCRACY* 197 (2004).

²⁹¹ Bill Mears, *Watchdog Group Questions Cheney, Scalia Hunting Trip; Supreme Court Justice Denies Doing Anything Improper*, CNN, Jan. 19, 2004, <http://www.cnn.com/2004/ALLPOLITICS/01/19/scotus.cheney.scalia..>

²⁹² Gina Holland, *Justice Scalia: No Apologies for Hunting Trip with Cheney*, WASHINGTON POST, Feb. 11, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A32403-2004Feb11.html>; see also Derrick Z. Jackson, *A Duck Hunt for Global Warming*, BOSTON GLOBE, Dec. 2, 2006, available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/12/02/a_duck_hunt_for_global_warming; see also Robert Scheer, *Old McDonald Had a Judge...*, THE NATION, Feb. 17, 2004, available at <http://www.thenation.com/doc/20040301/scheer0217>.

²⁹³ ROSEN, *supra* note 15, at 191-92.

“private foxes [were] placed in charge of the public henhouses.”²⁹⁴ Emblematic of the foxes’ reign, the Gifford Pinchot National Forest near Mount Hood, Oregon:

[L]ooks like the forestry equivalent of a neighborhood crack house. In the Pinchot woods, you see the George W. Bush public lands legacy. If you want to drill, or cut trees, or open a gas line—the place is yours. Most everything else has been trashed or left to bleed to death. They don’t take care of these lands because they see them as one thing—a cash out.²⁹⁵

Property-rights ideologues appear content to live in “the ecological equivalent of a gated community in which we are fine with our isolation.”²⁹⁶ The corporate elite’s appropriation of breathtaking natural areas supports social critic Barbara Ehrenreich’s rule that “if a place is truly beautiful, you can’t afford to be there.”²⁹⁷ Reserving natural wonderlands for those who can afford to pay for them reflects “the basic orientation of American jurisprudence...toward personal human rights and toward the natural world as existing for human possession and use.”²⁹⁸ This preference is bolstered by a legal profession “still preoccupied with individual ‘human’ rights, especially the limitless freedom to acquire property and exploit the land.”²⁹⁹ A legal watchdog group found that judges who regularly attended conferences sponsored by pro-development lobbyists “are generally responsible for writing the most radical pro-corporate, anti-environmental, and activist decisions.”³⁰⁰ Their rulings represent “an attempt to undo the recovery of the commons through the New Deal in order to enclose all public goods and resources as private

²⁹⁴ GORE, *supra* note 36, at 79.

²⁹⁵ Timothy Egan, *This Land Was My Land*, N.Y. TIMES, June 23, 2007.

²⁹⁶ David Wood, *Specters of Derrida: On the Way to Econstruction*, in ECOSPIRIT: RELIGIONS AND PHILOSOPHIES FOR THE EARTH 264, 271 (Kearns & Keller, eds., 2007).

²⁹⁷ Barbara Ehrenreich, *This Land Is My Land*, THE NATION, July 2, 2007, <http://www.thenation.com/doc/20070716/ehrenreich>.

²⁹⁸ BERRY, *supra* note 55, at 60.

²⁹⁹ *Id.* at 113.

³⁰⁰ GORE, *supra* note 36, at 234.

property.”³⁰¹ Richard Epstein’s anti-regulatory *Takings: Private Property and the Power of the Eminent Domain*, serves as a “bible” for Court conservatives.³⁰²

But conservatives justices’ “biblical” interpretation was unavailing in 2007’s *Massachusetts v. EPA* decision, a request for Bush administration officials to respond to climate change characterized as “*Bush v. Gore’s Movie*.”³⁰³ Seeing no reason for administrative foxes to stir themselves, Chief Justice John Roberts’ dissent “focused solely on the issue of legal standing to sue.”³⁰⁴ Roberts demonstrated that “he is fully aboard Justice Scalia’s project [and] argued vigorously...that the court never should have reached the merits of the case or addressed the question of the agency’s local obligations.”³⁰⁵ Court conservatives continuing utilization of standing to bar environmental claims highlights their increasing dependence on “the rule and reification of abstraction,” whereby an unmistakably urgent climate crisis is dismissed with “abstract constructions created by the dominant powers in society,” enabling ongoing “manipulation of nature and society for profits.”³⁰⁶ In this manner “the real, the concrete, the life-giving is substituted for by artificially constructed currencies.”³⁰⁷ Standing as a judicial tactic to thwart ecological reforms supports the observation that “nearly all technical words are harmful in science and philosophy; they serve only to separate the sectarians of the parish from those who are excluded from the conversation.”³⁰⁸ Judicial utilization of difficultly-grasped concepts will not placate an increasing public restiveness over governmental inaction on the climate crisis, and many might second Emerson in asking “why should

³⁰¹ SHIVA, *supra* note 88, at 45.

³⁰² *Id.*

³⁰³ Dahlia Lithwick, *Benchwarming: the Supreme Court Melts Down over Greenhouse Gases*, SLATE, Nov. 29, 2006, <http://www.slate.com/id/2154622/fr/rss>; *Mass. v. E.P.A.*, 549 U.S. 497 (2007).

³⁰⁴ Linda Greenhouse, *Justices Say E.P.A. Has Power to Act on Harmful Gases*, N.Y. TIMES, Apr. 3, 2007.

³⁰⁵ *Id.*

³⁰⁶ SHIVA, *supra* note 88, at 112.

³⁰⁷ *Id.*

³⁰⁸ SERRES, *supra* note 1, at 7-8.

we grope among the dry bones of the past or put the living generation out of its faded wardrobe?"³⁰⁹

Justice Scalia's originalism defiantly sports the faded wardrobe of the past, albeit accompanied with his "acerbic style and know-it-all manner."³¹⁰ The additions of conservative Justices Roberts and Samuel Alito have bolstered Scalia's anti-"activism" crusade, but he "has never been a particularly patient man," and "sees little to gain from incrementalism or its appearance."³¹¹ It is, after all, Heisenberg's, and not Scalia's, Uncertainty Principle. His obdurate anti-environmentalism may indelibly define his legacy as the Scopes Trial did William Jennings Bryan's; former firebrands desperately clinging to superseded ideas. Scalia's distrust of ecology may stem from its humbling effect, as it shows how we are "ultimately powerless over the environment, that we can't make it bend to our will," resulting in "feelings of helplessness and powerlessness (which) are so vilified in our culture, they're categorized as wimpy or weak."³¹² Scalia uncannily personifies Alan Watts' depiction of a nature-denier as "a psychological type which takes special glee in having one's philosophy of life clear-cut, hard, and rigid," having "mastered a logical method which can tear other opinions, and especially metaphysical opinions, to shreds. Attitudes of this kind usually go together with a somewhat aggressive and hostile type of personality which employs sharp definition like the edge of a sword."³¹³

But increasing recognition of our essential interconnectedness with the natural world dramatizes how "the myth of the rugged individualist simply doesn't hold up in the new cosmology."³¹⁴ We are now confronting an ecological crisis which comprises "gain or loss on an absolute scale," and "unless the nature of the State is harmonized with the state of Nature, our greed and ignorance will eventually take us beyond

³⁰⁹ EMERSON, *supra* note 105, at 35.

³¹⁰ Savage, *supra* note 30; see also Manus, *supra* note 16 (providing a sense of Justice Scalia's terse impatience with environmental plaintiffs).

³¹¹ Linda Greenhouse, *Even in Agreement, Scalia Puts Roberts to Lash*, N.Y. TIMES, June 28, 2007.

³¹² MARK COLEMAN, *AWAKE IN THE WILD: MINDFULNESS IN NATURE AS A PATH OF SELF-DISCOVERY* 88 (2006).

³¹³ WATTS, *supra* note 44, at 80.

³¹⁴ SANGUIN, *supra* note 52, at 93.

the capacity of the very ecosystems that support human existence.”³¹⁵ Americans must accept “a more humble place at the banquet of life, or Gaia, as self-regulator of the earth’s biosystems, will act to ensure that there is no room for us at the party.”³¹⁶ As Vaclav Havel notes, “either we will achieve an awareness of our place in the living and life-giving organism of our planet, or we will face the threat that our evolutionary journey may be set back thousands or even millions of years.”³¹⁷ Given imminent environmental peril, “the entire question of possession and use of the Earth, either by individuals or by establishments, needs to be considered in a more profound manner than Western society has ever done previously.”³¹⁸ This will also necessitate “a harrowing revision of modern natural law, which presupposes the unformulated proposition that only man, individually or in groups, can become a legal subject.”³¹⁹

Justice William O. Douglas attempted to introduce an ecocentric perspective into High Court jurisprudence, specifically in his 1972 *Sierra Club v. Morton* dissent.³²⁰ Douglas adopted Christopher Stone’s proposal to grant standing to natural entities, asking the Court to “fashion a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be destroyed, defaced, or invaded by roads and bulldozers where injury is the subject of public outrage.”³²¹ He proposed that “courts recognize standing in persons who are able to present themselves as occupying a level of intimacy with a particular ecological unit,” as this “would establish that such persons understood and thus could completely assert the legal interests of the various elements of nature that made up the ecological unit.”³²² Influenced by Northwest Native American and Asian eco-religious concepts, Douglas considered environmentalists “in some senses *members of the ecological unit* with which they had developed an intimate

³¹⁵ BERRY, *supra* note 55, at 105; HAYDEN, *supra* note 43, at 2.

³¹⁶ SANGUIN, *supra* note 52, at 186.

³¹⁷ Vaclav Havel, *Our Moral Footprint*, N.Y. TIMES, Sep. 27, 2007.

³¹⁸ BERRY, *supra* note 55, at 61.

³¹⁹ SERRES, *supra* note 2, at 37.

³²⁰ *Sierra Club v. Morton*, 405 U.S. 727 (1972) (Douglas, J, Dissenting).

³²¹ Manus, *supra* note 16, at 144.

³²² *Id.*

association, and thus would serve as suitable spokespersons for such units.”³²³ He urged the Court to consider “personifying the environment,” and to establish it as a “jural entity.”³²⁴

Yet this legal paradigm shift has gained little traction because “the vocabulary and expressions that are available to us influence and even steer our thought” away from granting legal status to non-human nature.³²⁵ Stone argues that “increasing regard for Nonpersons requires us to consider how suited our received ways of normative analysis are to resolve or even guide us through” the climate crisis.³²⁶ Conservative jurists dread a paradigm in which “objects themselves are legal subjects and no longer mere material for appropriation, even collective appropriation,” because “if the objects themselves become legal subjects, then all scales will tend towards an equilibrium.”³²⁷ Recognizing that “our traditional moral philosophies cannot resolve” ever more urgent environmental concerns, deep ecology and creation theology respond to Stone’s plea for “a myth that can life our growing body of knowledge of geophysics, biology and the cosmos.”³²⁸ Deep ecology fulfills Stone’s hopes for a “moral maturation,” which embodies a “widening of the circle” of human values.³²⁹ Naess’s “biospherical egalitarianism” would grant to all of nature “the equal right to live and blossom.”³³⁰ A deep ecologist observed that:

A being made be said to have interests if it has needs, and it may be said to have needs if it is seeking to maintain or

³²³ *Id.* (emphasis added).

³²⁴ CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?: AND OTHER ESSAYS ON LAW, MORALS, AND THE ENVIRONMENT* 21 (1996).

³²⁵ *Id.* at 32-33.

³²⁶ *Id.* at 49.

³²⁷ SERRES, *supra* note 1, at 37.

³²⁸ Alan Drengson, *Shifting Paradigm: from Technocrat to Planetary Person*, in *THE DEEP ECOLOGY MOVEMENT: AN INTRODUCTORY ANTHOLOGY* 74, 93 (Drengson & Inoue, eds., 1995); STONE, *supra* note 324, at 40-41.

³²⁹ STONE, *supra* note 324, at 140.

³³⁰ Arne Naess, *The Shallow and the Deep, Long-Range Ecology Movement: a Summary*, in *THE DEEP ECOLOGY MOVEMENT* 3, 4 (1995).

realize its own existence—it *needs* those things which contribute to its self-maintenance or self-realization.³³¹

Stone predicts that the establishment of rights in natural objects would enable an entity “to find quite a number of ‘rights’ waiting for it when it got to court.”³³² Philosopher Michel Serres suggests we “add to the exclusively social contact a natural contract of symbiosis and reciprocity in which our relationship to things would set aside mastery and possession in favor of admiring attention, reciprocity, contemplation and respect.”³³³ He adds that since “the Earth speaks to us in terms of forces, bonds, and interactions... that’s enough to make a contract.”³³⁴ Roszak envisions natural-rights jurisprudence leading to a “legally actionable, environmentally based criterion of mental health that could take on prodigious legal and policy-making implications,” similar to what “now attaches to physical hazards like toxic waste.”³³⁵ He suggests that such actions “would be even more feasible if the Wilderness Act, the legal foundation for most environmental cases, were amended to include the psychological benefits people gain from untamed nature.”³³⁶

Other environmental advocates caution against these proposals. They fear that “to extend or bestow or recognize rights in nature would be, in effect, to domesticate all of nature—to subsume it into the human political apparatus.”³³⁷ Such a policy “presupposes the existence of a position of power from which to do the granting,” incorporating nature into an anthropocentric “system of hierarchy and domination.”³³⁸ Instead, they propose that “the only way to deal with rights for nature is to subtract our own perceived right to use any and all aspects of the nonhuman world

³³¹ Freya Mathews, *Conservation and Self-Realization: a Deep Ecology Perspective*, in THE DEEP ECOLOGY MOVEMENT 124, 129 (1995).

³³² STONE, *supra* note 324, at 31.

³³³ SERRES, *supra* note 1, at 38.

³³⁴ *Id.* at 39.

³³⁵ Roszak, *Where Psyche Meets Gaia*, in ECOPSYCHOLOGY: RESTORING THE EARTH, HEALING THE MIND 1, 15 (Roszak, Mary E. Gomes & Allen D. Kramer, eds., 1995).

³³⁶ ROSZAK, *supra* note 222, at 330.

³³⁷ JENSEN, *supra* note 74, at 62 (quoting John A. Livingston).

³³⁸ Thomas Birch, *The Incarceration of Wildness: Wilderness Areas as Prisons*, in DEEP ECOLOGY FOR THE 21ST CENTURY 339, 341.

for any and all purposes, from recreational to industrial."³³⁹ Otherwise, government intervention would consist of "replacing biological methods of growth and interaction with artificial methods of control," and "Once this intervention begins, it never ends."³⁴⁰ Critics of accommodation note that "few of the people who make most of the decisions that affect the relationship between humans and other aspects of the Earth Community have made the shift from a mechanistic worldview to a holistic or ecological worldview."³⁴¹ Deep ecologists fear that mainstream environmentalists "have sought to position themselves on the political chessboard without redrawing its squares, without re-defining the rules of the game, without redesigning the pawns."³⁴²

What is vital, instead, is to develop "planetary minds for a planetary crisis."³⁴³ As Stone comments, "to shift from such a lofty fancy as the planetarization of consciousness" to more mundane legal concerns "is to come down to earth hard," but the High Court today has the opportunity to acknowledge earth-friendly spiritualities, and provide them "shape and reality and legitimacy."³⁴⁴ Given that "there is no office in which to file a claim for sacred land," metaphysics must overcome the ideological rigidity of textualism and originalism.³⁴⁵ But then, "holistic thinking has had its past; particularly in our dealings with nature, it deserves also to have its future."³⁴⁶

³³⁹ Livingston, *supra* note 337.

³⁴⁰ Jack Turner, *In Wildness Is the Preservation of the World*, in DEEP ECOLOGY FOR THE 21ST CENTURY 331,334.

³⁴¹ CULLINAN, *supra* note 143, at 63-64.

³⁴² LATOUR, *supra* note 292, at 5.

³⁴³ SANGUIN, *supra* note 52, at 14.

³⁴⁴ Christopher D. Stone, *Should Trees Have Standing?: Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 500 (1972).

³⁴⁵ JACK TURNER, THE ABSTRACT WILD 62 (1996).

³⁴⁶ FREYFOGLE, *supra* note 267, at 252.

