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Andrew P. Morriss

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ARTICLES

DISESTABLISHING ENVIRONMENTALISM

BY

ANDREW P. MORRISS* & BENJAMIN D. CRAMER**

The debate over environmental policy is increasingly conducted in language with strong religious overtones. Both proponents and opponents of various environmental policies appeal to religious doctrine to support their positions: Those who question human-caused global warming are labeled “heretics,” while appeals for environmental “stewardship” echo Biblical texts. Religious groups play an important role in defining environmental policy issues, and both supporters and critics of specific environmental policy views have labeled particular sets of beliefs about the environment a “religion.”

In this Article we engage in a thought experiment, arguing that there are valuable lessons to be learned from treating Environmentalism as if it were a religion and therefore subject to the First Amendment’s prohibition on laws “respecting an establishment of religion.” In particular, the consideration of the economics of the Establishment Clause—perhaps better termed the economics of disestablishment—offers important insights into how to structure environmental policies in a way that can improve environmental quality.

* H. Ross & Helen Workman Professor of Law and Business & Professor, Institute for Government and Public Affairs, University of Illinois at Urbana-Champaign; Senior Scholar, Mercatus Center at George Mason University; & Senior Associate, Property & Environment Research Center, Bozeman, Montana. A.B. Princeton University; J.D., M.Pub.Aff., University of Texas; Ph.D. (Economics) Massachusetts Institute of Technology. The authors would like to thank Jonathan Adler, Fr. Michael Butler, Pete Geddes, P.J. Hill, Fr. Gregory Jensen, Roger Meiners, Fr. Charles Nalls, Larry Solum, Nathaniel Stewart, and Bruce Yandle for their helpful comments and Matthew Brown, Justin Cook, Marc Demers, and Theresa Golski for invaluable research assistance.

** Fellow, Center for Business Law and Regulation, Case Western Reserve University School of Law. B.A. The Ohio State University; J.D. Case Western Reserve University School of Law.

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I. INTRODUCTION

Debate over environmental policy is increasingly conducted in language with strong religious overtones. Both proponents and opponents of various environmental policies appeal to religious doctrine to support their positions.¹

¹ See, e.g., Daryl Fisher-Ogden & Shelley Ross Saxer, *World Religions and Clean Water Laws*, 17 DUKE ENVTL. L. & POL'Y F. 63, 64 (2006) ("Religion could help save the ecology of our planet."); John Copeland Nagle, *The Spiritual Values of Wilderness*, 35 ENVTL. L. 955, 958 (2005) (quoting Rep. Morris Udall that "[t]here ought to be a few places left in the world left the way the Almighty made them"); *id.* (quoting John Muir that an Alaskan glacier's "[e]very feature glowed with intention, reflecting the plans of God"); John Muir, *God's First Temples: How Shall We Preserve Our Forests?*, in JOHN MUIR: NATURE WRITINGS 629 (William Cronon ed., 1997); TOM HAYDEN, *THE LOST GOSPEL OF THE EARTH: A CALL FOR RENEWING NATURE, SPIRIT, AND POLITICS* 187 (1996) (calling for a transition to politics "spiritually grounded in respect for the earth"); JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* 104, 108 (1980) (stating that preservationists, including himself, are "secular prophets, preaching a message of secular salvation"); Richard Perez-Pena, *Lieberman Cites Religion as Foundation of Environmentalism*, N. Y. TIMES, Oct. 19, 2000, at A30 (quoting Sen. Joseph Lieberman that, "If you believe in God, I think it's hard not to be an environmentalist, because you see the environment as the work of God."). An extensive list of citations on this point is included in Lucia A. Silecchia, *Environmental Ethics from the Perspectives of NEPA and Catholic Social Teaching: Ecological Guidance for the 21st Century*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 659, 664 n.11 (2004). Robert H. Nelson has identified elements of the Calvinist and Puritan conception of the world in apocalyptic environmental writing. Robert H. Nelson, *Bruce Babbitt:*

Those who question human-caused global warming are labeled “heretics,”² ignoring environmental limits is “ecologically wicked” and “sinful,”³ while appeals for environmental “stewardship” echo Biblical texts.⁴ Religious groups play an important role in defining environmental policy issues. For example, the United Church of Christ helped introduce the term “environmental racism” into debates over environmental policy.⁵ Both supporters and critics of specific environmental policy views have labeled particular sets of beliefs about the environment a “religion.”⁶ And empirical studies have found that membership in churches and environmental groups are sometimes substitutes.⁷

Pipeline to the Almighty, THE WKLY. STANDARD, June 24, 1996, at 18. Religious imagery is also used by opponents of environmental policies, although less frequently. See, e.g., Many A. Brachear, *Religious Leaders Divided about Global Warming*, CHI. TRIB., June 15, 2007, http://archives.chicagotribune.com/2007/jun/15/news/chi-seekerbox_15jun15 (last visited Apr. 19, 2009) (quoting Oklahoma Sen. Jim Inhofe that “[w]e should respect creation and be wise stewards, but we must be careful not to fall into the trap of secular environmentalists who believe that man is an afterthought on this Earth who is principally a polluter. . . . Rather, we are made in God’s image and should use the resources God has given us.”).

² See, e.g., John Tierney, *An Early Environmentalist, Embracing New ‘Heresies,’* N. Y. TIMES, Feb. 27, 2007, <http://www.nytimes.com/2007/02/27/science/earth/27tier.html?ei=5090&> (last visited Apr. 19, 2009) (describing Stewart Brand as a “heretic to environmentalism”); *Wildlife Groups Axe Bellamy as Global Warming ‘Heretic,’* SUNDAY TIMES, May 15, 2005, <http://www.timesonline.co.uk/tol/news/uk/article522744.ece> (last visited Apr. 19, 2009).

³ ROBERT H. NELSON, *ECONOMIC VS. ENVIRONMENTAL RELIGION: THE NEW HOLY WARS* *303 (forthcoming 2009) (citation omitted) (manuscript at 303, on file with Environmental Law).

⁴ See, e.g., W. Wade Berryhill, *Creation, Liberation, and Property: Virtues and Values Toward a Theocentric Earth Ethic*, 16 REGENT U. L. REV. 1, 49 (2003–2004) (“How can continued abuse of the finite resources be justified morally, ethically, or biblically? As the property concepts discussed earlier dictate, we must articulate a policy that fosters the preservation of the earth’s resources and adopt a stewardship that preserves the corpus for use by future neighbors.”); Richard H. Hiers, *Reverence for Life and Environmental Ethics in Biblical Law and Covenant*, 13 J.L. & RELIG. 127, 186–87 (1996–1999) (“[C]ontemporary concerns for the well-being of the earth (or biosphere), humans and other species of living beings, and individual creatures of all species who share this planet’s various habitats . . . may be seen to derive directly from the kind of theocentric or monotheistic belief in God as creator and valuer of all that is, affirmed in biblical tradition.”); Jonathan Edward Maire, *The Possibility of a Christian Jurisprudence*, 40 AM. J. JURIS. 101, 130 (1995) (“[F]rom the Biblical account of creation we might derive a notion of stewardship which ought to serve as a foundation for laws affecting the environment and regulating scientific research.”); EARTH KEEPING: CHRISTIAN STEWARDSHIP OF NATURAL RESOURCES 26 (Loren Wilkinson ed., 1980) [hereinafter EARTH KEEPING] (“Despite the merit of [various] . . . reasons for preserving animal and plant life, for the Christian the fundamental reason is still unselfish: humans are designated as stewards, or guardians, over creation.”).

⁵ EDUARDO LAO RHODES, *ENVIRONMENTAL JUSTICE IN AMERICA: A NEW PARADIGM* 14 (2003).

⁶ See, e.g., Jan Lopatka, *Czech Leader Klaus Fights Global Warming ‘Religion,’* REUTERS, Mar. 21, 2007, <http://www.reuters.com/article/latestCrisis/idUSL21418509> (last visited Apr. 19, 2009) (“Czech President Vaclav Klaus said on Wednesday that fighting global warming has turned into a ‘religion’ that replaced the ideology of communism and threatens to clip basic freedoms. . . . [Poor nations] will not be able to absorb new technological standards required by the anti-greenhouse religion”); Tom Harper, *Scientists Threatened for ‘Climate Denial,’* SUNDAY TELEGRAPH, Mar. 11, 2007, <http://www.telegraph.co.uk/news/uknews/1545134/Scientists-threatened-for-%27climate-denial%27.html> (last visited Apr. 19, 2009) (“Professor [Timothy] Ball appeared in The Great Global Warming Swindle, a Channel 4 documentary in which several scientists claimed the theory of man-made global warming had become a ‘religion,’ forcing alternative explanations to be ignored.”); ROBERT A. NISBET, *PREJUDICES: A PHILOSOPHICAL DICTIONARY* 101 (1982) (“Environmentalism is now well on its way to becoming the third great wave of the redemptive struggle in Western history, the first being Christianity, the second modern socialism. In its way, the dream of a perfect physical environment has all the

In this Article we engage in a thought experiment, arguing that there are valuable lessons to be learned from treating Environmentalism as if it were a religion, and therefore subject to the First Amendment's prohibition on laws "respecting an establishment of religion."⁸ (We will use a capitalized "Environmentalism" to refer to the potentially religious set of beliefs about the environment and an uncapitalized "environmentalism" to refer to secular beliefs about the environment. We discuss the basis for the distinction below in Part II.B.) In particular, the consideration of the economics of the Establishment Clause—perhaps better termed the economics of *disestablishment*—offers important insights into how to structure environmental policies in a way that can improve environmental quality.

The relative successes of established and disestablished religions make a compelling case that establishment of religion leads to less, rather than more, religious belief and behavior in the long run and that a free market in religion ultimately produces more religious belief and observance than does an established church, albeit of a potentially different character than that produced by an established faith. Our conclusion is that applying these lessons to environmental policy can help increase environmental quality, while ignoring them risks creating the environmental equivalent of the empty churches of established denominations in Europe.⁹ Disestablishment of religion yielded a diverse and active collection of

revolutionary potential that lay both in the Christian vision of mankind redeemed by Christ and in the socialist, chiefly Marxian, prophecy of mankind free from social injustice."); Freeman Dyson, *The Question of Global Warming*, N.Y. REV. BOOKS, June 12, 2008, at 43, 45 ("There is a worldwide secular religion which we may call environmentalism, holding that we are stewards of the earth, that despoiling the planet with waste products of our luxurious living is a sin, and that the path of righteousness is to live as frugally as possible. . . . This is a religion that we can all share, whether or not we believe that global warming is harmful.").

⁷ Robert C. Lowry, *Religion and the Demand for Membership in Environmental Citizen Groups*, 94 PUB. CHOICE 223, 234 (1998) ("[R]eligious affiliation is an important empirical determinant of the demand for membership in environmental citizen groups."); Brian Kropp, *Environmental Organizations: What Makes Them Tick?*, in *THE MARKET MEETS THE ENVIRONMENT: ECONOMIC ANALYSIS OF ENVIRONMENTAL POLICY* 260–61, 272–73 (Bruce Yandle ed., 1999); see also Conrad L. Kanagy & Fern K. Willits, *A "Greening" of Religion? Some Evidence from a Pennsylvania Sample*, 74 SOC. SCI. Q. 674, 674, 677–79 (1993) (finding that frequency of church attendance is negatively correlated with "pro-environment" responses on surveys); Nelson, *supra* note 1, at 19 ("For most of its history, environmentalism has been more of a substitute for, than a complement to, religious institutions."); JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* 104 (1980) (describing himself and other parks advocates as "secular prophets, preaching a message of secular salvation").

⁸ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . ."). The idea was even the basis for a federal suit against the United States Forest Service arguing that the agency was "complicit in the establishment of religion" in its management practices. See *Loggers Accuse Forest Service of Establishing Religion*, EARTHKEEPING NEWS, Nov.–Dec. 1999, http://www.nacce.org/1999/slapp_suit.html (last visited Apr. 19, 2009). As Robert Nelson notes, "most leaders of American environmental organizations have sought to distance themselves from religion. Explicitly acknowledging the religious character of environmentalism would have posed a host of complicated, and potentially politically damaging, issues concerning the role of these organizations in the public arena . . ." NELSON, *supra* note 3 (manuscript at 23).

⁹ Laurence R. Iannaccone, Roger Finke & Rodney Stark, *Deregulating Religion: The Economics of Church and State*, 35 ECON. INQ. 350, 352–53 (1997) (noting that Scandinavian countries with

religious faiths that made the United States rank consistently among the most religious nations in the world;¹⁰ we contend that disestablishment of Environmentalism can also produce a more diverse, active collection of environmental policy ideas with the potential to change individual behavior in ways that will benefit the environment more than continuation of an official environmental catechism can accomplish.

No doubt the mere suggestion that environmentalism is a religion will raise some hackles. As religious people ourselves, albeit in conventional Christian denominations, we are sensitive to the potential for offense that the metaphor offers to both sincere environmentalists and sincere religious believers. We do not intend offense; we make this argument because we want the environment to reap the benefits disestablishment brought to religion in America. We therefore ask the indulgence of both groups in pursuing this thought experiment—one that we think will yield some benefits for the ideals both hold dear.

Although the United States Supreme Court's Religion Clauses jurisprudence is charitably described as confused,¹¹ we begin in Part II with the constitutional jurisprudence concerning the definition of religion. Even in its current muddled state, that jurisprudence sheds light on the types of beliefs to which the lessons of disestablishment apply, particularly if combined with some of the insights from the recent social science literature on religion. While we will leave the debate over whether Environmentalism is formally a religion to scholars who specialize in the constitutional doctrine, we conclude that Environmentalism shares sufficient characteristics with religion to justify our inquiry. In Part III we examine the lessons of religious disestablishment and their application to Environmentalism and conclude that there are valuable lessons from our approach for improving the environment. Part IV concludes by both anticipating criticism through describing what our approach would *not* mean and by analyzing the utility of this thought experiment.

established churches have “exceptionally low levels of religiosity” while the “free-for-all” in the United States produces a “high level of religiosity”).

¹⁰ Iannaccone, Finke & Stark, *supra* note 9, at 355 (noting “[o]verall levels of religious adherence shot up” in America due to disestablishment).

¹¹ See Patrick M. Garry, *A Congressional Attempt to Alleviate the Uncertainty of the Court's Establishment Clause Jurisprudence: The Public Expression of Religion Act*, 37 CUMB. L. REV. 1, 16–17 (2006) (recounting the “contorted, confusing, historically-contradictory” development of the Court's “convoluted maze” of Religion Clauses jurisprudence); Marci A. Hamilton, *The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence*, 29 GA. L. REV. 81, 131 (1994) (contending that the Court's “deliberate[] or careless[]” choice of which of the Religion Clauses to apply could cause “identical cases [to] come out differently”); Thomas A. Schweitzer, *Lee v. Weisman and the Establishment Clause: Are Invocations and Benedictions at Public School Graduations Constitutionally Unspeakable?*, 69 U. DET. MERCY L. REV. 113, 186 (1992) (“That the law of the religion clauses is confused has become a matter of observation which no longer requires argument.”). One reason is that the Supreme Court has paid little attention to the history of establishment in the United States. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2108 (2003) (“The Justices never analyzed any of the books, essays, sermons, speeches, or judicial opinions setting forth the philosophical and political arguments *in favor* of an establishment of religion, and relied on only one, perhaps unrepresentative, example from among the hundreds of arguments made *against* the establishment.”).

II. RELIGION AND THE ENVIRONMENT

From the Biblical injunction to “be fruitful and multiply”¹² to the earth goddesses who play a role in a large number of polytheistic religions,¹³ virtually every religion has something to say about the environment.¹⁴ Of course, that religions regularly touch on environmental matters no more makes environmentalism a religion than the Ten Commandments’ proscriptions on theft transform the philosophy of property rights into a religion (unless Justice Breyer¹⁵

¹² The full text from Genesis is: “Be fruitful and multiply, and fill the earth and subdue it; and have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth.” *Genesis* 1:28 (Revised Standard Version).

¹³ See, e.g., Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1105–06 (1996) (“To our forbearers, the Earth was awesome and surprising, warranting respect. Literally the Mother Land, she was primordial, there from the beginning, ancient beyond comprehension, yet she was reborn every moment in some new incarnation of the life force. This organicism manifested itself in any number of ways. At a religious level, the earth’s life force was represented and worshiped in the mythology of the Earth Goddess. Virtually every ancient culture of the ancient world had its version: Ishtar in the Near East, Isis in Egypt, Demeter in Greece, Ceres in Rome. In what were essentially agrarian societies the Earth Goddess embodied the vital force around which human activity revolved. Life was geared to the changing of seasons and to acting in concert with nature, rather than in trying to rearrange it. Whatever her name, the sacredness of the Earth Goddess, the ongoing source of life, was universal” (citations omitted)).

¹⁴ Indeed, many religions explicitly take a position on environmental protection, either by accommodating it within their liturgy, see, e.g., THE BOOK OF COMMON PRAYER AND ADMINISTRATION OF THE SACRAMENTS AND OTHER RIGHTS AND CEREMONIES OF THE EPISCOPAL CHURCH 827 (1979), available at <http://justus.anglican.org/resources/bcp/bcp79.pdf> (“Give us wisdom and reverence so to use the resources of nature, that no one may suffer from our abuse of them, and that generations yet to come may continue to praise you for your bounty”), or by taking a policy position during a church conference, see, e.g., EVANGELICAL LUTHERAN CHURCH IN AMERICA, A SOCIAL STATEMENT ON: CARING FOR CREATION: VISION, HOPE, AND JUSTICE 1 (1993), available at www.elca.org/~media/Files/What%20We%20Believe/Social%20Issues/environment/Environment%20social%20statement.pdf (“Even as we join the political, economic, and scientific discussion, we know care for the earth to be a profoundly spiritual matter.”). See also MARK DOWIE, *LOSING GROUND: AMERICAN ENVIRONMENTALISM AT THE CLOSE OF THE TWENTIETH CENTURY* 232–33 (1995) (describing how “[t]heologians are scanning the scriptures for ecological wisdom” and how “[p]rogressive priests, ministers, and rabbis preach that surrounding ecosystems are part of a parish and that plants and animals are also members of the congregation.”); Erika M. Zimmerman, *Valuing Traditional Ecological Knowledge: Incorporating the Experiences of Indigenous People into Global Climate Change Policies*, 13 N.Y.U. ENVTL. L.J. 803, 807 (2005) (“A close relationship with the environment is central to indigenous people’s way of life, as it is tied to their religious beliefs, social traditions, and language.”).

¹⁵ Justice Breyer’s votes and opinions in *McCreary County, Kentucky v. ACLU of Ky.* (McCreary), 545 U.S. 844, 850–51 (2005), and *Van Orden v. Perry*, 545 U.S. 677, 703–05 (2005) (Breyer, J., concurring) embody the subjective nature of the current Establishment Clause jurisprudence. After noting that “the Court has found no single mechanical formula that can accurately draw the constitutional line in every case,” Justice Breyer concluded that *Van Orden* was a “borderline case,” and that “in such cases, I see no test-related substitute for the exercise of legal judgment.” *Van Orden*, 545 U.S. at 699–700. The problem with this, of course, is that the application of “legal judgment,” is itself a test. But unlike a normal test, “legal judgment” is in the eye of the beholder. In an attempt to address the seemingly subjective nature of this standard, Justice Breyer wrote that this legal judgment

is not a personal judgment. Rather, as in all constitutional cases, it must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and

says it does, of course). The important question is whether Environmentalism embodies enough characteristics of religion that we will get better environmental outcomes by treating Environmentalism *as if* it were a religion even if it is not formally a religion, constitutionally or otherwise. Specifically, we argue that the *disestablishment* of Environmentalism would produce more environmental protection in many respects, just as the disestablishment of religion led to more religious behavior.

To determine whether some versions of environmentalism are religious enough to make the lessons of disestablishment applicable requires that we examine both the content of the Constitution's use of the word religion and the set of beliefs that might be labeled Environmentalism. We first briefly survey the existing jurisprudence and commentary on the constitutional meaning of religion. We then examine the debate over whether some forms of Environmentalism qualify as a religion within the meaning of the Constitution.

A. Defining Establishment and Religion

The courts have wrestled with the definition of religion throughout the history of the Religion Clauses' jurisprudence. From *Davis v. Beason*¹⁶ in 1890 through the controversial 1987 decision by U.S. District Judge W. Brevard Hand that "secular humanism" constituted a religion,¹⁷ the definition of religion has been crucial to

consequences measured in light of those purposes. While the Court's prior tests provide useful guideposts—and might well lead to the same result the Court reaches today . . . no exact formula can dictate a resolution to such fact-intensive cases.

Id. at 700 (internal citation omitted).

In other words, to reassure the readers that his different votes on two Ten Commandment cases were not based upon his subjective legal judgment, he states that they were based on his view of the purpose behind the Religion Clauses. *See id.* at 703–04 ("I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves."). We fail to see how this is not merely subjective.

Some have praised Justice Breyer for his candor, *see* L. Scott Smith, *Religion, Politics, and the Establishment Clause: Does God Belong in Public Life?*, 10 CHAP. L. REV. 299, 354 (2006) ("It is to Justice Breyer's credit that he frankly admits the role of subjective 'legal judgment' in Establishment Clause cases."), but we think this form of I-know-it-when-I-see-it jurisprudence undermines the rule of law. Rather than rely upon a test, future litigants will have to rely upon their best guess of how Justice Breyer would view their case in light of his view of the purpose behind the Establishment Clause. *See also* Greg Abbott, *Upholding the Unbroken Tradition: Constitutional Acknowledgment of the Ten Commandments in the Public Square*, 14 WM. & MARY BILL RTS. J. 51, 59 (2005) (predicting that Justice Breyer's reliance on "the exercise of legal judgment" means that his vote will be "fulcrumatic" to future Establishment Clause cases). This is not likely to be an easy task given that Justice Breyer believes that a six foot tall Ten Commandments monument on the grounds of the Texas statehouse does not violate the Establishment Clause, *see Van Orden*, 545 U.S. at 700, but a copy of the Ten Commandments, as part of a courthouse display in Kentucky, along with "the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice," does violate the Establishment Clause. *McCreary*, 545 U.S. at 856.

¹⁶ 133 U.S. 333 (1890). The Court stated that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and the obligations they impose of reverence for his being and character, and of obedience to his will." *Id.* at 342.

¹⁷ *Smith v. Bd. of Sch. Comm'rs of Mobile County*, 655 F. Supp. 939, 988 (S.D. Ala. 1987), *rev'd* 827 F.2d 684 (11th Cir. 1987).

interpreting the Constitution's language on religious liberty.¹⁸ In a wide range of cases involving everything from religious exemptions to the draft,¹⁹ the content of curricular materials,²⁰ prayer in public schools,²¹ and the display of the Ten Commandments,²² the courts have wrestled with the problem of creating a coherent definition. Despite this long struggle, or perhaps because of it, there is no definitive answer in either the historical record or the Court's jurisprudence as to exactly what constitutes a religion for constitutional purposes.²³ The range of possible readings

¹⁸ See Rebecca Redwood French, *From Yoder to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law*, 41 ARIZ. L. REV. 49, 49 (1999) ("The Supreme Court and its commentators have been struggling for over a century to find an adequate definition or characterization of the term 'religion' in the First Amendment. It has turned out to be a particularly tricky endeavor, one that has stumped both the Court and its commentators.").

¹⁹ The United States has generally made statutory accommodations for conscientious objectors. See Michael S. Satow, *Conscientious Objectors: Their Status, The Law and Its Development*, 3 GEO. MASON U. CIV. RTS. L.J. 113, 115–20 (1992–1993) (detailing the evolution of conscientious objector jurisprudence). Nevertheless, there is a substantial amount of jurisprudence dealing with this issue. See, e.g., *Gilette v. United States*, 401 U.S. 437, 442–43 (1971) (affirming limitation on conscientious objector status to those who object to "war in any form" rather than allowing "persons who object to a particular war" to claim conscientious objector status); *Oestereich v. Selective Serv. Bd.*, 393 U.S. 233, 234–35 (1968); *Arver v. United States*, 245 U.S. 366, 375–76 (1918) (upholding the Selective Service Act of 1917, including its exemption of those "whose tenets excluded the moral right to engage in war"). See also Paul G. Reiter, Annotation, *Discharge from Armed Forces of Ground of Conscientious Objection*, 10 A.L.R. FED. 15, 25 (1972).

²⁰ See, e.g., *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 766 (M.D. Pa. 2005) (holding that a public school's decision to teach intelligent design as an alternative to evolution violated the Establishment Clause); Nicholas A. Schuneman, *One Nation, Under . . . The Watchmaker?: Intelligent Design and the Establishment Clause*, 22 BYU J. PUB. L. 179, 179 (2007) (describing the controversy surrounding teaching intelligent design in public schools, and noting that for "nearly eighty years, American courts have mediated the debate between creationists and evolutionists"); Stephen W. Trask, *Evolution, Science and Ideology: Why the Establishment Clause Requires Neutrality in Science Classes*, 10 CHAP. L. REV. 359 (2006); Richard B. Katskee, *Why It Mattered to Dover that Intelligent Design Isn't Science*, 5 FIRST AMEND. L. REV. 112, 112 (2006) (symposium); Arnold H. Loewy, *The Wisdom and Constitutionality of Teaching Intelligent Design in Public Schools*, 5 FIRST AMEND. L. REV. 82, 86 (2006) (symposium); Jay D. Wexler, *Kitzmiller and the "Is It Science?" Question*, 5 FIRST AMEND. L. REV. 90, 91 (2006) (symposium).

²¹ See, e.g., *Sch. Dist. of Abington Twp., Penn. v. Schempp*, 374 U.S. 203, 223 (1963) (striking down public school's policy of beginning each school day with a Bible reading); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (striking down public school's official recitation of Christian prayer during the school day); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (striking down student led prayer at public high school football games); *Lee v. Weisman*, 505 U.S. 577, 593 (1992) (striking down clergy led prayer at public high school graduation).

²² See *McCreary*, 545 U.S. 844, 858 (2005) (rejecting a display of the Ten Commandments posted in a Kentucky courthouse); *Van Orden*, 545 U.S. 677, 681 (2005) (allowing a monument of the Ten Commandments to remain on the grounds of the Texas State Capitol).

²³ See JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 84 (2000) ("[P]recisely what constituted religion and nonreligion and where the line was to be drawn between them, the [first] congressional record simply does not say."); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 296 (2001) ("The Framers said almost nothing about the Establishment Clause . . ."); Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 645 (1987) ("Because such discussion of the definition of religion for establishment purposes is rare, courts faced with attacks on Secularism have had little guidance . . ."); Val D. Ricks, *To God God's, to Caesar Caesar's, and to Both the Defining of Religion*, 26 CREIGHTON L. REV. 1053, 1053–54 (1993) (contrasting the proliferation of literature by commentators with the paucity of rulings by courts on the

of the term religion runs from an extremely narrow one requiring the full apparatus of buildings, priests, official doctrines, and rituals to a broad definition that accepts any individual's self-labeled religious belief as a religion.²⁴ Neither end of the range is satisfactory as a definition, however.

There are also doctrinal problems with defining an *establishment* of religion. As Judge Michael McConnell notes, "[i]t has been so long—about 170 years—since any state in the United States has had an established church that we have almost forgotten what it is."²⁵ The Supreme Court has not yet articulated a clear definition of this term either. As a result, as Professor Leonard Levy noted in summarizing the Court's Establishment Clause jurisprudence, "a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices."²⁶ Note that Professor Levy's complaint in the quoted passage is not that the Court finds too few or too many establishments of religion (although he has an opinion on that as well) but that there is no consistent analysis capable of predicting when it will and when it will not, leaving both separationists and accommodationists dissatisfied.²⁷

Despite these problems, this jurisprudence is helpful for our purposes. The legal doctrine is useful because, regardless of how theoretically confused it may be or how unsatisfying the doctrine is to law professors craving an overarching theory, religion in America has flourished under the Supreme Court's interpretation of the Establishment Clause.²⁸ As we describe below, Americans are remarkably religious people compared with most of the rest of the world. We go to churches, temples,

question of the definition of religion and summarizing that "[i]f anything, the bulk of scholarship and case law leads to the conclusion that the task of defining religion is impossible"; Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181, 181–83 (2002) (noting that "[r]esearch to establish the meaning of the word religion in 1791 was difficult because a definition was never laid out by anyone in the founding generation[,] but arguing for an original meaning that "traditional mono-theistic beliefs, and certainly Christianity, are included as religions, while belief systems based on non-theistic views of the world—philosophy for example—are not included in the definition of religion"); Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 126 (2007) ("Courts often assume religion is implicated in a case, or presume that it is not, without expressly defining the term, and commentators, despite numerous scholarly efforts, have been unable to reach any consensus as to the meaning of religion . . ."); Marilyn Perrin, Note, *Lee v. Weisman: Unanswered Prayers*, 21 PEPP. L. REV. 207, 258–59 (1993) (lamenting that the Court failed to develop a robust analytical framework to address the definition of religion in its decision, and instead made the question even more confusing than before).

²⁴ See L. Scott Smith, Esq., *Constitutional Meanings of 'Religion' Past and Present: Explorations in Definition and Theory*, 14 TEMP. POL. & CIV. RTS. L. REV. 89, 108–11 (2004) (discussing a multitude of attempts at defining religion and expressing discomfort at the Court's failure to produce a workable definition).

²⁵ McConnell, *supra* note 11, at 2107.

²⁶ LEONARD LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 221–22 (2d ed. 1994).

²⁷ Compare *McCreary*, 545 U.S. 844, 881 (2005) (holding display containing text of Ten Commandments at a county courthouse violated Establishment Clause), with *Van Orden*, 545 U.S. 677, 692 (2005) (holding monument inscribed with Ten Commandments on grounds of state capitol did not violate Establishment Clause).

²⁸ Some of the credit goes to state governments, which disestablished on their own. Our main point is that the Supreme Court did not prove an obstacle to this growth.

synagogues, mosques, and other houses of worship more than most, voluntarily contribute more money and time to religious institutions than almost anyone else, and practice our faiths more regularly than do citizens of virtually any other country in the world today.²⁹ The Supreme Court rejected the narrowest reading of the term religion as early as 1890, noting that religion “is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter.”³⁰ Indeed, the variety of forms of religious expression would counsel against the narrowest reading even if we consider only the religions present and recognized in the United States during the Founding Era.³¹ And the pressure of interpreting the Religion Clauses in light of the diversity of belief in the modern era has also pushed the constitutional definition of religion well beyond the narrow definition. For example, in a series of cases interpreting the military draft laws during the 1960s, the courts faced the problem of deciding whether conscientious objectors who lacked many of the traditional accoutrements of the popular understanding of religion were nonetheless entitled to “C.O.” status.³² The result was a line of decisions broadening the constitutional understanding of religion.³³ Indeed, while the Supreme Court’s influential definition in 1890 of religion as a term that “has reference to one’s view of his relations to his Creator, and to the obligations they impose of reverence for his

²⁹ See Pope Benedict XVI, Responses to Questions Posed by the Bishops of the United States (Apr. 16, 2008), http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080416_response-bishops_en.html (last visited Apr. 19, 2009) (“It strikes me as significant that here in America, unlike many places in Europe, the secular mentality has not been intrinsically opposed to religion. Within the context of the separation of Church and State, American society has always been marked by a fundamental respect for religion and its public role, and, if polls are to be believed, the American people are deeply religious.”); see also Alan Wolfe, *And the Winner Is*, THE ATLANTIC, Mar. 2008, at 56, 60 (explaining the United States’s outlier status as a simultaneously wealthy and religious nation is due to “a free religious marketplace” where “entrepreneurs of the spirit compete to save souls”); Peter Berger, Professor of Sociology and Theology and Dir., Inst. on Culture, Religion and World Affairs, Boston Univ., Remarks at The Pew Forum on Religion & Public Life Luncheon Roundtable: Secular Europe and Religious America: Implications for Transatlantic Relations (Apr. 21, 2005), <http://pewforum.org/events/?EventID=76> (last visited Apr. 19, 2009) (“The major churches in Western and Central Europe, both Protestant and Catholic, are in very deep trouble by any indicator you want to take. Attendance of people at services, loyalty to the institution, recruitment of clergy, financial contributions, influence in the public realm all have declined—a reality that’s very different from the one in United States.”).

³⁰ *Beason v. Davis*, 133 U.S. 333, 342 (1890). The case created “[t]he Supreme Court’s first, and still extant, classic definition of religion.” Henry J. Abraham, *Constitutional and Other Definitions of Religion: The Contemporary Scene*, in ALL IMAGINABLE LIBERTY: THE RELIGIOUS LIBERTY CLAUSES OF THE FIRST AMENDMENT 167, 170 (Francis Graham Lee ed., 1995).

³¹ The *Atlas of the Historical Geography of the United States* listed 3228 congregations present in 1776, divided among 17 broad denominational categories, ranging from Congregationalist to “Dunker” and Sandemanian. See RODNEY STARK & ROGER FINKE, *ACTS OF FAITH: EXPLAINING THE HUMAN SIDE OF RELIGION* 27–28 (2005).

³² See, e.g., *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970).

³³ Abraham, *supra* note 30, at 175 (“[T]he 1965 Draft Act cases proved conclusively that there is less certainty in, and less emphasis on, a strictly construed traditional definition of religion. . . . [In those cases] a unanimous Supreme Court adopted broadened concepts of religious liberty and conscience by declaring that a conscientious objector need not believe in the orthodox concept of a Supreme Being.”); Smith, *supra* note 24, at 108 (“If the United States Supreme Court’s jurisprudence of religion underscores a single truth, it is that the body of law the Court has crafted to elucidate and to safeguard religious freedoms guaranteed by the First Amendment does not turn on an explicit definition of religion or of any related term.”).

being and character, and of obedience to his will"³⁴ may have initially appeared to be broad and expansive, it now seems almost hopelessly outdated in a society that includes adherents to faiths that recognize no creator.

At the other end of the spectrum of possible definitions lies "an individualistic and subjective view of religion," as in United States District Judge Brevard Hand's 1987 determination that "secular humanism" was a religion.³⁵ (Hand's decision was later reversed on other grounds by the Eleventh Circuit in an opinion that did not address the definition of religion issue.) Judge Hand held that "[a]ny definition of religion must not be limited . . . to traditional religions, but must encompass systems of belief that are equivalent to them for the believer."³⁶ To distinguish a religion, to which the Establishment Clause applied, from a philosophy, to which it did not, Hand contended that the beliefs must approach matters

on the basis of certain fundamental assumptions with which governments are unconcerned. These assumptions may be grouped as about:

- 1) the existence of supernatural and/or transcendent reality;
- 2) the nature of man;
- 3) the ultimate end, or goal or purpose of man's existence, both individually and collectively;
- 4) the purpose and nature of the universe.³⁷

The resulting system of beliefs need not answer every question a person would confront from day to day, but it should have "the potential . . . to resolve as yet unasked moral questions."³⁸ Hand's expansive reading is generally thought to be overly broad by most law and religion scholars today,³⁹ and is beyond the range acceptable to the courts (at least at present).⁴⁰ The doctrinal development thus

³⁴ *Beason*, 133 U.S. at 333.

³⁵ *Smith v. Bd. of Sch. Comm'rs of Mobile County*, 655 F. Supp. 939, 977 (S.D. Ala. 1987), *rev'd on other grounds*, 827 F.2d 684 (11th Cir. 1987).

³⁶ *Id.* at 978.

³⁷ *Id.* at 979.

³⁸ *Id.* Hand also suggested that factors such as sincerity, group organization and hierarchical structure, literary manifestations, and ritual and worship could help distinguish religions from nonreligions. *Id.*

³⁹ See Andrew A. Cheng, *The Inherent Hostility of Secular Public Education Toward Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses*, 19 U. HAW. L. REV. 697, 715-16 (1997) (concluding that adoption of Judge Hand's broad definition of religion so as to encompass secular humanism would render "meaningful interpretation of the Religion Clauses . . . impossible"); Jeffrey L. Oldham, *Constitutional "Religion": A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117, 147 (2001) (contrasting the "broad sweep" of Judge Hand's analysis with more "traditional" definitions of religion); Smith, *supra* note 24, at 111 (arguing that Judge Hand's definition is "much too vague to be used in a legal context," that it "leaves one . . . with more questions than answers," and that it is unclear whether Judge Hand would "designate all such philosophies as religions"); Daniel A. Spiro, *The Creation of a Free Marketplace of Religious Ideas: Revisiting the Establishment Clause After the Alabama Secular Humanism Decision*, 39 ALA. L. REV. 1, 51 (1987) ("[M]uch fault can be found with Judge Hand's approach to resolving the issues before him.").

⁴⁰ See *Smith*, 827 F.2d 684 (11th Cir. 1987) (reversing Judge Hand's decision); Cheng, *supra* note 39, at 709 n.54 and accompanying text (collecting extensive list of cases to conclude that "[c]ourts . . . were generally unsympathetic" to claims of secular humanism as a religion); Charles Davis, *Between a*

suggests that there is some requirement not contained in Judge Hand's definition for a set of beliefs to qualify as a religion.

We can locate that in a 1943 opinion by Judge Learned Hand (Brevard Hand's distant relation):⁴¹

Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men . . . in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.⁴²

Judge Learned Hand's notion that a religion "refuses to be limited by [logic]" strikes us as adding a critical element to the definition. This refusal is not necessarily a rejection of logic, as the achievements of religious thinkers such as Maimonides, St. Augustine, and Muhammad ibn Idrīs al-Shafī'i⁴³ demonstrate. Rather, to be religious means that one is willing to go beyond logic in some important way, adding an element of faith.

Given that the Supreme Court appears to be moving towards a requirement of "a shared organized value structure" without the requirement of "traditional notions of a deity,"⁴⁴ we need not go as far as Judge Brevard Hand to find a workable definition of religion that includes more than the houses of worship on Main Street. What matters for our purposes is that the lack of a "traditional" deity, a priesthood, a set of clearly defined doctrines, or a building that serves as church, mosque, synagogue, or temple are not disqualifying factors when considering whether a government action violates the Establishment Clause with respect to a set of beliefs. A "shared organized value structure" is still an extraordinarily vague concept. We can refine it into a more useful form with a bit of social science.

The best social science definition of religion we have encountered is Professors Rodney Stark and Roger Finke's, which states that religion is that which "is concerned with the supernatural; everything else is secondary."⁴⁵ In the social science

Man and His God: Violating the First Amendment Through Compelled Behavior Modification, 29 SEATTLE U. L. REV. 1031, 1046 (2006) ("Until the Supreme Court decides the issue, whether a particular lower court will accept Secular Humanism as a religion is left to that court to decide. The contention that it is a religion, however, has found enough support that courts should not dismiss the issue summarily."); Richard Collin Mangrum, *Shall We Sing? Shall We Sing Religious Music in Public Schools?*, 38 CREIGHTON L. REV. 815, 850 n.144 (2005) ("While inclined to recognize secular humanism as a religion for purposes of free exercise, courts have been loathe to consider ethical belief systems such as secular humanism as 'religious' for purposes of Establishment Clause analysis.").

⁴¹ See *Topics of the Times; Uninspired Judging*, N.Y. TIMES, Mar. 8, 1987, <http://query.nytimes.com/gst/fullpage.html?res=9B0DE5DA173CF93BA35750C0A961948260> (last visited Apr. 19, 2009) (noting that Judge Brevard Hand's office "says he is a distant relative" of Learned Hand).

⁴² *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943).

⁴³ Muhammad ibn Idrīs al-Shafī'i is an important, early Islamic law scholar. See YASIN DUTTON, *THE ORIGINS OF ISLAMIC LAW: THE QUR'AN, THE MUWATTA' AND MADINAN 'AMAL 4* (2000). We are assuming readers recognize the other two names as being significant thinkers in the Jewish and Christian traditions without a citation.

⁴⁴ Abraham, *supra* note 30, at 185.

⁴⁵ STARK & FINKE, *supra* note 31, at 89. Some might argue that including a requirement of reference to the supernatural would exclude Buddhism, various forms of deism, or some other faiths.

of religion literature, the supernatural is defined as a force or being “beyond or outside this natural order, which can suspend, alter, or ignore the normal flow of events”⁴⁶ and a power that transcends the normal “physical limits of everyday life.”⁴⁷ This definition allows inclusion of a wider set of beliefs than the narrow one rejected by *Beason* and its progeny because it ignores the outward form of expression to focus on the characteristics of the belief system. It is also more stringent than Judge Brevard Hand’s, since it limits the term by more than the requirement that the belief concern one of his four purposes, but still captures important ideas that his definition offered which *Beason* did not. Judge Learned Hand’s approach explores this additional element, making Stark and Finke’s definition doctrinally compatible with the range of definitions currently seen as acceptable.

What does it mean to focus on the supernatural? Professors Stark and Finke use their definition to distinguish religion from magic and that distinction is helpful here. Both magic and religion deal with the supernatural but the relationship between man and the supernatural is quite different in magic than in religion. Magic deals with impersonal supernatural forces, capable of manipulation by man. “The results of a magical procedure are thought to be certain if it is properly conducted”⁴⁸ Magic is thus the supernatural equivalent of physics or chemistry; it simply requires mastering the formula to accomplish a magical act.⁴⁹ Generally, magic enables control of the supernatural by man. In contrast, religions do not view the supernatural as controllable by man. In a religion the supernatural can act on man, while man can at most petition, but never dictate to, the supernatural. Thus “religions merely regard miracles as possible.”⁵⁰ The social science distinction between magic and religion has a parallel in the jurisprudence of religion, as courts applying statutes prohibiting or regulating fortunetelling, palmistry, and other “crafty sciences”⁵¹ have made a similar distinction between

Defining “religion” is a tricky business, given the diversity of human beliefs, and this is a complex topic to which we hope to return in future scholarship. For now, we think Stark and Finke’s approach uses a sufficiently broad definition of supernatural that we can safely rely on it for our purposes. In particular, as we describe below, we think the most rhetorically powerful versions of Environmentalism invoke clear appeals to the supernatural.

⁴⁶ Laurence R. Iannaccone & Eli Berman, *Religious Extremism: The Good, the Bad, and the Deadly*, 128 PUB. CHOICE 109, 112 (2006).

⁴⁷ *Id.* Professor Graber makes a similar point in her discussion of wilderness as a sacred space, defining a “religious experience” as distinct from a “religious institution[.]” as “a sudden illumination of individual consciousness, believed by mystics to be caused by personal contact with sacred power Religious experience does not have ‘content;’ it is not ‘about anything’ but itself, at least to a mind in a state of transcendence.” LINDA H. GRABER, *WILDERNESS AS SACRED SPACE* 1 (1976).

⁴⁸ STARK & FINKE, *supra* note 31, at 110.

⁴⁹ This is magic’s great weakness, since it can therefore be disproved if the properly conducted procedure fails to yield the predicted result. *Id.* at 105–06 (describing this interchange and explaining why magic does not produce organizations). This distinction explains the defense of the Harry Potter novels against charges of subverting Christianity. See Alan Jacobs, *Harry Potter’s Magic*, 99 FIRST THINGS 35, 37 (2000) (describing that Rowling “begins by positing a counterfactual history, a history in which magic was not a false and incompetent discipline, but rather a means of controlling the physical world at least as potent as experimental science”).

⁵⁰ STARK & FINKE, *supra* note 31, at 110.

⁵¹ *State v. Kenilworth*, 54 A. 244, 245 (N.J. Sup. Ct. 1903), *aff’d*, 56 A. 1133 (N.J. 1903) (describing palmistry as a “crafty science,” meaning “one by which the simple-minded are apt to be deceived”).

what they regard as “hocus pocus” and religious beliefs in communications from supernatural entities.⁵²

A second lesson from the economics of religion literature is that in a world of scarce resources and natural limits to human action (e.g., the laws of physics), humans can obtain some goods only from outside the material realm, whether it is a sense of order and meaning to this life, forgiveness of sins, or eternal life after the end of one’s life on earth. Many goods and services, from eternal life to control of the weather, are unavailable through nonsupernatural technologies.⁵³ Even ordinary goods are unavailable to some people because of a lack of resources or for other reasons.⁵⁴ As the economics of religion literature stresses, demand for what can be provided by the supernatural is a rational response to scarcity.⁵⁵ People therefore rationally turn to supernatural “technologies” such as prayer, sacrifice, and ritual to obtain these goods and services.⁵⁶

Again the distinction between magic and religion is instructive. Someone who believed in magic would attempt to obtain goods from the supernatural realm by mastering the proper spells or potions—acquiring the philosopher’s stone to possess eternal life, for example. In contrast, religions and religious organizations can be seen as an effort to structure trade with supernatural entities to obtain desired goods unavailable through other means.⁵⁷ (Trade is necessary because “[i]n the beginning, in the end, and everywhere in between, there is no such thing as a free lunch.”⁵⁸) By offering sacrifices, worshipping, obeying moral laws, or similar practices, the religiously observant person offers the supernatural entity (or entities) something that the supernatural entity desires and seeks in return the desired service or good (e.g., the rains come, sin is forgiven, life has meaning, or eternal life is provided).⁵⁹ Of course, religious practices and beliefs are often far more theologically sophisticated than this simple trade analogy suggests, but this simplification makes clear the distinction between commanding supernatural forces to do one’s will and petitioning such forces for the grant of a benefit.

A religion that we may profitably analyze using the tools provided by social science is thus one in which the beliefs concern man’s relationship with

⁵² Compare *Bridewell v. City of Bessemer*, 46 So. 2d 568, 570–71 (Ala. 1950) (describing fortune telling as “hocus pocus” that amounts to a “useless calling” and upholding ordinance intended to protect the gullible by frustrating the practice through taxation), with *People ex rel. Mirsbirger v. Miller*, 46 N.Y.S.2d 206, 210–11 (Mag. Ct. 1943) (finding a religious exemption to a statute generally prohibiting fortune telling covered a Spiritualist who acted as a medium in exchange for voluntary contributions to her church). See generally Gregory G. Sarno, Annotation, *Regulation of Astrology, Clairvoyancy, Fortunetelling, and the Like*, 91 A.L.R.3d 766 (1979) (collecting cases).

⁵³ Iannaccone & Berman, *supra* note 46, at 112–13.

⁵⁴ RODNEY STARK, *THE RISE OF CHRISTIANITY: HOW THE OBSCURE, MARGINAL JESUS MOVEMENT BECAME THE DOMINANT RELIGIOUS FORCE IN THE WESTERN WORLD IN A FEW CENTURIES* 35 (1996).

⁵⁵ STARK & FINKE, *supra* note 31, at 90–91.

⁵⁶ *Id.* at 96–102.

⁵⁷ *Id.* at 102–04.

⁵⁸ Iannaccone & Berman, *supra* note 46, at 112.

⁵⁹ Note that this differs from magic where the prescribed spell properly executed must deliver the results. Rather, the religious trade between human and supernatural entity is an offering of a bundle of goods and services (e.g., prayers, sacrifices, obedience) in exchange for another (e.g., rain). Just as in trade between two humans, the supernatural entity remains free to reject the offered trade. A magic spell, on the other hand, compels the supernatural entity to deliver the requested good or service.

supernatural forces but which does not view those forces as controllable by man in the sense that chemistry makes chemical reactions controllable by humans. We are therefore looking for evidence that some form of environmentalism, which we will label Environmentalism, constitutes a set of beliefs about the relationship between man and a supernatural force or entity (e.g., Gaia, Nature) rather than a set of propositions about manipulating forces to produce an outcome desired by humans (e.g., arguing that adopting a particular technology will result in enhanced environmental quality). Thus if someone argues that we should reduce pollution from a river by filtering effluent from a chemical plant so that humans can fish and swim in it, this is not a religious argument about the environment but a utilitarian one capable of being debated by comparing the costs and benefits of the clean river and the pollution control measures needed. On the other hand, if someone argues that we must clean up a river because we have a moral obligation to the Earth or the fish or that one must recycle goods because the act of recycling serves Nature rather than because that form of recycling actually saves energy or other resources, the argument is becoming closer to being a religious one. Similarly, saving the rain forest because a species in it might someday provide a cure for human disease is a utilitarian basis for habitat preservation; preserving it because the species in it have a moral claim derived from Nature that humans not infringe on their existence is more like a religious justification. While there can be nonreligious, nonutilitarian claims for nature preservation, when nature is transformed into a (at least) quasi-supernatural entity, as we argue below has occurred, such claims appear to us to be indistinguishable from religious ones.

This social science-derived definition is well within the boundaries of the courts' attempts at defining religion, making it possible to conceptualize the issues within the Establishment Clause framework without stretching that framework beyond the limits of current jurisprudence. The next step is to see if there is a form of Environmentalism which involves a shared organized belief structure that governs a relationship with the supernatural in an effort to provide humans with a set of goods unavailable elsewhere.

B. Is Environmentalism a Religion?

It is not necessary to ask whether widely practiced faiths such as Buddhism, Christianity, Hinduism, Islam, or Judaism are religions; any reasonable definition of religion must encompass them. Each dates its origins to antiquity and has (at least) one body of canonical literature, sacred objects, authorities, rituals, and other characteristics that enable us to immediately recognize it as a religion. Such things may not be necessary under the Supreme Court's jurisprudence to qualify as a religion, but their presence is surely evidence that a set of beliefs is indeed a religion. Whether Environmentalism is a religion is a much harder question to answer, however, since it lacks most of these easy-to-read signals and is a relatively recent development. Indeed, defining Environmentalism is itself tricky, as the lower-case version of the term can include beliefs spanning a wide range of

views.⁶⁰ However, it is no more difficult than defining Christianity, where more than 40,000 denominations⁶¹ differ on subjects such as transubstantiation of the Eucharist, the ordination of women, the proper authority of bishops, and the efficacy of infant baptism, but share a core belief in the divinity of Christ. Despite these differences, there is enough in common among the multitude of Christian denominations so that it is meaningful to speak of "the Christian religion." In this Part we make the case that the same is true for Environmentalism.

1. *What is Environmentalism?*⁶²

We regularly hear that "environmentalism has become woven into the fabric of American life"⁶³ or that "[a]ll of us are environmentalists, in the sense that we would just as soon have clean air and water."⁶⁴ Or as Richard Darman, President George H.W. Bush's Director of the Office of Management and Budget, put it in 1990:

[W]e are all environmentalists. . . . The President is an environmentalist, Republicans and Democrats are environmentalists. Jane Fonda and the National Association of Manufacturers, Magic Johnson and Danny DeVito, Candice Bergen and The Golden Girls, Bugs Bunny and the cast of Cheers are all environmentalists.⁶⁵

There is an important truth in Darman's comment, one that reflects a widespread change in attitudes among Americans.⁶⁶ No one today seriously argues

⁶⁰ See, e.g., HAL K. ROTHMAN, *GREENING OF A NATION?* 182 (1998) ("By the middle of the 1980s there was a clear spectrum in the environmental movement. It began with centrist organizations such as the Sierra Club, the Audubon Society, and the National Parks and Conservation Association and extended to a very extreme periphery that encompassed such groups as Greenpeace . . . and Earth First! . . ."); Robert H. Nelson, *Environmental Religion: A Theological Critique*, 55 CASE W. RES. L. REV. 51, 53 (2004) ("There are many varieties of environmental religion, just as there are multiple understandings of the Christian faith.").

⁶¹ See Gordon-Conwell Theological Seminary, *Status of Global Mission, 2009, in the Context of the 20th and 21st Centuries*, <http://www.gordonconwell.edu/ockenga/globalchristianity/resources.php> (last visited Apr. 19, 2009).

⁶² We are particularly grateful to Ross Emmett, Wallace Kaufman, Roger Meiners, Iain Murray, Randal O'Toole, and Joel Schwartz for suggestions for this list.

⁶³ DEBORAH LYNN GUBER, *THE GRASSROOTS OF A GREEN REVOLUTION: POLLING AMERICA ON THE ENVIRONMENT* 1 (2003).

⁶⁴ John P. Wiley, Jr., *Coming to Terms*, SMITHSONIAN, Dec. 1998, at 28. See also GUBER, *supra* note 63, at 54 ("The real question is no longer whether Americans side with environmentalism but rather what kind of commitment they bring to the table.").

⁶⁵ Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOY. L.A. L. REV. 791, 793 (1994); see also WILLETT KEMPTON ET AL., *ENVIRONMENTAL VALUES IN AMERICAN CULTURE* 5 (1995) ("The majority of Americans now" consider themselves "environmentalists."); DOWIE, *supra* note 14, at 3-4 ("A Gallup poll in 1970 showed that 53 percent of Americans viewed 'reduction of air and water pollution' as a national priority, up from 17 percent in 1965. By the 1990s well over 80 percent of Americans, according to recent polls, were comfortable calling themselves environmentalists.").

⁶⁶ This can be seen in the changes in environmental rhetoric:

The same patch of land once referred to as a swamp is now more likely to be called wetlands, and the area once called jungle is now called a rainforest. The process of shifting word choice reflects a change from considering these areas as threatening or disgusting to considering them to be essential components of the ecosystem and precious environmental resources. Such

that environmental protection is not an important public policy goal. But focusing on this unanimity obscures some important differences.

Perhaps we are all environmentalists, but reducing the word to the lowest common denominator tells us remarkably little about the content of environmentalism. If all environmentalism means is a preference for clean air or clean water when no costs are attached to the achievement of the same, it is not a meaningful term for use in everyday discourse. As public opinion pollsters have found, at this vague level the “environment” disappears from the political radar screen because

[i]t is hard . . . to make a campaign issue out of a matter when voters tend to be in agreement. No candidate is going to say that he favors dirty air and polluted water, wants to see more dolphins killed, or hopes to build a Wal-Mart in the middle of Yosemite.⁶⁷

Even most dictionary definitions are merely some variant on “advocacy of the preservation, restoration, or improvement of the natural environment; *especially*: the movement to control pollution.”⁶⁸ Such definitions are broad and imprecise, suggesting what John Wiley called “a poverty of language” for describing the range of beliefs about the environment.⁶⁹ Finding common threads is further hindered by what even some environmentalists identify as a lack of sufficient development of environmental thought.⁷⁰ Others argue that the environmental movement lacks “a broad, shared vision of where it wants to take us.”⁷¹ Still others insist the term be expanded to cover a wide range of issues.⁷²

conceptual shifts, reflected in language, indicate that the changes are not simply a few isolated attitudes but involve a more fundamental cultural change.

KEMPTON ET AL., *supra* note 65, at 6 (citation omitted).

⁶⁷ James Q. Wilson, *Why They Don't Campaign About the Environment*, SLATE, Oct. 27, 2000, <http://www.slate.com/id/92005/> (last visited Apr. 19, 2009).

⁶⁸ Merriam-Webster Online Dictionary, Environmentalism, <http://www.merriam-webster.com/dictionary/environmentalism> (last visited Apr. 19, 2009); *see also* Nita Ghei, *Evaluating the WTO's Two Step Test for Environmental Measures Under Article XX*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 117, 126 (2007) (“In fact, we can define environmentalists as those individuals who value environmental quality highly and feel strongly about such issues.”); *see also* GUBER, *supra* note 63, at 176 (“[T]o describe an environmentalist merely as someone who is concerned with the quality of the natural environment (as many standard dictionaries and encyclopedias do) seems unhelpful, even tautological.”).

⁶⁹ Wiley, *supra* note 64, at 28.

⁷⁰ SAMUEL P. HAYS, *A HISTORY OF ENVIRONMENTAL POLITICS SINCE 1945*, at 102–03 (2000). (“Environmental political engagement was based less on ideologies and more on practical circumstances.”); *id.* at 215 (noting that environmental periodicals paid “limited attention” to policy matters); *see also* PHILIP SHABECOFF, *EARTH RISING: AMERICAN ENVIRONMENTALISM IN THE 21ST CENTURY* 30 (2000) (quoting Barbara Dudley, former director of Greenpeace USA that there is no national environmental movement but “just a lot of different people organized around saving a forest here or blocking a toxic waste incinerator there. When people talk about a movement, they are talking about organizations. But there is no leadership of a movement.”).

⁷¹ SHABECOFF, *supra* note 70, at 50; *see also* DOWIE, *supra* note 14, at 221 (“Contemporary environmentalists have yet to articulate a coherent social philosophy, and most American social philosophers have failed to integrate the science of ecology into their thinking. . . . American environmentalism remains fuzzy at the edges, ill-defined and semantically confusing in all its forms.”).

⁷² *See, e.g.*, DOWIE, *supra* note 14, at 172 (“*Environmentalism* should encompass the civil rights of children and the human rights of the Ojibway. Leroy Jackson, Lois Gibbs, and Cesar Chavez should be described whenever possible as *environmentalists*.”).

One possibility is that Environmentalism is something distinct from other beliefs about nature. Environmental historian Hal Rothman defines "environmentalism" as different from the beliefs he labels "conservationism," which he argues dominated environmental thinking before the 1960s. Environmentalism is "saving the planet from the excesses of the human race. . . . Human beings [are] entitled to clean air, clean water, open spaces, and a pristine and inspiring environment as well as the life, liberty, and pursuit of happiness enshrined in the United States Constitution."⁷³ Conservationism, on the other hand, was "the idea of using resources in a manner to further the goal of the 'greatest good for the greatest number in the long run'"⁷⁴ Environmentalism as distinct from conservationism focuses on "social change and political activism" to address issues related to "pollution and toxic substances" rather than "on the land and wildlife preservation."⁷⁵ Rothman's definition seems to us to add little to the dictionary definitions, although we think Rothman's point that post-1970 environmental thought is distinct from earlier conservationism is important. And the "wilderness ethic" is an important source of Environmentalism, as "the most completely articulated version of the 'correct' relationship between man and nature with widespread current appeal[,] and from which "imagery and values" derived from it "spill over into environmental questions where they may not be useful or appropriate."⁷⁶

In making the case that Environmentalism is a religion, it is tempting to equate it with "deep ecology," an approach associated with Norwegian philosopher Arne Naess and his 1973 article *The Shallow and the Deep, Long-Range Ecology Movements*⁷⁷ that purports to go "beyond a limited piecemeal shallow approach to

⁷³ HAL K. ROTHMAN, *SAVING THE PLANET: THE AMERICAN RESPONSE TO THE ENVIRONMENT IN THE TWENTIETH CENTURY* 110 (2000). Rothman distinguishes the two approaches as follows: "While conservation had focused on society, on the greatest good for the greatest number in the long run, environmentalism often had ambiguous social connotations. It reflected the growing obsession with individualism that had come to dominate American society, but it also embraced a contradictory sense of community effort in support of collective goals." *Id.* at 111. Rothman's language illustrates our point despite his evident confusion between the Declaration of Independence's "pursuit of happiness" language and the Constitution's text.

⁷⁴ ROTHMAN, *supra* note 60, at 3 (internal citations omitted).

⁷⁵ SHABECOFF, *supra* note 70, at 6. Similarly, Kempton, Boster, and Hartley cite a variety of analysts who make the case that modern environmentalism represents something new. KEMPTON ET AL., *supra* note 65, at 9.

⁷⁶ GRABER, *supra* note 47, at 106. Graber notes that this spillover is "aided by the erosion of positive spiritual and aesthetic values associated with the countryside and the city." *Id.*

⁷⁷ Arne Naess, *The Shallow and the Deep, Long-Range Ecology Movement: A Summary*, 16 *INQUIRY* 95 (1973). Naess is "the modern-day father of deep ecology, subscribing to the deeper and more spiritual approach described by such Americans as Muir, Thoreau, and Leopold." PHILIP F. CRAMER, *DEEP ENVIRONMENTAL POLITICS: THE ROLE OF RADICAL ENVIRONMENTALISM IN CRAFTING AMERICAN ENVIRONMENTAL POLICY* 41 (1998). Other important deep ecology writers are Bill Devall and George Sessions. Peter C. List, *Introduction to RADICAL ENVIRONMENTALISM: PHILOSOPHY AND TACTICS* 8, 9 (Peter C. List ed., 1993). Dowie similarly claims that Muir, Leopold, and Carson would not recognize the staff of "Beltway environmental organizations" as their "intellectual and spiritual descendants" but would instead "look to Bill Devall, Carolyn Merchant, Murray Bookchin, and John Seed" as the "keepers of the faith." DOWIE, *supra* note 14, at 224. Even some other environmentalists concede that deep ecology has religious characteristics. See David Roberts, *Environmentalism as a Religion*, *GRIST*, Aug. 9, 2005, <http://www.gristmill.grist.org/story/2005/8/9/183352/2738> (last visited Apr. 18, 2009) ("But there's something more going on with environmentalism, . . . [with the idea that] environmentalism really does involve a form of spiritualism or worship. The graven idol, in this case, is

environmental problems and attempts to articulate a comprehensive religious and philosophical worldview.”⁷⁸ This is too easy—the rhetorical equivalent of shooting spotted owls in a barrel. We are interested in a broader phenomenon than the comparatively narrow deep ecology movement itself,⁷⁹ although deep ecology is certainly an important strain (or “denomination” to press the religion metaphor) of Environmentalism and one that has influence outside those who subscribe to all its tenets.⁸⁰ Deep ecology writers can tell us something about Environmentalism, but the “religion” of Environmentalism and deep ecology are not coextensive any more than Christianity and Catholicism, Judaism and Hasidic Judaism, or Islam and Shia Islam, although anyone seeking to understand those broader religions would need to consider the contributions of Catholic, Hasidic, or Shia scholars to do so.

We propose the following six characteristics of Environmentalism.⁸¹ Not all—and perhaps not even many—people who label themselves “environmentalists” in public opinion polls or casual conversation hold all the beliefs described here precisely as we have stated them, and complete agreement with the entire set is not a prerequisite to fitting our definition of a religious Environmentalist.⁸² But people who are leaders of environmental causes, including both intellectual and political leaders, often hold some or all of these beliefs⁸³ and these themes run through much of modern environmental writing—from the canonical 1960s “scriptures” of Rachel Carson’s *Silent Spring*,⁸⁴ Stewart Udall’s *The Quiet Crisis*,⁸⁵ and Paul Ehrlich’s *The*

nature itself. Deep ecology is what people have in mind.”). Muir, in particular, is often cited as the source of deep ecology. Long before Naess, John Muir wrote that the idea that the world was made for man was “a presumption not supported by all the facts.” JOHN MUIR, THOUSAND MILE WALK TO THE GULF 136 (William F. Blade ed., 1916); see also SHABECOFF, *supra* note 70, at 3.

⁷⁸ BILL DEVALL & GEORGE SESSIONS, DEEP ECOLOGY: LIVING AS IF NATURE MATTERED 65 (1985).

⁷⁹ Deep ecologists are quite critical of “mainstream” environmental organizations. See, e.g., CRAMER, *supra* note 77, at 53 (“Mainstream environmental groups are frequently chastised in many scholarly writings about the deep/shallow ecology split, but such reproach is not as severe as in the *Earth First! Journal*.”); FREDERICK BUELL, FROM APOCALYPSE TO WAY OF LIFE: ENVIRONMENTAL CRISIS IN THE AMERICAN CENTURY 30–31 (2003) (discussing and criticizing efforts by environmental activists, including Al Gore, to distinguish themselves from Deep Ecologists in an effort to appear moderate).

⁸⁰ See, e.g., Peter C. List, *Preface to RADICAL ENVIRONMENTALISM: PHILOSOPHY AND TACTICS*, at vi, viii (Peter C. List ed., 1993) (“[R]adical environmentalists are saying something worth saying about the destruction of nature and have become a significant factor in at least some environmental disputes in our society.”); BUELL, *supra* note 79, at 56 (arguing against excluding “radical and populist environmentalists” in environmental thinking and action).

⁸¹ We opt to focus on these more abstract points, but there is also evidence of a shared set of factual propositions about the state of the world, which Bjorn Lomborg termed “the Litany.” See BJORN LOMBERG, THE SKEPTICAL ENVIRONMENTALIST 3–4 (2001).

⁸² Peter List includes an instructive list of factions within Earth First! in his introductory survey of radical environmentalism: “old guard founders and their sympathizers, younger anarchists, ecofeminists, vegetarians, animal liberators, and various eco-spiritualists, not to mention individuals of different radical political persuasions.” List, *supra* note 80, at ix. Expanding beyond just that one group, List finds that “[t]he term ‘deep ecology’ has also been used to refer to a variety of philosophies, including social ecology, ecofeminism, bioregionalism, radical green political thought, Earth First! philosophy, Native American traditional philosophy, academic deep ecology, and animal liberationism.” *Id.* at ix. We are not quite sure what all of those are, but his point that there is no unified set of principles is a good one.

⁸³ See, e.g., CRAMER, *supra* note 77, at 15 (“Deep ecology has penetrated many environmental organizations.”).

⁸⁴ RACHEL CARSON, SILENT SPRING (1962). *Silent Spring* was “an instant best-seller” and made “[t]he toxicity of progress” a “national issue.” ROTHMAN, *supra* note 60, at 90. Dowie lists *Silent Spring*, *The*

Population Bomb,⁸⁶ to more recent additions to the canon like Al Gore's *Earth in the Balance*.⁸⁷ These are:

1. Humanity has lost its spiritual connection to Nature, an alienation that needs to be reversed to allow humans to find their rightful place in the world.⁸⁸

Population Bomb, and Barry Commoner's *The Closing Circle* as playing critical parts in the creation of "modern environmentalism." DOWIE, *supra* note 14, at 23. Deep ecologists Bill Devall and George Sessions argue that Carson and Leopold embodied a "deeper, more spiritual approach to Nature." DEVAL & SESSIONS, *supra* note 78, at 65. Buell credits Carson with "having a decisive effect" in "making concern about environmental crisis a national issue." BUELL, *supra* note 79, at xi. In part this was accomplished by making "the peacefully domestic suburban world of consumerist America—the society that emerged from the 1950s—seem a toxic minefield." *Id.* at xiii. Carson "helped spark a small tsunami of catastrophe rhetoric in environmental science and screeds and in popular literature." *Id.*

⁸⁵ STEWART L. UDALL, *THE QUIET CRISIS* 12 (1963). "*The Quiet Crisis*, written with the assistance of the great western environmentalist and novelist, Wallace Stegner, is a seminal book because it popularized Aldo Leopold's 'Land Ethic' and Rachael Carson's work on the dangers of pesticide use, and it urged the adoption of holistic environmental thinking as a public policy norm." A. Dan Tarlock, *Land Use Regulation: The Weak Link in Environmental Protection*, 82 WASH. L. REV. 651, 654 (2007); see also DEVAL & SESSIONS, *supra* note 78, at 59 ("A turning point in the search for a philosophy of ecology.").

⁸⁶ PAUL EHRLICH, *THE POPULATION BOMB* (1968). *The Population Bomb* was a "sensation" and "kicked off an immense debate about the virtues of having more people on the planet." ROTHMAN, *supra* note 60, at 91. Buell calls it a "defining crisis text of the 1960s." BUELL, *supra* note 79, at 180. Devall and Sessions point to it as "the most dramatic response to the situation in recent times." DEVAL & SESSIONS, *supra* note 78, at 55.

⁸⁷ AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* (1992). In the following footnotes we have cited and discussed examples that support each point, although we make no claim to be providing an exhaustive survey of environmentalist literature.

⁸⁸ NELSON, *supra* note 3 (manuscript at 25) ("The distinctive feature of the contemporary environmental movement . . . is not a goal to improve public health but its rethinking of the basic relationship between human beings and nature—a central topic of religion for thousands of years."). Dowie lists a "return to nature" for humanity and a recognition that humanity is not "the crowning achievement of evolution" among his predictions of a future environmental consensus. DOWIE, *supra* note 14, at 226. This idea traces back to Rachel Carson's work. Carson argued that:

What is important is the relation of man to all life. This has never been so tragically overlooked as in our present age, when through our technology we are waging war against the natural world. It is a valid question whether any civilization can do this and retain the right to be called civilized. By acquiescing in needless destruction and suffering, our stature as human beings is diminished.

Id. at 225 (quoting a speech given by Rachel Carson in 1964); see also ALDO LEOPOLD, *A SAND COUNTY ALMANAC: WITH ESSAYS ON CONSERVATION FROM ROUND RIVER* at xix (1970) ("[T]hat land is to be loved and respected is an extension of ethics."). Deep ecologist Arne Naess contends that "[t]here is a process of ever-widening identification and ever-narrowing alienation which widens the self." Arne Naess, *Identification as a Source of Deep Ecological Attitudes*, in *DEEP ECOLOGY* 256, 261 (Michael Tobias ed., 2d ed. 1988) [hereinafter Naess, *Identification*]. See also DEVAL & SESSIONS, *supra* note 78, at 48 ("Technological society not only alienates humans from the rest of Nature but also alienates humans from themselves and from each other."). Even nondeep ecologists concede that the deep ecologists "have a point" with respect to reigniting "the transcendental fire." SHABECOFF, *supra* note 70, at 76; see also CRAMER, *supra* note 77, at 4 ("[Deep ecologists] seek the healing of alienation from self, community, and the Earth that shallow ecology has caused."); SHABECOFF, *supra* note 70, at 76 ("As writer and conservationist Michael Frome insisted, 'We need a community of faith—faith in nature, in humankind, and in each other.'"). Similarly, Dave Foreman's standard speech included an assertion that "there's still meaning" available in wilderness. SUSAN ZAKIN, *COYOTES AND TOWN DOGS: EARTH FIRST! AND THE ENVIRONMENTAL MOVEMENT* 198 (1993). Rothman argues that the

2. Humans have a responsibility to Nature that entitles nonhuman entities to a moral status comparable to that of humans.⁸⁹

Wilderness Act came about because “Americans recognized that wilderness—for many just the *idea* of wilderness—helped make them whole, helped obviate the sense of loss that stemmed from urbanization and suburbanization.” ROTHMAN, *supra* note 73, at 134–35. As a result, he dates “environmentalism” from the passage of the Wilderness Act in 1964:

The passage of the Wilderness Act signaled the arrival of environmentalism. Wilderness was a true quality-of-life issue. Even most of its advocates never went anywhere near it, but its psychic importance as an indicator of the health of the world and the virtue of American society was great. Out of the various pieces of conservation interest, [the drafters] successfully interpreted the hopes, fears, and aspirations of American society and forged a new movement that tugged at the emotions of the most influential portion of the American public, the broad and prosperous middle class of the late 1960s. While it maintained a de facto fidelity to the old sacred-profane distinction, the new environmentalism found a constituency that reflected its values with energy and clarity.

Id. at 137.

This theme is also tied to a belief in an original age of innocence that was destroyed by anthropocentrism and technology. This is embodied in Daniel Quinn’s novel *Ishmael*, the winner of the \$500,000 Turner Tomorrow Fellowship Award. DANIEL QUINN, *ISHMAEL* (1992); Read *Ishmael*, *Ishmael* By Daniel Quinn Winner Of Largest Prize For a Single Literary Work In History, <http://www.readishmael.com/readishturner.html> (last visited Apr. 19, 2009). Considering Leopold’s land ethic, Graber notes that such views are valuable to the believer because “the purist is encouraged to see himself as part of the advance guard for a higher level of civilization, which is a much more pleasant self-image than ‘nature nut.’” GRABER, *supra* note 47, at 50.

Alienation surfaces as an important factor in Kempton et al.’s analysis of environmental thinking, which found that alienation is one of the explanations raised primarily by environmentalists rather than by the full range of their interviewees. See KEMPTON ET AL., *supra* note 65, at 55. Different types of environmentalists find different sources of this alienation. Aldo Leopold argued that the problem stemmed from our ignorance of the complexity of the natural world. See H. Lewis Ulman, “*Thinking Like a Mountain*” *Persona, Ethos, and Judgment in American Nature Writing*, in GREEN CULTURE: ENVIRONMENTAL RHETORIC IN CONTEMPORARY AMERICA 46, 71 (Carl G. Herndl & Stuart C. Brown eds., 1996) (“In *A Sand County Almanac*, Leopold argues that human history should have taught us humility with regard to our *ignorance* of the complex relationships that constitute the natural communities to which we belong . . .”). Stewart Udall observed the importance of returning to old ways of thinking, thereby “recovering a sense of reverence for the land” that had formerly been lost. UDALL, *supra* note 85, at 12. Deep ecologist Arne Naess contended that it was our attempt to ignore our dependence on the nonhuman world. Naess, *supra* note 77, at 96 (“The attempt to ignore our dependence and to establish a master-slave role has contributed to the alienation of man from himself.”). In a passage that we have to confess we do not really understand, but which seems to make our point, ecofeminist Ynestra King calls for “a dynamic, developmental theory of the person—male and female—who emerges out of nonhuman nature, where difference is neither reified nor ignored and the dialectical relationship between human and nonhuman nature is understood.” Ynestra King, *Healing the Wounds: Feminism, Ecology, and the Nature/Culture Dualism*, in REWEAVING THE WORLD: THE EMERGENCE OF ECOFEMINISM 106, 117 (Irene Diamond & Gloria Feman Orensteine eds., 1990). We are not the only people who find deep ecology writings veering toward gibberish. An early critique from within the environmental movement noted that “[a]t its worst, ‘deep ecology is fuzzy-headed, anti-intellectual, pie-in-the-sky, pseudo-spiritual gobbledygook.” ZAKIN, *supra*, at 245. This loss of connection parallels Christian thinking on the impact of the Fall in fragmenting the world. We are grateful to Fr. Michael Butler for pointing out this connection to us.

⁸⁹ Perhaps most famously, Edward Abbey claimed “I’m a humanist, I’d rather kill a *man* than a snake.” EDWARD ABBEY, *DESERT SOLITAIRE: A SEASON IN THE WILDERNESS* 20 (1968). Dowie lists “anthropocentrism will become passé” as one of his predictions for the future of environmentalism. DOWIE, *supra* note 14, at 226. List puts the distinction between concern for the earth based on the impact of pollution on mankind and concern for the “inherent or intrinsic value of nature itself” as a key

distinction between early environmentalists and current radicals. List, *supra* note 77, at 6. See also THOMAS R. DUNLAP, FAITH IN NATURE: ENVIRONMENTALISM AS RELIGIOUS QUEST 35 (2004) (noting that environmentalism “held—possibly its most radical departure from orthodoxy—that nature had value apart from its use to humans and had the right to exist”). Deep ecologist Arne Naess puts it more bluntly: “[T]he equal right to live and blossom is an intuitively clear and obvious value axiom.” Naess, *supra* note 77, at 96; see also Bojan Pancevski, *New Swiss Law Protects Rights of ‘Social’ Animals*, TIMES ONLINE, Apr. 28, 2008, <http://www.timesonline.co.uk/tol/news/world/europe/article3818457.ece> (last visited Apr. 18, 2009); Gautam Naik, *Switzerland’s Green Power Revolution: Ethicists Ponder Plants’ Rights: Who Is to Say Flora Don’t Have Feelings? Figuring Out What Wheat Would Want*, WALL ST. J., Oct. 10, 2008, at A1 (discussing an amendment to the Swiss constitution that mandates “the moral consideration of plants for their own sake”). Not seeing man as an order of creation distinct from the rest of nature is inconsistent with the Judeo-Christian tradition as well as with classical Greek thought’s portrayal of man as a “rational animal,” a point on which Environmentalism tends to follow an Eastern religious model rather than a Judeo-Christian one. We are grateful to Fr. Michael Butler for pointing out this distinction.

This idea of the rights of nature distinct from man can be traced to Leopold’s land ethic. Leopold contended that “[a] thing is right when it tends to preserve the integrity and stability and beauty of the biotic community. It is wrong when it tends otherwise.” LEOPOLD, *supra* note 88, at 262. Kempton et al., identify “biocentrism” (a value system “which grant[s] nature itself intrinsic rights, particularly the right of species to continue to exist”) as one of three sources for environmental values. KEMPTON ET AL., *supra* note 65, at 6. Zakin’s account of the founding of Earth First! quotes Louisa Wilcox, a reporter who knew the early members of the group, that the rationale was to be “a voice which speaks for the rights of wild country, wild critters, just for themselves,” ZAKIN, *supra* note 88, at 138, and Dave Foreman as saying “If we can see that grizzly bears and mosquitoes and redwoods and algae have value in and of themselves and are important just like we are, then I think we start making the first step.” *Id.* at 291; see also *id.* at 112–13 (noting that the biocentric idea that nature itself has rights was more common among environmentalists in their interviews than among nonenvironmentalists).

This can be seen in public opinion surveys. When asked whether they agreed or disagreed with the statement, “If any species has to become extinct as a result of human activities, it should be the human species,” it is not surprising that 80% of Earth First! members surveyed agreed. A surprisingly large group (one-fifth) of the general population survey group also agreed with the statement. KEMPTON ET AL., *supra* note 65, at 114.

This point of view crops up repeatedly in environmental writings. For example, as early as the writings of Aldo Leopold, the discussion of species preservation was being framed in terms of humanity’s “right” to exterminate a species. Leopold argued, “We have no right to exterminate any species of wildlife. I stand on this as a fundamental principle.” See Ulman, *supra* note 88, at 63 (quoting Leopold). See also SHABECOFF, *supra* note 70, at 5 (contending that Leopold “admonished that humans are no more and no less than members of the entire community of life”). Leopold himself wrote that his land ethic would change “the role of *Homo Sapiens* from conqueror of the land-community to plain member and citizen of it.” LEOPOLD, *supra* note 88, at 240. Former Interior Secretary Bruce Babbitt pointed to Leopold as the basis for his call for a “new American land ethic” in a 1993 interview. Francis Wilkinson, *Bruce Babbitt: Is He Tough Enough to Save the Environment?*, ROLLING STONE, July 8–22, 1993, at 48. Citing Leopold’s reference to how mankind came to realize that property in humans was wrong, Babbitt argued that we can no longer think of land “as property, meaning that we have no obligations toward it. What a land ethic is about is discarding that concept of property and trying to find a different understanding of the natural landscape. We have a moral responsibility toward our surroundings.” *Id.* Roderick Nash traced the later attacks by various forms of environmentalists on hierarchies of all sorts to Leopold, noting that Leopold’s “most radical ideas” came from his concern for “the intrinsic rights of nonhuman life forms and of life communities or ecosystems to exist.” Roderick Nash, *Aldo Leopold and the Limits of American Liberalism*, in ALDO LEOPOLD: THE MAN AND HIS LEGACY 53, 75–76 (Thomas Tanner ed., 1987).

Other examples of environmental writing make similar claims. For example, Alaskan environmentalist Richard Nelson’s award-winning book, *The Island Within*, draws a lesson from an orphan deer’s experience: “I remember the orphan deer, and think: there are no boundaries; there is no

3. Nature was once undisturbed (Eden) but was ruined by human action (the Fall).⁹⁰ Remaining "pure" areas of Nature have a sacred status and altering them is sacrilegious.⁹¹

separation; each of us is the other. I am the deer and the deer is me." RICHARD NELSON, *THE ISLAND WITHIN* 249 (1989). From this experience, Nelson resolves to

bring the island inside of me, binding my body and my soul more closely with this place. Turning away from the artificial boundaries of physical separateness, I can strive to become part of the island's life, just as it has become the center of mine.

Living from wild nature joins me to the island as no disconnected love ever could When I touch my self, I touch a part of the island. It lives within me as it also gives me life.

Id. at 249–50; see Conservation Science Institute, Richard Nelson, http://conservationinstitute.org/awards/award_richard_nelson.htm (last visited Apr. 19, 2009); see also WALTER A. ROSENBAUM, *ENVIRONMENTAL POLITICS AND POLICY* 29 (4th ed. 1995) ("Reduced to its essentials, environmentalism springs from an attitude toward nature that assumes that humanity is part of the created order, ethically responsible for the preservation of the world's ecological integrity and ultimately vulnerable, as are all earth's other creatures, to the good or ill humans inflict on nature.").

Similarly, "deep ecology" adherents seek "an egalitarian attitude on the part of humans not only toward all *members* of the ecosphere, but even toward all identifiable *entities* or *forms* in the ecosphere [including] rivers, landscapes, and even species and social systems considered in their own right." Warwick Fox, *The Deep Ecology-Ecofeminism Debate and Its Parallels*, 11 *ENVTL. ETHICS* 5, 6 (1989); see also CRAMER, *supra* note 77, at 3 (deep ecologists "reject traditional anthropocentric beliefs in favor of a biocentric outlook"); Foundation for Deep Ecology, Deep Ecology Platform, <http://www.deep ecology.org/platform.htm> (last visited Apr. 18, 2009) (according to deep ecology's basic principles as formulated by Arne Naess and George Sessions, the values of nonhuman life on Earth "are independent of the usefulness of the non-human world for human purposes"); David A. Garber, *Mother Nature as a Hothouse Flower*, *L.A. TIMES BOOK REV.*, Sunday, Oct. 22, 1989, at 19, available at 1989 WLNR 2691673. ("We are not interested in the utility of a particular species or free-flowing river, or ecosystem, to mankind. They have intrinsic value, more value—to me—than another human body, or a billion of them."). Even some Christian environmentalists argue for an expansion beyond a "man-centered theology." See EARTH KEEPING, *supra* note 4, at 3–4 ("When Christians affirm that God loved the world and that Christ died for the life of the world, they are speaking not just of humanity, but of the whole planet—indeed, the whole created universe In some way, the Christian must include the rest of creation in his or her own salvation.").

⁹⁰ See, e.g., ZAKIN, *supra* note 88, at 73–74 (quoting Brock Evans, "the eloquent, Princeton-educated attorney who ran the Sierra Club's Washington, D.C. office," that the Alaska pipeline project had "broken [the land's] spirit, forever"); CARSON, *supra* note 84, at 7 (stating chemicals released into the environment "are no longer merely the calcium and silica and copper and all the rest of the minerals washed out of the rocks and carried in rivers to the sea; they are the synthetic creations of man's inventive mind, brewed in his laboratories, and having no counterparts in nature"); see also SHABÉCOFF, *supra* note 70, at 10 ("[E]nvironmentalism provided an intellectual and ethical context that enabled Americans, and people in much of the rest of the world, to see the harm that human activity was inflicting on the natural world—and on their own bodies."); *id.* at 14 ("[O]ur mastery and manipulation of nature has thrust us into dangers unknown to past generations. We are discovering anew that the tree of knowledge bears perilous fruit."); ENVIRONMENTAL DEFENSE FUND, *STRATEGIC PLAN 1* (1997), available at http://www.edf.org/documents/696_StrategicPlan.pdf ("A historic threshold has been crossed. A shift has occurred in the balance of strength between nature and humankind. We have passed, almost without noticing it, from a world in which the overall stability of the Earth's environment could be taken for granted to a world in which major, often irreversible manmade alterations of the environment are under way."); George Sessions, *Ecological Consciousness and Paradigm Change*, in *DEEP ECOLOGY* 28, 29 (Michael Tobias ed., 1985) ("[W]e have been literally destroying the very biosphere itself at an exponentially increasing rate since World War II."); see also LEE SILVER, *CHALLENGING NATURE* 202 (2006) ("Post-Christian cultures, in particular, want to believe in a Mother Nature that is feminine and benevolent, always promoting her biosphere in positive ways. Life will thrive unless, according to Greenpeace International, foolish humans persist in 'throwing the world's

4. Correcting humans' relationship to Nature requires new ways of thinking,⁹² feeling,⁹³ and acting,⁹⁴ which must arise out of personal, transforming revelation.⁹⁵

climate out of its natural balance and into chaos.' The assumption is that if we leave Mother Nature alone to follow her own path, everything will turn out for the better."); LOREN EISELEY, *THE FIRMAMENT OF TIME* 123–24 (1960) ("It is with the coming of man that a vast hole seems to open in nature, a vast black whirlpool spinning faster and faster, consuming flesh, stones, soil, minerals, sucking down the lightning, wrenching power from the atom, until the ancient sounds of nature are drowned in the cacophony of something which is no longer nature, something instead which is loose and knocking at the world's heart, something demonic and no longer planned—escaped, it may be—spewed out of nature, contending in a final giant's game against its master."); GRABER, *supra* note 47, at 15 ("The traditional concept of Eden and the contemporary purist's concept of wilderness are identical in one important respect: the original Creation is thought to survive on a select portion of the Earth's surface.").

⁹¹ This idea is perhaps best captured by Edward Abbey in *The Monkey Wrench Gang*, when the hero George Hayduke says "My job is to save the fucking wilderness. I don't know anything else worth saving." EDWARD ABBEY, *THE MONKEY WRENCH GANG* 211 (Avon Books 1976) (1975); *see also* DUNLAP, *supra* note 89, at 19 ("Environmentalism believed nature had intrinsic value and rights that humans should respect . . ."). This idea can be traced back to John Muir, who argued that "certain areas" needed to be "preserved forever as virgin, roadless, damless, and mineless, accessible to humanity only on foot, and only to those willing to sleep on the ground and carry out everything they carried in." DOWIE, *supra* note 14, at 16–17; *see also* ZAKIN, *supra* note 88, at 122 (summarizing Earth First! founder Dave Foreman's view of grazing in the West as that western grasslands should not be used at all); *id.* at 180 (quoting Jack Loeffler that Edward Abbey had made a "psychological shift" to see "himself as secondary to the planet; well, to the West, to the landscape, to the land"); GRABER, *supra* note 47, at 11 ("The axiom of the wilderness ethic is that wilderness is a manifestation of the Wholly Other from man, and it is to be valued for that reason."); Sessions, *supra* note 90, at 40 (quoting Gary Snyder stating that "[w]hat we envision is a planet in which the human population lives harmoniously and dynamically by employing a sophisticated and unobtrusive technology in a world environment which is *left natural*"); CARSON, *supra* note 84, at 8 (noting the "central problem of our age" is "the contamination of man's total environment with such substances of incredible potential for harm"); *id.* at 296 (quoting a scientist as stating that "[w]e . . . have to put an end to these unnatural manipulations brought into the most important and almost last natural living space which has been left for us"). For some, we have passed the point at which salvation is possible. *See, e.g.*, BUELL, *supra* note 79, at 188 (describing follow-up to *Limits to Growth's* conclusion that we can achieve at best "a damaged but restorable world," an opportunity missed by our failure to act in the 1990s, "doom[ing] the earth to erosion and terrible contraction in the future"); *see also* DUNLAP, *supra* note 89, at 86 (summarizing beliefs that wilderness is an ultimate value).

⁹² *See, e.g.*, LEOPOLD, *supra* note 88, at xix ("[S]hift of values . . . by reappraising things unnatural, tame, and confined in terms of things natural, wild, and free."); CARSON, *supra* note 84, at 261 (quoting entomologist that "We must change our philosophy, abandon our attitude of human superiority, and admit that in many cases in natural environments we find ways and means of limiting populations of organisms in a more economical way than we can do it ourselves"); *id.* at 275 (quoting scientist that "We need a more high-minded orientation and a deeper insight, which I miss in many of our researchers. Life is a miracle beyond our comprehension, and we should reverence it even where we have to struggle against it . . ."). Dunlap notes that Carson "condemned the careless use of pesticides but spoke with greater force against the attitude of mind that encouraged us to rely on them" and that Leopold became "a nature saint for his argument about humans' moral duties toward the world." DUNLAP, *supra* note 89, at 36; *see also* Jimmie Killingsworth & Jacqueline S. Palmer, *Millennial Ecology: The Apocalyptic Narrative from Silent Spring to Global Warming*, in *GREEN CULTURE: ENVIRONMENTAL RHETORIC IN CONTEMPORARY AMERICA*, *supra* note 88, at 21, 30 ("The implication [from the prologue to *Silent Spring*] is that the old, simple ways of seeing and acting no longer work; that a new reality requires a new kind of narrative."); MURRAY BOOKCHIN, *THE MODERN CRISIS* 68 (2d rev. ed. 1987) ("Nature lives in us ontogenetically as different layers of experience which analytic rationalism often conceals from us: in the sensitivity of our cells, the remarkable autonomy of our organ systems, our so-called layered brain which experiences the world in different ways and attests to different worlds, which analytic reason, left to its own imperialistic claims, tends to close to us . . ."); SHABECOFF, *supra* note 70, at 69 ("Looking

back in October 1998 at ten years of funding environmental projects, Edward Skloot, executive director of the Surdna Foundation, concluded: 'Most American corporations and individuals, as well as their government representatives, still believe that natural resources and habitat are there for the taking. Without reformation of this dominating mind-set, and agreement on a few universal truths that give our individual and collective lives meaning and sustenance, we will not be able—and should not be able—to live sustainably in the world.'"); ZAKIN, *supra* note 88, at 10 (describing Earth First! as developing "a truly ecological worldview"); GRABER, *supra* note 47, at 15 ("When the purist enters the wilderness he comes in search of religious experience, attempting to transcend his ordinary world, self, and manner of perception."); *id.* at 77 (noting wilderness advocates oppose motor vehicle use in wilderness areas because they "feed human egoism by allowing people to cruise the wilderness at will. In contrast, self-propelled travel is limited by the weather and by the weakness of the flesh"); Sessions, *supra* note 90, at 30 ("An ecologically harmonious paradigm shift is going to require a total reorientation of the thrust of Western culture.").

In her 1976 survey, Graber noted that in nature writing, "knowledge about" nature is valued "only insofar as it helps [the writer] to define, justify, or enrich his environmental encounters." GRABER, *supra* note 47, at 36. Science serves the purpose of justifying "the purist's numinous experience" and providing a means to interpret it "as a useful, satisfying moral code." *Id.* at 50. This is a different function for science than the simple pursuit of knowledge. Rejecting traditional "ways of thinking" upsets some potential allies. For example, Princeton biologist Lee Silver argued against the practice of paying attention to cultural beliefs that conflict with scientific knowledge in his 2006 book *Challenging Nature*. Silver argued that those "anti-science intellectuals" who refused "to consider the facts on the ground finds no rationale except for a mystical naturalistic ideology masquerading as a political position." SILVER, *supra* note 90, at xiv.

⁹³ See, e.g., CARSON, *supra* note 84, at 9 ("The problem whose attempted solution has brought such a train of disaster in its wake is an accompaniment of our modern way of life."); SHABECOFF, *supra* note 70, at 11 (stating that environmentalists "will have to find ways to rekindle the transcendental flame lifted by John Muir but now only a spark in their workaday institutions"); ZAKIN, *supra* note 88, at 10 (mainstream environmental groups "had lost touch with the pure, transcendental rush" that originally motivated them, requiring a new form of organization in Earth First!).

⁹⁴ See, e.g., SHABECOFF, *supra* note 70, at 94 (calling for "economic growth for purposes different from the present purposes" and that will "improve the quality of our lives, preserve the beauty and salubrity of our surroundings, and secure the future of our posterity" rather than "increas[ing] our consumption of ephemera"); DONELLA H. MEADOWS ET AL., *THE LIMITS TO GROWTH* 156 (1972) (noting critically that "[a]pplying technology to the natural pressures that the environment exerts against any growth process has been so successful in the past that a whole culture has evolved around the principle of fighting against limits rather than learning to live with them"); BUELL, *supra* note 79, at 46 ("Modernity must as a result [of environmental crisis] restructure itself to cope with this challenge."); MARK HERTSGAARD, *EARTH ODYSSEY* 266–67 (1998) (reporting that even environmental "moderates" like William Ruckelshaus had come to believe that "[t]inkering around the edges would not suffice; agriculture, industry, transportation, energy, housing, and many other spheres of human activity had to be reconfigured from the ground up"); HARVEY MANNING, *BACKPACKING: ONE STEP AT A TIME* 342–43 (1972) (hiking guide concluding by stating "It is not enough to walk the trails lightly. To save the wilderness each hiker must work for zero population growth, minimum energy consumption, complete recycling of resources, and follow the old New England adage: Eat it up. Wear it out. Make it do. Do without."); DEVAL & SESSIONS, *supra* note 78, at 181 ("[D]irect action is necessary to develop human ecological consciousness and maturity in its fullest sense."). See also ROTHMAN, *supra* note 73, at 182 ("Environmentalism in its post-1970s form was the antithesis of [the 'mythic'] independence [in American thought]. . . . It advocated a communal approach to all things: nature, human endeavor, and social interaction. It also promoted restraint, a decidedly un-American idea."). An extreme example of this type of thought is Dave Foreman's call (interrupted by "loud applause") at the 1989 Sierra Club International Assembly for "a reverse Peace Corps" which would bring "Australian aborigines and bushmen and Eskimos and Kayapo Indians and Penan tribespeople to come teach us how to live." ZAKIN, *supra* note 88, at 398.

⁹⁵ See, e.g., DUNLAP, *supra* note 89, at 40 ("Environmentalism accepted the universe on the basis of reason but also looked for a personal relationship with nature, which came to mean wild country, that yielded insight into the universe."); LEOPOLD, *supra* note 88, at 6 (noting "spiritual dangers" of not

owning a farm). Leopold describes a small flower, the Draba, thus "Finally there is Draba, beside whom even Linaria is tall and ample. I have never met an economist who knows Draba, but if I were one I should do all of my economic pondering lying prone on the sand, with Draba at nose length." *Id.* at 110. Similarly, Leopold criticizes his fellow bus passengers on a trip across Illinois:

No one in the bus sees these relics [of the prairie]. A worried farmer, his fertilizer bill projecting from his shirt pocket, looks blankly at the lupines, lespedezas, or Baptisias that originally pumped nitrogen out of the prairie air and into his black loamy acres. He does not distinguish them from the parvenu quack-grass in which they grow. Were I to ask him why his corn makes a hundred bushels, while that of non-prairie states does well to make thirty, he would probably answer that Illinois soil is better. Were I to ask him the name of that white spike of pea-like flowers hugging the fence, he would shake his head. A weed likely. . . .

The highway stretches like a taut tape across the corn, oats and clover fields; the bus ticks off the opulent miles; the passengers talk and talk and talk. About what? About baseball, taxes, sons-in-law, movies, motors, and funerals, but never about the heaving groundswell of Illinois that washes the windows of the speeding bus. Illinois has no genesis, no history, no shoals or depths, no tides of life and death. To them Illinois is only the sea on which they sail to ports unknown.

Id. at 125–27. Others writing at the same time also called for "people to search in wilderness for an immediate and emotional grasp of intellectual truths about relationship to the world." DUNLAP, *supra* note 89, at 39.

H. Lewis Ulman describes an important transformation in Aldo Leopold's writings in these terms. Discussing Leopold's essay, *Thinking Like a Mountain*, Ulman notes that Leopold first recounts his youthful hunting of a wolf and how "Leopold's ecological conscience is transformed by watching a 'fierce green fire' die in her eyes." Ulman, *supra* note 88, at 60. When Leopold is older and more mature, and able to "think like a mountain," he realizes the value of the wolf to preserving the wilderness range and he uses the essay

to effect a public "shift of values" similar to his changed attitude toward predators [], thus linking the substantive good toward which his argument tends—the systemic value of wildness—to the manner in which that value constructs both self and culture. In this essay, that construction is figured as a shift from immaturity to wisdom, both individually and culturally.

Id. at 60–61.

Similarly, Rachel Carson "preached—that is not too strong a word—that we had a duty to life on earth, the 'obligation to endure.' We had to understand our place in the world, change our values and our hearts." DUNLAP, *supra* note 89, at 15. The organizers of the first Earth Day hoped it would lead to "a new value system based on ecology and reverence for life." ZAKIN, *supra* note 88, at 37 (quoting Denis Hayes). Dave Foreman got part of his inspiration for Earth First! from spending time living in the desert where the

culture took its rituals from the changing seasons, from the rocks and rain and blood and growth and births and deaths of humans and animals. . . . It promised a way to make complete freedom work on a social scale, by setting up a community that would be small and tribal, with its own rituals and agreements, spoken and unspoken, shifting if necessary, but never coerced.

Id. at 62; see also GRABER, *supra* note 47, at 12 ("The [wilderness] purist must reject his feelings of human superiority in favor of a pantheist-like vision of shared essence. Purists tend to believe that man's awareness of his true unity with nature is dulled by life in urban, industrial society, but a journey to wilderness helps shake off the crust of habit."); *id.* at 42 ("[P]urists frequently attempt to read a moral message in their [wilderness] experiences" as well as experiencing "[a]wakened awareness of wilderness as a hierophany" as a "message in itself."); DEVAL & SESSIONS, *supra* note 78, at 8 ("Deep ecology is a process of ever-deeper questioning of ourselves, the assumptions of the dominant worldview in our culture, and the meaning and truth of our reality."); Albert Borgman, *The Nature of Reality and the Reality of Nature*, in REINVENTING NATURE 43 (Michael E. Soulé and Gary Lease eds., 1995) ("Human conduct that is invigorated by reality and devoted to excellence and celebration [in Nature] differs notably from conduct that is dedicated to the production and consumption of hyperreal commodities . . . [which would produce] the debilitating mindlessness of consumption . . ."); THEODORE ROSZAK, PERSON/PLANET: THE CREATIVE

5. Human history on Earth is part of an apocalyptic narrative that links disaster to the sin or hubris of an “overweening desire to control nature” and that contrasts with the “idea of progress with its ascendant narratives of human victory over nature.”⁹⁶

DISINTEGRATION OF INDUSTRIAL SOCIETY, at xix (1978) (“[T]he environmental anguish of the Earth has entered our lives as a radical transformation of human identity.”); *id.* at xxx (“[T]here is a planetary dimension to the spreading personalist sensibility which links the search for an authentic identity to the well-being of the global environment.”).

This personal transformation must begin with recognition of collective guilt (a parallel to original sin in Christian theology) for environmental sins. For example, Richard Nelson writes about the destruction of a forest in Alaska by lumbering:

Yet whatever judgment I might make against those who cut it down I must also make against myself. I belong to the same nation, speak the same language, vote in the same elections, share many of the same values, avail myself of the same technologies, and owe much of my existence to the same vast system of global exchange. There is no refuge in blaming only the loggers or the government that consigned this forest to them. The entire society—one in which I take active membership—holds responsibility for laying this valley bare.

NELSON, *supra* note 89, at 56–57; *see also* CRAMER, *supra* note 77, at 4 (“For some, deep ecology is a path for personal growth, whereas for others it is a compass for daily action.”); Stephen Jay Gould, *Unenchanted Evening*, NATURAL HISTORY, Sept. 1991, at 4, 14 (“[W]e cannot win this battle to save species and environments without forging an emotional bond between ourselves as nature as well—for we will not fight to save what we do not love (but only appreciate in some abstract sense).”); Naess, *Identification*, *supra* note 88, at 265 (“[E]cology helped many to know more about themselves.”); DEVALL & SESSIONS, *supra* note 78, at 66 (“[T]he search for deep ecological consciousness is the search for a more objective consciousness and state of being through an active deep questioning and meditative process and way of life.”); *id.* at 69 (“The ultimate norms of deep ecology . . . cannot be fully grasped intellectually but are ultimately experiential.”); SHABECOFF, *supra* note 70, at 11 (“There will have to be yet another wave of environmentalism, one that is broader, more sophisticated, visionary, and aggressive and massive enough to stand against the tide of human numbers and technology, of ignorance and greed and willfulness, that threatens to propel us into an age of physical, biological, and cultural decline.”); *id.* at 28 (“This is the great work of our age—to move the human situation from a destructive relationship with the Earth to a creative one.” (quoting Thomas Berry)).

⁹⁶ Killingsworth & Palmer, *supra* note 92, at 21. The apocalyptic narrative is captured well by the following account:

The litany of ecological complaints plaguing the world today . . . include: overpopulation, destruction of the ozone layer, global warming, extinction of species, loss of genetic diversity, acid rain, nuclear contamination, tropical deforestation, the elimination of climax forests, wetland destruction, soil erosion, desertification, floods, famine, the despoliation of lakes, streams and rivers, the drawing down and contamination of ground water, the pollution of coastal waters and estuaries, the destruction of coral reefs, oil spills, overfishing, expanding landfills, toxic wastes, the poisonous effects of pesticides and herbicides, exposure to hazards on the job, urban congestion, and the depletion of nonrenewable resources.

JOHN BELLAMY FOSTER, *THE VULNERABLE PLANET* 11–12 (1994). Carson dedicated *Silent Spring* to Albert Schweitzer, who she quoted as saying “Man has lost the capacity to foresee and to forestall. He will end by destroying the earth.” CARSON, *supra* note 84; *see also id.* at 297 (“The ‘control of nature’ is a phrase conceived in arrogance, born of the Neanderthal age of biology and philosophy, when it was supposed that nature exists for the convenience of man.”); DEVALL & SESSIONS, *supra* note 78, at 74 (“A total view, such as deep ecology, can provide a single motivating force for all the activities and movements aimed at saving the planet from human exploitation and domination.”); ROTHMAN, *supra* note 73, at 111 (“Environmentalists associated themselves with salvation in a near-religious fashion; there was evil, they said, and only human faith—not the scientific knowledge of the conservationists—could save the earth and all its inhabitants from self-destruction.”); SHABECOFF, *supra* note 70, at 177 (“The mission of environmentalism is to mobilize society at all levels to confront the danger and disorder into which human activity has propelled us and to guide us to a safer, saner way of living on

6. Environmental principles cannot be compromised because they come from a higher authority (Gaia, Nature, or elsewhere).⁹⁷

this planet, now and in the time of our posterity.”); KEMPTON ET AL., *supra* note 65, at 1 (“[T]oday’s multiple simultaneous changes are unprecedented and, in the view of some scientists, potentially catastrophic. For the first time, the primary driving force of planet-scale change is humanity, with our growing numbers and increasingly disruptive activities.”); ZAKIN, *supra* note 88, at 7 (stating, in describing founders of Earth First!, that “[a]ll of them had read enough to understand that the land’s ability to replenish itself was being choked off by industrial development. If only half of what they said was true, environmental issues were no longer a question of jobs vs. nature, snail darters vs. dams. Life itself was threatened.”); *id.* (stating that Ecologist Raymon Dasman termed the environmental situation “World War Three, industrial man’s war on nature”); BUELL, *supra* note 79, at 39 (quoting the 1992 “World Scientists’ Warning to Humanity” that “[a] great change in our stewardship of the earth and the life on it is required, if vast human misery is to be avoided and our global home on this planet is not to be irretrievably mutilated”); *id.* at 76 (“Environmental crisis is no longer an apocalypse rushing toward a herd of sheep that a few prophets are trying to rouse. It is not a matter of the imminent future but a feature of the present.”). This narrative is present even in relatively dry, technical environmental writing, such as the Club of Rome’s “Project on the Predicament of Mankind” early 1970s report, *The Limits to Growth*. See MEADOWS ET AL., *supra* note 94, at 142 (“*The basic behavior mode of the world system is exponential growth of population and capital, followed by collapse.*”); see also BUELL, *supra* note 79, at xii (“[R]esponses to proliferating environmental problems in the 1960s and 1970s were fiercely urgent and apocalyptically final.”). It also reached popular market hiking guides, such as Manning’s 1972 conclusion that “[t]he last half of the 20th century and the first half of the 21st will be known in history books of the future (if any) as the Crisis Era, when man’s ingenuity and appetite and pure, plundering, crushing, numbers drove him dangerously out of balance with his sustaining life-systems.” MANNING, *supra* note 94, at 342.

Killingsworth and Palmer argue that the apocalyptic narratives in environmental writing serves to broaden the appeal of the environmental ideology. Killingsworth & Palmer, *supra* note 92, at 41. Slovic argues that jeremiads have a limited effect in the long run and that “the more significant, long-term transformation of values is the work of writers who emphasize fundamental epistemological discoveries and whose political concerns, if any, are blurred with or deeply embedded in the epistemological.” Scott Slovic, *Epistemology and Politics in American Nature Writing: Embedded Rhetoric and Discrete Rhetoric*, in GREEN CULTURE: ENVIRONMENTAL RHETORIC IN CONTEMPORARY AMERICA, *supra* note 88, at 82, 86. Other writers contend that the idea of limits is insufficiently recognized in environmentalist thinking. See, e.g., HAYS, *supra* note 70, at 108 (“Although there was acceptance of the notion of limits in a few practical environmental circumstances, there was little evidence of a tendency to apply environmental limits generally, and efforts to bring that problem to the fore often fell by the wayside.” In particular, efforts to focus on “the population problem” proved “so controversial that they were dropped.”) See also SHABECOFF, *supra* note 70, at 11 (“Given the gravity of the problems, if environmentalists and their cause do not prevail in the next few decades, our habitat, our quality of life, and our democratic institutions could erode to the point that they might take centuries to recover.”). Still others contend that environmentalism has “moved *beyond* apocalypse into a variety of new conceptual spaces and rhetorics[,]” although this “presents a more, not a less, sobering picture of environmental crisis-in-progress than 1970s end-of-the-world fantasies ever achieved.” BUELL, *supra* note 79, at 35.

⁹⁷ See, e.g., CARSON, *supra* note 84, at 127 (noting “the beauty and ordered world of nature still have a meaning that is deep and imperative” for those who see it); *id.* at 216 (observing our “genetic heritage” is “a possession that has come down to us through some two billion years of evolution and selection of living protoplasm, a possession that is ours for the moment only, until we must pass it on to generations to come”); KEMPTON ET AL., *supra* note 65, at 92–94 (summarizing “spirituality in nature” theme to environmentalism and noting that “deep spiritual feelings” about the environment were more prevalent among “those who had committed major portions of their time to working on environmental issues”); GRABER, *supra* note 47, at 3 (describing how nature becomes sacred, stating “Nature is never merely ‘natural.’ It is a divine creation filled with religious value: the different modalities of the sacred are manifest in the structure of the world”); *id.* at 112 (“Because wilderness is believed to be a manifestation of sacred power, any man-made change pulls wilderness down from its peak of

These are not an exhaustive list, but we contend that they are a fair summary of much of modern Environmental thought and writing. These views are different from the views of people who simply “desire to experience outdoor recreation,” as the early members of the wilderness movement did,⁹⁸ or who desire improved air or water quality because they seek to maximize human welfare, as we think many who respond to polling questions on environmental issues believe.⁹⁹ These may be ideas that are out of the mainstream today but we agree with the editor of a collection of “radical environmental” writing that “by studying radical environmentalism and ecophilosophy now, we could be looking at a part of our intellectual future”¹⁰⁰

perfection.”); Michael Tobias, *Introduction* to DEEP ECOLOGY, at v, vii (Michael Tobias ed., 1985) (“Deep Ecology concerns those personal moods, values, aesthetic, and philosophical convictions which serve no necessarily utilitarian, nor rational end. By definition their sole justification rests upon the goodness, balance, truth and beauty of the natural world, and of a human being’s biological and psychological need to be fully integrated within it.”); ROSZAK, *supra* note 95, at 59 (“Perhaps what announces itself in our experience as political idea or moral ideal is first of all in the Earth as a mothering instinct, the natural will of this remarkable planet to shelter and perfect her cargo of life.”); DEVAL & SESSIONS, *supra* note 78, at 20 (stating that Native Californians, unlike “white invaders,” “perceived themselves as being deeply bound together with other people (and with the surrounding non-human forms of life) in a complex interconnected web of life, that is to say a true community.”); Borgman, *supra* note 95, at 43–44 (describing that the United States is “uniquely Nature’s Nation. Nature in its many voices speaks more powerfully here than in Europe and Japan.”). Nelson elaborates on this in his discussion of environmentalists’ reading of Leopold.

When [self professed disciple of Leopold, Max] Oelschlaeger – reflecting on a reading of Leopold that he shares with many other fellow environmentalists – says that nature is “animated,” that the mountain has “sentience,” that the cry of the wolf “speaks of a deeper meaning,” he obviously is not saying that the natural world is literally speaking with words that a person can listen to. What, then, does he mean? From a strictly scientific perspective, it would be difficult to know; perhaps the words mean nothing at all; they may simply be empty phrases that sound good to many people. Or they may be seen as metaphors of an environmental poetry that symbolically captures the beauty of the mountains and of nature in general. . . .

Leopold, however, seems to have a deeper purpose than preaching the aesthetic attractions of mountains or other scenery. Indeed, seen in the historical light of Christian religion, Leopold’s message is more familiar. The workings of nature provide a mirror of the mind of God, as put there at the creation, which has now been transposed to a much earlier time than the biblical story suggested. To encounter natural systems as they existed prior to human impacts . . . is to see into the deepest meanings of the universe, to discover a divine order there, to come to know God.

NELSON, *supra* note 3 (manuscript at 276).

⁹⁸ HAYS, *supra* note 70, at 39.

⁹⁹ See Riley E. Dunlap, *Public Opinion and Environmental Policy*, in ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 63–108 (James P. Lester ed., 2d ed. 1995) (describing in depth public opinion data on environmental issues); Wilson, *supra* note 67; Nelson, *supra* note 60, at 53 (“There are also branches of environmentalism that probably do not involve any significant religious convictions at all. Desires to reduce cancer rates and otherwise to improve public health, or to breathe cleaner air, for example, are not religious beliefs in themselves.”).

¹⁰⁰ List, *supra* note 80, at ix. See also NELSON, *supra* note 3 (manuscript at 186) (“The ideas of ‘deep ecology’ are not widely known to the American public but have exercised a significant (if often unacknowledged) influence even within the mainstream environmental movement. Deep ecology takes some of the core premises of contemporary environmentalism and extends them to their full logic, reaching radical conclusions that more timid—or more politically practical—environmentalists are reluctant to examine or defend.”).

Most importantly, these six characteristics meet our definition of a religion. They concern man's relationship to supernatural forces beyond man's control.¹⁰¹ They are a set of beliefs not "limited by logic;" such elements as the apocalyptic narrative that has repeatedly proven wrong in its predictions of imminent doom (e.g., *The Population Bomb*¹⁰² and *Limits to Growth*¹⁰³) and the idea of a moral duty owed to Nature are not logically derived postulates but are matters that must be accepted on faith. Indeed, much Environmental thinking today depends on a conception of Nature as a power outside man, which must be appeased by sacrifices of human material welfare (use less energy, emit less carbon, recycle). And it is from such appeals beyond logic that a degree of Environmentalism's appeal comes: in *Encounters with the Archdruid*, John McPhee praised David Brower as effective because he was "a visionary[.] . . . an emotionalist in an age of dangerous reason."¹⁰⁴ Viewed in this light, Environmentalism looks like a religion.

2. Environmentalism's Religious Language

Another reason to treat Environmentalism as a religion is that a great deal of environmentalists' language sounds religious.¹⁰⁵ The second half of the "looks like a duck, sounds like a duck" test thus suggests that the religious analogy is appropriate. A number of important environmentalist writers and thinkers have cast environmental ideas into religious terms. For example, environmental writer and historian Theodore Roszak called for environmentalism to answer questions of "ethical conduct, moral purpose, and the meaning of life" as part of a guide to "salvation."¹⁰⁶ The editor of an anthology of "radical environmentalism" says that those radicals are attempting "to align themselves with a new planetary philosophy."¹⁰⁷ Former Interior Secretary Bruce Babbitt said that "religious values are at the core of the 1973 Endangered Species Act;"¹⁰⁸ others have termed that law

¹⁰¹ As Robert Nelson notes, "when environmentalists speak of subordinating human concerns to the dictates of 'the planet,' there is no other coherent understanding except to say that they are taking about submitting to God." NELSON, *supra* note 3 (manuscript at 202).

¹⁰² EHRlich, *supra* note 86. Buell terms this a "defining crisis text of the 1960s." BUELL, *supra* note 79, at 180.

¹⁰³ MEADOWS ET AL., *supra* note 94. Despite the criticism of the projections at the heart of *Limits to Growth*, the apocalyptic vision it described remains popular. See, e.g., BUELL, *supra* note 79, at 45 (claiming that the "well-nigh irreconcilable antagonism between corporate-led growth and environmental health" found "its most eloquent expression in the Club of Rome's significantly titled book, *Limits to Growth*"); *id.* at 145 (stating the book's "fundamental logic" has been "reaffirmed").

¹⁰⁴ JOHN MCPHEE, ENCOUNTERS WITH THE ARCHDRUID 79, 83 (1971).

¹⁰⁵ Indeed, writing about environmental writing often invokes religious metaphors and parallels to explain environmental writers. For example, Scott Slovic finds parallels between Rachel Carson and Aldo Leopold's writings and those of Cotton Mather and Jonathan Edwards. See Slovic, *supra* note 96, at 82, 86, 102 ("[I]t is fascinating to see how closely the jeremiadic structure of [*Silent Spring*] . . . resembles the structure of Jonathan Edwards' late sermon, 'Sinners in the Hands of an Angry God.'"); CRAMER, *supra* note 77, at 17 ("[D]eep ecology mirrors Eastern religions and philosophies.").

¹⁰⁶ THEODORE ROSZAK, THE VOICE OF THE EARTH 51 (1992).

¹⁰⁷ List, *supra* note 80, at 1, 3.

¹⁰⁸ Press Release, Dep't of Interior, Statement of Interior Sec'y Bruce Babbitt on Evangelical Support of Endangered Species Act (Jan. 31, 1996).

a “modern Noah’s Ark.”¹⁰⁹ The first Earth Day was called “a secular revival meeting.”¹¹⁰ An Earth First! member described first going into the wilderness as “the closest thing to a religious experience I ever had”¹¹¹ and Professor Graber concluded that “[t]he wilderness ethic is strongly religious in character.”¹¹² Even a sympathetic observer like Mark Dowie lists religion “for a few” as among the things environmentalism has become, along with “world view, life style, science” and “a complex political movement.”¹¹³

Moreover, there are at least some significant strains within Environmentalist writing that use language that suggests the authors are articulating a religious belief. Consider the following examples, which are relevant not because those articulating such beliefs are thought leaders but because they demonstrate how deeply religious language is embedded in modern environmental writing.¹¹⁴

Professor Joe Holland, a professor of philosophy and religious studies at St. Thomas University, a Catholic school in Minnesota, argued in a 1996 article that:

¹⁰⁹ Peter Steifels, *Evangelical Group Defends Laws Protecting Endangered Species as a Modern Noah’s Ark*, N.Y. TIMES, Jan. 31, 1996, at A12.

¹¹⁰ ZAKIN, *supra* note 88, at 35 (quoting an unnamed reporter).

¹¹¹ *Id.* at 109; *see also* GRABER, *supra* note 47, at 7 (“Contemporary geopiety puts man in touch with sacred power through the hierophany of wilderness as sacred space.”).

¹¹² GRABER, *supra* note 47, at 111.

¹¹³ DOWIE, *supra* note 14, at 27; *see also* CRAMER, *supra* note 77, at 16 (“Many deep ecologists think that more science and dominating technology will not be sufficient to stop the ecological crisis . . . until we find a new religion, with that religion being deep ecology. Deep ecology has a religious component. It borrows heavily from religion and those who practice the philosophy possess religious feelings about their mission to make others realize their destructive ways and to teach them how to better live in their natural surroundings.”); ROGER S. GOTTLIEB, A GREENER FAITH: RELIGION, ENVIRONMENTALISM, AND OUR PLANET’S FUTURE 19 (2006).

¹¹⁴ We are not contending that these particular authors or organizations have a status within the modern environmental movement that renders their pronouncements uniquely authoritative, i.e., that they constitute a magisterium able to speak authoritatively on matters of doctrine in the sense that the teaching authority of the Catholic Church is embodied in the Pope and the bishops in communion with him. *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH ¶ 882 (2d ed. 1994) (“The Pope, Bishop of Rome and Peter’s successor . . . ‘by reason of his office as Vicar of Christ, and as pastor of the entire Church has full, supreme, and universal power over the whole Church . . .’” (quoting LUMEN GENTIUM 22)). “It is this Magisterium’s task to preserve God’s people from deviations and defections and to guarantee them the objective possibility of professing the true faith without error.” *Id.* ¶ 890. But there need not be a formal body with such authority for there to be a religion. Among Christians many denominations are decentralized without a formal central authority on doctrine (e.g., Baptists). *See, e.g.*, THE BAPTIST FAITH AND MESSAGE, at art. VI (2005), *available at* <http://www.sbc.net/bfm/pdf/The%20Baptist%20Faith%20and%20Message.pdf> (“A New Testament church of the Lord Jesus Christ is an autonomous local congregation of baptized believers, associated by covenant in the faith and fellowship of the gospel.”) (adopted by the Southern Baptist Convention on June 14, 2000). The Southern Baptist Convention has also adopted a summary of faith expressing their belief in local ecclesial autonomy: “Baptists cherish and defend religious liberty, and deny the right of any secular or religious authority to impose a confession of faith upon a church or body of churches.” Southern Baptist Convention, *The Baptist Faith and Message*, <http://www.sbc.net/bfm/default.asp> (last visited Apr. 19, 2009). Among other faiths, Islam is almost completely decentralized in matters of doctrine. *See* JOHN L. ESPOSITO & JOHN O. VOLL, MAKERS OF CONTEMPORARY ISLAM 3 (2001) (describing the evolution of Islamic doctrine as a process of prominent intellectuals advancing competing conceptions of their faith, which then form the basis of different Islamic movements taking hold throughout the world); BASSAM TIBI, ISLAM BETWEEN CULTURE AND POLITICS 37–38, 45 (2001) (summarizing the similarities between different branches of Muslims as the Islamic consensus while noting that there are many doctrinal differences between Muslims that are dependent on geography and culture).

[C]learly, we are now at the historical moment when a new cultural stage of the Western journey needs to be born. This time, however, it will not simply be a Western project, but an historical project growing out of the non-Euro-American peoples of the Earth and, in particular, out of feminine energy. At the heart of this new global culture will be a remembering of the sacred character of the spiritual revelation in and through the natural world—a revelation never forgotten by Earth's ancient native peoples.¹¹⁵

After surveying a wide and eclectic range of sources on history, anthropology, and the environment, Professor Holland concluded that:

[W]e are tragically discovering that the hyper-masculine culture of the Euro-American West also inflicted a deep spiritual wound on its ecological matrix and, indeed, on its own soul; and, that this Earth wound, as well as its accompanying soul wound, are now driving the West in its world-expansive culture of death. Exposing these inner and outer wounds of Euro-American culture—especially the assault on the ancient and noble native peoples—and, in turn, asking the divine mystery and its feminine face for ecological, societal, and spiritual healing, is the postmodern challenge for all our institutions.¹¹⁶

For Holland, the challenge is thus not merely to stop environmental degradation that renders the Earth less suitable for human existence but a spiritual problem that requires seeking forgiveness from a source outside humanity. Similarly, environmental writer Thomas Berry argued that saving the environment called for “not simply adaptation to a reduced supply of fuels” or “some modification in our system of social and economic controls” but for “a radical change in our mode of consciousness,” and “even a new sense of what it means to be human.”¹¹⁷ Such calls are religious in appearance and tone within our definition.

Even more explicitly, political calls to environmental action often embody religious-sounding language. For example, the “First National People of Color Environmental Leadership Summit” in October 1991 adopted seventeen “Principles of Environmental Justice,” several of which set out what is at least a quasi-religious creed.¹¹⁸ Beginning with a preamble that states that the signatories “do hereby reestablish our spiritual interdependence to the sacredness of our Mother Earth,” the Principles go on to state that:

1. Environmental justice affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction. . . .

¹¹⁵ Joe Holland, *The Death Wish of Late Modern Euro-American Culture and the Spiritual Wisdom of the Ancient Native Peoples*, 9 ST. THOMAS L. REV. 59, 66–67 (1996).

¹¹⁶ *Id.* at 68.

¹¹⁷ THOMAS BERRY, *THE DREAM OF THE EARTH* 42 (1988).

¹¹⁸ The summit itself was intended to “reshape and redefine the American environmental movement.” DOWIE, *supra* note 14, at 151. We are not singling these principles out; they are the subject of some debate within the environmental movement. See, e.g., DAVID HARVEY, *JUSTICE, NATURE AND THE GEOGRAPHY OF DIFFERENCE* 369–70 (1996) (taking critical approach to principles for lacking logic); Laura Pulido, *The Sacredness of “Mother Earth”: Spirituality, Activism, and Social Justice*, 88 ANNALS OF THE ASS’N OF AM. GEOGRAPHERS 719, 720 (1998) (defending principles and noting that they “have enjoyed significant support from progressive scholars”). The principles are cited in over 100 law review articles (as of our Westlaw search of the JLR database on February 22, 2009).

....

3. Environmental justice mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things. . . . [and]

....

17. Environmental justice requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to insure the health of the natural world for present and future generations.¹¹⁹

Taken together, these principles assert spirituality, an over-arching moral code, and requirements for personal action no different in structure than those contained in the Ten Commandments, the Gospels, or the Koran.

We contend that this sort of argument is both sufficiently widespread within modern environmental writings and close enough to a *religious* faith in things such as "Earth wounds" and the "sacredness of Mother Earth" that it is really making a claim about the relationship of mankind with the supernatural.¹²⁰ When advocates of environmentalism focus on an extra-rational way of knowing,¹²¹ a close relationship

¹¹⁹ FIRST NATIONAL PEOPLE OF COLOR ENVTL. LEADERSHIP SUMMIT, THE PRINCIPLES OF ENVIRONMENTAL JUSTICE (EJ) (1991), available at <http://www.ejnet.org/ej/principles.pdf>.

¹²⁰ See *id.* Some environmental literature focuses on "stewardship" obligations which "arise out of the steward's membership in the ecological community and [are] therefore . . . owed to nature." Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 306 (2002). Once the discussion has moved into territory where man "owes" a duty to "nature," we contend that it has moved into a relationship between man and the supernatural where Nature is treated as if it possessed "wisdom" or moral worth. For example, Devall and Sessions call their readers "to reawaken our understanding of Earth wisdom." DEVAL & SESSIONS, *supra* note 78, at ix. This goes "beyond the so-called factual scientific level to the level of self and Earth wisdom." *Id.* at 65. It involves "cultivating ecological consciousness" which they define as

becoming more aware of the actuality of rocks, wolves, trees, and rivers – the cultivation of the insight that everything is connected. Cultivating ecological consciousness is a process of learning to appreciate silence and solitude and rediscovering how to listen. It is learning how to be more receptive, trusting, holistic in perception, and is grounded in a vision of nonexploitive science and technology.

Id. at 8. However, "stewardship" language alone does not indicate a religious environmentalism. As Professor William Blatt noted in a review of Lloyd Burton's book *Worship and Wilderness: Culture, Religion and Law in Public Lands Management* (2002), "[m]ost Christians regard themselves as stewards, managing nature for other ends. This stewardship model often subordinates environmental values to economic development. Accordingly, many Christians disagree with environmentalists on issues such as industrialization, population control, and global warming." William Blatt, *Holy River and Magic Mountain: Public Lands Management and the Rediscovery of the "Sacred in Nature"*, 39 LAW & SOC'Y REV. 681, 684 (2005). We should also note here Dunlap's argument that environmentalism possesses "spirituality" but not "transcendent spirituality" and so does not appeal "to supernatural elements." DUNLAP, *supra* note 89, at 104. Dunlap is correct that few environmentalists posit explicit supernatural entities but we find their treatment of nature to be a disguised version of the supernatural. See NELSON, *supra* note 3 (manuscript at 202–03).

¹²¹ DEVAL & SESSIONS, *supra* note 78, at 69 ("The ultimate norms of deep ecology . . . cannot be fully grasped intellectually but are ultimately experiential.").

between the individual and the environment, or on being intimate with nature,¹²² they are making claims about the relationship between humans and a nonhuman power that are no different in type than the claims made by some forms of Christianity,¹²³ Islam,¹²⁴ or other beliefs more conventionally understood as religions.

Thus although “nature” may not be exactly analogous to the *personal* god of the three great monotheistic faiths, it is recognized in much environmental writing as *a power apart* from man to which *human needs must be subordinated*. The “Principles of Environmental Justice,” for example, do not simply call for equal treatment of all peoples and a raising up of the living standards for those humans with fewer material goods, but for “a sustainable planet for humans and other living things” in which human wants and desires must accommodate the needs of animals, plants, and other life forms, and they do so in the name of the “sacredness of Mother Earth.”¹²⁵ At least some environmentalists’ writings sound religious enough to support the notion that there is an Environmentalism that is fundamentally religious in character.

¹²² To take just one example, consider this description from a 1970s outdoor guide:

Ecology . . . should be the hiker’s passion, not merely to enrich his pleasure but so he may understand the functioning of individual ecosystems and how to fit into them as unobtrusively as possible. . . . He should . . . gain a feel for the dynamic balance of a river, of a glacier, and how they carve valleys. And grow intimate with the trees and flowers, mosses and lichens, fungi and molds. . . . And at night he should look out to the moon and the stars and deeply comprehend this is the only Earth we will ever have.

MANNING, *supra* note 94, at 340–42. See also DEVALL & SESSIONS, *supra* note 78, at 68 (calling for “intimate relationships with a particular landscape” as part of doing “the ‘real work’ of spiritual growth and maturity”).

¹²³ See, e.g., 1 John 4:7–10 (Revised Standard Version) (“Beloved, let us love one another, for love is of God, and he who loves is born of God and knows God. He who does not love does not know God; for God is love. In this the love of God was made manifest among us, that God sent his only Son into the world, so that we might have life through him. In this is love, not that we loved God but that he loved us and sent his Son to be the expiation for our sins.”). We are grateful to Fr. Charles Nalls, who provided us with the following explication of these passages: “The origin of the life of a Christian and of Christian perfection to which the Bible constantly calls us, is the Heavenly Father, Who communicates His life through the Son, and through the Son, the Holy Spirit.” Email from Fr. Charles Nalls to Andrew P. Morriss, H. Ross & Helen Workman Professor of Law, Professor of Business Administration, & Professor, Institute for Government and Public Affairs, University of Illinois at Urbana-Champaign (Aug. 24, 2008, 20:08:00 EST) (on file with Environmental Law); see also ENCYCLOPEDIA BRITANNICA ONLINE, CHRISTIANITY, <http://www.britannica.com/EBchecked/topic/571823/Sufism> (last visited Apr. 19, 2009) (“Christian mystics claim that the soul may be lifted into a union with God so close and so complete that it is merged in the being of God and loses the sense of any separate existence.”).

¹²⁴ See, e.g., ENCYCLOPEDIA BRITANNICA ONLINE, SUFISM, <http://www.britannica.com/EBchecked/topic/571823/Sufism> (last visited Apr. 19, 2009) (defining Sufism as a “mystical Islamic belief and practice in which Muslims seek to find the truth of the divine, love, and knowledge through direct personal experience of God”).

¹²⁵ FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT, *supra* note 119; see also Pulido, *supra* note 118, at 721 (“Not only does the ‘sacredness of Mother Earth’ denote a particular moral, spiritual, and political principle, but it also serves as a guide to where activists think we should be going, and as a challenge to all of us to recognize our own spirituality, our responsibilities to each other, and what we should be about in this world.”).

3. Environmentalist Writing on Religion

One more reason to consider Environmentalism as a religion is that there are numerous Environmentalist critiques of other religions for failing to properly revere the Earth, some of which suggest that correct environmental beliefs can (and should) substitute for these other faiths. For example, in one of the foundational documents of modern environmental writing, the 1967 article *The Historical Roots of Our Environmental Crisis*,¹²⁶ Professor Lynn White, Jr. argued that:

Especially in its Western form, Christianity is the most anthropocentric religion the world has seen. . . . Christianity, in absolute contrast to ancient paganism and Asia's religions (except, perhaps, Zoroastrianism), not only established a dualism of man and nature but also insisted that it is God's will that man exploit nature for his proper ends.¹²⁷

White went on to note that pre-Christian beliefs often included animistic beliefs in "guardian spirits" of hills, streams, and trees. "Before one cut a tree, mined a mountain, or dammed a brook, it was important to placate the spirit in charge of that particular situation, and to keep it placated."¹²⁸ By destroying animism's belief in local guardian spirits, White argued, "Christianity made it possible to exploit nature in a mood of indifference to the feelings of natural objects."¹²⁹ Taking a dim view of the results, White concluded that "we shall continue to have a worsening ecologic crisis until we reject the Christian axiom that nature has no reason for existence save to serve man."¹³⁰ White's theme of an inadequate Judeo-Christian reverence for nature pervades much environmental writing today,¹³¹ although some Environmentalists seek to draw on some Christian

¹²⁶ Lynn White, Jr., *The Historical Roots of Our Environmental Crisis*, 155 SCI. 1203 (1967). When presented at the December 1966 American Association for the Advancement of Science meeting, the article "caused an immense stir." Sessions, *supra* note 90, at 36. White's article is widely acknowledged as a "classic" although it has also been criticized by those who disagree with White's assessment of Christianity. See, e.g., KEMPTON ET AL., *supra* note 65, at 89; Lowry, *supra* note 7, at 225 ("White's thesis has been attacked on a number of grounds, including his interpretation of the creation story.").

¹²⁷ White, *supra* note 126, at 1205.

¹²⁸ *Id.*

¹²⁹ *Id.*; see also LEOPOLD, *supra* note 88, at xviii ("Conservation is getting nowhere because it is incompatible with our Abrahamic concept of land.").

¹³⁰ White, *supra* note 126, at 1207. We do not agree with White's characterization of Christianity, but that is a subject for another article.

¹³¹ See, e.g., DOWIE, *supra* note 14, at 232 ("Environmentalism confronts so many assumptions of American culture . . . [including] the Judaeo-Christian nucleus of western culture, every article of faith of which is challenged by ecocentrist thinking. . . . With the notable exception of Buddhism, none of the world's major religions teach a primary reverence for nature."); Ynestra King, *Toward an Ecological Feminism and Feminist Ecology*, in MACHINA EX DEA: FEMINIST PERSPECTIVES ON TECHNOLOGY 120 (Joan Rothschild ed., 1983) ("A dualistic Christianity had become ascendant with the earlier demise of the old Goddess religions, paganism, and animistic belief systems. With the disenchantment of nature came the conditions for unchecked scientific exploration and technological exploitation."); Michael Tobias, *Humanity and Radical Will: Reflections from the Island of Life*, in DEEP ECOLOGY 2-3 (Michael Tobias ed., 1985) ("The Bible strains terrifically to acquire management, monoculture, to delegate assignments to a living coterie of ranters and ravers. It is modernist in its appeal. It tries to outsmart, gun down, and reinvent the older verities. What forces created the Bible's particularly painful presumptions? What bleached bones, collapse of ecosystems, and psychic moonlight accomplished so full a turnaround?").

sources.¹³² Of course, placing oneself in opposition to any particular religion is not sufficient to define a set of beliefs as a religion, but it is probative of the religious nature of Environmentalism that some environmental writers offer a different account of what they perceive as a central set of tenets of other religions.¹³³

White was not calling for a return to the actual practice of animism. But he was doing much more than disparaging Christianity for its failure to conform to modern scientific principles, as that could be done without invoking animistic spirits. White's essay is typical of much of environmental writing on more conventional religion in that it suggests that a return to earlier, pre-scientific religious beliefs about nature would be beneficial. At least some environmentalist writing thus sets out a critique of other religions that implies that Environmentalism offers an alternative and superior worldview to that provided by those religions,¹³⁴ and suggests, at least implicitly, that Environmentalism can offer a substitute belief structure that fulfills the role that religion does for its adherents. That this new belief system lacks a personal god makes it no less a substitute for Judaism, Christianity, or Islam, than those faiths' monotheism made them incapable of serving as a substitute for polytheistic faiths they frequently displaced in their rises to prominence.

Of course, Lynn White's views in 1967 hardly define the entirety of environmental thinking forty plus years later. But given that White is not alone in his views of the need to displace other religions with a different view of man's relationship to nature,¹³⁵ the echoing of his assessment of Christianity and other religions by other environmental writers (which we think represents a profound misunderstanding of Christian doctrine),¹³⁶ and the prominent acknowledgement of

¹³² See, e.g., DEVALL & SESSIONS, *supra* note 78, at 34 (describing Christian "Eleventh Commandment" movement to add "The Earth is the Lord's and the fullness thereof: thou shalt not despoil the Earth, nor destroy the life thereon") We think adding something written by people to the Ten Commandments is problematic theologically.

¹³³ White, *supra* note 126, at 1205. White sees the "nonrepetitive and linear" Judeo-Christian creation story that places man apart from the rest of nature as central to Christianity. *Id.* Robert Nelson argues persuasively that environmentalism might be better characterized as a Christian heresy rather than a wholly new religion. See NELSON, *supra* note 3 (manuscript at 171-75).

¹³⁴ See, e.g., CRAMER, *supra* note 77, at 16 ("[T]he ecophilosophy does not borrow from all religions equally; for many commentators argue that deep ecology is a rejection of Judeo-Christian religion.").

¹³⁵ See, e.g., DEVALL & SESSIONS, *supra* note 78, at 184 (quoting Paul Shephard that "Monotheism socially becomes fascism, imperialism or capitalism; philosophically is unmetaphorical, unambiguous, and dichotomous; and psychologically is rigid, fixed and linear"). We think if Professor Shephard spent some time puzzling over the Trinity, he would soon find that monotheism need not be "unmetaphorical" or "unambiguous."

¹³⁶ See, e.g., Mary Evelyn Tucker and John Grim, *Series Forward to Conference on Christianity and Ecology Organized by the Harvard University Center for the Study of World Religions, American Academy of Arts and Sciences, Cambridge, Massachusetts, 16 April 1998*, quoted in SHABECOFF, *supra* note 70, at 74 ("For the most part, worldviews associated with the Western Abrahamic traditions of Judaism, Christianity and Islam have created a dominantly human-focused morality. Because these worldviews are largely anthropocentric, nature is viewed as being of secondary importance."); IAN MCHARG, *DESIGN WITH NATURE* 26 (1969) (stating that Christianity and Judaism's "insistence [through the creation account in Genesis] upon dominion and subjugation of nature, encourages the most exploitative and destructive instincts in man rather than those that are deferential and creative.") (McHarg is cited as an important source by some deep ecologists. See Tobias, *supra* note 131, at 19.) Even some Christian environmental writers have accepted White's diagnosis. See EARTH KEEPING, *supra* note 4, at 104 ("It is our thesis that White is, with a few important exceptions, correct in his

his views in modern environmental writing,¹³⁷ it seems a fair implication that within the environmental community there are at least enough who see Environmentalism as a substitute for religion in ordering individuals' lives for this to be evidence of Environmentalism's "religious" nature. For example, while he was Interior Secretary, Bruce Babbitt used religious language to describe how he moved from the Catholic faith to finding that "the vast [Arizona] landscape was somehow sacred and holy, and connected to me in a sense that my catechism ignored."¹³⁸ As with our other examples, this is not conclusive evidence that the Supreme Court should take its next opportunity to declare some version of environmental thought within the constitutional definition of religion. We think the presence of internal evidence of Environmentalism within the broader sweep of environmental views is a powerful reason to apply the lessons of disestablishment to those views.

4. Critiques of Environmentalism as a Religion

Viewing Environmentalism as a religion is increasingly common in the public square and has been regularly invoked to criticize Environmentalism.¹³⁹ For example, in a 2003 speech the late Michael Crichton argued that Environmentalism is "a perfect 21st century remapping of traditional Judeo-Christian beliefs and myths."¹⁴⁰ He notes that many environmentalists have an equivalent to the Judeo-Christian Eden with a "state of grace and unity with nature," an equivalent to Adam and Eve's Fall, this time "into a state of pollution," and a "judgment day coming for us all. We are all energy sinners, doomed to die, unless we seek salvation, which is now called sustainability."¹⁴¹ Just as with other religions, Crichton argued, environmental beliefs are "all about belief," are unverifiable, and are maintained by adherents even when lacking scientific support.¹⁴²

One of Crichton's primary examples of religious thinking in environmentalism is the widespread support among environmentalists for the ban on DDT use adopted by most countries in the aftermath of Rachel Carson's book *Silent Spring*.¹⁴³ Pointing to scientific evidence that DDT was (and continues to be) important in the fight against malaria and that it was not carcinogenic, Crichton concluded that

analysis of the effect of Christianity on views of nature." We think most adherents of those religions would argue that they are focused on the divine, not human-focused.

¹³⁷ See, e.g., SHABECOFF, *supra* note 70, at 76.

¹³⁸ Nelson, *supra* note 1, at 17 (quoting Babbitt).

¹³⁹ Note that the use of the Environmentalism/environmentalism capitalization terminology is not how these authors distinguish environmental views. Our use of it is not inconsistent with their approaches and we add it to our discussion to maintain consistency and, we hope, add clarity.

¹⁴⁰ Michael Crichton, Environmentalism as Religion (Sept. 15, 2003), <http://www.michaelcrichton.com/speech-environmentalism-as-religion.html> (last visited Apr. 19, 2009) (remarks to the Commonwealth Club, San Francisco).

¹⁴¹ *Id.*

¹⁴² *Id.* We do not read Crichton to suggest that religious people routinely reject facts, but rather that religious people are willing to maintain beliefs that nonreligious people are not, accepting that there are aspects of their belief that cannot be verified empirically using science.

¹⁴³ CARSON, *supra* note 84; RICHARD TREN & ROGER BATE, *MALARIA AND THE DDT STORY* 35–64 (2001) (describing history of DDT use to control malaria).

the DDT ban has caused the deaths of tens of millions of poor people, mostly children, whose deaths are directly attributable to a callous, technologically advanced western society that promoted the cause of environmentalism by pushing a fantasy about a pesticide, and thus irrevocably harmed the third world. Banning DDT is one of the most disgraceful episodes in the twentieth century history of America. We knew better, and we did it anyway, and we let people around the world die and didn't give a damn.¹⁴⁴

In Crichton's analysis, the DDT story demonstrates the religious nature of Environmentalism because it shows a rejection of scientific evidence in favor of an article of faith. Putting Crichton's argument into our framework, Environmentalism is a religion because it makes unverifiable claims that purport to explain how the world works. In doing so, it takes on faith matters that are capable of being determined by science (e.g., whether DDT is a carcinogen and whether its use has such deleterious impacts on wildlife that a ban is justified) and does not yield the factual questions to the scientific evidence when the "religious" and scientific inquiries yield different answers. Indeed, the DDT example is one that is particularly powerful evidence of the religious nature of Environmentalism because not only did the debate feature nonrational declarations of faith in the environmental harmfulness of DDT, but because there was considerable reluctance among some environmentalists to debate the issue in terms of human welfare by engaging in the type of benefit-cost analysis used by those who sought broader use of DDT against malarial mosquitoes.¹⁴⁵

It is easy enough to expand on the parallels—Environmentalism has its saints (Thoreau and Rachel Carson), jihadists (the EarthFirst!), monks (Edward Abbey), cathedrals (the wilderness, Arctic National Wildlife Refuge (ANWR)), prophets (John Muir and Aldo Leopold), rituals (recycling), sins (human-caused environmental damage), church hierarchies (United States Environmental Protection Agency (EPA) officials and environmental pressure group leaders), freelance televangelists (Al Gore),¹⁴⁶ and so on.¹⁴⁷ Crichton thus made a powerful

¹⁴⁴ Crichton, *supra* note 140.

¹⁴⁵ See TREN & BATE, *supra* note 143, at 45–49.

¹⁴⁶ See Bruce Yandle et al., *Bootleggers, Baptists, & Televangelists: Regulating Tobacco by Litigation*, 2008 U. ILL. L. REV. 1225, 1236–40 (2008) (describing role of "regulatory televangelists"). Like the more famous hypocrites among televangelists, Gore preaches Environmentalism while living a life of excess energy use. See, e.g., Tennessee Center for Policy Research, *Al Gore's Personal Energy Consumption Up 10% Despite 'Energy-Efficient' Renovations*, http://www.tennesseepolicy.org/main/article.php?article_id=764 (last visited Apr. 19, 2009) (describing increase in energy consumption after original criticism); Tennessee Center for Policy Research, *Al Gore's Personal Energy Use is His Own Inconvenient Truth*, http://www.tennesseepolicy.org/main/article.php?article_id=367 (last visited Apr. 19, 2009) (original report on Gore's home energy use); Steve Gill, *Gore Hits the Waves with a Massive New Houseboat*, PAJAMAS MEDIA, Aug. 6, 2008, <http://www.pajamasmedia.com/blog/gore-hits-the-waves-with-a-massive-new-houseboat/> (last visited Apr. 19, 2009) (describing energy use on Gore's houseboat); *Gore Makes Energy Challenge, Exits in Long Idling Limo*, CNSNEWS.COM, <http://www.cnsnews.com/public/cnsnewstv/video.aspx?v=e44z8zqGkU> (last visited Apr. 19, 2009) (describing how limousines for the Gore family waited with engines running to keep air conditioning operating for 15 minutes during a Gore speech).

¹⁴⁷ Environmental writer David Roberts suggested that all issues on which there are strong feelings have

a group of people for whom it has become a 'religion' in that sense. They've made up their mind, it's never going to change, and they interpret all evidence through the heavy filter of their own preconceptions. They have a set of saints, a set of dogmas, a set of holy texts, even various

case that Environmentalism is a religion in the most traditional sense of the word, differing from more conventional faiths only in neglecting to use explicitly religious terminologies, such as “saint” or “church.”

Economist Robert Nelson also argues Environmentalism is a religion, on somewhat different grounds. Like Crichton, Nelson finds environmental thinking to be a distorted form of Christianity. He contends that Environmentalism is a “secular Puritanism,”¹⁴⁸ tracing its roots to New England transcendentalism and a deep-seated need in Protestantism for a substitute for the rituals and structures of Catholicism lost in the Reformation.¹⁴⁹ In addition to noting the widespread use of religious imagery and language by prominent environmental leaders and writers,¹⁵⁰ Nelson also argues from the characterization of Environmentalism as a religion to explain important features of environmental thought. For example, Nelson argues that it is the religious nature of Environmentalism that explains why

the Arctic National Wildlife Refuge (ANWR) has become so important to the environmental movement today. It is not just the on-the-ground environmental features of the area—there are in truth many other equally desolate and isolated places that are also important to some group of wild animals. The truly distinctive feature of ANWR is that so much oil would potentially be sacrificed. It creates a rare opportunity for a powerful religious statement.¹⁵¹

The statement made by foreswearing development of ANWR is a sacrifice of human needs—the energy available for man’s use by drilling in ANWR—for the preservation of a place without direct utility for humans, a powerful sacrifice indeed and one that is without immediate utility.¹⁵² An undeveloped ANWR would be “the

identifying raiments. Environmentalism’s been around for a long time, and it’s accrued its fair share of such folks.

David Roberts, *Environmentalism as a Religion: What Does the Accusation Mean and How Should Greens Respond?*, GRIST, Aug. 9, 2005, <http://gristmill.grist.org/story/2005/8/9/183352/2738> (last visited Apr. 19, 2009).

¹⁴⁸ ROBERT H. NELSON, HOW MUCH IS GOD WORTH? THE PROBLEMS—ECONOMIC AND THEOLOGICAL—OF EXISTENCE VALUE 9 (1996), available at <http://cei.org/pdf/1456.pdf>.

¹⁴⁹ *Id.* at 10; Robert H. Nelson, *The Opiate of Almost Everyone*, LIBERTY, Feb. 2006, at 25, 33, available at www.publicpolicy.umd.edu/faculty/nelson/Liberty%20-%20The%20Opiate%20of%20Almost%20Everyone.pdf [hereinafter Nelson, *Opiate*] (describing that environmentalism resembles “a camouflaged revisiting of traditional Christian faith”).

¹⁵⁰ Nelson, *Opiate*, *supra* note 149, at 33.

¹⁵¹ NELSON, *supra* note 148, at 11. See also Robert H. Nelson, *Dick Cheney Was Right: The Energy Debate is About Virtue*, THE WEEKLY STANDARD, June 11, 2001, at 18–20 (elaborating on theme of sacrifice in ANWR). The idea of sacrifice pervades the deep ecology literature. See, e.g., Tobias, *supra* note 131, at 14 (“What are we willing to forsake? How much can we expect from the present? Over one trillion dollars could be saved were the U.S. to exercise restraint in the following areas: opulent fashion, redundancy of services, excessive advertising and packaging, consumer fraud, exploitation industries, crime prevention, environmental health costs, unnecessary government regulations, Federal wastage, tax loopholes . . .”); Jason Annan, *Is Environmentalism the New State Religion?*, in THE MARKET MEETS THE ENVIRONMENT: ECONOMIC ANALYSIS OF ENVIRONMENTAL POLICY 295, 299–300 (Bruce Yandle ed., 1999) (discussing role of sacrifice in environmental policy as a result of religious environmentalism).

¹⁵² This can be seen as well in some of the popular commentary on ANWR. See, e.g., Tim Hogan, *Time to Protect the Arctic Refuge for Good*, BOULDER DAILY CAMERA, Apr. 15, 2007, at B08 (“[T]he Arctic National Wildlife Refuge has become a symbol of and a testimony to the restraint the American people have exercised on behalf of wild nature.”).

most expensive cathedral ever dedicated to any faith in the history of the world, forever redounding to the glory of an environmental god, and the American environmental movement."¹⁵³ Nelson makes a similar argument with respect to restrictions on logging and environmental opposition to dams.¹⁵⁴ Importantly for our purposes, Nelson's analysis makes clear that this is not a magical appeal to supernatural forces; there is no claim that if we forego ANWR's resources we will benefit by those forces' operation. Thus preserving ANWR is not part of a magical incantation that will directly benefit humanity. Rather, we are called to sacrifice for the sake of making the sacrifice, making the sacrifice religious rather than magical.¹⁵⁵

Environmental historian Thomas Dunlap also argues that environmentalism is a religion based on his analysis of the role it plays in adherents' lives.

Environmentalism campaigns for new laws, but it also gives moral weight to the apparently trivial decisions of daily life. It tells you what kind of grass to put in the front yard, how to get to work, even what kind of diapers to put on the baby. It makes a brick in the toilet tank an expression of virtue. It asks not just that we change policies or even our habits, but that we change our hearts, not just that we recycle papers, cans, and bottles, but that we form a new relationship with nature. Finally, it invokes the sacred, holding some areas and species in awe and finding in wilderness the opening to ultimate reality.¹⁵⁶

Because it addresses "great questions in the culture's authoritative terms," and calls for adherents to believe so as "to make a proper connection with the higher powers,"¹⁵⁷ Dunlap finds environmentalism to be a religion, asking "religious questions: what purpose do humans have in the universe, and what must they do to fulfill it?"¹⁵⁸

When we consider these arguments together, a strong case emerges for considering Environmentalism as if it were a religion. Crichton identified faith-based reasoning in environmental thinking along with numerous structural similarities to more readily recognized religions. Nelson's analysis adds an important dimension to Crichton's, identifying man's relationship with the supernatural as the rationale for the faith-based reasoning.¹⁵⁹ It is not simply that Environmentalists are mistaken about, for example, DDT; it is that their mistakes are a consequence of their rejection of both rational inquiry on the question and a human-centered framework that would value the lives of the thousands of people who die from malaria daily, what one observer compared to the daily crash of

¹⁵³ NELSON, *supra* note 3 (manuscript at 115).

¹⁵⁴ Robert H. Nelson, *Progressives: They Not Only Look Dead, They Are*, THE WEEKLY STANDARD, Sept. 23, 1996, at 27-29.

¹⁵⁵ Graber describes the same notion of personal sacrifice in her analysis of a description of a river clean up project, which she finds stresses "ritualized personal action" as a means to "reaffirm . . . allegiance to the wilderness ethic." GRABER, *supra* note 47, at 80.

¹⁵⁶ DUNLAP, *supra* note 89, at 4.

¹⁵⁷ *Id.* at 11.

¹⁵⁸ *Id.* at 13.

¹⁵⁹ Nelson, *Opiate*, *supra* note 149, at 33 ("[E]nvironmentalism is very much a religion in helping its followers to make (ultimate) sense of our lives in the context of the universe." (internal quotation omitted)).

seven 747 aircraft filled with children,¹⁶⁰ above the environmental costs of DDT use. Dunlap points out how environmentalism plays the role of religion for many of its adherents.

5. *Thinking about Environmentalism as a Religion*

Applying our definition requires asking whether Environmentalism involves a relationship with the supernatural. As Douglas Adams noted in another context, “If it looks like a duck, and quacks like a duck, we have at least to consider the possibility that we have a small aquatic bird of the family Anatidae on our hands.”¹⁶¹ We think Environmentalism resembles a religion at a level deeper than the notion of the superficial comments about the displeasure of “Mother Earth” or Gaia at human activities. For example, Aldo Leopold called for a “land ethic” in his classic *Sand County Almanac*, one of the foundational works of modern Environmentalism¹⁶² (and environmentalism, for that matter). This ethic would reflect “the existence of an ecological conscience, and . . . a conviction of individual responsibility for the health of the land”¹⁶³ and shift man’s position from “conqueror of the land-community to plain member and citizen of it” who respects “his fellow-members” and “the community as such.”¹⁶⁴ Leopold is in many respects a moderate environmentalist in today’s terms, and the scientific observations underlying his work suggest that despite such passages he was not a mystic given to routine appeals to extra rational ways of knowing.¹⁶⁵ Yet even in his writings, we find an idea of forces in nature beyond humanity, forces to which humans bear responsibility, a key component of the idea of nature as a supernatural force to which we can appeal.¹⁶⁶ Thus a crucial passage in Leopold’s writing is his

¹⁶⁰ *Malaria and Tuberculosis in Africa, Hearing Before the H. Subcommittee on International Relations*, 108th Cong. 99 (2004) (statement of Roger Bate, Ph.D., Director, Africa Fighting Malaria (quoting Dr. Wen Kilama, Chairman of the Malaria Foundation International)).

¹⁶¹ DOUGLAS ADAMS, *DIRK GENTLY’S HOLISTIC DETECTIVE AGENCY* 270 (1987).

¹⁶² Shabecoff terms *Sand County Almanac* “an amalgam of science and ethics that is now one of the sacred texts of American environmentalism.” SHABECOFF, *supra* note 70, at 5. Graber finds that Leopold’s “seminal contribution to the wilderness ethic was his view that scientific knowledge and mystical insight can be fused to form a ‘land ethic’” which she says was “simultaneously a useful mechanism which would make conservation work and a system of behavior which would bring spiritual satisfaction through proper practice.” GRABER, *supra* note 47, at 48–49. Devall and Sessions find Leopold “truly subversive” and *A Sand County Almanac* to be “a landmark in the development of the biocentric positions.” DEVAL & SESSIONS, *supra* note 78, at 86.

¹⁶³ LEOPOLD, *supra* note 88, at 258.

¹⁶⁴ *Id.* at 240; *see also* Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 112 (1995) (“Leopold gauged the virtue of human conduct by its impacts on the surrounding biotic community, condemning conduct that tended to disrupt the community’s integrity, stability, and beauty. It was a community-based ethic, with humans part of the larger whole and dependent in the long run on the health of the whole.” (citations omitted)).

¹⁶⁵ *See, e.g.*, ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 153–54 (Oxford University Press 1973) (1949) (“Science contributes moral as well as material blessings to the world. Its great moral contribution is objectivity, or the scientific point of view.”); *id.* at 55 (describing the “virtue of grouse hunting”).

¹⁶⁶ DUNLAP, *supra* note 89, at 65 (“Leopold did not use explicitly religious language, probably would have been skeptical of an environmental religion, and surely would have been horrified at the suggestion he was helping to establish one. Yet his work spoke to the religious dimension of life and to ultimate questions and needs, and the public made him, deservedly, an environmental nature saint.”).

description in his essay *Thinking Like a Mountain* of when a group he was with shot a wolf:

We reached the old wolf in time to watch a fierce green fire dying in her eyes. I realized then, and have known ever since, that there was something new to me in those eyes—something known only to her and to the mountain. I was young then and full of trigger-itch; I thought that because fewer wolves meant more deer, that no wolves would mean hunters' paradise. But after seeing the green fire die, I sensed that neither the wolf nor the mountain agreed with such a view.¹⁶⁷

Indeed, Leopold's iconic status among many modern environmental thinkers appears to us to be based largely on such passages in his work (which are quoted frequently) and less on his insistence on rigorous scientific analysis and fondness for hunting. These ideas are taken further by the deep ecology movement, which explicitly forswears a human-centered view of the environment. For example, the group Earth First! states on its website that it "does not accept a human-centered worldview of 'nature for people's sake.' Instead, we believe that life exists for its own sake, that industrial civilization and its philosophy are anti-Earth, anti-woman and anti-liberty."¹⁶⁸ As we previously noted, one need not go that far to find fundamentally religion-like assertions widespread within modern environmental writing.

In examining whether or not Environmentalism is sufficiently religious to make the disestablishment analysis appropriate, there are three possibilities to consider. First, Environmentalism may have nothing to do with man's relationship with the supernatural, in which case it is not even remotely religious in nature. This is false with respect to at least a subset of environmental thinking substantial enough to deserve a separate identification as Environmentalism. While talk of "Earth wounds" and the like may be difficult to penetrate for noninitiates, the basic precepts of Environmentalism set out earlier are clearly an attempt to address the relationship of mankind to something more important than mankind. From Leopold's encounter with "green fire" in the dying wolf's eyes to David Brower's experiences in the Hetch Hetchy Canyon,¹⁶⁹ Environmentalism is not merely appealing to a rationally-based preference for cleaner air or water but to a human desire for contact with something larger than mankind.

The second possibility is that Environmentalism is a version of magic, rather than a religion. For this to be true, it would have to be possible for man to manipulate nature to obtain what man desires (e.g., a desirable surface temperature

¹⁶⁷ LEOPOLD, *supra* note 165, at 138–39.

¹⁶⁸ Earth First! Journal, No Compromise in Defense of Mother Earth, <http://www.earthfirstjournal.org/section.php?id=1> (last visited Apr. 19, 2009). We should note that being "anti-Earth" strikes us as a valid reason for opposing an action, even if we disagree with Earth First! about just what being "anti-Earth" is. We do find it puzzling why the trilogy of sins includes being "anti-woman" rather than "anti-human," since it seems to us that their quasi-Marxist approach to economics suggests that the activities of which they disapprove are just as "anti-man" as they are "anti-woman." Our failure to understand this point is likely just evidence for yet another item in the anti-Earth bill of particulars against us, however.

¹⁶⁹ See DAVID ROSS BROWER, *FOR EARTH'S SAKE: THE LIFE AND TIMES OF DAVID BROWER 387–93* (1990) (describing Brower's experiences in the Hetch Hetchy valley). Missouri Senator James Reed noted that the "intensity of resistance to the [Hetchy Hetch] dam increased with the distance from the site, to peak in the transcendental heartland of New England." GRABER, *supra* note 47, at 99. On the controversy generally, see *id.*

of the Earth by stopping global climate change). A key tenet of Environmentalism is that we cannot control Nature and that man's prior attempts to do so are hubristic efforts that bring problems.¹⁷⁰ We can therefore exclude the possibility that Environmentalism is like magic rather than like religion.

The remaining possibility is that Environmentalism is at least religion-like, if not formally a religion. We think we have offered considerable evidence, both internal and external, from advocates and critics, to support our conclusion that Environmentalism is sufficiently analogous to a religion to benefit from examining it through the lens of the Establishment Clause and the economics of disestablishment. In particular, there is little doubt that a considerable portion of modern environmental thought concerns itself with man's relationship with the supernatural. This can be seen particularly clearly in the debate over climate change,¹⁷¹ in the insistence on the sacrifice of natural resource-rich locations like ANWR,¹⁷² and in the reverence for counter-productive but symbolic legislation like the Endangered Species Act.¹⁷³

This does not mean, of course, that every contributor to the Sierra Club or member of the National Wildlife Federation considers himself or herself to be practicing a religion when he or she signs a check for dues or buys a calendar of wilderness photographs. Indeed, many members of such groups no doubt hold religious beliefs that are inconsistent with any religious version of

¹⁷⁰ See items 3 and 5 in our list of Environmentalism's tenets *supra* and the text accompanying notes 91 and 96. See also Ellen Ruppel Shell, *Nature's Wrath, Man's Mistakes: Our Hubris and Folly*, WASH. POST., Sept. 4, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/02/AR2005090202688.html> (last visited Apr. 19, 2009) ("The belief that we have the power to control nature at her fiercest has deluded us into thinking we can win the fights we deliberately pick with her."); JOHN MCPHEE, *THE CONTROL OF NATURE* 271–72 (1989) (concluding account by comparing Los Angeles' efforts to control debris flows to pyramids in Egypt); Jeanne Roberts, *Ecology 101: How to Engineer a Natural Disaster*, CELSIAS, Aug. 20, 2008, <http://www.celsias.com/article/ecology-101-how-engineer-natural-disaster/> (last visited Apr. 19, 2009) ("There are many instances where we can lay the blame for disasters squarely on Mother Nature's broad shoulders, but more and more - as man refines his technology and extends his reach - the fault is our own.").

Proponents of efforts to address climate change by controlling emissions of greenhouse gases appear to suggest that we can control nature to the extent that we can refrain from having an impact. See, e.g., John C. Dermbach, *Achieving Early and Substantial Greenhouse Gas Reductions Under a Post-Kyoto Agreement*, 20 GEO. INT'L ENVTL. L. REV. 573, 574 (2008) ("Unless new policies and measures are implemented, greenhouse gas emissions are projected to increase at least 25 percent, and as much as 90 percent, by 2030. The scientific information being developed indicates that the human role in climate change is substantial, that average surface temperatures are increasing and that sea levels are rising . . ."). But even people advocating reduction of greenhouse gas emissions argue that the problems that continued emissions would cause are not controllable. See, e.g., *id.* ("[T]hese changes are having observable and negative effects around the world, and that these effects will grow in magnitude and scale as greenhouse gas concentrations in the atmosphere continue to increase.").

¹⁷¹ See, e.g., World Council of Churches, WCC Statement to the High-Level Segment of the UN Climate Change Conference (COP11 and COP/MOP1) Montreal, Canada, Dec. 9, 2005, <http://www.oikoumene.org/en/resources/documents/wcc-programmes/justice-diakonia-and-responsibility-for-creation/climate-change-water/091205-statement-to-cop-11-and-copmop-1.html> (last visited Apr. 19, 2009) (arguing for moral dimension to climate change issue).

¹⁷² See *supra* note 151 and accompanying text.

¹⁷³ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006); see *infra* notes 202–03 and accompanying text.

Environmentalism.¹⁷⁴ However, that there is an important overlap between religious and secular environmental thinking on some issues no more disqualifies the former form of environmentalism from status as a religion than an atheist's belief that murder should be prohibited disqualifies Judaism or Christianity as a religion because of the common ground between the Sixth Commandment and the atheist's views.¹⁷⁵ What does seem clear is that there is a set of beliefs held by some environmentalists that is sufficiently religious in nature to allow us to proceed to apply the disestablishment analysis.

C. The Establishment of Environmentalism

There are many religions in the United States, yet there is no officially established faith as there is in England, Iran, Ireland, Saudi Arabia, Scotland, Sweden, and many other countries. This does not mean there are not particular actions that constitute establishment of a religion. Just as government aid to a religious organization, a public display of a Nativity sans the required three plastic animals,¹⁷⁶ or a public monument containing the Ten Commandments in circumstances that Justice Breyer dislikes¹⁷⁷ can constitute a violation of the

¹⁷⁴ See, e.g., *Exodus* 20:2 ("I am the Lord thy God."); *Exodus* 20:3 ("Thou shalt have no other gods before me."); *John* 14:6 ("Jesus saith unto him, I am the way, the truth, and the life: no man cometh unto the Father, but by me."); QUR'AN, *sura aal-e-Imran* 3:6 ("There is no god but He."). How seriously such prescriptions are taken varies considerably from faith to faith. See, e.g., *Archbishop Becomes Druid*, BBC News (Aug. 5, 2002), <http://news.bbc.co.uk/1/hi/wales/2172918.stm> (last visited Apr. 19, 2009) (noting defenses of Christian cleric being made a "druid" as not inconsistent with Christianity).

¹⁷⁵ See *Exodus* 20:13. Some Christian denominations, notably Catholics and Lutherans, count this as the Fifth Commandment, rather than the Sixth. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 114, ¶ 2258. The Eleventh Circuit also noted that statutes prohibiting murder are not establishments of a religion despite the overlap with the religious injunction not to kill. See *Smith v. Bd. of Sch. Comm'rs of Mobile County*, 827 F.2d 684, 691 (11th Cir. 1987).

¹⁷⁶ Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 127 (1992).

¹⁷⁷ Justice Breyer's interpretation of the Establishment Clause has further confused an already disjointed area of the law, prompting commentators to make statements such as "Few areas of constitutional law remain more captive to the subjective whims of judicial preference than the First Amendment's religion clauses." Carlton Morse, Note, *A Political Process Theory of Judicial Review Under the Religion Clauses*, 80 S. CAL. L. REV. 793, 795 (2007). We are hardly alone in this view. Professor Erwin Chemerinsky, who represented Van Orden before the Supreme Court, expressed his surprise and disappointment at Justice Breyer's reasoning. Chemerinsky argued that, while Justice Breyer proclaimed that "the Establishment Clause is primarily about preventing divisiveness based on religion," he "offered no guidance as to how divisiveness could be applied as a First Amendment principle." Erwin Chemerinsky, *Why Justice Breyer Was Wrong in Van Orden v. Perry*, 14 WM. & MARY BILL RTS. J. 1, 2-4 (2005). A major problem with Justice Breyer's reasoning is that it is unpredictable, inviting accusations of being subjective. Professor Chemerinsky's complaint rings true here, as he rightfully notes that "[f]rom the perspective of divisiveness, it is not at all clear why the Ten Commandments displays in *McCreary* were more divisive than the one in *Van Orden*. Yet, Justice Breyer voted to invalidate the former and allow the latter." *Id.* at 4. While we do not necessarily agree with Justice Brandeis's famous statement that "in most matters it is more important that the applicable rule of law be settled than that it be settled right," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), an open ended test, to the extent that it can be called a "test," weakens the objective rule of law. We agree with Professor Chemerinsky that, if Justice Breyer's opinion continues to be the deciding vote in Establishment Clause cases, "[t]he result will be that each religious symbol on government property will need to be separately litigated concerning its history, its purpose, and its context." Chemerinsky, *supra*, at 16. Given the muddled state of Establishment Clause

Establishment Clause, so too might particular policies constitute an establishment of Environmentalism even without a formal establishment of an “Environmental Church.” As Professor Nelson noted in 1996, Environmentalism as a religion would

open a Pandora’s Box with respect to issues of church and state. In the framework of existing constitutional exegesis, no satisfactory answers will be found to questions such as the following: (1) If environmentalism does literally teach a religious message, how can the active teaching of this message in the public schools be justified, when traditional Christian beliefs—from which the environmental message is in major part originally derived—are not allowed similar proselytizing? (2) If a wilderness is literally a church of environmental religion, which many people today visit to experience a spiritual awakening, why is it permissible for the government to maintain this type of place of worship but not an ordinary Christian church?¹⁷⁸

In this Part, we discuss the evidence that Environmentalism is becoming and even could be argued, if it were defined as a religion, to have become an established religion.

Broadly speaking, environmental policies that are potentially “established” fall into three categories: 1) government commanding private actors to alter their behavior in pursuit of public environmental policy goals so that the private actors support Environmentalism; 2) symbolic government actions regarding the environment to further Environmentalism; and 3) government resource management in accordance with the dictates of Environmentalism and without a secular purpose. Courts have found religious establishments when each of these types of actions is taken with respect to a religion and we can also see examples of “established” Environmentalism with respect to each.

1. Commanding Private Action

Direct commands to engage in activity that supports a particular faith are the hallmark of established faiths. Established religions may require individuals to pay taxes to support the official faith, attend services, obey the dictates of religious law, or a host of other activities. Given that the state is a specialized organization with a comparative advantage in compulsion,¹⁷⁹ the primary point of establishment is to make those organizational resources available to the favored faith.

There are comparatively few direct commands to support a particular faith in recent American jurisprudence precisely because it is so obvious that the Establishment Clause forbids such action. On the margin, the most jurisprudential activity in this area lies with prayer in public school cases, in which objections are raised to the compulsory participation in officially sanctioned prayers, moments of silence, teaching creationism, attempts to create public religious schools for special

jurisprudence, and the Supreme Court’s seeming inability to agree on a coherent application of the clause, we are not at all convinced that further litigation is in anyone’s best interest.

¹⁷⁸ Nelson, *supra* note 1, at 19.

¹⁷⁹ Randall G. Holcombe, *Government Growth in the Twenty-First Century*, in POLICY CHALLENGES AND POLITICAL RESPONSES: PUBLIC CHOICE PERSPECTIVES ON THE POST-9/11 WORLD 95, 104 (William F. Shughart II & Robert D. Tollison eds., 2005) (“[C]ompulsion underlies all government activity.”).

education, and other activities.¹⁸⁰ The seemingly endless cycle of litigation over the precise wording and circumstances of such school prayer efforts reveals the danger of entanglement that these cases present. The prayers show a steady decline in religious content as constitutional objections are raised, moving steadily toward a theological mush that the proponents hope the courts will find inoffensive.¹⁸¹ One problem with establishment efforts on the margin is that the need to accommodate a sufficient range of preferences to produce majority support for the effort is likely to yield such mush, defeating the original goal of inculcating real theological values, and contaminating the established faith with the sort of doctrinal weakness that is associated with declining observance by the faithful.

These economic lessons are particularly clear with respect to direct actions in support of a particular faith: the consequences of establishment are overwhelmingly negative for everyone involved. Consider the case of the Church of England. Religious observance in this established church has steadily declined. As one observer noted, “[i]t is not exaggerated to conclude that between 1960 and 1985 the Church of England as a going concern was effectively reduced to not much more than half its previous size.”¹⁸² At the same time, at least a considerable portion of the church’s hierarchy has moved away from commitment to what people in the

¹⁸⁰ In *Engel v. Vitale*, 370 U.S. 421 (1962), parents challenged a New York school district’s requirement that students recite the following prayer at the beginning of each school day: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” *Id.* at 422–23. The Supreme Court held that this violated the Establishment Clause, *id.* at 424, and has consistently rejected attempts to institutionalize religious exposure in public schools. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 586–87 (1992) (holding that clergy-led prayer at graduation violated the Establishment Clause); *Wallace v. Jaffree*, 472 U.S. 38, 59–60 (1985) (striking an Alabama statute that required a moment of silence for “meditation or voluntary prayer”); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 205–06 (1963) (striking school district’s requirement that teachers recite Bible verses and lead students in reciting The Lord’s Prayer).

¹⁸¹ See *Weisman v. Lee*, 728 F. Supp. 68, 69 (D.R.I. 1990), *aff’d*, 505 U.S. 577 (1992) (describing how “[t]he Assistant Superintendent of Schools has distributed to school principals a pamphlet entitled ‘Guidelines for Civic Occasions’ as a guideline for the type of prayers to be used at the ceremonies. The pamphlet is prepared by the National Conference of Christians and Jews, a national organization with an office in Providence. The guidelines suggest methods of composing ‘public prayer in a pluralistic society,’ stressing ‘inclusiveness and sensitivity’ in the structuring of non-sectarian prayer. The guidelines do not suggest the elimination of reference to a deity as appropriate.”). Nicholas van Hoffman wrote memorably about this in *The Mush God*, a 1978 column in which he described the “Mush God” as having

no theology to speak of, being a Cream of Wheat divinity. The Mush God has no particular credo, no tenets of faith, nothing that would make it difficult for believer and non-believer alike to lower one’s head when the temporary chairman tells us the Reverend, Rabbi, Father, Mufti, or So-and-So will lead us in an innocuous, harmless prayer, for this god of public occasions is not a jealous god. You can even invoke him to start a hooker convention and he/she or it won’t be offended.

ADRIAN ROGERS, TEN SECRETS FOR A SUCCESSFUL FAMILY 29 (1996) (quoting Nicholas Van Hoffman, *The Mush God* (1978)).

¹⁸² ADRIAN HASTINGS, A HISTORY OF ENGLISH CHRISTIANITY 1920–1985, at 603 (1986); see also GRACE DAVIE, RELIGION IN BRITAIN SINCE 1945: BELIEVING WITHOUT BELONGING 53 (1994) (describing the post-1960 decline of the Anglican Church as “calamitous” and quoting HASTINGS, *supra*, at 551).

1950s might have supposed to be core Anglican (and Christian) precepts.¹⁸³ This movement did not occur because the traditional Anglican message failed to resonate with potential congregants: the theologically more conservative churches of the Anglican Communion, largely African disestablished churches, have experienced considerable growth and have begun extending their reach to congregations outside of Africa.¹⁸⁴ There may well be other issues involved in the comparative decline and rise of these different portions of the same denomination besides establishment, but it is difficult to see a positive role for establishment in the Anglican story.

An example of the establishment of Environmentalism where the disestablishment analysis is helpful is the current federal fixation on corn-based ethanol. The federal government has set ambitious targets for use of ethanol in coming years.¹⁸⁵ As a result, government subsidy and research dollars have been concentrated on corn-based ethanol,¹⁸⁶ to the detriment of alternative biofuels that

¹⁸³ See, e.g., HASTINGS, *supra* note 182; at 663 (suggesting that “there is simply no future for a Church which can produce no reasoned expression of its faith stronger than what the dominant theologians of the seventies were able to muster”); Charles Raven, *England: Is the Liberal Tide Beginning to Ebb?*, VIRTUE ONLINE, Feb. 12, 2009, <http://www.virtueonline.org/portal/modules/news/article.php?storyid=9935> (last visited Apr. 19, 2009) (arguing, from the perspective of a conservative Anglican, that if a recent reaffirmation on the uniqueness of Christ signaled a return to traditional theology in the Church of England, “there must be fears that it will be inhibited by the influence of Archbishop Rowan Williams. It is not of course that he would oppose the idea of the uniqueness of Jesus, but that it would be emptied of straightforward content.”). One example is the dispute over then-Archbishop of Wales, now-Archbishop of Canterbury Rowan Williamson’s induction as a “druid,” which some complained was inconsistent with Christianity but others saw as merely a cultural event. See also *Archbishop Becomes Druid*, *supra* note 174; Jordan Hylden, *Anglican Storm Clouds*, FIRST THINGS, Feb. 15, 2007, <http://www.firstthings.com/onthesquare/?p=635> (last visited Apr. 18, 2009) (describing rifts within Anglican Communion); Theo Hobson, *A Very English Coup – And the End of Our National Church*, SPECTATOR, July 2, 2008, <http://www.spectator.co.uk/print/themagazine/features/811011/a-very-english-coup-and-the-end-of-our-national-church.shtml> (last visited Apr. 18, 2009) (liberal noting that “[t]he important point to remember about the Church of England is that it was part and parcel of the world’s first and greatest liberal culture. No other church in history has been so firmly tied to political liberalism. It has always been explicitly subject to the will of Parliament. As an established Church, it had to adapt to the unfolding of the national character. To retain its centrality it had to be flexible, to go with the cultural flow.”). The theological liberalism of the Church of England was memorably satirized in the series *Yes (Prime) Minister*, in the episode *The Bishop’s Gambit*, in which a canon who does not believe in God is proposed as a bishop. *Yes (Prime) Minister: The Bishop’s Gambit* (BBC television broadcast Feb. 20, 1986), available at <http://www.yes-minister.com/ypmseas1b.htm>.

¹⁸⁴ See PHILIP JENKINS, *THE NEXT CHRISTENDOM: THE COMING OF GLOBAL CHRISTIANITY* 204 (2002) (describing growing numbers and authority of non-European churches within Christianity).

¹⁸⁵ Energy Independence and Security Act of 2007, Pub. L. No. 110–140, § 202, 121 Stat. 1492 (codified as amended in scattered sections of 42 U.S.C. and 49 U.S.C.) (providing goals for the minimum volume of renewable fuels, cellulosic biofuels, and advanced biofuels to be used in commerce through 2022); Jason Scott Johnston, *Climate Change Confusion and the Supreme Court: The Misguided Regulation of Greenhouse Gas Emissions Under the Clean Air Act*, 84 NOTRE DAME L. REV. 1, 61 (2008) (“The Energy Independence and Security Act established a goal of producing fifteen billion gallons of corn-based ethanol by 2015.”); see also FRED SISSINE, *ENERGY INDEPENDENCE AND SECURITY ACT OF 2007: A SUMMARY OF MAJOR PROVISIONS*, CONG. RESEARCH SERV. REP. FOR CONG. NO. RL34294, at 5 (2007), available at http://energy.senate.gov/public/_files/RL342941.pdf.

¹⁸⁶ See Robert W. Hahn, *Ethanol: Law, Economics, and Politics*, 19 STAN. L. & POL’Y REV. 434, 439, 454 (2008) (noting that while the various subsidy and incentive programs of the federal government have been directing increasing amounts of money toward research and development programs for

offer solutions to some of corn-based ethanol's drawbacks,¹⁸⁷ and food prices have soared both within the United States and in developing countries due to rising corn prices.¹⁸⁸ Further, considerable environmental damage is resulting from more intensive corn production in the United States,¹⁸⁹ with estimates of the net environmental benefits ranging from small to negative.¹⁹⁰

Partly as a result of this experience, ethanol is not universally popular today even in the greenest portions of the political spectrum.¹⁹¹ And adherents to Environmentalism as we have described it may not be taken in (or may no longer be taken in) by the ethanol industry's claims. But ethanol's self-interested proponents have successfully hijacked the rhetoric of Environmentalism in their pursuit of government support, as have myriad other "green energy" interests.¹⁹² In short, Environmentalists may merely be playing the role of Baptists in a "bootleggers and Baptists" coalition, providing "theological" cover for what would otherwise be naked rent-seeking.¹⁹³ A disestablishment of Environmentalism would

cellulosic ethanol, the amount paid to corn ethanol producers is still greater). See generally ALTERNATIVE FUELS & ADVANCED VEHICLES DATA CTR., U.S. DEP'T OF ENERGY, FEDERAL ETHANOL INCENTIVES AND LAWS, http://www.afdc.energy.gov/afdc/ethanol/incentives_laws_federal.html (last visited Apr. 19, 2009).

¹⁸⁷ Vanessa M. Cordonnier, *Ethanol's Roots: How Brazilian Legislation Created the International Ethanol Boom*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 287, 313 (2008) ("The use of cellulosic crops for ethanol production offers many environmental improvements over feed-stocks such as corn or sugar cane."); Hahn, *supra* note 186, at 454 ("Cellulosic ethanol is believed to be better for the environment and may actually achieve some energy security for the United States.").

¹⁸⁸ Hahn, *supra* note 186, at 464 ("[C]orn prices have risen from \$2.00 per bushel in 2005 to about \$3.50 per bushel in 2007."); Sandra Zellmer, *Boom and Bust on the Great Plains: Deja Vu All Over Again*, 41 CREIGHTON L. REV. 385, 413 (2008) (book review) ("In 2007, U.S. corn prices hit record highs due to the recent ethanol boom . . .").

¹⁸⁹ Zellmer, *supra* note 188, at 397 (observing that the ethanol boom blunts the effect of domestic conservation programs because steep corn prices entice farmers to use targeted lands for production despite incentives to the contrary); *id.* at 410–11 (observing that in addition to causing increased pollution from fertilizer runoff and depletion of natural aquifers, increased corn production for ethanol contributes to deforestation of the Amazon by farmers anxious to take advantage of increased soy-bean prices); *cf.* Hahn, *supra* note 186, at 447 (explaining that increased domestic corn consumption for ethanol will lead to environmental degradation abroad as well, because decreased corn exports will lead to increased corn production abroad and all the harmful soil erosion, use of pesticides and fertilizers, and inevitable pollution that comes with it).

¹⁹⁰ *E.g.*, Hahn, *supra* note 186, at 467 ("Ethanol made from corn is not likely to boost energy security much and its environmental benefits appear to be relatively small."); David Pimentel & Tad W. Patzek, *Ethanol Production Using Corn, Switchgrass, and Wood; Biodiesel Production Using Soybean and Sunflower*, 14 NAT. RESOURCES RESEARCH 65, 66 (2005) (finding that the production of a unit of energy from corn ethanol requires 29% more energy from fossil fuel than it yields); Zellmer, *supra* note 188, at 411 ("Although the nation has encouraged ethanol use as a method of reducing greenhouse gas emissions, the overall effect on global climate change is mixed, at best.").

¹⁹¹ See Hahn, *supra* note 186, at 454 ("[S]ome environmentalists support current corn ethanol production because they see it as a stepping stone to cellulosic ethanol."); PEW RESEARCH CTR., MIXED SIGNALS ON ENERGY POLICY (2008), <http://pewresearch.org/pubs/756/mixed-signals-on-energy-policy> (last visited Apr. 19, 2009) (reporting survey data indicating that while a majority of Americans continue to support ethanol subsidies and research, the margin of support has declined by 21% among college graduates from February 2006 to February 2008).

¹⁹² See Andrew P. Morriss et al., *The Mythologies of Green Jobs*, 16 MO. ENVTL. L. & POL'Y REV. (forthcoming 2009).

¹⁹³ Bruce Yandle, *Bootleggers and Baptists: The Education of a Regulatory Economist*, REG., May/June 1983, at 12 ("Bootleggers, you will remember, support Sunday closing laws that shut down all

undercut such coalitions by enabling skeptics to insist on “secular” motivations for alternative energy programs. Such justifications would have to focus on performance, not rhetoric. Without the quasi-religious appeal to Environmentalism, it would be easier to demand focus on the net energy gain, cost per unit, or actual environmental impact as the basis for government interventions in energy markets.

In general, the analogy between the ethanol fixation and established churches’ troubles is relatively straightforward. Just as an established church that receives government subsidies need not actually engage in activities that put bodies in pews for services, since its clergy receive government support regardless of attendance figures or religious observance,¹⁹⁴ so the ethanol industry need not actually produce net energy or improve environmental quality since it receives substantial subsidies regardless of the amount of net energy it produces or its actual environmental impact compared to other forms of energy. Ethanol and the DDT example discussed earlier provide a clear example of an “establishment” of Environmentalism through the use of government’s coercive power to require private actors to do (ethanol) and not do (DDT) actions with no “secular” purposes.

2. Government Symbolic Action

No doubt because the Establishment Clause is clear that direct support of religious organizations for obviously religious purposes is forbidden, there are few examples of American governments directly promoting religion in prohibited ways. For example, as a rule the federal and state governments of the United States do not own religious buildings,¹⁹⁵ conduct religious services,¹⁹⁶ or otherwise deliver

the local bars and liquor stores. Baptists support the same laws and lobby vigorously for them. Both parties gain, while the regulators are content because the law is easy to administer.”); Morriss et al., *supra* note 192, at 11 (“Rent-seeking refers to the use of the political process to obtain rewards for a factor of production in excess of the market rate. It often occurs when individuals or groups invest in the political process to create barriers to entry or capture public resources for private gains, especially for the groups promoting the policies.”).

¹⁹⁴ See, e.g., *infra* note 258 and associated text; The Church of England, Funding the Church of England, <http://www.cofe.anglican.org/info/funding/index.html#where> (last visited Apr. 18, 2009) (“[O]ver £200 million is given tax-efficiently each year through Gift Aid and a further £60 million is recovered from the Inland Revenue in tax.”).

¹⁹⁵ While the government is generally restrained from owning church buildings, as doing so would violate the Establishment Clause, the government may own religious buildings of historical significance or promulgate laws and regulations intended to preserve such structures so long as the government’s interest remains one of secular historical preservation. Compare *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (“[T]he three main evils against which the Establishment Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’” (quoting *Walz v. Tax Commission*, 397 U.S. 664, 668, (1970))), with *Access Fund v. U.S. Dept. of Agriculture*, 499 F.3d 1036, 1044–45 (9th Cir. 2007) (upholding Forest Service’s regulation of climbing on rock formation valued by Native American groups as a religious site when the regulation was motivated principally by the Forest Service’s desire to maintain a culturally significant site for secular historic preservation purposes) and *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 977 (9th Cir. 2004) (“[T]he Establishment Clause does not bar the government from protecting an historically and culturally important site simply because the site’s importance derives at least in part from its sacredness to certain groups.”).

¹⁹⁶ A notable exception is the use of chaplains, paid by taxpayer funds, to pray at the beginning of legislative sessions. In *Marsh v. Chambers*, 463 U.S. 781 (1983), the Supreme Court rejected a challenge to Nebraska’s policy of beginning each legislative session with a prayer offered by a state-

religious “goods and services” to the public but leave it to private organizations to do those things. Nonetheless there are numerous examples of governmental behavior that has been held by courts to improperly advance a particular religious belief and so constitute a violation of the Establishment Clause’s prohibition.¹⁹⁷ This is precisely where the Establishment Clause jurisprudence is the most vulnerable to serious criticism, however, and so some caution is necessary in drawing lessons for the issues before us.

Governments regularly undertake symbolic religious actions, such as placing Nativity displays on public property or opening official proceedings with prayers.¹⁹⁸ Symbolic acts that favor religion are oftentimes problematic under the Establishment Clause, from displays of the Ten Commandments on public property to prayers at high school football games.¹⁹⁹ Establishment Clause jurisprudence has been particularly confused here, as the Ten Commandments cases illustrate, but

supported chaplain, noting that “[f]rom colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.” *Id.* at 786. The historical nature of legislative prayer could be considered to be merely a form of ceremonial deism. See *Elk Grove Unified Sch. Dist. v. Nedow*, 542 U.S. 1, 37 (2004) (Rehnquist, C.J., concurring) (describing the national motto, traditional patriotic songs, and the words that the Marshall uses to open each session of court (“God save the United States and this honorable Court”) as falling into the category of “ceremonial deism,” and stating “[t]hese references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.”). However, a seemingly more difficult issue is that of military chaplains because their role extends into the uniquely sectarian rather than merely ceremonial role. Nevertheless, the use of military chaplains is enshrined in military history and has long been a part of the American system. See Steven K. Green, *Reconciling the Irreconcilable: Military Chaplains and the First Amendment*, 110 W. VA. L. REV. 167, 179 (2007) (acknowledging that, while “[p]atently unconstitutional under almost any view of the Establishment Clause,” military chaplains are justifiable “as a permissive accommodation of service members’ religious practice” and as a “limited exception to the Establishment Clause”). Despite its general acceptance, however, the use of military chaplains has raised its own set of legal issues. See William A. Wildhack III, *Navy Chaplains at the Crossroads: Navigating the Intersection of Free Speech, Free Exercise, Establishment, and Equal Protection*, 51 NAVAL L. REV. 217, 221–23 (2005) (discussing the difficulties of maintaining denominational fidelity in the midst of a hierarchical organization of multifaith clergy); see also William J. Dobosh, Jr., *Coercion in the Ranks: The Establishment Clause Implications of Chaplain-Led Prayers at Mandatory Army Events*, 2006 WIS. L. REV. 1493, 1560 (2006) (arguing that the use of chaplain-led prayer at “mandatory, nonreligious, Army ceremonies” violates the Establishment Clause).

¹⁹⁷ See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding that a crèche on display outside of the county courthouse violated the Establishment Clause, but a Menorah displayed next to a Christmas tree outside of a government building was permissible); *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986) (holding that a crèche displayed on the lawn of city hall, without other holiday symbols, violated the Establishment Clause); *Am. Jewish Congress v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (holding that the city’s act of allowing a religious organization to erect a 27 foot tall Menorah in a park near city hall violated the Establishment Clause).

¹⁹⁸ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (allowing the display of a crèche on public land because “[w]hen viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message”); see also ceremonial deism discussion, *supra* note 196; William M. Howard, Annotation, *First Amendment Challenges to Display of Religious Symbols on Public Property*, 107 A.L.R. 5th 1 (2003).

¹⁹⁹ See *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (holding school policy regarding student-led prayer at high school football games violates the Establishment Clause).

there is still an important lesson to be derived from considering whether governments should be free to symbolically endorse particular religious views.

Just as they do with respect to religion, governments regularly engage in symbolic actions that relate to environmental issues and causes. For example, presidents routinely issue proclamations and statements concerning Earth Day.²⁰⁰ Such actions are inoffensive and nonproblematic, as are presidential proclamations regarding conventionally religious holidays such as Christmas, Passover, and Ramadan. But governments also engage in symbolic actions that impose significant costs on individuals, taxpayers as a whole, and, often, the environment. Such symbolic actions could be viewed as problematic “establishments” of Environmentalism. Two examples of such environmental symbolism are the restriction of mineral exploration and development in ANWR and the Endangered Species Act (ESA). In the case of ANWR, we earlier noted Professor Nelson’s analysis pointing out that ANWR’s value to environmental pressure groups is its symbolic sacrifice of economic development potential in favor of the protection of nature.²⁰¹ In the case of the ESA, the statute’s remarkable ineffectiveness and the ready availability of effective alternatives built around positive incentives for expanding and preserving habitat leave the Act’s symbolic value as the best explanation for its passage.²⁰²

Both cases of symbolic action are problematic in ways that Nativity scenes on public property or the “In God We Trust” language on U.S. currency are not. In the case of the ESA, the symbolism is counterproductive since the statute creates incentives to reduce habitat for endangered species.²⁰³ In the ANWR example, the problem is that the sacrifice is being made to benefit one group (those who value ANWR’s “wildness”) without regard to the overall cost to everyone in society. Like many government decisions, there is no mechanism for the costs to be borne by those seeking the decision. Compare the Audubon Society’s treatment of a wildlife refuge it owned that had significant natural gas reserves under it.²⁰⁴ Audubon chose to develop the natural resource, albeit with some additional safeguards that a less environmentally sensitive land owner might not have insisted on.²⁰⁵ Because Audubon faced the opportunity cost of its choices, it had to consider

²⁰⁰ See, e.g., The American Presidency Project, Remarks on Signing the Earth Day Proclamation, <http://www.presidency.ucsb.edu/ws/?pid=17998> (last visited Apr. 19, 2009) (documenting President George H.W. Bush’s remarks on the signing of the Earth Day proclamation).

²⁰¹ See NELSON, *supra* note 148.

²⁰² STEVEN LEWIS YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT 57 (1982) (“It was spawned by an extremely symbolic issue that fed public sentiment and support and was buttressed by an amazingly strong and well-organized set of activist groups and a powerful set of congressional staff and members. It was defined as a technical problem that would not harm any domestic interests and framed prohibitively because no one perceived any costs of doing so. The act was seen as a low-cost, no-lose legislative situation.”).

²⁰³ See Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls*, 49 B.C. L. REV. 301, 335–38 (2008); Andrew P. Morriss & Richard L. Stroup, *Quartering Species: The “Living Constitution,” the Third Amendment, and the Endangered Species Act*, 30 ENVTL. L. 769, 785–98 (2000).

²⁰⁴ See Pamela S. Snyder & Jane S. Shaw, *PC Oil Drilling in a Wildlife Refuge*, WALL ST. J., Sept. 7, 1995, at A14; Dwight R. Lee, *To Drill or Not to Drill: Let the Environmentalists Decide*, 6 THE INDEP. REV. 217, 218–19 (2001), available at <http://www.terry.uga.edu/~dlee/drill.pdf>.

²⁰⁵ Snyder & Shaw, *supra* note 204; Lee, *supra* note 204.

the value of the sacrifice—not developing the natural gas would mean it had fewer resources to protect wildlife habitat elsewhere. In ANWR, those opposed to development (including the Audubon Society) do not face that choice, since the cost of the foregone development is shared by all Americans. (One possible solution would be to give ANWR to the Audubon Society.)²⁰⁶ Similarly, the Nature Conservancy regularly trades land parcels to other developers, sacrificing one parcel to save an environmentally more significant one.²⁰⁷ Rational decisions—as opposed to faith-based ones—require that opportunity costs be considered.

3. Direct Government Action

Both federal and state governments are regular actors in environmental contexts. Governments own and manage properties with environmental significance. Even federal agencies not directly concerned with the environment must consider the environmental impact of their actions.²⁰⁸

The Wilderness Act of 1964²⁰⁹ offers an opportunity to explore establishment issues in the context of government action.²¹⁰ The statute sets aside areas “where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.”²¹¹ As Professor John Copeland Nagle has exhaustively documented, the rationales for the Wilderness Act included a number of explicitly spiritual ones, including appeals to Christian scriptures providing an important role for wilderness, although the formal list of purposes did not include any such references.²¹² Wilderness preservation generally involves a mix of religious and nonreligious motivations; Professor Linda Graber’s perceptive analysis of the role of wilderness concluded that it serves as a “contemporary form of a sacred space, valued as a symbol of geopiety and as a focus for religious feeling.”²¹³ We do not contend that preserving wilderness is an exclusively spiritual activity that is itself an establishment of religion or argue that Christians (or anyone else) who supported the Wilderness Act because of their faith acted improperly. Where the disestablishment analysis is helpful is in determining the range of

²⁰⁶ See Lee, *supra* note 204, at 221–22.

²⁰⁷ See *id.* at 220–21; THE NATURE CONSERVANCY, SHEEP MOUNTAIN LAND EXCHANGE: TRADE SECURES PUBLIC ACCESS AND WINTER RANGE FOR WILDLIFE 2 (2006), available at http://www.nature.org/wherewework/northamerica/states/wyoming/files/smntn_factsheet.pdf. In the Sheep Mountain Land Exchange, the Nature Conservancy proposed to transfer environmentally sensitive land that it purchased to the Bureau of Land Management (BLM). *Id.* In exchange, the BLM would give an equal amount of less sensitive BLM land to the Nature Conservancy, which would place conservation easements on some of those parcels. *Id.* To finance the land swap and ensure that the county tax base was not diminished, the remaining parcels would be sold to private landowners for commercial development. *Id.*

²⁰⁸ See National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370e (2006). Section 4322 instructs all agencies of the federal government to consider the environmental impacts of their actions.

²⁰⁹ Wilderness Act, 16 U.S.C. §§ 1131–1136 (2006).

²¹⁰ See Nagle, *supra* note 1, at 1003 n.284.

²¹¹ 16 U.S.C. § 1131(c) (2006).

²¹² See Nagle, *supra* note 1, at 978–87.

²¹³ GRABER, *supra* note 47, at ix. See also Nelson, *supra* note 1, at 18 (quoting 1994 speech by director of National Park Service that “wilderness is a religious concept” that “should be part of our religious life”).

permissible interpretations of the text of the statute. The controversy over the Wilderness Act's application to salmon stocking in the Kenai Wilderness illustrates how a disestablishment approach could be useful.

Beginning in 1974, Alaska added additional salmon fry to Tustemena Lake, a lake within the Kenai National Wildlife Refuge (Refuge), to increase the harvesting of salmon by sport and commercial fishermen outside the wilderness area.²¹⁴ In 1993, the state contracted with a nonprofit organization, the Cook Inlet Aquaculture Association (CIAA), to conduct the salmon stocking.²¹⁵ The United States Fish & Wildlife Service (FWS) reviewed and approved the CIAA's proposed stocking program.²¹⁶ The Wilderness Society sued, claiming that the CIAA program violated the Wilderness Act.²¹⁷ The district court found for the government, as did a divided panel of the Ninth Circuit.²¹⁸ The en banc Ninth Circuit unanimously reversed and held in the Wilderness Society's favor.²¹⁹ All of the opinions make arguments well within the normal bounds of legal analysis;²²⁰ the legal disagreements centered on whether or not the Wilderness Act was ambiguous on these points and, if so, the proper degree of deference to give to the FWS's interpretation of the statute.²²¹

One issue from the dispute is useful as an illustration here. The parties disagreed about whether the statutory definition of wilderness required forbidding alterations of the "natural" conditions within the Refuge or required managing the Refuge to offset actions outside the Refuge that had an impact within the Refuge.²²² (The panel disagreed about both issues;²²³ the en banc court resolved the case on a separate point and so did not reach this issue.²²⁴) Here the disestablishment analysis is particularly helpful. The Ninth Circuit panel majority found that there were conflicting understandings of the agency's obligations under the statute.²²⁵ As Professor Nagle summarized the dispute,

[o]n the one hand, to preserve the "natural conditions" of the Refuge could mean protecting against the introduction of artificial propagation programs, like the [CIAA] Project, that alter the natural ecological processes within the Refuge. On the other hand, to preserve the "natural conditions" of the Refuge could mean preserving the

²¹⁴ *Wilderness Soc'y v. U.S. Fish & Wildlife Service (Wilderness Society I)*, 316 F.3d 913, 917 (9th Cir. 2003), *vacated*, 353 F.3d 1051 (9th Cir. 2003) (en banc).

²¹⁵ *Id.* at 918.

²¹⁶ *Id.* at 919–20.

²¹⁷ *Id.* at 920.

²¹⁸ *Id.* at 916, 930.

²¹⁹ *Wilderness Soc'y v. U.S. Fish & Wildlife Service (Wilderness Society II)*, 353 F.3d 1051, 1055 (9th Cir. 2003) (en banc).

²²⁰ The en banc court noted that "none of our precedent, and no explicit guidance from the United States Supreme Court, has addressed how to assess 'commercial enterprise' when faced with activities involving mixed purposes and effects. The lack of explicit guidance on this issue in part led the district court to defer to the agency action." *Id.* at 1063.

²²¹ *See id.* at 1059.

²²² *Wilderness Society I*, 316 F.3d at 923–24.

²²³ *Id.* at 922–24; *id.* at 932–33 (Fletcher, J. dissenting).

²²⁴ *Wilderness Society II*, 316 F.3d at 1055.

²²⁵ *Wilderness Society I*, 316 F.3d at 923–24.

natural ecological processes as they *would* exist in their wild state, in the absence of artificial disturbance from outside the wilderness area.²²⁶

As Professor Nagle notes, these two visions of wilderness differ considerably. The former sees wilderness as a prohibition on land use; the latter sees it as “a unique type of land use”²²⁷ which can be preserved by active management of the refuge to mitigate the impact of events outside the refuge on the refuge. The panel majority deferred to the FWS,²²⁸ which had chosen the latter; the panel dissent opted for the former.²²⁹ But with respect to many of the purposes of the Wilderness Act, maintaining wilderness lands *as they would be* in the absence of human activity is more in keeping with the statutory purpose. For example, the Wilderness Act defines wilderness as being “protected and managed so as to preserve its natural conditions.”²³⁰ It is certainly a reasonable (and, dare we say, natural) reading of “managed” to infer that Congress wanted the FWS to actively engage in land management to ensure that wilderness lands appeared to the visitor as if they were unaffected by human activity outside the designated areas. Indeed, such actions are entirely consistent with ideas of wilderness common in the 1960s and 1970s; Professor Graber’s survey of the idea of wilderness as sacred space concluded that “the true definition of wilderness is found not in the presence or absence of physical modification, but in human needs and desires.”²³¹ If those needs are for the appearance of undisturbed space, active management would be consistent. However, if one accepted a wilderness ethic that sought to instantiate a moral vision based on undisturbed wilderness, as Graber contends John Muir sought to do,²³² one begins to stray close to establishment. If it is human action that causes a parcel of land to decline from “the axiomatic perfection of wilderness[.] . . . the ideal condition for Earth, the way it was fresh from the Creator’s hands,”²³³ the objection strikes us as approaching a religious one. Further, if one accepts that wilderness areas are to be kept pristine by making them

²²⁶ *Id.*

²²⁷ Nagle, *supra* note 1, at 967. The en banc Ninth Circuit ultimately resolved the case without addressing the meaning of wilderness, focusing instead on the commercial nature of the stocking program and concluding that it was prohibited by the statute. *Wilderness Society v. U.S. Fish & Wildlife Service*, 360 F.3d 1374, 1374 (9th Cir. 2004) (en banc). Indeed, “wilderness is a profoundly spiritual concept.” Nagle, *supra* note 1, at 969.

²²⁸ *Wilderness Society I*, 316 F.3d at 923–25.

²²⁹ *Id.* at 933–34 (Fletcher, J., dissenting).

²³⁰ Wilderness Act, 16 U.S.C. § 1131(c) (2006).

²³¹ GRABER, *supra* note 47, at 10.

²³² Graber describes Muir’s understanding of the relationship of morality and wilderness as follows:

John Muir considered beauty and morality as one. He called beauty “purity” and believed that as soon as man began to tamper with nature, the quality of beauty faded and became less than perfect. By definition, then, wilderness is the most beautiful—and the most moral—part of nature. Although famous in his time as a glaciologist and as a botanist; Muir believed that the scientific understanding of nature was far less important than a religious understanding, and that spiritual insight was identical to the perception of beauty.

Id. at 14. Graber also notes that “[t]he wilderness ethic is primarily a philosophy based on the avoidance of man-caused environmental changes.” *Id.* at 114.

²³³ *Id.* at 102.

“difficult to find and hard to use,” as some wilderness advocates suggest,²³⁴ thinking about the issue in establishment terms helps keep the focus on tying such a policy to meeting human needs. Moreover, we think it is difficult to conceive of reasons to prefer the panel dissent’s approach without giving weight to considerations that fall close to an establishment of Environmentalism.

In general, without a scientific definition of “natural” conditions, it is impossible to determine what a “natural” environment is without resort to (at least) quasi-religious values. For example, when philosopher Mark Sagoff examined the literature on invasive species, he discovered that ecologists cannot distinguish between ecosystems with only “native” species and those with “invasive” species except by documenting the invasion itself.²³⁵ In short, there is no scientific distinction between an invaded environment and a “natural” one.²³⁶ Thus, in many respects, the term “natural” is inevitably fraught with what must ultimately be “religious” meanings since it cannot be defined without resort to extra-rational thought processes. Does it mean the conditions that existed prior to the arrival of humans in North America? Does it mean prior to the arrival of Europeans? The latter is often the environmental literature’s answer to the meaning of “natural,” a definition that ignores the large-scale ecological changes caused by Native Americans prior to the arrival of European settlers.²³⁷ Similarly, Professor Graber concluded in her analysis of wilderness as sacred space that the defining characteristic of wilderness was the “[a]bsence of human beings and the consequences of their actions”²³⁸ and that wilderness advocates sought “to prevent real wilderness areas from changing in a manner inconsistent with the image [of the areas], and attempt to make settled landscapes as much like the image as possible.”²³⁹ Further, the “intense emotion and rigid codes of conduct

²³⁴ *Id.* at 86.

²³⁵ Mark Sagoff, *Who Is the Invader? Alien Species, Property Rights, and the Police Power*, 26 SOC. PHIL. & POL’Y (forthcoming Summer 2009).

²³⁶ *See id.*

²³⁷ *See, e.g.,* Williamson B.C. Chang, *The “Wasteland” in the Western Exploitation of “Race” and the Environment*, 63 U. COLO. L. REV. 849, 853 (1992) (“[W]e must first understand that problems of race and environmental catastrophe stem from a predominant eurocentric view that transformed the relationship between the individual and nature.”); DEVAL & SESSIONS, *supra* note 78, at 20 (noting that prior to arrival of “white invaders” California existed “in its *natural* state for 15,000 years”). This view fails to take into account the large-scale management of land through deliberate fires, the wasteful practices of Native American buffalo hunters, and other practices inconsistent with the notion of an ecologically sensitive population. *See* Bruce L. Benson, *Property Rights and the Buffalo Economy of the Great Plains, in SELF-DETERMINATION: THE OTHER PATH FOR NATIVE AMERICANS* 29, 37–40 (Terry L. Anderson et al. eds., 2006). This myth continues to have a powerful influence on environmental thought.

In our day, beliefs about Indians’ inherent simplicity and innocence refer mainly to their putative lack of impact on the environment. This notion dates back at least to Henry David Thoreau, who spent much time seeking “Indian wisdom,” an indigenous way of thought that supposedly did not encompass measuring or categorizing, which he viewed as the evils that allowed human beings to change Nature. Thoreau’s ideas continue to be influential.

CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS 13 (2005). *See also* NELSON, *supra* note 3 (manuscript at 378) (discussing concept of pre-European contact status as “natural”).

²³⁸ GRABER, *supra* note 47, at 10.

²³⁹ *Id.* at 76.

associated with wilderness areas suggest a motivation beyond the practical."²⁴⁰ We contend that defining humanity generally, or a subset such as Europeans in particular, out of nature is a fundamentally religious position and so one that a government should not be able to adopt absent a "secular" justification. If the Wilderness Act takes such a position, it could be seen as an instance of direct action to "establish" Environmentalism.²⁴¹

Note that we are *not* arguing against wilderness preservation. That can be justified on "scientific, aesthetic, nationalistic, or hygienic" grounds as well as religious ones.²⁴² And in keeping with the general principle that courts are to choose a constitutional reading of a statute over an unconstitutional one where possible,²⁴³ courts should favor nonreligious interpretations of environmental statutes like the Wilderness Act over "religious" ones. The benefit of removing the religious interpretation is that it requires that whether these other grounds exist in a particular case must be open to debate. Thus the question in the Kenai National Wildlife Refuge case would be whether stocking the lake with salmon advanced or detracted from "scientific, aesthetic, nationalistic, or hygienic" grounds for wilderness preservation generally or for protecting the Kenai National Wildlife Refuge in particular. Evaluating such claims is consistent with courts' general responsibilities in reviewing administrative agencies' actions; evaluating the religious claims about nature shifts what ought to remain a political question into the courts.

Under a sensible view of the Establishment Clause, disestablishing Environmentalism would cause governments to focus on those direct actions that could be clearly linked to secular purposes (i.e., those purposes that improve human living conditions). Those who sought to accomplish other purposes would have to find ways of doing so that did not involve state power.²⁴⁴

Governments have an impact on religion indirectly when they provide funding or other resources to religious organizations for the accomplishment of secular purposes. For example, American governments often attempt to subsidize education at religious schools, at least with respect to nonreligious subjects.²⁴⁵ In some cases, this type of support has been held to violate the Establishment

²⁴⁰ *Id.* at x.

²⁴¹ If we consider such a position in light of our definition of religion as a shared organized belief structure that governs a relationship with the supernatural in an effort to provide humans with a set of goods unavailable elsewhere, defining mankind (or some of mankind) as "unnatural" would fit. If man is not "natural," what is "natural" appears to be worth preserving because it represents forces beyond man. Given the Wilderness Act's overall goals, preserving the "natural" environments from encroachment by humanity appears to us to be an example of setting aside a holy place for "nature" to exist uncontaminated by humanity in an effort to gain spiritual rewards for humanity from its continued, uncontaminated existence.

²⁴² GRABER, *supra* note 47, at ix-x; see also discussion *infra* Part IV.A.

²⁴³ See NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:11 (6th ed. 2000) ("When possible, statutory provisions should be construed to avoid unconstitutionality rather than simply void them on the basis of an interpretation which renders them constitutionally infirm.")

²⁴⁴ We would be delighted to see the federal government sell at fair market value the resource rights to ANWR to the Wilderness Society, the Nature Conservancy, or the Sierra Club, for example. The buyers' members could then decide whether the preservation of ANWR without exploitation of natural resources was worth the opportunity cost. We suspect they might reach a different conclusion if they owned it, than if it remained in public hands. See *supra* note 207 and accompanying text.

²⁴⁵ See, e.g., *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997).

Clause.²⁴⁶ Without debating the merits of the indirect support cases themselves, we think that those cases reveal that there is a class of instances in which indirect support is questionable under the Establishment Clause.

There are two problems with indirect support that are sufficient to constitute an establishment. First, government support comes with government strings. Public agencies rightly are concerned with how public funds are expended and a variety of reporting requirements, accounting controls, and similar measures inevitably accompany government funding. To ensure that public funds are expended productively, governments (at least sometimes) insist on accountability for results. Entanglement of the religious organization with the public sector is an inevitable result. These entanglements are not cost free for the organization receiving the funds. Not only do they render the organization accountable to Caesar as well as to the relevant deity and congregation, entanglements divert organizational resources from the propagation, practice, and elaboration of the faith to ensuring that the dealings with Caesar continue to yield the desired flow of resources. To the extent that such entanglement makes the religious organization dependent on the receipt of the government funds, they can threaten the integrity of the religious beliefs.²⁴⁷

The school support cases have direct analogues in the environmental arena. Governments may make grants to environmental organizations for a variety of purposes, from environmental education to the operation of recycling centers.²⁴⁸ The same issues of separation of secular and religious purposes can arise with taxpayer dollars properly used to teach people how to dispose of old paint or computer monitors, but improperly used to advocate Environmentalism.²⁴⁹

Our examples are intended to show that there are circumstances under which an establishment of Environmentalism can or has occurred and to suggest ways that a disestablishment analysis can provide guidance in separating permissible from impermissible governmental actions. We next turn to the lessons that can be learned from the disestablishment of more conventional religions.

III. THE LESSONS OF DISESTABLISHMENT

Why did the Founders seek to prevent Congress from establishing a religion in the United States? This was not an obvious step for the new government to take. Indeed, religious liberty itself was a relatively new and untried concept in 1789.²⁵⁰

²⁴⁶ Compare *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding tax deductions for school expenses, finding they provided only indirect support to parochial schools), with *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (striking a tuition reimbursement program and tax benefit provisions for parents of children attending nonpublic schools as violation of the Establishment Clause).

²⁴⁷ See *infra* notes 263–73 and accompanying text.

²⁴⁸ See, e.g., Jonathan H. Adler, *Rent Seeking Behind the Green Curtain*, 19 REG. 26, 29–31 (1996) (describing rent-seeking in 1990s ethanol programs); Jonathan H. Adler, *Clean Politics, Dirty Profits: Rent-Seeking Behind the Green Curtain*, in *POLITICAL ENVIRONMENTALISM: GOING BEHIND THE GREEN CURTAIN* 1, 3 (Terry L. Anderson ed., 2000) (same); Jonathan H. Adler, *Clean Fuels, Dirty Air*, in *ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS* 39–41 (Michael S. Greve & Fred L. Smith, Jr. eds., 1992) (describing clean fuels program as ethanol subsidy).

²⁴⁹ See generally MICHAEL SANERA & JANE S. SHAW, *FACTS, NOT FEAR: TEACHING CHILDREN ABOUT THE ENVIRONMENT* (2d ed. 1999) (criticizing environmental education).

²⁵⁰ See Jay Dolan, *From Coercion to Persuasion: The Rise of Religious Freedom*, in *ALL IMAGINABLE LIBERTY: THE RELIGIOUS LIBERTY CLAUSES OF THE FIRST AMENDMENT* 17, 17–18

Many of the states themselves had “mild and equitable” establishments of religions in their own constitutions—“the constitutional expression of the Republican argument that each community must establish by law some form of public religion, some image and ideal of itself, some common values and beliefs to undergird and support the plurality of private religions.”²⁵¹ It is certainly possible to imagine environmental values playing this role in modern society. Indeed, some environmental leaders appear to suggest that they should, as when former Vice President Al Gore called for a commitment to address climate change in part because it would provide an opportunity for a collective moral endeavor.²⁵²

Examining the reasons for the Establishment Clause, both those of the Founders and those derived from the more recent social science analysis of the relative successes of established and disestablished churches, can shed light on the appropriate approach to environmental policy. In this Part we sketch the arguments for disestablishment of religion and then apply them to Environmentalism, asking what would happen to the “Environmental faith” if we took disestablishment to heart.

(Francis Graham Lee ed., 1995). Broadly speaking, the history of religious liberty went through three stages “during the course of the seventeenth and eighteenth centuries. In the middle decades of the seventeenth century coercion was the dominant motif; toleration became normative by 1700; and persuasion was the standard established in the revolutionary era.” *Id.*

²⁵¹ WITTE, *supra* note 23, at 38. See also Jeffries & Ryan, *supra* note 23, at 292 (stating that “[w]ith the barely arguable exception of Rhode Island, no American state could have been found in compliance with the modern understanding of separation of church and state” at the time of the ratification of the First Amendment); FORREST MACDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 42–43 (1985) (describing colonial and early state establishments of religion).

²⁵² In a 2006 speech at New York University, Gore analogized the effort to control climate change to the struggle against Germany and Japan in World War II, saying:

[T]he opportunity presented by the climate crisis is not only the opportunity for new and better jobs, new technologies, new opportunities for profit, and a higher quality of life. It gives us an opportunity to experience something that few generations ever have the privilege of knowing: a common moral purpose compelling enough to lift us above our limitations and motivate us to set aside some of the bickering to which we as human beings are naturally vulnerable. America’s so-called “greatest generation” found such a purpose when they confronted the crisis of global fascism and won a war in Europe and in the Pacific simultaneously. In the process of achieving their historic victory, they found that they had gained new moral authority and a new capacity for vision. They created the Marshall Plan and lifted their recently defeated adversaries from their knees and assisted them to a future of dignity and self-determination. They created the United Nations and the other global institutions that made possible many decades of prosperity, progress and relative peace. In recent years we have squandered that moral authority and it is high time to renew it by taking on the highest challenge of our generation. In rising to meet this challenge, we too will find self-renewal and transcendence and a new capacity for vision to see other crises in our time that cry out for solutions: 20 million HIV/AIDS orphans in Africa alone, civil wars fought by children, genocides and famines, the rape and pillage of our oceans and forests, an extinction crisis that threatens the web of life, and tens of millions of our fellow humans dying every year from easily preventable diseases. And, by rising to meet the climate crisis, we will find the vision and moral authority to see them not as political problems but as moral imperatives.

Former Vice President Al Gore, Policy Address at New York University School of Law on Solving the Climate Crisis (Sept. 18, 2006), <http://www.nyu.edu/community/gore.html> (last visited Apr. 18, 2009). Dunlap suggests that providing people with such a larger purpose is a reason for environmentalists to be more explicitly religious. DUNLAP, *supra* note 89, at 172.

A. Disestablishment as a Means of Promoting Religion

In part, at least, preventing a national establishment of religion and providing for religious liberty more generally was part of a plan to foster religion rather than to limit it. This radical idea—that religion would be best promoted by separating it from the state instead of by binding it to the state—proved effective. After the Revolution, “America shifted from a nation in which most people took no part in organized religion to a nation in which nearly two-thirds of American adults do.”²⁵³ America today is among the world’s most religious countries, with extraordinary levels of membership, attendance, financial support, and religious belief distributed among a diverse set of religious creeds.²⁵⁴ The reason for this extraordinary level of religiosity is simple: “religion flourishes best when left to private voluntary support in a free society.”²⁵⁵

In contrast, religion in nations with established churches has declined substantially over long periods of time.²⁵⁶ This is all the more striking when compared to the failure of modern totalitarian states to eliminate religious belief, even if they are able to restrict public observance.²⁵⁷ Perhaps the only modern

²⁵³ ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA, 1776–2005: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY 1* (2d ed. 2005).

²⁵⁴ See generally *id.* at 22–23 (describing increased religiosity in America); Laurence R. Iannaccone, *Looking Backward: A Cross-National Study of Religious Trends 32–35* (July 29, 2003), available at <http://www.religionomics.com/old/ere/S2-Archives/Iannaccone%20-%20Looking%20Backward.pdf> (unpublished manuscript, Center for Study of Public Choice, George Mason University, Working Paper) (summarizing conclusions about trends in religiosity in America and abroad based on empirical study of religious attendance polling).

²⁵⁵ LEVY, *supra* note 26, at xvii.

²⁵⁶ For example, in Sweden, only about three percent of the population attends weekly church services, despite the Church of Sweden’s (Lutheran) status as an established church. See Andrew Higgins, *In Europe, God is (Not) Dead*, WALL ST. J., July 14, 2007, at A1. In addition, polling data indicate that only 11.5% of respondents who consider themselves members of the Church of England attended services weekly. See THE OPINION RESEARCH BUSINESS, *CHURCH OF ENGLAND OMNIBUS SURVEY 67 tbl.7* (2007), available at <http://www.cofe.anglican.org/info/statistics/orb2007churchpowattendance.pdf> (summarizing survey results indicating that, of the 1002 people surveyed, 452 considered themselves members of the Church of England, and only 52 of those people reported attending Church on a weekly basis). The same poll indicated that 45% of respondents consider themselves members of the Church of England. See *id.* When considered against the Church of England’s own reports of average weekly attendance, *The Church of Eng., Average Weekly Attendances 2006 and 2005*, <http://www.cofe.anglican.org/info/statistics/churchstats2006/statisticspg4.htm> (last visited Apr. 18, 2009) (reporting a total average weekly attendance of 1.16 million), and government census data, Office for Nat’l Statistics, UK Statistics Auth., *Census 2001: England & Wales*, <http://www.statistics.gov.uk/census2001/pyramids/pages/727.asp> (last visited Apr. 18, 2009) (reporting a total population of England and Wales of 52 million), it appears that the true percentage of those considering themselves members of the Church of England attending weekly services is only 5%, significantly lower than 11.5%. It could be that the discrepancy is accounted for by survey respondents tending to be a little generous in estimating their own piety.

²⁵⁷ See Laurence R. Iannaccone, *Religious Extremism: Origins and Consequences*, 20 CONTEMPORARY JEWRY 8, 11–12 (1999) (“The resilience of religiosity is nowhere more evident than in Russia, where despite sixty years of state-sponsored atheism, bloody church purges, widespread religious persecution, and pervasive secular indoctrination, only eight percent of the people remained atheistic by 1990 and religious belief is especially widespread among the young.”); Adi Ignatius, *A Tsar is Born*, TIME, Dec. 31, 2007, at 46 (noting that Russian President Vladimir Putin grew up in an officially atheist country, but “is a believer and often reads from a Bible that he keeps on his state plane”).

exceptions to the establishment/decline scenario are the recently established theocracies, such as the Islamic Republic of Iran and the former Taliban government in Afghanistan, where religious observance, if not belief, increased through the coercive use of the state's power.²⁵⁸ To understand how disestablishment might affect the environment, we first consider its impact on religion and then apply the lessons to Environmentalism.

1. *The Impact of Disestablishment on Religion*

An important reason why establishment reduces the efficiency of religious organizations in accomplishing their missions is the destructive impact of state support on the incentives for religious leaders to respond to members' needs. The Founders were aware of this because Americans had direct experience with established churches in some of the thirteen colonies.²⁵⁹ The results of establishment had been poor—religion was not flourishing in the colonies at the time of independence.²⁶⁰ As Professors Finke and Stark conclude, “[a]lthough the immorality and incompetence of the Anglican clergy exiled in [colonial] America might have been overstated by early historians, their sloth was not.”²⁶¹ Some colonial leaders recognized this cost of establishment. For example, writing to a friend about the establishment of the Episcopal Church in New York, Colonel Lewis Morris, a former governor of New Jersey, said:

If by force the salary is taken from [the people] and paid to the ministers of The Church, it may be a means of subsisting those Ministers, but they'wont [sic] make many converts Whereas [without establishment] the Church will in all probability flourish, and I believe had at this day been in a much better position, had there been no

²⁵⁸ See U.S. Cent. Intelligence Agency, *The World Factbook*, Iran, <https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html> (last visited Apr. 18, 2009); Hannibal Travis, *Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq*, 3 *Nw. J. INT'L HUM. RTS.* 1, 12–14 (2005), available at <http://www.law.northwestern.edu/journals/jihr/v3/4/Travis.pdf>. One important difference between modern Iran and modern Britain is that while the state supports the established faith in both, in the latter this is not accompanied by efforts to enforce a monopoly. Compare HASTINGS, *supra* note 182, at 664–65 (discussing role in Britain of “a large, well established Church in regard to the millions of people who have no regular connection, and little clear belief”), with U.S. Dep’t of State, Iran: International Religious Freedom Report 2007, <http://www.state.gov/g/drl/rls/irf/2007/90210.htm> (last visited Apr. 18, 2009) (“There was continued deterioration of the extremely poor status of respect for religious freedom during the reporting period. Government rhetoric and actions created a threatening atmosphere for nearly all non-Shi’a religious groups, most notably for Bahá’is, as well as Sufi Muslims, evangelical Christians, and members of the Jewish community. Reports of government imprisonment, harassment, intimidation, and discrimination based on religious beliefs continued during the reporting period. Bahá’i religious groups often reported arbitrary arrests, expulsions from universities, and confiscation of property. Government-controlled media, including broadcast and print, intensified negative campaigns against religious minorities—particularly the Bahá’is—during the reporting period.”). Nonmembers of the Church of England in Britain thus encounter many fewer obstacles to practicing their faiths than do non-Muslims in Iran.

²⁵⁹ See Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 *MICH. L. REV.* 2347, 2351 (1997) (“[B]y the standards of modern doctrine, almost every state in post-Revolutionary America had laws establishing religion.”).

²⁶⁰ See FINKE & STARK, *supra* note 253, at 22 (“On the eve of the Revolution only about 17 percent of Americans were churchd.”).

²⁶¹ *Id.* at 30.

act [of legal establishment] in her favor; for in the Jerseys and Pennsylvania, where there is no act, there are four times the number of church men than there are in this province of N. York; and they are soe [sic], most of them, upon principle, whereas nine parts in ten, of ours, will add no great credit to whatever church they are of; nor can it well be expected otherwise.²⁶²

Subsequent experience has proven the Founders right about the best way to foster the growth of religion and religious belief. Church attendance and other measures of religiosity increased “dramatically” between Independence and the Civil War, rising from 17% to 37%.²⁶³ Indeed, it is not hard to see the difference in incentives between a church where the minister’s salary is paid by the local congregation and one where the minister draws a salary from the state.²⁶⁴ In the former, the parish council is spending its own money; in the latter it is spending someone else’s. As a result, greater care will be taken with the resources in the former than in the latter.

When the new federal government adopted a policy of nonestablishment,²⁶⁵ the results were dramatic, as an Austrian visitor to the United States noted in 1837:

In America, every clergyman may be said to do business on his own account, and under his own firm. He alone is responsible for any deficiency in the discharge of his office, as he alone is responsible for any credit due to his exertions. He always acts as principal, and is therefore more anxious, and will make greater efforts to obtain popularity, than one who serves for wages.²⁶⁶

Why did this happen? Nobel laureate economist Gary Becker summarized the impact of state support: “Competition is good for religion, as it is for ordinary commodities, because religious groups are forced to learn how better to satisfy members’ needs than they do when they have a monopoly position.”²⁶⁷ Becker’s insight is that officially established religions are analogous to a situation where there is “a heavily subsidized dominant firm, run or regulated by the state” together with “[a] large number of smaller, independent, and competing firms” which exist around the dominant firm’s edges.²⁶⁸

Using this framework, Professor Laurence Iannaccone developed several hypotheses about religious “firms” under such conditions, based on the extensive analysis of regulated and state-operated industries, some of which apply equally well to state provision of environmental goods and values.²⁶⁹ With respect to incentives,

²⁶² *Id.* at 42–43 (alteration in original).

²⁶³ *Id.* at 22.

²⁶⁴ *See id.* at 11 (noting that without establishment, “the clergy must now openly compete for adherents and their churches now rely on the resources of the adherents, not the state, for survival”).

²⁶⁵ McConnell, *supra* note 11, at 2109 (“Contrary to popular myth, the First Amendment did not disestablish anything. It prevented the newly formed federal government from establishing religion or from interfering in the religious establishments of the states.”).

²⁶⁶ FINKE & STARK, *supra* note 253, at 4.

²⁶⁷ GARY S. BECKER & GUILTY NASHAT BECKER, *THE ECONOMICS OF LIFE* 15 (1997).

²⁶⁸ Laurence R. Iannaccone, *The Consequences of Religious Market Structure: Adam Smith and the Economics of Religion*, 3 RATIONALITY & SOC’Y 156, 160 (1991).

²⁶⁹ The other two are that “the stultifying effects of religious regulation and monopoly will be long-lived,” *id.* at 163, and that “[e]ven when public religion is provided ‘free,’ the overall level of religious

Iannacone hypothesized that “[t]he public provision of religion will be characterized by inefficiency. Quality adjusted production costs will be higher than those of the private firms.”²⁷⁰ This will express itself through suboptimal effort, reduced quality of services, and socially wasteful rent-seeking behavior, such as lobbying.²⁷¹ Established religions will “cost more per practicing member and . . . produce members with lower than average levels of religious knowledge and belief.”²⁷² In his analysis of data on religious activity, Professor Iannacone has found support for all of these hypotheses.²⁷³ We can apply these lessons to Environmentalism.

To understand how establishment affects a faith, first consider its impact on Christianity in Europe. For its first three hundred years, “the Christian church was largely isolated from official Roman society” and received “virtually no support” and “virtually no protection against oppression” from Roman authorities.²⁷⁴ In 312, Emperor Constantine I converted to Christianity, legalized the religion, and began to use state resources to build and support Christian churches; not until about 407 could it “be fairly claimed that non-Christians were outlaws at last, and (it followed) that a state religion had at last emerged.”²⁷⁵ On the positive side, establishment improved the Church’s²⁷⁶ finances and political position, both in absolute terms and relative to other (officially disfavored) religions. The “orthodox clergy were given special military protection, legal privileges, and financial support to spread the faith, to educate the young, to care for the poor, and to build new churches and monasteries.”²⁷⁷ However, the Church paid a high price for the benefits of establishment as the state gained control of the Church:

Constantine and his successors convoked and presided over church councils and synods, appointed and removed bishops and other high clergy, and founded and administered churches and monasteries. Numerous imperial laws regulated the internal activities of the church, the lives of its clerics, and the acquisition and disposition of church property.²⁷⁸

consumption may be lower than that of a comparable competitive market.” *Id.* at 161. This last is so to the extent “public religion constitutes a nonaugmentable gift in kind, which people may accept even when their optimal consumption level in a free market would be greater.” *Id.* at 162.

²⁷⁰ *Id.* at 161.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 157.

²⁷⁴ WITTE, *supra* note 23, at 9.

²⁷⁵ RAMSAY MACMULLEN, *CHRISTIANIZING THE ROMAN EMPIRE* (A.D. 100–400), at 101 (1984); *see also* WITTE, *supra* note 23, at 9–10; MICHAEL GRANT, *CONSTANTINE THE GREAT: THE MAN AND HIS TIMES* 193 (1993) (“Constantine’s prolific erection of Christian basilicas and other buildings, on a scale which, despite respect for antique traditions, amounted to an architectural revolution, meant that the whole empire did not contain enough architects and builders to construct what he wanted them to construct . . .”).

²⁷⁶ Until the Great Schism between the Eastern and Western Church in 1054, it was appropriate to refer to Christianity as a single Church. *See* TIMOTHY WARE, *THE ORTHODOX CHURCH* 43–61 (1997) (describing breakdown in unity between Eastern and Western Churches).

²⁷⁷ WITTE, *supra* note 23, at 10. Of course, “[h]eretics, pagans, and Jews, in turn, were subject to many of the same policies of severe repression and legal disability that had earlier encumbered Christians.” *Id.*

²⁷⁸ *Id.*

Entanglement with the state changed the content of Christian doctrine as well, in part by sometimes putting people in charge of doctrinal issues whose own religious devotion was secondary to their desire for power and wealth.²⁷⁹ Indeed, Professors Stark and Finke conclude that

the conversion of Constantine did not cause the triumph of Christianity. Rather it was the first, and most significant step, in slowing its progress, draining its vigor, and distorting its moral vision. Most of the evils associated with European Christianity since the middle of the fourth century can be traced to establishment.²⁸⁰

Their conclusion is similar to that reached by the Danish philosopher Sören Kierkegaard, who, “looking at the established churches of Europe, said that when Christianity becomes part of the state, it ceases to be Christianity, a proposition readily generalized beyond the Christian churches.”²⁸¹ Worse, this entanglement with the empire meant that religious controversies would be settled based on which faction had control of the state.²⁸² The sometimes violent controversies over the use of icons that wracked the Byzantine Empire from 730 to 847, for example, turned in large part on the opinions of the emperors.²⁸³ As a result, religious differences provoked costly political conflicts, a pattern that continued in Europe for centuries.

The history of Christianity in Europe offers multiple examples of personal interests trumping doctrine, such as English King Henry VIII’s break with Rome over the unwillingness of Pope Clement VII to grant him a divorce from Catherine of Aragon.²⁸⁴ More recently, consider the fate of the New Testament in Sweden, where an established church exists. In the 1970s Minister of Ecclesiastical Affairs Alva Myrdal, “a famous leftist and nonbeliever,” appointed a government commission to create a new translation of the New Testament into Swedish.²⁸⁵ “Published in 1981, even its ardent supporters acknowledged that the translation contained ‘sweeping transformation[s] of accepted interpretations. . . . In important ways, it must of necessity run against the grain of Bible traditions.’ This translation is now the official Church of Sweden version.”²⁸⁶

²⁷⁹ Iannaccone, *supra* note 268, at 162 (“Government officials will influence public religion’s content so as to maximize their own profits and political tenure.”). Professor Richard Garnett has argued that the freedom of the church from political interference was a crucial development in limiting the power of the state. See Richard Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007). Some of the details of Constantine’s own conversion story suggest that he put much greater weight on his belief that being a Christian led to winning battles than on any degree of personal devotion to Christian beliefs. See MACMULLEN, *supra* note 275, at 44.

²⁸⁰ STARK & FINKE, *supra* note 31, at 69.

²⁸¹ See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 81 (Anchor Books 1994) (1993).

²⁸² STARK & FINKE, *supra* note 31, at 229 (“Much is written about the decline in church influence on the state, but the growing influence of the state on the church has been almost entirely ignored.”).

²⁸³ See WARE, *supra* note 276, at 30–34 (describing iconoclast controversy).

²⁸⁴ See JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* 134–40 (1997) (describing controversy).

²⁸⁵ STARK & FINKE, *supra* note 31, at 229.

²⁸⁶ *Id.* at 229–30 (quoting Christer Åsberg, *The Swedish Bible Commission and Project NT 81, in BIBLE READING IN SWEDEN: STUDIES RELATED TO THE TRANSLATION OF THE NEW TESTAMENT* 1981, at 15, 18–19 (Gunnar Hansson ed., 1990)).

In short, establishment came at a high price for Christianity in Europe. From turning over the translation of the Scriptures to a nonbeliever's supervision to Henry's break with Rome, virtually every aspect of Christianity in Europe has been subject to state interference at one time or another. The price has been high in terms of belief and practice, with the decline of established European Christianity a stark contrast to the flourishing disestablished Christian churches of Africa, Latin America, and the United States.²⁸⁷

2. *The Impact of Disestablishment on Environmentalism*

How does this apply to the environment and Environmentalism? Disestablishment of Environmentalism would have at least two beneficial effects. First, just as disestablishing religion led to a more diverse set of religions as churches, temples, synagogues, and mosques found various "market niches" to serve, so disestablishing Environmentalism is likely to produce a more diverse set of environmental philosophies among environmental groups. Second, disestablished environmental organizations would have to focus more on provision of direct services to attract members, increasing the supply of environmental goods and services.

a. Diversity Among Environmental Groups

There are a large number of environmental groups today and their numbers have been increasing steadily over time. By one count more than 100 were in operation by the 1980s,²⁸⁸ and the National Wildlife Federation's most recent attempt to list all of them produced a list of more than 4200 groups.²⁸⁹ In particular, there has been an expansion of groups focused on local issues, such as creating local land trusts. Do we really need more? Yes, absolutely; we just do not need more of the same.

Despite the growing number of organizations and widespread public support for "environmentalism" as measured by public opinion polls, existing national environmental groups tend to focus their efforts on public solutions to change other people's behavior through government coercion rather than on convincing people to change their own behavior through persuasion. We can see the problems with the environmental movement in two key indicators. The first—a sign that we are already observing something of the problem of establishment with respect to national environmental organizations—lies in their membership statistics. For example, the large national environmental organizations experience considerable membership "churn,"²⁹⁰ revealing a lack of long-term commitment on the part of

²⁸⁷ See JENKINS, *supra* note 184, at 2, 97–99.

²⁸⁸ ROTHMAN, *supra* note 73, at 171 ("In the 1970s environmentalists had begun to divide into more specialized groups; . . . by the 1980s more than a hundred major conservation and environmental groups competed for dollars and support.").

²⁸⁹ National Wildlife Federation, Conservation Directory, <http://www.nwf.org/conservationDirectory/> (last visited Apr. 19, 2009).

²⁹⁰ See DOWIE, *supra* note 14, at 44 ("Membership organizations generally experience an attrition rate of between 30 and 40 percent a year. Whatever the reasons, many members just do not renew. Even

their members.²⁹¹ At the same time, internal critics argue that the “mainstream” environmental groups are losing “passion and militancy.”²⁹² We think that both the most ardent member of Earth First! and the once-a-year-check-writing member of the Sierra Club would agree with us that a membership motivated primarily by a short-term sense of crisis is not a membership that has made a long-term commitment to the environment.²⁹³

A second sign that there is a problem is that many national environmental groups are heavily dependent on direct mail solicitations, which have become “the movement’s heroin.”²⁹⁴ This dependence affects substance,²⁹⁵ and requires a substantial financial commitment.²⁹⁶ Not only do environmental groups themselves see this as a problem, but it reflects a fundamental disconnect between the stated rhetoric of environmental groups about the need for personal transformation and the practice of their members. A church whose members mailed in an occasional check and only attended services on Christmas and Easter is unlikely to be considered a success because it would have few opportunities to change its members’ lives. Similarly, an environmental group whose members’ activities are limited merely to paying annual membership dues cannot expect to induce

to maintain a constant membership, environmental organizations have to mail hundreds of thousands, if not millions of prospect letters—“cold solicitations”—every year.”)

²⁹¹ ROTHMAN, *supra* note 60, at 192 (noting the problem of multiple organizations which “[t]o the public . . . all served the same purpose” and so the choice of which to join became seen as “almost arbitrary”).

²⁹² SHABECOFF, *supra* note 70, at 45 (“An alleged loss of passion and militancy by the mainstream leaders and cadres is a recurring theme among critics from both within and without the environmental movement.”); see also DOWIE, *supra* note 14, at 4 (stating that in the 1980s the “large national organizations began to produce disappointing results” due in part to a “loss of passion in the ranks”). Shabecoff contends that environmental groups leaders and staff “are just as passionate and dedicated as they have ever been” but concedes that the national organizations have experienced “a certain bureaucratization and institutional fatigue.” SHABECOFF, *supra* note 70, at 46.

²⁹³ Shallow commitment surfaces in some environmentalist critiques of the movement as well. See, e.g., ROTHMAN, *supra* note 60, at 5 (“In effect, Americans have shown a tendency to be ‘green’ when it is inexpensive—economically, socially, and culturally—but a reluctance to collectively sacrifice convenience and even the smallest of material advantages to assure a ‘cleaner’ future.”); SHABECOFF, *supra* note 70, at 26 (“Perhaps the greatest problem the environmental movement will have to face lies not in the external world but inside the heads of the American people. Although the great majority of Americans support environmental goals, that support may be shallow among many or most of them.”).

²⁹⁴ DOWIE, *supra* note 14, at 42–43 (quoting “journalist, political consultant, and direct mail copy writer Jeffrey Gillenkirk”). Dowie notes that “direct mail is an expensive, wasteful, and environmentally degrading way to raise money.” *Id.* at 43.

²⁹⁵ *Id.* at 44 (noting that “[d]irect mail managers and outside consultants are often present when environmental organizations are discussing long-term strategy. They frequently influence it simply by reminding their clients of what has or has not worked in the mail.”). When the economics of direct mail factor into substance there is a problem, for, as Dowie notes, this means

if 2 or 3 percent of an organization’s marketing universe (an above-average response) joins in response to direct mail package A, while package B bombs (pulls less than half of 1 percent), the organization is motivated to follow the tactics in A rather than B. Both A and B may be worthy causes, but if B is of greater ecological consequence, it won’t matter. Tactic A will prevail.

Id. at 47.

²⁹⁶ *Id.* at 44 (describing direct marketing as a “constant, ongoing process that requires a professional well-paid staff” including “pollsters, list managers, consultants, and at least one contracted fulfillment service” and estimating that 65%–70% of “the combined budget of Washington-based mainstream environmental organizations comes through the mail from millions of small donors”).

individuals to behave with greater awareness of the environmental consequences of their behavior.²⁹⁷ In both cases, the periodic check writer receives the psychological satisfaction of participation without incurring the costs of participating in a transformative manner. Since environmental groups routinely insist that the environment in the United States remains in a state of crisis despite almost forty years of aggressive federal legislation and regulation,²⁹⁸ it seems to us that shifting the focus from influencing the government to changing individual behavior is a critical part of achieving further improvements in environmental quality on the movement's own terms.²⁹⁹

The third sign of problems for the existing national environmental organizations—but a sign of the regeneration possible with disestablishment—is the shift of focus away from the national organizations to a diverse set of organizations concerned with local issues.³⁰⁰ These groups focus their attention on solving environmental problems in their own communities. The surge in their membership in recent decades is evidence of the impact of reconnecting environmentalism directly to people's lives. Shifting the focus of environmentalism toward such activity and away from abstract political theorizing and lobbying in Washington, D.C. would be a healthy development in connecting individuals to the environment.

The larger failure to find ways to motivate people to change their preferences is important for three reasons. First, we are reaching technological frontiers in improving add-on pollution control measures for many common technologies. Auto and truck internal combustion and diesel engine emissions, for example, will soon be about as low as they can be made.³⁰¹ Further progress in reducing the environmental impact of transportation will depend heavily on shifting people's preferences away from personal automobile use to mass transit, alternative transportation, and changed lifestyles, as well as toward more fuel efficient

²⁹⁷ See KEMPTON ET AL., *supra* note 65, at 220 (despite widespread adherence to environmental values, "few are acting in the political realm, and few make major environmentally motivated changes such as moving to smaller housing or reducing the miles traveled by motor vehicle"); SHABECOFF, *supra* note 70, at 35 (describing national environmental group membership as "passive dues payers, who sometimes can be roused to write to their representatives in government or to write letters to the editor of the local newspaper").

²⁹⁸ See E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 327–28 (1985) (summarizing the competitive mood of Senator Muskie and President Nixon as they rivaled one another to claim credit as environmental heroes for their roles in passing the National Environmental Policy Act of 1969, the Clean Air Act of 1970, the Clean Water Act of 1972, and the creation of the Environmental Protection Agency in 1970, which ultimately resulted in legislation that was more stringent than many stakeholders anticipated, but satisfied the two rivals' needs to compete through environmental one-upmanship).

²⁹⁹ A diversity of tactical approaches has some positive political consequences. See, e.g., ROTHMAN, *supra* note 73, at 173 ("Although Earth First! alone might embarrass the mainstream, having a spectrum of environmental groups provided more consistent success than any single narrow approach.").

³⁰⁰ See, e.g., RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA 1 (2003) (stating that private land trusts "are the most successful and exciting force in U.S. land conservation today and perhaps the most effective component of the whole environmental movement").

³⁰¹ See Andrew P. Morriss, *The Next Generation of Mobile Source Regulation*, 17 N.Y.U. ENVTL. L. J. 325, 325 (2008) ("[W]e have reached the point where further reductions in per-mile emissions from individual mobile sources of the criteria pollutants will be both tiny and expensive.").

vehicles—something that existing policies have not managed to accomplish.³⁰² Second, environmentalists themselves argue that major lifestyle changes are needed among the general population to achieve critical environmental quality improvements.³⁰³ We are skeptical of some of these claims, but there seems little doubt that, having dealt with the obvious point sources we are now left with dispersed nonpoint sources linked to individual behavior (e.g., backyard grilling, garbage burning, fireplaces, parking lots)³⁰⁴ that will be difficult to control through centralized regulatory measures. Third, so long as Americans (and others) retain their attachment to private property, something we hope will not change, private land use decisions are increasingly important for a broad range of environmental goals, from habitat preservation to water pollution.³⁰⁵ Not only have centralized regulatory measures been largely ineffective in encouraging land owners to develop or implement a land ethic, they have sometimes had the opposite effect.³⁰⁶

There is considerable evidence that existing environmental groups are failing to motivate Americans:

Environmental causes resonate with most Americans, to be sure—83 percent of those polled in an April 2000 Gallup poll readily agreed with the broadest goals of the environmental movement—but when asked to rate their own commitment to the cause, just 16 percent said they were “active participants,” while more than half admitted they

³⁰² *Id.* at 327. One example of the lack of individual commitment to reduce emissions is the collapsed demand for hybrid cars when gasoline prices fell in the fall of 2007. See Autoline with John McElroy, Hybrid Sales Collapse, <http://www.autolinedetroit.tv/journal/?p=2167> (last visited Apr. 19, 2009) (noting hybrid sales fell more than overall market); see also Bill Vlasic, *Detroit Goes for Gasless Cars, but Will Drivers?*, N.Y. TIMES, Jan. 11, 2009, at A1 (describing Ford’s goal to start selling electric cars by 2011 as a “risky bet” because “[t]here are no guarantees that consumers—for all their stated concerns about global warming, dependence on foreign oil and unpredictable gas prices—will buy enough of them,” and further noting that sales of hybrid vehicles have declined along with gas prices).

³⁰³ Christopher H. Schroeder, *Legislating to Address Climate Change: Some Lessons from the Field*, 3 ENVTL. & ENERGY L. & POL’Y 236, 250 (2009) (“For deep environmentalists, these problems require a fundamental reorientation of patterns of consumption and production in ways that will lead to sustainable patterns of living.”).

³⁰⁴ See Andrew P. Morriss, Bruce Yandle & Roger E. Meiners, *The Failure of EPA’s Water Quality Reforms: From Environment-Enhancing Competition to Uniformity and Polluter Profits*, 20 UCLA J. ENVTL. L. & POL’Y 25, 45–47 (2001/2002); Michael P. Vandenbergh, *Order Without Social Norms: How Personal Norm Activation Can Protect the Environment*, 99 NW. U. L. REV. 1101, 1102–03 (2005); MARC O. RIBAUDO ET AL., U.S. DEP’T OF AGRIC., ECONOMICS OF WATER QUALITY PROTECTION FROM NONPOINT SOURCES: THEORY AND PRACTICE, at vi (1999), available at <http://www.ers.usda.gov/publications/aer782/aer782fm.pdf>; Nat’l Oceanic and Atmospheric Admin., Nonpoint Source Pollution, <http://oceanservice.noaa.gov/education/kits/pollution/04nonpointsource.html> (last visited Apr. 19, 2009).

³⁰⁵ See Morriss & Stroup, *supra* note 203, at 795 (explaining the crucial role of private decision makers for habitat); Andrew P. Morriss, Bruce Yandle & Terry L. Anderson, *Principles for Water*, 15 TUL. ENVTL. L.J. 335, 349 (2002) (“Given the importance of private conservation efforts to key environmental policies, such as species preservation and river conservation, a diverse approach is critical to improving environmental quality.”).

³⁰⁶ See Morriss & Stroup, *supra* note 203, at 795 (“A landowner who discovers an endangered species on her land has the incentive to ‘shoot, shovel, and shut up.’”).

were sympathetic but uninvolved. These statistics run parallel with broader trends in declining membership among some national environmental organizations since 1990.³⁰⁷

Moreover, environmental organizations are failing to educate Americans about the environment, even on their own terms. “[M]any Americans receive a failing grade in basic environmental knowledge and persist in perpetuating certain myths and misconceptions.”³⁰⁸ There is certainly no significant public debate over many of the basic precepts of Environmentalism; instead attempts at initiating such debates sometimes prompt almost hysterical reactions seemingly intended to shut down any discussion of fundamental issues.³⁰⁹ In contrast, Americans hold widely differing views on numerous theological matters, and there are active but largely civil debates within and across denominations over religious doctrines as well as strong internal critiques of the behavior of denominations and sects.³¹⁰

Most importantly, environmental groups are not persuading people to change their behavior. Americans

often fail to take relatively simple and inexpensive steps toward environmental action. While many households do recycle and some purchase green products in the marketplace, evidence suggests that those decisions are more likely when based on tangible incentives or when the need for personal sacrifice is slight. Quite simply, whether rich or poor, black or white, liberal or conservative, Americans are united in

³⁰⁷ GUBER, *supra* note 63, at 3 (footnotes omitted).

³⁰⁸ *Id.* at 179; see also NAT'L ENVTL. EDUC. AND TRAINING FOUND., THE NATIONAL REPORT CARD ON ENVIRONMENTAL KNOWLEDGE, ATTITUDES AND BEHAVIORS: THE SIXTH ANNUAL SURVEY OF ADULT AMERICANS (1997), available at <http://www.epa.gov/enviroed/pdf/rptcard.pdf> (“The news is mixed, but mostly troubling, with less than one third of Americans having a fairly simple knowledge of the causes or content of key environmental concerns.”). We might have a different set of questions to ask, but the basic findings are troubling.

³⁰⁹ See Jane S. Shaw, *Global Warming Teach-In*, POPE CTR. FOR HIGHER EDUC. POLICY, Mar. 2, 2009, <http://popecenter.org/commentaries/article.html?id=2139> (last visited Apr. 19, 2009) (describing incidents).

³¹⁰ There is perhaps no better example of this internal strife than The Episcopal Church, which is facing internal strife due to varying interpretations of Scripture and tradition. See Michelle Boorstein, *Conservative Episcopalians Vote to Create Alternative Branch*, WASH. POST, Dec. 4, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/03/AR2008120303065.html> (last visited Apr. 19, 2009) (“Conservatives from the Episcopal Church voted yesterday to form their own branch of Anglicanism in the United States and said they would seek new recognition in the worldwide church because of their growing disenchantment over the ordination of an openly gay bishop and other liberal developments.”). Fights over theological matters can spill into the legal arena when various groups within a denomination vie for control of church property. See Sean D. Hamill, *After a Theological Split, a Clash Over Church Assets*, N.Y. TIMES, Oct. 6, 2008, <http://www.nytimes.com/2008/10/06/us/06church.html> (last visited Apr. 19, 2009) (describing the impending legal battle following the Episcopal Diocese of Pittsburgh’s vote to separate from the national church). See generally R. Gregory Hyden, *Welcome to the Episcopal Church, Now Please Leave: An Analysis of the Supreme Court’s Approved Methods of Settling Church Property Disputes in the Context of the Episcopal Church and How Courts Erroneously Ignore the Role of the Anglican Communion*, 44 WILLAMETTE L. REV. 541 (2008) (describing the litigation surrounding various property disputes between the Episcopal Church and former parishes and suggesting a judicially manageable framework for resolving them); Sarah M. Montgomery, Note, *Drawing the Line: The Civil Courts’ Resolution of Church Property Disputes, the Established Church and All Saints’ Episcopal Church, Waccamaw*, 54 S.C. L. REV. 203 (2003) (same).

wanting something done about the environment, but they remain hesitant across the board to include themselves as a part of that solution.³¹¹

For the most part, environmental writers addressing these issues fall back on tired clichés about how advertising creates demand for a consumer lifestyles that people do not “really” want,³¹² quasi-Marxist notions,³¹³ arguments that giant corporations run the world,³¹⁴ or a lack of connection to the grassroots³¹⁵ as the reasons for the failure of the organizations to transform American life in the fashion they desire. Mark Dowie’s generally pessimistic assessment, for example, argues that “the movement’s problems began when the [large national environmental organizations] shifted their talent and attention from the mountains, rivers, forests, and communities they were formed to protect” and became “career havens for progressive lawyers, scientists, and lobbyists” rather than being driven by “raw indignation and volunteer energy.”³¹⁶

We disagree with Dowie’s diagnosis in part. The problems internal critics identify may be part of the explanation, but they are not sufficient to explain the disconnect between widespread public belief that the environment is important and what appears to many environmentalists to be an almost as widespread public unwillingness to do more than write an occasional check or buy a calendar or t-shirt. We think an important part of the reason for these failings is that the Environmentalism on offer from the large national environmental groups is unattractive to many Americans in part because virtually every aspect of it is contradicted by Americans’ daily experience. Environmentalists may believe that we are living in an apocalyptic age, but that is not how most people perceive the

³¹¹ GUBER, *supra* note 63, at 177.

³¹² See, e.g., Surya Deva, *Sustainable Good Governance and Corporations: An Analysis of Asymmetries*, 18 GEO. INT’L ENVTL. L. REV. 707, 718 (2006) (“Corporations produce sales through ‘engineered buying’: creating market demand with special purchasing seasons from New Year’s Day to the end of the year, from pre-Christmas to post-Christmas, from Easter to Boxing Day, and special purchasing events from stocktake to clearance, and from grand openings to the liquidation and close-out sales. These engineered sales are less about what consumers necessarily ‘need’ to buy, but rather what they ‘should’ buy; the creation of such artificial demands is now the mantra of modern sales. Quite notably, such sales are no longer confined to Western markets alone, as even markets in developing countries are having their own local version of sales and other tools to drive engineered sales.”); DEVAL & SESSIONS, *supra* note 78, at 29 (describing how we need to distinguish “wants – encouraged by mass-media advertising and the demands of our society that we ‘consume more’ in order to keep the economy growing – and real, vital needs.”).

³¹³ See, e.g., Enrique Leff, *Marxism and the Environmental Question*, in THE GREENING OF MARXISM 137, 142 (Ted Benton ed., 1996) (“The aim of eco-Marxism is to integrate new principles into the development of the forces of production and the democratization of society through a theory that encompasses not only economic costs and externalities but nature as a force of production, as productive potential.”).

³¹⁴ See, e.g., LORI WALLACH & MICHELLE SFORZA, WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY 78–79 (1999) (describing a government-organized forum providing an opportunity for industry to make high-level contacts with U.S. and E.U. government officials).

³¹⁵ See, e.g., Richard Toshiyuki Drury, *Rousing the Restless Majority: The Need for a Blue-Green-Brown Alliance*, 19 J. ENVTL. L. & LITIG. 5, 7 (2004) (“The primary reason for [the mainstream environmental movement’s] lack of effectiveness is that the mainstream environmental movement has largely abandoned its grassroots base in favor of a strategy of lobbying and litigation.”).

³¹⁶ DOWIE, *supra* note 14, at 60.

state of the environment on a day-to-day basis.³¹⁷ And while many Americans want clean air and water and desire an experience of nature and wilderness from time to time, many also want green lawns, wood-burning fireplaces, and large cars.³¹⁸ They want mosquito control, fruit and vegetables without spots, and drugs tested on animals before they are used on humans. They want suburban homes and vacations in the Caribbean as well as habitat preservation and clean water. In short, while some might desire additional wilderness contemplation, many of these same people also want to visit Disney World.³¹⁹ For many Americans, restoring their spiritual connection to nature thus competes, not always successfully, with other spiritual and temporal priorities. Moreover, while Americans are prepared to donate considerable sums to save “charismatic mega-fauna,” their support for spending even other people’s money on less attractive endangered species is much smaller.³²⁰ And given that Americans eat an extraordinary number of animals annually,³²¹ an approach to the environment that stresses the equality of humanity and other organisms does not appear to be aligned with the relative valuations of many Americans. Even the major successes of environmental groups are not universally popular among the neighbors to the programs. For example, there is considerable support for maintaining some pristine areas, but this support often diminishes as the area chosen is discovered to be closer to home.³²² And in the almost forty years

³¹⁷ Compare the apocalyptic visions in such “eco-tastrophe” classics as John Brunner’s *The Sheep Look Up* and Kim Stanley Robinson’s *Red Mars* with people’s every day lives. JOHN BRUNNER, *THE SHEEP LOOK UP* (1972); KIM STANLEY ROBINSON, *RED MARS* (1993). These two classic works, written twenty years apart, present visions of the Earth collapsing, with rampant disease, extinction, and pollution. Both works are discussed in detail in BUELL, *supra* note 79, at 253–56 (discussing Brunner), 275–79 (discussing Robinson). Yet the day-to-day reality for people in developed nations is of cleaner air, cleaner water, and a generally cleaner environment than they experienced in 1972. See LOMBORG, *supra* note 81, at 4–5 (describing overall improvement in environment).

³¹⁸ See, e.g., WALLACE KAUFMAN, *COMING OUT OF THE WOODS: THE SOLITARY LIFE OF A MAVERICK NATURALIST* 128 (2000) (memoir describing choice by environmentalist author to build a fireplace for his home despite fireplaces’ status as “environmental crimes”).

³¹⁹ In 2005 the National Park Service recorded 2,835,651 visitors to Yellowstone National Park, National Park Service, NPS Reports: NPS Stats, <http://www.nature.nps.gov/stats> (last visited Apr. 19, 2009), while Disney’s Magic Kingdom in Florida had 16,640,000 visitors in 2006 and Disneyland in California had 14,730,000 visitors that year. See TEA/ERA, *ATTENDANCE 2006: THEME PARK ATTENDANCE REPORT*, at iv (2007), available at <http://www.connectingindustry.com/pdfs/TEA-ERAAttendance06.pdf>.

³²⁰ See generally John Charles Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 554 (1994) (“Hence, we have the tendency to afford greater attention to ‘charismatic megafauna,’ rather than their less showy, but often more essential, distant cousins.”); Barton H. Thompson, Jr., *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127, 1150–51 (1999) (discussing how Congress’s investment decisions are based more on a species’s “poster quality” than its relative ecosystem value).

³²¹ OFFICE OF COMMC’NS, U.S. DEP’T OF AGRIC., *AGRICULTURE FACT BOOK 2001–2002*, at 15 (2003), available at <http://www.usda.gov/factbook/2002factbook.pdf> (reporting that in the year 2000, 195 pounds of meat were consumed per American, 57 pounds above the annual consumption in the 1950s).

³²² See Joseph C. Pettygrove, *Canyons, Castles, & Controversies: A Comparison of Preservation Laws in the United States & Ireland*, 4 REGENT J. INT’L L. 47, 60–67 (2006) (describing controversy over President Clinton’s designation of wilderness areas in Utah under the Antiquities Act and sense of betrayal by locals who felt they had been sacrificed for political concerns).

since the first Earth Day, environmental quality as experienced by most Americans has dramatically improved, making the apocalyptic narrative ring false for many.³²³

In contrast, the success stories of the modern environmental movement are local land trusts and grassroots groups devoted to particular issues within communities.³²⁴ Private landowners are adopting conservation plans, creating conservation easements, repurposing water rights, and otherwise changing land and resource use to improve environmental quality without being part of a national movement.³²⁵ The energy and resources devoted to such efforts are the source of tangible improvements in environmental quality. Notably absent from such efforts are connections to the established Environmentalism we described earlier—indeed, some engaged in these transactions are actually doing so in hopes of making a profit.³²⁶ If we are to develop an environmentalism capable of persuading people to change their preferences in ways that lead to improved environmental quality, we will need to experiment with a wide variety of approaches. To the extent that the current Environmental orthodoxy has become “established,” it inhibits such change. Moreover, it inhibits the development of new solutions and technologies that lack the religious aspect of Environmentalism but address the biological, chemical, and other problems underlying many environmental problems. A characteristically peppy story in *Wired* proposed using technology to address environmental problems while allowing Americans to “lead the same bent, weird, trippy, indecent, self-indulgent, consumer-centered, all-American lives we always have.”³²⁷ Technology would mean that we could avoid

the cost of time and attention that was the quiet hell of the wannabe-Green lifestyle. The laudable goal was to live an ecologically sane life, close to the good green earth, reading your Emerson essays on the shore of Walden Pond. But in harsh reality, your

³²³ See, e.g., Terry L. Anderson, *Property Rights and Sustainable Development*, in YOU HAVE TO ADMIT IT'S GETTING BETTER: FROM ECONOMIC PROSPERITY TO ENVIRONMENTAL QUALITY, at xvii (Terry L. Anderson ed., 2004) (“[T]he prosperity and improved human well-being that we are enjoying today are not leaving future generations worse off; rather, today’s bounty is leaving them with more capital and larger stocks of natural resources.”). Note that the failure of the apocalypse to arrive is not grounds for changes in policy, at least according to some. For example, Buell argues that because

apocalyptic prophecies do not come true thus does *not* mean that the problems they highlight have completely disappeared and that environmental concern can simply be dismissed. For far more important than the present status of any particular environmental problem in an era of accelerating human-caused environmental change is the momentum of the underlying forces that cause that change.

BUELL, *supra* note 79, at 71. Buell even asserts that “[t]he often-dismissed and much-maligned doomsters of the 1970s, the authors of *The Limits to Growth*, . . . have not been, in sober fact, disproven yet.” *Id.*

³²⁴ See, e.g., BREWER, *supra* note 300, at 1 (describing local land trust movement).

³²⁵ See, e.g., Andrew P. Morriss, *The State of the Natural Resources Literature*, 44 NAT. RESOURCES J. 621 (2004) (describing private conservation efforts).

³²⁶ See, e.g., TERRY L. ANDERSON & DONALD R. LEAL, ENVIRO-CAPITALISTS: DOING GOOD WHILE DOING WELL 17 (1997) (“Entrepreneurial approaches that capitalize on profits in the marketplace offer an important alternative for producing environmental quality in a world where acrimony and tight budgets dominate most policy debates.”).

³²⁷ Michael McDonough (as told to Bruce Sterling), *Newer York, New York*, WIRED, Jan. 2000, at 94–98.

daily life meant endless hours of butter to churn, pigs to slop, beans to hoe, trash to sort and recycle.³²⁸

Environmentalists mocked *Wired's* hyper-optimistic tone³²⁹ but given a choice between peppy optimism and pessimistic fatalism, it would not be surprising that some people will opt for the former.

b. Entanglement with the State's Impact on Environmental Quality

Entanglement with the state is also costly for the environment. By this we do not mean that governments should be prohibited from taking actions to improve environmental quality. But when government decision makers allow the religious aspects of environmental thinking to cloud their judgment, and they have Constantine-like powers, the environment can suffer. For example, the Clean Air Act Amendments of 1977 included a requirement of universal use of "scrubbers" on coal-fired power plants that disadvantaged low-sulfur western coal and so produced greater total pollution by encouraging the use of high-sulfur eastern coal. As a result, eastern coal interests and environmental pressure groups cut a political deal that actually led to dirtier air, as described in Ackerman and Hassler's landmark *Clean Coal/Dirty Air*.³³⁰ Similarly, in its heavy-duty diesel engine litigation in the late 1990s, EPA subordinated environmental considerations to political ones, reducing air quality to claim a nominal victory with political dividends.³³¹ Perhaps most dramatically, the "religious" objections to nuclear power, particularly in Europe, have carried an environmental cost in terms of increased greenhouse gases, sulfur oxide, and other emissions from fossil-fuel power plants used instead.³³²

Just as in the fights for control of established churches in Europe, we observe environmental interest groups expending considerable resources on efforts to influence government positions on symbolic measures. For example, despite a noble sounding goal,³³³ the Endangered Species Act is a failure at protecting

³²⁸ *Id.* at 92–96.

³²⁹ BUELL, *supra* note 79, at 211–13.

³³⁰ BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAILOUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT 77–78 (1981).

³³¹ See ANDREW P. MORRIS ET AL., REGULATION BY LITIGATION 90–92 (2009) (discussing heavy-duty diesel engine litigation); Andrew P. Morriss et al., *Regulation by Litigation: EPA's Regulation of Heavy-Duty Diesel Engines*, 56 ADMIN. L. REV. 403, 506–07 (2004) (same).

³³² See, e.g., Spencer Reiss, *Face It. Nukes Are the Most Climate-Friendly Industrial-Scale Form of Energy*, WIRED, May 19, 2008, http://www.wired.com/science/planetearth/magazine/16-06/ff_heresies_08nuclear (last visited Apr. 19, 2009) ("[E]very serious effort at carbon accounting reaches the same conclusion: Nukes win."); UNITED KINGDOM, DEP'T FOR BUS., ENTER. & REGULATORY REFORM, MEETING THE ENERGY CHALLENGE: A WHITE PAPER ON NUCLEAR POWER 48–53, 67–72 (2008), available at <http://www.berr.gov.uk/files/file43006.pdf> (describing role of nuclear power in meeting greenhouse gas emissions targets); Tara Patel, *Sweden, Finland boost Europe's March to Nuclear Power*, BLOOMBERG.COM, Feb. 5, 2009, http://www.bloomberg.com/apps/news?pid=20601085&sid=aF66_gtAtX4&refer=europe (last visited Apr. 19, 2009) (describing past opposition to nuclear use in Europe).

³³³ Endangered Species Act of 1973, 16 U.S.C. § 1531(c)(1)–(2) (2006) ("It is [] declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter. . . . It is

endangered species by any measure.³³⁴ Its failure is largely due to two factors: the inappropriate species-centric approach it takes, ignoring the critical role of habitat protection, and the negative incentives it provides private landowners with respect to maintaining habitat.³³⁵ Yet environmental interest groups lobby extensively to prevent its replacement by a more effective alternative, in our view largely because of its symbolic value.³³⁶ We should be careful before dismissing something as “merely” symbolic; much of the recent Establishment Clause litigation has revolved around symbolic action. We doubt that anyone seriously believes that a Ten Commandments display in a courtroom, a cross on a city seal, or a crèche on the lawn at city hall would actually create very many converts to Christianity. Rather, as the recent fight over the “Seven Aphorisms of Summum”³³⁷ reveals, much of the fight is over who has symbolic access to the public square. However, while all interest groups lobby for their interests, few groups do so for purely symbolic reasons, with no hope of tangible progress toward their substantive goals, unless in pursuit of the type of motivation we have termed “religious.” Getting the symbolism out of environmental policy would thus reduce the need for some contentious debates and focus attention on real problems.

We are not arguing that just “establishment” of a particular view of environmentalism leads regulators to make bad decisions where decisions are allocated to public decision makers—mistakes are inevitable by private actors as well. What matters is that the environment is harmed by the inevitable entanglement of politics and policy in the public sector. Just as the Swedish retranslation of the New Testament overseen by an atheist introduced changes in doctrine, and just as Emperor Constantine’s establishment of Christianity politicized doctrinal questions, so too establishment of Environmentalism has negative effects on the debate over the appropriate policies to protect the environment. Such entanglements are particularly pernicious when they involve “religious” values, for it is hard for the political process to evaluate such policy conflicts. The lessons of disestablishment counsel in favor of removing such decisions from the political process and, when it is not possible to do so, limiting the role of the state. For example, as the *Clean Coal/Dirty Air* story suggests, establishing performance-based emissions standards rather than technology-based standards is one way to limit opportunities for religious values to interfere with the improvement of environmental quality. Demanding performance from

further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.”)

³³⁴ See Adler, *supra* note 203, at 325–32 (summarizing empirical literature on failings of ESA); Sam Peltzman, AEI-Brookings Joint Ctr. 2004 Distinguished Lecture, Regulation and the Natural Progression of Opulence 8 (Sept. 8, 2004), available at <http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/phpNe.pdf> (stating the ESA is “a colossal failure, having thus far produced a net recovery rate of under ½ percent (6 of 1300+) of listed species”); FOSTER, *supra* note 96, at 127–28 (“Even the Endangered Species Act . . . has failed so dramatically in the context of the rapid destruction of [habitat] . . . on the one hand, and the slow speed with which species are officially listed for protection, on the other, that some environmentalists have labeled it a ‘chronicle of extinction.’”).

³³⁵ See Adler, *supra* note 203, at 313–15, 325–32 (describing incentive issues); Morriss & Stroup, *supra* note 203, at 794–98 (same).

³³⁶ See Morriss & Stroup, *supra* note 203, at 786 (“It is an environmental symbol of the highest order—with one environmental historian comparing it to the Declaration of Independence.”).

³³⁷ See *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1129 (2009).

environmental laws and replacing those that fail is another. While this approach likely will have the effect of producing fewer environmental regulations, because purely symbolic efforts will not be allowed, we argue that it will produce more effective ones.

B. The Problem of Environmental Orthodoxy

Disestablishment allows for a greater number of religious adherents, representing a more diverse set of beliefs, but there are those who view this as an argument *against* religious liberty. For those who believe they have discovered the One True Faith—and have the political capital to capture the state's endorsement³³⁸—religious diversity is nothing more than state-sanctioned heterodoxy. In this scenario, the proliferation of religious groups straying from the orthodox position merely trades heathens for heretics. The lessons gleaned from the history of religious liberty show that the state is particularly ill equipped to identify the One True Faith, and oftentimes its attempts to do so have been tragic.

For example, the diversity of religious organizations and doctrinal beliefs within Christianity that resulted from the Reformation caused numerous problems within Europe, where freedom of religion was scarce and established churches predominated. The Wars of Religion, among Europe's bloodiest conflicts to date,³³⁹ resulted in part from the combination of the unwillingness of various established churches to tolerate competitors in their markets and the usefulness of religious conflicts as excuses for territorial aggrandizement by some European monarchs eager to expand their territories.³⁴⁰ But when the same diverse set of religious institutions and faiths that produced violent conflict in Europe was transplanted to the more hospitable soil of toleration in the United States, the competition among them for members contributed to the growth of religious belief and practice rather

³³⁸ Those sects that claim the One True Faith but lack the political influence necessary to secure establishment would presumably prefer to tolerate the heresy of the majority rather than face de jure anathematization from the state.

Despite unflinching attachment to what they perceive as absolute and exclusive "truth," the Jehovah's Witnesses, Mormons, and Adventists, and virtually all other American-born sects display strong commitment to religious toleration. . . . Genuinely violent sects tend to arise in countries where the civil government has suppressed religious freedom, favoring one form of religious expression over all others. Within these environments, an unfavored sect is strongly motivated to oppose the government, despise the established religion, and covet the privileges that come with state support.

Iannaccone, *supra* note 257, at 23.

³³⁹ See generally DIARMAID MACCULLOCH, *THE REFORMATION: A HISTORY* (2003) (describing the wars of religion in the 16th and 17th centuries); see also Richard Hooker, *Reformation: Religious Wars*, <http://www.wsu.edu/~dee/REFORM/WARS.HTM> (last visited Apr. 19, 2009).

³⁴⁰ The history of Christianity's development in Western Europe also sheds some light on the virtues of disestablishment. The development of religious liberty grew, in part, out of the changes in the structure of religious beliefs during the 1600s and 1700s. As Professor Witte summarized the impact of the Reformation, "[t]he Lutheran Reformation territorialized the faith." WITTE, *supra* note 23, at 14. After Luther, each state would decide for itself what faith to follow. *Id.* at 14–15. The breakdown in the western unity of the faith introduced opportunities for a diverse set of beliefs to flourish, allowing multiple new innovations to appear in doctrine and practice.

than to violence.³⁴¹ Of course, if the multiplicity of religions and religious practices in the United States is seen not as a strength but as a sign of heresy and deviation from whatever one might define the true path to be, this will not be encouraging. And sometimes it appears that Environmentalism takes such a view of the environment. After all, if we have found the “Truth” about the environment, so that the issue is not the search for truth but the implementation of the Truth, then toleration is not an appropriate model—why tolerate a known falsity? The calls for trials of “heretics” on global warming, for example, exemplify this approach.³⁴²

Again, the parallel with religion is instructive. The variation in demand for characteristics of religious goods “occurs because of ‘normal’ variations in the human condition such as social class, age, gender, health, life experiences, and socialization.”³⁴³ To the extent that environmental views are religion-like in that they are nonfalsifiable beliefs about the structure of the world or depend on quasi-supernatural ideologies, the same conclusion applies. Discussions of “Earth Mothers” or “Earth Goddesses” are obvious parallels,³⁴⁴ but nonfalsifiable beliefs are more common than these that use explicitly religious language. Similarly, to the extent that views on environmental issues vary because of factors like age, class, and life experience,³⁴⁵ we should expect to see substantial variation across people in their beliefs about the appropriate way to approach the environment. These are powerful reasons to avoid anything that might resemble a state-encouraged monopoly.

Indeed, we find in religion that it is “impossible for any single church, regardless of its state ties, to provide the full range of religious options demanded by all segments of the market.”³⁴⁶ For example, a national church cannot simultaneously be monotheistic and polytheistic.³⁴⁷ And religious controversies extend to more nuanced matters of doctrine as well, so that even where major issues of faith are settled, a wide range of individual doctrinal preferences are unlikely to be met as effectively by a single church as they are by a broader array. As a result, “[p]ublic religion narrows the range of religious opportunities open to citizens.”³⁴⁸ With respect to religion, “the historical record gives no hint of natural monopoly in the realm of religion. Rather, from Old Testament Israel to

³⁴¹ See FINKE & STARK, *supra* note 253, at 9–10.

³⁴² See *supra* note 2.

³⁴³ FINKE & STARK, *supra* note 253, at 10.

³⁴⁴ GRABER, *supra* note 47, at 6 (“The Earth Mother goddesses of the ancient Mediterranean religions” are an example of “geopiety, with human worship directed toward the spirit or character of a place.”); ROSZAK, *supra* note 95, at 40–45 (discussing “Return of the Goddess” in modern times and quoting “one modern witch” that “paganism is the spirituality of the ecological movement”).

³⁴⁵ See Business Wire, *Research and Markets: A Critical Report Questioning the Eco-Friendly Attitudes and Behavior in the US*, BNET BUSINESS NETWORK, Aug. 19, 2008, http://findarticles.com/p/articles/mi_m0EIN/is_2008_August_19/ai_n28010575 (last visited Apr. 19, 2009) (summarizing a Research and Markets report detailing varying levels of “green” activity in the United States across gender, age, household income, and political affiliation); see also John M. Broder & Marjorie Connelly, *Public Says Warming Is a Problem, but Remains Split on Response*, N.Y. TIMES, Apr. 27, 2007, at A20 (describing differing views on global warming along party lines).

³⁴⁶ Iannaccone, *supra* note 268, at 162–63; see also FINKE & STARK, *supra* note 253, at 11 (“Because new churches can now arise without seeking permission from the state or existing congregations, the supply of religions quickly matches the demand for religion.”).

³⁴⁷ Iannaccone, *supra* note 268, at 163.

³⁴⁸ *Id.* at 162.

contemporary Iran, religious uniformity has arrived on the edge of the sword, and only the sword has sufficed to maintain it.”³⁴⁹ Again, if we are only concerned with propagating the “One True Faith”—religious or Environmental—diversity is a bad thing. People will fall into the snares of heresy more readily if there are multiple faiths competing for their allegiance, sometimes by offering amenities like bowling alleys and coffee bars.³⁵⁰ But such concerns presume the state knows the true faith’s dictates and can thus choose effectively among the potential candidates for the national church. While this is patently absurd in matters of religious faith, is it also ridiculous with respect to environmental issues? Are these not capable of scientific resolution? Some religious leaders claim divine revelation; perhaps environmentalists can claim a scientific infallibility in its place.

There are at least two reasons to be skeptical that a government official would be more capable of finding the “one true environmental faith” than that same official would be to find the one true religion. First, science is not a matter settled by consensus or the weight of authority, but by the testing of hypotheses—some of which have revealed truths that would have never been able to obtain a majority vote in a legislature or ecumenical council.³⁵¹ State-controlled science in the service of an ideological agenda has a poor record in rejecting false hypotheses.³⁵² And major scientific advances often come from outside orthodox thinking.³⁵³ Vigorous inquiry comes from the marketplace of ideas, not state-sponsored orthodoxy. For example, the record of state decisions on environmental matters is poor. The early twentieth century raptor control programs,³⁵⁴ the widespread aerial spraying of pesticides in the 1950s and 1960s for control of fire ants and gypsy moths,³⁵⁵ and the eradication of wolves from Yellowstone³⁵⁶ are just a few of the environmental management decisions we have now come to regret. Which of our environmental

³⁴⁹ *Id.* at 159.

³⁵⁰ See, e.g., William C. Symonds, *Earthly Empires: How Evangelical Churches Are Borrowing from the Business Playbook*, BUSINESS WEEK, May 23, 2005, at 78, 80 (“To reach these untapped masses, savvy [church] leaders are creating Sunday Schools that look like Disney World and church cafés with the appeal of Starbucks.”).

³⁵¹ Galileo is an example of someone who fell victim to this fact. See *Vatican Science Panel Told by Pope: Galileo Was Right*, N.Y. TIMES, Nov. 1, 1992, <http://query.nytimes.com/gst/fullpage.html?res=9E0CE1DA1F31F932A35752C1A964958260> (last visited Apr. 19, 2009) (detailing Pope John Paul II’s acknowledgment “that the Roman Catholic Church had erred in condemning Galileo . . . for asserting that the Earth revolves around the Sun.”); *Vatican Admits Galileo Was Right*, NEW SCIENTIST, Nov. 7, 1992, at 5 (noting Pope John Paul II’s declaration that Galileo was right and that the Inquisition had acted in good faith but was wrong).

³⁵² The most infamous example is the destructive influence of Trofim Denisovich Lysenko on Soviet genetics. See VALERY N. SOYFER, *LYSENKO AND THE TRAGEDY OF SOVIET SCIENCE 4* (Leo Gruliov & Rebecca Gruliov trans., 1994) (“Lysenkoism was by no means a result of the erroneous, unscientific views of one individual, supported by the leaders of the official ideology and the machinery of state, but a social phenomenon in conditions ostensibly of planned science but actually of harsh and unceasing Party dictatorship over the scientists.”).

³⁵³ See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (describing role of paradigm shifts in advancing science).

³⁵⁴ See Andrew P. Morriss & Roger E. Meiners, *The Destructive Role of Land Use Planning*, 14 TUL. ENVTL. L.J. 95, 128–29 (2000).

³⁵⁵ See Andrew P. Morriss & Roger E. Meiners, *Property Rights, Pesticides & Public Health: Explaining the Paradox of Modern Pesticide Policy*, 14 FORDHAM ENVTL. L. REV. 1, 6–23 (2002).

³⁵⁶ See HANK FISCHER, *WOLF WARS* 19–23, 26 (1995).

policy choices will later generations come to see as equally misguided? The death toll from the misguided “religious” ban on DDT in malaria-ridden countries is only now persuading at least some environmental organizations to relent in their opposition—after millions have died unnecessarily.³⁵⁷

Second, on many environmental matters there is no one truth but a range of potential preference combinations. Indeed, we think this is true of most environmental policy questions, as “[w]e no longer debate *whether* to protect the environment but rather where, when, how, under what conditions, and at what expense.”³⁵⁸ Faced with scarce resources, different people will prefer different tradeoffs:

Americans place genuine value and priority on environmental quality to be sure, but they also support lowering crime rates, improving public education, and maintaining a strong economy (among other things), all of which easily surpass the environment in polls. Data likewise suggest that voters and taxpayers are sensitive to the costs associated with protective environmental policies, often preferring a moderate course of action when faced with scientific uncertainty or when painful choices are forced between environment and other equally desirable goals.³⁵⁹

Americans will also make different tradeoffs within the environmental choice set. For example, many environmentalists oppose logging in national forests.³⁶⁰ But reduced logging, together with fire suppression programs, has produced conditions that yield devastating fires.³⁶¹ There are a wide range of possible forest management strategies, some of which include types of logging that might qualify as “environmentally sound.”³⁶² No-logging options, driven by a “religious” objection to logging rather than by an environmental truth or by science, do not meet the needs of all segments of the population; but neither does a “some logging” option meet the desires of the non-logging crowd. Moreover, if a religious Environmentalism is established, making pollution a sin, there is little room for compromise.³⁶³ Since there is no option that pleases everyone, the solution is to forbid reliance on religious principles during the decision-making process so that the disputes are over evidence rather than beliefs and accept that different strategies may be followed in different places. To the extent that religious beliefs dictate the preferred strategy, privatization of publicly owned resources may be necessary to allow at least partial satisfaction of various preference sets.

We can draw a useful historical lesson by considering the religious situation of the early colonists in New England. Having fled religious repression in Europe,

³⁵⁷ See *supra* note 160 and accompanying text.

³⁵⁸ GUBER, *supra* note 63, at 176.

³⁵⁹ *Id.* at 177.

³⁶⁰ See John H. Cushman, Jr., *U.S. Plans to Curb Fires by Allowing Increased Logging*, N.Y. TIMES, Dec. 12, 1994, at A1 (detailing the give and take between environmental coalitions generally opposed to expanded logging and the U.S. Forest Service, which seeks to decrease forest fires through increased logging).

³⁶¹ See *id.*

³⁶² ALAN J. LONG, ENVIRONMENTALLY SOUND FOREST HARVESTING 3–4 (rev. 2001) (1994), available at <http://edis.ifas.ufl.edu/pdf/files/FR/FR04200.pdf> (describing a series of environmentally friendly logging methods, each depending upon the environment and circumstances).

³⁶³ Annan, *supra* note 151, at 304.

the colonists did not immediately open their societies to those whose faith differed from their own:

Initially, the New England leadership left little room for individual religious experimentation. Despite their adherence to a basic separation of the offices of church and state, the New England authorities established a common Calvinistic congregationalism for the community. Separatism for them did not connote disestablishment of one religion or toleration of other religions.³⁶⁴

Over time, however, New England developed a dissenting tradition and, gradually, religious liberty increased.³⁶⁵

Much like the early New England colonists, while the environmental movement today sometimes behaves as if there is little room for dissent,³⁶⁶ some signs suggest that environmental Puritan orthodoxy is beginning to erode. Many strains of environmentalism incorporate scientific views as well as more conventionally religiously-based sources of reverence for the Earth and God's creation. Allowing the truth to emerge from science sometimes is a path for heterodoxy, as early scientific approaches to environmental problems are revealed by later research to be flawed or mistaken.³⁶⁷ The wide scope of environmental problems also creates space to try dissenting policies, and for those policies' success to be seen and emulated. The successful reintroduction of the wolf into Yellowstone National Park, a success largely due to Defenders of Wildlife's heterodox approach that involved compensating those harmed by the reintroduction, is one powerful example of this impact.³⁶⁸ Greater tolerance for alternative approaches may also flow from international efforts as developing countries assert their own interests in setting environmental priorities.³⁶⁹ An environmental movement that creates greater room for a dissenting tradition will allow for experimentation that, we believe, can only help the environment in the long run.

As we argued earlier, disestablishment would promote diversity in the conception of environmental values just as it has in religious values. Absent a coercive monopoly faith, each must compete in the marketplace and some are more successful than others.³⁷⁰ Just as this has been true of religions in America, so it would be true of different environmental approaches. Here social science can offer

³⁶⁴ WITTE, *supra* note 23, at 26.

³⁶⁵ Dolan, *supra* note 250, at 21. There were many reasons for this, including that "Puritanism itself nurtured dissent . . . [because] Puritans believed that truth became known through the written word of the scriptures" and so allowed individuals to receive the truth, the growth of tolerance in other colonies, and the increased toleration in England. *Id.* at 21-22.

³⁶⁶ See, e.g., *supra* note 2.

³⁶⁷ See Morriss & Meiners, *supra* note 355, at 6-23.

³⁶⁸ See, e.g., FISCHER, *supra* note 356, at 93-94, 167; ROBERT J. NOECKER, REINTRODUCTION OF WOLVES, CONG. RESEARCH SERV. REP. FOR CONG. NO. 97-747 ENR (Aug. 1, 1997), <http://ncseonline.org/NLE/CRSreports/Biodiversity/biodv-13.cfm?&CFID=6622718&CFTOKEN> (last visited Apr. 19, 2009).

³⁶⁹ See Morriss & Meiners, *supra* note 355, at 29-40.

³⁷⁰ FINKE & STARK, *supra* note 253, at 202 ("[T]he primary impact of religious pluralism is to provide a broad spectrum of specialized religious firms competing to attract and hold a segment of the market.").

insights into which beliefs would succeed based on its analysis of the relative success of different faiths and denominations.

The social science analysis of religion begins with the claim that “religious behavior—to the degree that it occurs—is generally based on cost-benefit calculations and is therefore rational behavior in precisely the same sense that other human behavior is rational.”³⁷¹ These cost-benefit calculations occur within “religious economies” which “consist of a market of current and potential followers (demand), a set of organizations (suppliers) seeking to serve that market, and the religious doctrines and practices (products) offered by various organizations.”³⁷² Recall from our earlier discussion that the supernatural product offered by religion consists of goods unavailable from nonsupernatural technologies. Eternal life, for example, is a good that can only be provided by a supernatural technology.

The market for the supernatural has four key characteristics. First, it is naturally competitive, as there are few barriers to entry.³⁷³ As one scholar noted, “[i]f you have a vision for ministry, you just do it, which makes it far easier to respond to market demand.”³⁷⁴ A free market for religion thus produces many firms. Second, there is a “uniquely wide range of products.”³⁷⁵ Professor Iannaccone argues that “[a] particular religious firm can flourish only if it provides a commodity that is at least as attractive as its competitors.”³⁷⁶ Not all of these products are supernatural; religious organizations routinely deliver social benefits ranging from welfare assistance to entertainment to their members.³⁷⁷ Third, competition yields innovation.³⁷⁸ As Professors Finke and Stark note, “the deregulation of religion leads to a constant stream of innovations. Throughout American history we will find the upstarts are a source of innovations in music, communication, religious education, preaching, revival, and organizational strategies.”³⁷⁹ Finally, “the market must address problems of information and uncertainty.”³⁸⁰ Members cannot directly verify many of the supernatural claims (e.g., eternal life) and so must base their evaluation of the value of those goods on other indicators of reliability.³⁸¹ Religions compete for members in such a

³⁷¹ STARK & FINKE, *supra* note 31, at 56.

³⁷² *Id.* at 36; STARK, *supra* note 54, at 193–94 (explaining the concept of religious economy).

³⁷³ Iannaccone, *supra* note 257, at 13; Iannaccone & Berman, *supra* note 46, at 114.

³⁷⁴ Symonds, *supra* note 350, at 86 (quoting Professor Christian Smith).

³⁷⁵ Iannaccone & Berman, *supra* note 46, at 114.

³⁷⁶ Iannaccone, *supra* note 268, at 158.

³⁷⁷ See, e.g., FINKE & STARK, *supra* note 253, at 155 (cataloging the benefits provided to immigrant communities).

³⁷⁸ Iannaccone & Berman, *supra* note 46, at 111 (“Consumer preferences thus shape the content of religious commodities and the structure of the institutions that provide them.”).

³⁷⁹ FINKE & STARK, *supra* note 253, at 12.

³⁸⁰ Iannaccone & Berman, *supra* note 46, at 115.

³⁸¹ Stark and Iannaccone explain this response through the term “compensator” beliefs—beliefs that “offer the prospect of huge rewards, but because their truth is difficult or impossible to evaluate, they are also inherently risky.” Rodney Stark & Laurence R. Iannaccone, *Rational Choice Propositions About Religious Movements*, in *HANDBOOK OF CULTS AND SECTS IN AMERICA* 241, 244 (David G. Bromley & Jeffrey K. Hadden eds., 1993); see also ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA, 1776–1990: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY* 252 (1992) (“Religion is a collective good . . . many of the emotional and psychic rewards of religion are greater to the degree that they are socially generated and experienced.”); Laurence R. Iannaccone, *Introduction to the Economics of Religion*, 38 *J. ECON. LITERATURE* 1465, 1491 (1998), available at <http://www.religionomics.com/>

marketplace; individuals “choose what religion (if any) they will accept and how extensively they will participate in it.”³⁸²

Market forces mean that “the consumer’s freedom to choose constrains the producers of religion.”³⁸³ Because the supernatural goods offered by the competing religious firms are so risky, individuals

rely on interactions with others to help them determine whether the value of religious rewards outweighs the risks—that is, to evaluate the cost of qualifying for the reward versus the risk that the reward will not be forthcoming. To the extent that others with whom an individual interacts display confidence in the value of future religious rewards, that individual will gain greater confidence in them too.³⁸⁴

As a result, Finke and Stark conclude “that religious organizations can thrive only to the extent that they have a theology that can comfort souls and motivate sacrifice”³⁸⁵ and that members’ religious commitment and participation are the crucial factor in growth.³⁸⁶ High costs are a net positive influence only “when religions are based on beliefs in an exclusive God, active in the lives of people. When religions conceive of God as distant, impersonal, and unresponsive, it is hard to justify why anyone should make significant sacrifices for their faith.”³⁸⁷ Thus, religions “can make too many demands, just as they can make too few. Requiring members to withdraw from all secular opportunities, as some communes do, will clearly limit the growth of the organization.”³⁸⁸

Successful religions strike a balance between the costs they impose and the benefits they offer. That balance has not favored the progressive “refinement” of theology evidenced by many of the mainline Protestant denominations in the United States. Indeed, Starke and Fink suggest that “theological refinement is the kind of progress that results in organizational bankruptcy.”³⁸⁹ Most importantly for our purposes, competition has rewarded religious movements in the American

old/cesr_web/papers/cesr_research/Iannaccone%20-%20JEL%20Intro.pdf [hereinafter Iannaccone, *Economics of Religion*] (“[I]t is clear that religious activities involve a large amount of risk.”).

³⁸² Iannaccone, *supra* note 268, at 158.

³⁸³ *Id.*

³⁸⁴ FINKE & STARK, *supra* note 381, at 252; see also FINKE & STARK, *supra* note 253, at 282–83 (noting that many of the religious costs are in the present, while the rewards come later). Beliefs that impose sacrifices (costs) on members can help a faith gain adherents because those costs are lower for believers than for doubters. Iannaccone, *Economics of Religion*, *supra* note 381, at 1483 (“[A]pparently gratuitous sacrifices can function to mitigate a religion’s free-rider problems by screening out half-hearted members and inducing higher levels of participation among those who remain.”); STARK, *supra* note 54, at 177 (observing that “high costs tend to screen out free-riders—those potential members whose commitment and participation would otherwise be low”). Costly beliefs help raise the average level of intensity of belief, providing reinforcement for belief. Iannaccone, *Economics of Religion*, *supra* note 381, at 1482–83 (“In congregational settings, an active member (who attends regularly, sings wholeheartedly, and greets others enthusiastically) increases the utility of other members.”).

³⁸⁵ FINKE & STARK, *supra* note 253, at 8.

³⁸⁶ See FINKE & STARK, *supra* note 381, at 109–10.

³⁸⁷ FINKE & STARK, *supra* note 253, at 251.

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 8.

marketplace that focus on religion, rather than on more generic policy goals.³⁹⁰ The rewards come in every dimension of religiosity.³⁹¹

Perhaps the most important religious trend of the past fifty years is the rise of fundamentalist religious groups among many different religions.³⁹² Commenting on this, Professor Becker noted that “[i]n a competitive environment, born-again Christians, Orthodox Jews, fundamentalist Moslems, and other groups attract members only if they meet spiritual and moral needs better than mainline religions.”³⁹³ Such groups were attracting members in the 1990s, Becker argued, because most people want religions that

reaffirm their need to take responsibility for their behavior. With mainline religions failing to stress the need for people to exercise self-control and responsibility, they are losing members to fundamentalist groups with more traditional teachings. Fundamentalists also have been in the forefront of attacking the breakdown of the family, pornography, and disrespect for authority.³⁹⁴

This is not just a recent phenomenon. Professors Finke and Stark found in their study of over 200 years of American religion that “[n]ot all denominations shared in this immense rise in membership rates, and to the degree that denominations rejected traditional doctrines and ceased to make serious demands on their followers, they ceased to prosper. The churching of America was accomplished by aggressive churches committed to vivid otherworldliness.”³⁹⁵

There is no formal establishment of any environmental belief today that would cause global warming “heretics” to fear being burned at the stake—and this is not just because such activity would cause further emissions of greenhouse gases.³⁹⁶

³⁹⁰ *Id.* at 212 (efforts at unification of denominations in pursuit of more efficient provision of social services foundered because “people went to church in search of salvation, not social service”); *id.* at 235 (“Since at least 1776 the upstart sects have grown as the mainline American denominations have declined.”); Iannaccone, *Economics of Religion*, *supra* note 381, at 1471 (“Throughout the world, fast growing religions tend to be strict, sectarian, and theologically conservative. In the United States such groups continue to gain members, even as theologically liberal Protestant denominations (including Episcopalians, Methodists, Presbyterians, and United Church of Christ) struggle with relative and absolute losses.”).

³⁹¹ Iannaccone, *Economics of Religion*, *supra* note 381, at 1472 (“Virtually every measure of religious involvement or commitment—beliefs, attendance, and contributions—correlates positively with the denomination’s overall level of conservatism, strictness, or sectarianism.”).

³⁹² See Erwin Chemerinsky, *Why Separate Church and State?*, 85 OR. L. REV. 351, 367 (2006) (“I have no doubt that when historians look back at the end of the twentieth century and the early years of the twenty-first, they will point to the rise of fundamentalism as the most important development across the world.”).

³⁹³ BECKER & BECKER, *supra* note 267, at 15.

³⁹⁴ *Id.*

³⁹⁵ FINKE & STARK, *supra* note 253, at 1.

³⁹⁶ We could not find estimates of the carbon emissions of burning someone at the stake. But we did discover that cremation leads to carbon emissions, although seemingly largely from the heating of the body to 850 degrees Celsius for 90 minutes. See *Scientist Says Cremation Should Meet a Timely Death*, TERRA DAILY, Apr. 18, 2007, http://www.terradaily.com/reports/Scientist_Says_Cremation_Should_Meet_A_Timely_Death_999.html (last visited Apr. 19, 2009). Professor Short advocates burial “upright in a cardboard cylinder,” next to a favorite tree. *Way to go! . . . or How to Plant A Tree and Feel Better about Dying*, AUSTRALIAN SCI. MEDIA CENTRE, Apr. 17, 2007, http://www.aussmc.org/end_cremation.php (last visited Apr. 19, 2009). Burning at the stake could presumably be done at a lower

There are already heterodox voices critiquing policies and suggesting alternative approaches. Despite this, the problem of an established Environmental orthodoxy is a real one, even without a formal Inquisition. School textbooks promote orthodox views,³⁹⁷ government and foundation funding sustains environmental pressure groups,³⁹⁸ and orthodox views are enshrined in government policies that carry real costs for the environment and for people generally.³⁹⁹

There are three insights from our analysis here. First, Environmentalism would likely suffer compared to other versions of environmentalism because it could be more clearly seen as in competition with other religions and not just with a straw man “pro-pollution” opponent. This is not a trivial point because at least some Environmentalists seek to conceal their ultimate aims. For example, deep ecologist Arne Naess has argued that “[t]he shallow ecological argument carries today much heavier weight in political life than the deep. It is therefore often necessary for tactical reasons to hide our deeper attitudes and argue strictly homocentrically.”⁴⁰⁰

We can see how this would affect policy in the area of responding to climate change. The climate change debate hinges on three propositions: 1) global climate change is a real phenomenon; 2) it is caused by human activity; and 3) costly measures to reduce human impacts should be taken immediately. While there are dissenters from each of these propositions, the interesting issue for our purposes is the third proposition. On the one hand, many environmentalists believe immediate action, even if not sufficient to prevent climate change and costly (e.g., the Kyoto Protocol⁴⁰¹), is necessary.⁴⁰² On the other hand, there are those who argue that current technology is too costly to use and that it would be better to postpone remedial action until new technologies are available that can mitigate human

temperature and for a shorter time but would still release some carbon from both the body and the fuel. The environmental consequences of cremation have spawned a surprisingly large amount of coverage. See, e.g., Miki Perkins, *Dying with Carbon-Neutral Dignity*, THE AGE, Oct. 28, 2007, <http://www.theage.com.au/news/national/dying-with-carbonneutral-dignity/2007/10/27/1192941400065.html> (last visited Apr. 18, 2009) (describing organization seeking to establish “natural” burial ground to avoid carbon emissions from cremation); Steven Morris, *Crematorium Concern over Carbon Footprint Becomes a Burning Issue*, GUARDIAN, Aug. 11, 2007, <http://www.guardian.co.uk/environment/2007/aug/11/climatechange.uknews> (last visited Apr. 19, 2009) (describing crematorium in Britain reducing carbon emissions by saving up bodies for cremation).

³⁹⁷ See MICHAEL SANERA & JANE S. SHAW, *FACTS, NOT FEAR: A PARENT’S GUIDE TO TEACHING CHILDREN ABOUT THE ENVIRONMENT* 24 (1996) (“In sum, environmental education could be a valuable part of science instruction. Instead, it often merely repeats the nostrums of the environmental movement, and molds children into smug crusaders whose foundation of knowledge is shaky at best.”).

³⁹⁸ See, e.g., Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 9004, 116 Stat. 134, 480 (2002) (creating a government-funded “Biodiesel Fuel Education Program”); see also SHABECOFF, *supra* note 70, at 38–40 (describing the important role of foundation funding for environmental groups).

³⁹⁹ See, e.g., Morriss & Stroup, *supra* note 203, at 790–94 (describing problem cases under ESA that harmed species and landowners).

⁴⁰⁰ Naess, *Identification*, *supra* note 88, at 25.

⁴⁰¹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 32 (entered into force Feb. 16, 2005).

⁴⁰² See Gore, *supra* note 252.

impacts on climate more cheaply.⁴⁰³ “Capital E” Environmentalism insists on measures that flunk the cost-benefit test in *this* world. Moreover, a “religious” approach would not permit relative net benefit as a criterion for ranking priorities—sin is sin. On the other hand, a pragmatic environmentalism would pass not only the *de minimus* requirement of being a positive net benefit but would consider tradeoffs. Bjørn Lomborg, the widely reviled author of *The Skeptical Environmentalist*, has promoted a process he calls “the Copenhagen Consensus” to set priorities amid tradeoffs.⁴⁰⁴ In this process, a group of leaders in a field (e.g., United Nations ambassadors, Nobel prize winners) is assembled, given data on various world problems and the costs of solutions, and asked to order the priority for addressing the problems.⁴⁰⁵ The process consistently ranks problems capable of being addressed at low unit cost today over those requiring expensive, uncertain technologies.⁴⁰⁶ For example, addressing malaria and AIDS consistently ranks well ahead of remedial action today on climate change, even though Lomborg does not dispute that climate change is a serious problem in the long term.⁴⁰⁷

The second key insight is that successful environmental organizations would be more likely to focus on issues of immediate concern. We would likely see more focus on local issues, something many environmentalists think is necessary for increased success.⁴⁰⁸ Moreover, as Charles Schultz noted in 1977, “[i]n most cases the prerequisite for social gains is the identification not of villains and heroes but of the defects in the incentive system that drive ordinary decent citizens into doing things contrary to the common good.”⁴⁰⁹ The costs and benefits of recycling are good examples of the role of beliefs in a free market for environmental faiths. That recycling is an important activity is almost an article of faith in much of the environmental community.⁴¹⁰ Yet many forms of recycling are economically

⁴⁰³ See BJORN LOMBORG, COOL IT: THE SKEPTICAL ENVIRONMENTALIST’S GUIDE TO GLOBAL WARMING 152–59 (2008).

⁴⁰⁴ Copenhagen Consensus Center, About CCC, <http://www.copenhagenconsensus.com/About%20CCC/About%20CCC.aspx> (last visited Apr. 19, 2009) (describing process); *Copenhagen Consensus: Putting the World to Rights*, THE ECONOMIST, June 5, 2004, at 63 (same).

⁴⁰⁵ Copenhagen Consensus Center, *supra* note 404.

⁴⁰⁶ See HOW TO SPEND \$50 BILLION TO MAKE THE WORLD A BETTER PLACE 166–68 (Bjorn Lomborg ed., 2006) (describing results from Copenhagen Consensus).

⁴⁰⁷ See LOMBORG, *supra* note 403, at 44.

⁴⁰⁸ SHABECOFF, *supra* note 70, at 127 (“A number of environmentalists, political experts, and scholars interviewed for this book said that the poor political record of the environmental community can be explained by the poor job it does in demonstrating how its agenda links up with the real problems and needs of the American people. . . . Although the polls may show that people are concerned about the environment, the environment as an abstraction fails to motivate electoral decisions. But people do care deeply about concrete environmental issues where they live.”).

⁴⁰⁹ CHARLES L. SCHULTZ, THE PUBLIC USE OF PRIVATE INTEREST 18 (1977).

⁴¹⁰ CHRIS GOODALL, HOW TO LIVE A LOW CARBON LIFE 63 (2007) (“[I]ncreasing numbers of people do make the effort to segregate their recyclable wastes and do so out of a sense of moral duty.”); John Tierney, *Recycling is Garbage*, N.Y. TIMES, June 30, 1996, at SM24; PETER M. VANDOREN, TIME TO TRASH GOVERNMENT INTERVENTION IN GARBAGE SERVICE 14 (1999), available at <http://www.cato.org/pubs/pas/pa331.pdf> (“[S]upport for recycling is more religious than economic in nature.”); see also John Thogersen, *Recycling and Morality: A Critical Review of the Literature*, 28 ENV’T & BEHAVIOR 536, 547 (1996) (noting support for “the proposition that people generally classify recycling behavior . . . in the domain of morality”).

inefficient, costing more than they save.⁴¹¹ The costly personal behavior required to implement household recycling (e.g., sorting trash) is likely perceived as less costly by those who believe it is serving an important environmental goal than by those who do not. If recycling is indeed a good, environmentalists need to develop a compelling story that will encourage individuals to do it. Thus far they have failed to do so. More broadly, if changed personal behavior is necessary, we need new approaches.

The third insight is that to the extent that environmental groups offered Environmental views, they would have to do a much better job of explaining what those views mean. And indeed some call for an environmental "fundamentalism"—Mark Dowie argues that "[i]f American environmentalism is to remain a vital force in the next century it will be because its leaders return to the fundamentals of the original movement, recoup some of the passion lost during the previous three decades, and create a dynamic working vision of environmental recovery."⁴¹² For current environmental group leaders, who hold to Environmentalism but whose views do not always reflect those of their organizations' members, this would be a negative outcome. If, for example, most people believe that human needs are entitled to greater moral weight than the needs of animals, plants, and fungi, then environmental "denominations" that place human needs at the top of a hierarchy of needs might draw members away from denominations that prefer to equate humans and fungi or subordinate humans to plants.⁴¹³ There is thus no reason to expect Environmentalist leaders who recognize that their own views are not reflective of majoritarian views to embrace disestablishment; entrepreneurial "denominational" leaders who do believe their views are closer to the mainstream than the established groups, on the other hand, could be persuaded to embrace disestablishment as a strategy.

Why have some of the thousands of new environmental groups not filled this need? One important reason why existing groups have not diversified their approaches as much as they could is the lack of incentives to do so because of the established nature of their views.⁴¹⁴ Just as Colonel Morris observed about colonial New York, established "clergy" have little reason to respond to their flock's needs.

IV. CONCLUSION

We believe that acknowledging the quasi-sectarian nature of certain strands of environmentalism could lead to greater candor in our regulatory discourse. Government has no institutional advantage in resolving disputes that are essentially sectarian in nature; in fact, as our review of established religion shows, governments have shown that they are far less capable of making sectarian decisions than private individuals are.

⁴¹¹ See, e.g., VANDOREN, *supra* note 410, at 14 ("[For] glass, paper, and plastic, for example, the discrepancy between recycled and virgin prices often does not justify the development of markets for recycling."); Tierney, *supra* note 410 ("Recycling may be the most wasteful activity in modern America: a waste of time and money, a waste of human and natural resources.").

⁴¹² DOWIE, *supra* note 14, at 225.

⁴¹³ FINKE & STARK, *supra* note 253, at 9 (contending that "the primary market weakness that has caused the failure of many denominations, and the impending failure of many more, is precisely a matter of doctrinal content, or the lack of it. That is, . . . as denominations have modernized their doctrines and embraced temporal values, they have gone into decline.").

⁴¹⁴ See *supra* notes 267–73 and accompanying text.

Our approach to disestablishment does not presume that every belief related to environmental protection is somehow religious. And we also do not believe that being labeled as “religious” is inherently bad or illegitimate. Both of us are religious, and neither of us believes that religion is per se prohibited from public discourse.⁴¹⁵ But we would not want an official state body to resolve matters of faith, whether sectarian within Christianity such as transubstantiation or the ordination of women, or cross-creedally among Buddhism, Christianity, Hinduism, Islam, and Judaism. Similarly, we believe that by removing government’s ability to define environmental orthodoxy, environmentalism—and the environment—can flourish and benefit from the power of competition in the marketplace of ideas. The American experiment with religious liberty, particularly when compared to the established religions of Europe, demonstrates that less governmental involvement in religious affairs leads to more religious activity. We suggest that applying the principles of disestablishment would not crush environmental, or even Environmental, thought or practice; it would instead give environmentalism the freedom it needs to thrive.

A. What Disestablishment Does Not Mean

Having described our approach to the disestablishment of Environmentalism, it is important to note what disestablishment would *not* mean. Most importantly, it would not mean an end to environmental regulation. Even if courts enthusiastically adopted our analysis, disestablishment would not affect the vast majority of environmental regulations.

States have broad authority to exercise their “police powers” in order to protect the health, safety, and welfare of their citizens,⁴¹⁶ and our approach would not change this. Regulations protecting air quality, water supply, and waste disposal are easily justifiable as health, safety, and welfare measures. While the Constitution does not give Congress a general police power, the Supreme Court has broadly interpreted the scope of the Commerce Clause, the Spending Clause, and the Reconstruction Amendments’ enforcement clauses in a manner that gives the federal government a significant degree of latitude regarding environmental regulation.⁴¹⁷ Thus, even if courts applied disestablishment jurisprudence to environmental regulation, it would only affect those regulations that could not be justified under the police power. Our test ends up being quite permissive, which is

⁴¹⁵ In particular, we are sensitive to the argument that we have proven “too much” in the sense of making an argument that no values-based arguments are permissible. We think there are many values-based (and even Environmental values-based) arguments that are legitimate ones. We just do not think that government policy is better when it establishes one set of those values as official values. We hope to explore this issue more in future work.

⁴¹⁶ See, e.g., *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (“The States traditionally have had great latitude under their police powers to legislate as ‘to the protection of the lives, limbs, health, comfort, and quiet of all persons.’” (quoting *Slaughter-House Cases*, 16 Wall. 36, 62 (1873))).

⁴¹⁷ See Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 405–06 (2005) (stating that “[t]hus far, federal appellate courts have uniformly rejected Commerce Clause challenges to the scope of federal environmental regulation[,]” but suggesting that the ESA and Clean Water Act may be vulnerable in the future).

all the more reason to look askance at any regulation that would not pass. As we have shown above, these tend to be the least effective regulations.

Our approach would curtail governments' ability to act as evangelists of Environmentalism, but would not prevent governments from acting to help the environment. It would not matter that legitimate environmental regulations happen to correspond to particular Environmentalist beliefs. Governmental action does not become automatically suspect merely because religious groups agree with it or advocate for it; otherwise prohibitions against murder and theft would be suspect because of their association with traditional Judeo-Christian teaching.⁴¹⁸ Just as governments are permitted to take neutral actions that happen to be compatible with Christian values, governments may act in a neutral manner that happens to correspond with Environmentalist beliefs.

Some of these actions could provide quite direct benefits. Environmentalist groups could participate in the Executive Branch's "faith-based initiatives," whereby the organizations receive federal funds to provide social services.⁴¹⁹ These activities do not run afoul of the Establishment Clause so long as they are provided in a nonsectarian manner, even though, at least for those faith-based organizations that would have provided the services anyway, it frees up funds that could now be used for overtly sectarian purposes. Governmental assistance to Environmentalist organizations could have tangible policy effects. For example, government is generally not permitted to choose between religions, or to choose religion over nonreligion. Thus, government could not choose to lease land to cattle ranchers but not to Environmentalists. However, pursuant to Article IV's Property Clause,⁴²⁰ the federal government could give or sell land to Environmentalist organizations, even though the Environmentalist organizations would likely use the land for sectarian purposes.⁴²¹

B. Imagining a Disestablished Environmentalism

What might a disestablished environmentalism look like? We can think of three possibilities. First, a fruitful area for an alternative is to focus on changes in personal behavior. Thus far, many environmental organizations primarily offer individuals opportunities to send a check—hardly a transformative experience.

⁴¹⁸ Cf. *Exodus* 20:2–17 (detailing the Ten Commandments).

⁴¹⁹ Cf. *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2559–60 (2007) (describing the role of the White House Office of Faith-Based and Community Initiatives as established by Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001)).

⁴²⁰ U.S. CONST. art. IV, § 3, cl. 2.

⁴²¹ See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State (Valley Forge)*, 454 U.S. 464, 482 (1982). Note that the Supreme Court's decision in *Valley Forge* did not state that such transfers were affirmatively permissible under the Property Clause. It merely held that plaintiffs did not have standing as taxpayers to challenge the property transfer. Professor Chemerinsky has argued, "[n]o one is likely to have standing to challenge the practices objected to" in *Valley Forge*, and that, as a result, the Establishment Clause could be "blatantly disregarded and yet the courts would be powerless to halt the violations." ERWIN CHEMEKINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 96 (2d ed. 2002). Thus, as a legal matter, a transfer of federal land to an Environmentalist organization may raise constitutional questions; but as a practical matter, the government could still make the transfer.

Even when something like the thirty-year anniversary of the first Earth Day occurs, there's little actual benefit to the environment or change in behavior associated with the mass participation.⁴²² The success of "high tension" religions relative to "low tension" religions in the religious marketplace suggests that an environmentalism that focused on encouraging a realistic set of changes in personal behavior rather than the moral equivalence of humans and plants will occupy substantial market niches—something some Environmentalists acknowledge by suggesting they must conceal their true views.⁴²³ While we think it is unlikely that many Americans will abandon their suburban homes for high density urban living or flock to mass transit to reduce their carbon footprints, it is quite possible that people will change their preferences with respect to their home landscaping, seek products that can be reliably believed to have a lesser impact on the environment, and make other incremental changes whose total impact could be substantial. Moreover, the success of the fee demonstration program in some National Parks, including Yellowstone, showed that Americans willingly pay considerably higher prices for environmental goods when they see a direct connection between the higher price and improved environmental quality.⁴²⁴

Second, most of the largest environmental groups have not moved beyond the 1970s in their approach to environmental problems. They identify a problem and then seek federal statutes and regulations to address it. The few who have moved beyond the traditional command and control approach have experienced considerable success in changing environmental conditions for the better. Ducks Unlimited has improved the lot of migratory birds through its prairie pothole program;⁴²⁵ Defenders of Wildlife largely solved the conflict over the reintroduction of wolves into Yellowstone through a creative bounty program.⁴²⁶ A broader range of environmental thinking might well produce other policy entrepreneurs who would develop additional innovative ways of addressing environmental problems, just as religious competition in the United States has spurred innovations in the delivery of religion from nineteenth century Methodist circuit riding to today's nondenominational megachurches.⁴²⁷

Third, the worst environmental problems today are not in the United States but in developing countries, where the lack of clean drinking water and indoor air pollution from cook fires take a heavy toll on human life.⁴²⁸ Even within the United States, environmental justice advocates point to lower environmental

⁴²² ROTHMAN, *supra* note 60, at 210 (noting Earth Day 1990 in NYC, when 200,000 people generated 45 tons of garbage in Central Park, and remarking that "it is entirely possible that the planet might have been better off if they had just stayed home").

⁴²³ See *supra* note 400 and accompanying text.

⁴²⁴ See Holly Lippke Fretwell & Michael J. Podolsky, *A Strategy for Restoring America's National Parks*, 13 DUKE ENVTL. L. & POL'Y F. 143, 162–74 (2003).

⁴²⁵ See Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205, 237 (2001).

⁴²⁶ See FISCHER, *supra* note 356, at 101–03.

⁴²⁷ DUNLAP, *supra* note 89, at 164 ("Besides showing how far the movement goes beyond reform, seeing environmentalism in religious terms would focus discussions about what ought to be done, help environmentalists confront their opponents, provide a way to make common cause with outside groups, and allow environmentalists to appreciate more clearly the roots of their own movement.")

⁴²⁸ See Andrew P. Morriss & Roger E. Meiners, *Borders and the Environment*, 39 ENVTL. L. 141, 170 (2009).

quality where poor people live.⁴²⁹ Just as many churches dispatch mission groups funded by their congregations to improve the spiritual and material lives of the poor at home and abroad, so too might post-disestablishment environmental groups focus on marshalling resources to solve these pressing problems. (Unfortunately, the current approach has done just the opposite, obstructing the use of DDT in developing countries to control malaria at a cost of a million deaths a year and 300 million illnesses.)⁴³⁰

A disestablished environmentalism thus offers greater hope for improvement in environmental quality and human enjoyment of environmental goods and services than a further establishment of Environmentalism. We think that is a worthy goal.

⁴²⁹ See RHODES, *supra* note 5, at 24 ("One of the largest classes of environmental-justice problems is associated with a specific geographic community . . . usually inhabited by a minority or low-income population [and facing] . . . a greater environmental burden than that faced by the population in the larger surrounding area.").

⁴³⁰ TREN & BATE, *supra* note 143, at 13-14.