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**Reauthorizing the Endangered Species Act in
Favor of Wildlife and Wild Lands: An
Inevitable Result of Narrative Changes in
Twenty-First Century America?**

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The Endangered Species Act (ESA)¹ captured the importance of nature to the United States by codifying the value of species both

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¹ 16 U.S.C. §§ 1531–1544 (2006).

large and small. But the value of nature has always meant different things to different people. Diverse versions of the U.S. Origin Myth, which imagines how the United States came about, mirror these different perspectives. For some, the value of nature is in its domestication. For others, its value lies in its mere existence. Groups debating the implementation and, ultimately, reauthorization of the ESA reflect these divergent viewpoints. Some asserted that the ESA was broken because few species had recovered. They claimed that it unduly and unevenly restricted the use of private lands for zero gain in species' survival rates. Others stressed that since the passage of the ESA, few species had gone extinct; indeed, many had improved. Advocates of the ESA also argued that restrictions to protect species did not place a greater burden on private lands than many other federal, state, and local laws. These differences have left the ESA in legislative limbo.

Richard Nixon signed the ESA in 1973 after the House of Representatives passed it overwhelmingly and the Senate unanimously approved it by voice vote. On September 30, 1992, Congress's last reauthorization of the ESA expired.² Since then, despite several attempts to do so, the ESA has not been reauthorized.³ Only in 2005, following thirteen years of debate, did the House pass an amended bill⁴ designed to reauthorize the ESA by a margin of thirty-six votes,⁵ though it never reached the Senate floor. In April 2008, the Secretary of the Interior proposed an administrative rule change to the ESA.⁶ The proposed rule change would have put the burden of identifying any potential "destruction or adverse modification"⁷ of designated critical habitat on the federal agency investing in or acting at a site. The final version proposed would have

² See EUGENE H. BUCK ET AL., *THE ENDANGERED SPECIES ACT (ESA) IN THE 109TH CONGRESS: CONFLICTING VALUES AND DIFFICULT CHOICES 3* (Cong. Research Serv., CRS Order Code IB10144 2006), available at <http://www.cnie.org/NLE/CRSreports/06apr/IB10144.pdf>.

³ *But see* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 16 U.S.C. § 670a (2006) (regarding exemption of the Department of Defense from critical habitat designations).

⁴ Threatened and Endangered Species Recovery Act of 2005, H.R. 3824, 109th Cong. (2005).

⁵ 151 CONG. REC. H8583 (2005) (recorded vote: 229 yeas; 193 nos; 11 not voting).

⁶ *See* Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47,868 (proposed Aug. 15, 2008) (amending 50 C.F.R. pt. 402) (governing coordination between the Fish and Wildlife Service and the National Marine Fisheries Service).

⁷ Endangered Species Act § 7(a)(2), 16 U.S.C. § 1536(a)(2) (2006).

removed any requirement for consultation with regulatory agencies, including the U.S. Fish and Wildlife Service and the National Marine Fisheries Service,⁸ unless the action agency identified a prior finding of potential harm or “jeopardy.”⁹ The Secretary framed the change as a means to reduce the time and cost of consultations for both the action and the regulatory agencies.

The proposed rule change reignited the intense conflict over the ESA. Some groups feared the rule change would eviscerate the role of scientific evidence and privilege conversion over conservation.¹⁰ Others interpreted the change as a triumph for common sense. They believed it would circumvent a lengthy and costly process where less than ten percent of consultations resulted in a decision of jeopardy. Of these, a similarly small percentage recommended significant changes or a halt to activity.¹¹ Several groups immediately attacked the rule change in court.¹² This brought the ESA in particular, and environmental regulations more broadly, back to the forefront of policy battle lines as presidential administrations changed in January 2009.

This Article explores how the shifting mosaic of interests, reacting to how the ESA was implemented, crystallized into stark and opposing narratives in the public imagination during the debates over its reauthorization. This Article suggests that these narratives polarized in reaction to provisions in the ESA that appeared either to endanger nature or to abrogate property rights. This opposition of interests between groups loosely aligned in favor of nature, hereinafter the Environmentalists, and groups loosely associated to

⁸ Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 76,272 (proposed Dec. 16, 2008) (amending 50 C.F.R. pt. 402).

⁹ Jeopardy occurs when an action is reasonably expected to directly or indirectly diminish a species’ population, reproduction, or distribution such that the likelihood of survival and recovery in the wild is appreciably reduced. See Endangered Species Act § 7, 16 U.S.C. § 1536.

¹⁰ See Press Release, The Wildlife Soc’y, Leading Scientific Societies Criticize Proposed Rule Changes to Interagency Cooperation Under the Endangered Species Act (Sept. 29, 2008), available at http://www.enn.com/press_releases/2664; Posting of Rocky Barker to Voices.Idahostatesman.com, http://voices.idahostatesman.com/2008/12/17/rocky_barker/Environmentalists_go_ballistic_over_esa_consulting_rule_change (Dec. 17, 2008, 10:46 EST).

¹¹ See Nancy Kubasek et al., *The Endangered Species Act: Time for a New Approach?*, 24 ENVTL. L. 329, 339 (1994) (describing how less than one percent of formal consultations resulted in termination of projects).

¹² Cf. Julie Cart, *State Sues Over Changes in Species Act*, L.A. TIMES, Dec. 31, 2008, at B4, available at <http://articles.latimes.com/2008/dec/31/local/me-species31>.

protect property rights, hereinafter the Rugged Individualists, led to intense policy debate but little movement in decision making. Focusing on appeals to different expertise, disparate case studies, and divergent narratives, this Article examines the availability cascades,¹³ mechanisms by which a singular perspective repeated often enough can become a widely held belief, that consolidated these opposing groups and resulted in a stalemate over reauthorization. This stalemate froze the ESA and has prevented its long overdue reauthorization. While the stalemate keeps the legislation on a short leash since it requires annual appropriations, something that suits each side to a certain extent, the legislation fails to insulate private property proponents or conservationists from longer-term decisions that would undermine current investments. As a result, both sides have attempted to bridge the divide. These stopgap measures succeeded in undoing the stalemate in some place-based problem sets. Nonetheless, the national debate remains in a deep freeze.

Or does it? Today, many things environmental have become a norm of modern culture. We recycle. We consider buying smaller cars with better mileage. We think about climate change. These circumstances have leavened the case for Environmentalists and strengthened the appeal of their narrative. Moreover, attempts to bridge development and conservation inherent to, among others, the Safe Harbor¹⁴ and No Surprises¹⁵ amendments to the ESA have tempered the policy stalemate, allowing the ESA to remain a force for wildlife and wild lands while recognizing private rights over private property. These efforts provide a lens through which the notion of conservation at a reasonable price, especially on private lands,¹⁶ is achieving clarity and meaning in the twenty-first century.

As a result, this Article proposes that regardless of whether the new Congress makes reauthorizing the ESA a priority, the fate of the

¹³ See generally Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 683 (1999) (“An availability cascade is a self-reinforcing process of collective belief formation by which an expressed perception triggers a chain reaction that gives the perception increasing plausibility through its rising availability in public discourse.”).

¹⁴ Safe Harbor Agreements and Candidate Conservation Agreements With Assurances, 50 C.F.R. §§ 17.22(b), 17.32(b) (2008).

¹⁵ No Surprises Rule, 50 C.F.R. §§ 17.22, 17.32.

¹⁶ See Aldo Leopold, *Conservation Economics*, 32 J. FORESTRY 537, 541 (1934).

abovementioned rule change, namely its reversal,¹⁷ in the first days of the Obama administration hints at an emerging federal commitment to do battle on the side of the Environmentalists. This suggests that the ESA will remain a strong champion of wildlife and wild lands with or without actual reauthorization to that effect. This leaves room for the administration and Congress to focus on other environmental priorities that lack the clear intent and strong, albeit contested, constituency of the ESA.

I

IMAGINING THE ENDANGERED SPECIES ACT

A. *Wildlife and Wild Lands: An American Heritage*

Understanding the philosophical ancestry of U.S. environmental regulation can provide an important clue to the development of the ESA's most eager supporters and bitter enemies. Navigating the constant rediscovery and reconsideration of the U.S. Origin Myth provides just such a lens through which to understand the battle lines drawn over the ESA.¹⁸ This journey underscores the importance of

¹⁷ President Obama signaled his desire to reverse the last minute Bush administration rule change that became effective on January 15, 2009, by signing a memorandum directing that the Departments of the Interior and Commerce review the regulations impacting the consultation process, and that the agencies resume the traditional consultation process during the review. *See* The Endangered Species Act: Management for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 9753 (proposed Mar. 3, 2009), available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies/. The Omnibus Spending Bill, which was signed into law on March 11, 2009, streamlined what the new administration would have to do to actually reverse the regulations. *See* Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524 (2009). The administration will now be able to withdraw the ESA rules within sixty days of their enactment without having to go through any public comment period or legal challenge. Moreover, the Senate voted down an amendment that would have removed the language from the bill, which hopefully signals the Senate's intent to value due process favoring Environmentalists over expedited decision making that would favor Rugged Individualists. In the interim, however, the memorandum signed by the President will ensure that the full consultation requirements of the ESA are in place until the regulation can be changed. *See* Chris Good, *Scientists, Conservationists Cheer Obama at Interior Dept.*, ATLANTIC, Mar. 3, 2009, http://politics.theatlantic.com/2009/03/scientists_conservationists_cheer_obama_at_interior_dept.php; Alison Winter, *Endangered Species: Omnibus Gives Carte Blanche for Regulatory Reversals*, E&E NEWS, Feb. 23, 2009, <http://www.eenews.net/public/eenewspm/2009/02/23/4>.

¹⁸ Cf. Sven Birkerts, *Only God Can Make a Tree: The Joys and Sorrows of Ecocriticism*, BOSTON BOOK REV., Nov./Dec. 2006, available at <http://www.asle.org/site/resources/ecocritical-library/intro/tree/> (describing birth and evolution of ecocriticism).

nature to the American mind. Various versions of the Origin Myth borrow from both the idea of virgin wilderness and the feat of its domestication at human hands. Different times, places, and cultures shape the various tales. Many early Americans identified wilderness as uniquely American, as it had no counterpart in Europe. Thus, it became a potent source of nationalism.¹⁹ The influence of John Locke's political theory, most notably his idea that democracy was built on dominion over nature, cemented the role of nature, in general, and its domestication, in particular, as a central tenet of several imaginings of the U.S. Origin Myth.²⁰

These very early notions of nature and wilderness, imagined as the Wild West and the frontier, were products of the pioneer mind.²¹ Similarly, the portraits of untouched wilderness imagined by some today are products of the romantic mind. After all, enthusiasm for nature and areas devoid of civilizing influences emerged from Romanticism and a sense of the sublime developed among sophisticated Europeans surrounded by cities and books. The ESA reflects this tension between the pioneer and romantic imaginings of how the United States was fashioned, between nature as resource and nature as revered.²² After all, the ESA tempers the perceived Noah principle²³ of saving all species with a dose of political and economic realism. Together, these divergent interpretations set the philosophical stage for interest groups either favoring nature or its conversion in the reauthorization debates.

B. From Imagining Nature to Regulating Habitat: The Endangered Species Act

Congress promulgated the ESA in 1973 to "provide a means whereby the ecosystems upon which endangered species and

¹⁹ RODERICK FRAZIER NASH, *WILDERNESS AND THE AMERICAN MIND* 67–83 (4th ed. 2001).

²⁰ Carolyn Merchant, *Reinventing Eden: Western Culture as a Recovery Narrative*, in *UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE* 132, 136 (William Cronon ed. 1996).

²¹ See NASH, *supra* note 19, at xiii; William Cronon, *The Trouble with Wilderness; or, Getting Back to the Wrong Nature*, in *UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE*, *supra* note 20, at 69, 79.

²² See generally Donald Worster, *Seeing Beyond Culture*, 76 J. AM. HIST. 1142 (1990).

²³ See Jay O' Laughlin, *The Political Economy of Endangered Species Conservation*, 1 ELECTRONIC GREEN J. 1, 5–6 (1998).

threatened species depend may be conserved.”²⁴ At its root was a concern for saving nature.²⁵ Nonetheless, the ESA blended a motley variety of scientific ideas,²⁶ from ecosystem conservation to species preservation, with a smattering of hardship economics. As a result, the law was neither simple nor its ramifications straightforward. This served to reify tensions that already existed in the public sphere among proponents of private property rights; advocates of social responsibility for national public goods and spaces;²⁷ and advocates of the pioneer, and urban and suburban myths.

As much as the ESA itself fostered tensions, its implementation magnified conflict. Groups labeled the ESA as both highly prescriptive and frustratingly vague.²⁸ Fault lines were initially myriad, developing in reaction to differences over perceived land use dilemmas arising from listing decisions,²⁹ the role of regulatory and action agencies, and the reliability of available data.

²⁴ Endangered Species Act § 2(b), 16 U.S.C. § 1531(b) (2006).

²⁵ Identified from a reading of legislative intent and best parsed by the Supreme Court when they declared that “Congress intended endangered species to be afforded the highest of priorities.” *TVA v. Hill*, 437 U.S. 153, 174 (1978). This opinion emphasized that the final version of the ESA afforded first priority to the newly declared national policy of saving endangered species. This priority was made even more evident by the conscious omission of qualifying language, which weighted other concerns with that of saving nature, that had previously been included in the 1966 Endangered Species Preservation Act and the 1969 Endangered Species Conservation Act, and by previous House and Senate versions of the 1973 Bill. See George Cameron Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D. L. REV. 315, 321 (1974). Indeed, though Congress explicitly found that endangered species “are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people,” see section 2 of the ESA, nowhere did they list financial or economic value; thus, the ESA preserves species for the hearts and minds rather than the wallet. See Holly Doremus, *Restoring Endangered Species: The Importance of Being Wild*, 23 HARV. ENVTL. L. REV. 1, 12 (1999). So while the 1969 Act imposed “only hedged duties on three departments; the 1973 language is an unqualified command to the entire Executive Branch.” Coggins, *supra* note 25, at 322 (citations omitted).

²⁶ Indeed, the ESA was also part of a more general trend towards equating the terms “environment” and “nature” in the latter half of the twentieth century, using them as mere synonyms of one another. Cf. Birkerts, *supra* note 18.

²⁷ See Stephen Polasky & Holly Doremus, *When the Truth Hurts: Endangered Species Policy on Private Land with Imperfect Information*, 35 J. ENVTL. ECON. & MGMT. 22, 22 (1998).

²⁸ See Coggins, *supra* note 25, at 320–21; Daniel J. Rohlf & David S. Dobkin, *Legal Ecology: Ecosystem Function and the Law*, 19 CONSERVATION BIOLOGY 1344, 1344 (2005); Christopher J. Basilevac, *Understanding the Endangered Species Act: A Case Study of the Cactus Ferruginous Pygmy-Owl in Arizona*, 43 ARIZ. L. REV. 173, 174 (2001).

²⁹ See O’Laughlin, *supra* note 23, at 5–6.

Despite this conflict, most interest groups shared a perception that the ESA was broken. Different groups laid blame on various factors, including a lack of funding,³⁰ weak enforcement, inadequate implementation, overzealous science, and a preponderance of sticks without concomitant carrots.³¹ Nonetheless, the friction trumped any common dismay. The result was a stalemate over reauthorization. Adversarial legalism and regulatory delay filled the consequent policy vacuum.³² As of September 2005, there were thirty-four active lawsuits and fifty-one court orders involving 103 species before the courts.³³ Moreover, turmoil enveloped the regulatory agencies as all sides brought suits against them. Agency personnel applauded appropriate listings based on the best available evidence, but decried the use of courts to make them happen. The agencies' science and management cultures often clashed.³⁴ For a while, fearing the potential for legal wrangling over any agency decision, Congress stopped the agencies from making decisions regarding habitat and species designations altogether.³⁵

All of this happened as the early twentieth-century conservation ethic, preservation at a reasonable price, splintered into the modern environmental and property rights movements. As Congress debated reauthorization, rival groups positioned themselves as representing

³⁰ According to one survey performed in the 1990s, half of all funding for 247 listed species was spent on only eight species of interest. See Don L. Coursey, *The Revealed Demand for a Public Good: Evidence from Endangered and Threatened Species*, 6 N.Y.U. ENVTL. L.J. 411, 418–19 (1998).

³¹ See David S. Wilcove, Foreword, *The Promise and the Disappointment of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 275, 277 (1998); Daniel J. Rohlf, *Response to O'Connell*, 6 CONSERVATION BIOLOGY 144, 144–45 (1992).

³² See generally Martin Nie, *The Underappreciated Role of Regulatory Enforcement in Natural Resource Conservation*, 41 POL'Y SCIS. 139, 142 (2008) (explaining how "adversarial legalism" serves to fill this void).

³³ See *To Amend and Reauthorize the Endangered Species Act of 1973 to Provide Greater Results Conserving and Recovering Listed Species, and for Other Purposes "Threatened and Endangered Species Recovery Act of 2005": Hearing on H.R. 3824 Before the H. Comm. on Resources*, 109th Cong. 29 (2005) [hereinafter *Hearing on H.R. 3824*].

³⁴ See *Field Hearing on National Marine Fisheries Service's Implementation of the Endangered Species Act: Field Hearings Before the H. Comm. on Resources*, 105th Cong. 2 (1998) (statement of Rep. Richard Pombo, Chairman, H. Comm. on Resources) (indicating a problem with concurrent regulation by two federal agencies).

³⁵ See Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, 109 Stat. 73 (placing a moratorium on all species and habitat designations until the end of fiscal year 1995).

the true meaning of the U.S. Origin Myth, each claiming that their perspectives on the ESA cleaved most closely to the Myth's true legacy.³⁶

II TRIBAL ANIMUS

Congress's last reauthorization of the ESA expired on October 1, 1992.³⁷ During subsequent debates, the low-level conflict over implementation between myriad interest groups that largely sprung up over place-based problems and specific implementation scenarios crystallized into tribal warfare. The development of opposing ESA sides, building on the divergent imaginings of the U.S. Origin Myth, can be teased apart using conflict escalation modeling,³⁸ what began as differences over an issue that proved resilient to resolution became a battle to exist. Interests and opinions about reauthorization quickly crystallized into mutually incompatible standpoints. The debate was no longer simply about opposing points of view that pitted biological estimates of viability against the constraints of social, political, and economic realities in certain areas.³⁹ In addition, as land and real estate prices began to wildly fluctuate in the 1990s in states where a disproportionate number of endangered species were found, including California, Florida, and Hawaii,⁴⁰ preferred changes to the ESA were diverging even further. Standpoints of coalitions of the willing calcified into increasingly distinct tribes⁴¹ with exclusive membership and terminal loyalties. The destructive behavior that followed cemented tribal stereotypes in the public imagination and fostered the beginning of the end for one tribe.

³⁶ See Cronon, *supra* note 21, at 82; William Cronon, *Introduction: In Search of Nature*, in UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE, *supra* note 20, at 23, 38. The struggles over the permitted uses of the Alaskan National Wildlife Refuge tell a similar tale, and have acted, as both medium and message, as another centrifuge in which larger debates about the true interpretation of the U.S. Origin Myth are happening.

³⁷ See BUCK ET AL., *supra* note 2, at 3.

³⁸ See Thomas Jordan, *Glasl's Nine-Stage Model of Conflict Escalation: A Summary*, <http://www.wahlstroem.dk/GLASL.pdf> (last visited Dec. 26, 2009).

³⁹ See J. Michael Scott et al., *Socioeconomics and the Recovery of Endangered Species: Biological Assessment in a Political World*, 9 CONSERVATION BIOLOGY 214, 216 (1995).

⁴⁰ See Robert Innes et al., *Takings, Compensation and Endangered Species Protection on Private Lands*, 12 J. ECON. PERSPECTIVES 35, 35 (1998).

⁴¹ See generally Douglas A. Kysar & James Salzman, *Environmental Tribalism*, 87 MINN. L. REV. 1099 (2003).

A. *Inchoate Tribalism*

Designating critical habitat caused heated debate and became the main fault line in the battle over reauthorization.⁴² Sides either viewed listing as an obstacle to actions on any private, state, or federal land, or as the *sine qua non* of species conservation. Some groups perceived it as codifying legal restraints on actions on private property.⁴³ Different groups, depending on their viewpoint, invoked this fortress narrative either longingly or pejoratively.⁴⁴ Perceiving that critical habitat locked up land to all uses, the ESA excited intense opposition to its designation.⁴⁵ Conversely, critical habitat designation garnered intense excitement among proponents of greater protection who approved of its precautionary principle.⁴⁶

A real opposition of interests soon emerged around this fault line. Environmentalists, in their many shades of green, were on the side of nature. The early adopters of an environmental ethic advocated for more regulation, not less.⁴⁷ Biocentrists adhered to a growing awareness that the progressive, secular, and material philosophy on which industrial life rests was flawed and self-destructive.⁴⁸ They advocated placing noneconomic issues at the top of our hierarchy of priorities.⁴⁹ Proponents of biodiversity protection, government

⁴² See generally Lynne E. Dwyer et al., *Property Rights Case Law and the Challenge to the Endangered Species Act*, 9 CONSERVATION BIOLOGY 4 (1995); Jeff Curtis & Bob Davison, *The Endangered Species Act: Thirty Years on the Ark*, 5 OPEN SPACES Q. 8 (2003).

⁴³ See David S. Favre, *The Risk of Extinction: A Risk Analysis of the Endangered Species Act as Compared to CITES*, 6 N.Y.U. ENVTL. L.J. 341, 344 (1998).

⁴⁴ The conservation fortress narrative emerged from the Norman concept of royal forests in Britain in the fourteenth century. See generally Charles R. Young, *Conservation Policies in the Royal Forests of Medieval England*, 10 ALBION 95 (1978) (explaining that this fortress narrative extols a bullets and barbed wire approach to conservation that establishes protected areas, including national parks and wilderness areas, as the exclusive realm of wildlife rather than humans). These areas have tightly controlled access. See *id.* Robin Hood stories from the same era quickly popularized them as exclusive and unjust. See *id.* Today, strictly protected areas best embody fortress conservation.

⁴⁵ See Polasky & Doremus, *supra* note 27, at 43.

⁴⁶ See J.B. Ruhl, *The Battle Over Endangered Species Act Methodology*, 34 ENVTL. L. 555, 556 (2004).

⁴⁷ See Donald Worster, *The Shaky Ground of Sustainability*, in GLOBAL ECOLOGY: A NEW ARENA OF POLITICAL CONFLICT 132, 143 (Wolfgang Sachs ed., 1993).

⁴⁸ *Id.*

⁴⁹ Born during the heady days of the 1960s at the height of the "Right Livelihood" concept and based on reciprocity between nature and people, this Gaian philosophy is largely based on J.F. Lovelock's book *Gaia*. See Dick Richardson, *The Politics of Sustainable Development*, in THE POLITICS OF SUSTAINABLE DEVELOPMENT: THEORY,

regulation, environmental justice, and ecological economics also supported nature. Together, they decried the pollution-based prosperity that they perceived as leading us to foul our own nests.⁵⁰

Rugged Individualists, from proponents of the wise use and property rights movements to farmers everywhere, privileged property rights. They also supported the pursuit of private wealth, but recognized that some environmental regulation was a necessary evil. They accepted that the ESA was “well intentioned,”⁵¹ but believed it had become “subverted and corrupted . . . to the point where it does not protect endangered species but it does harass, injure and sometimes even kill innocent Americans.”⁵² Together, they saw the ESA as the poster child for regulatory excess and federal activism.

Each side began to orchestrate campaigns for and against amendments to the ESA that were about more than the everyday politics of moral outrage aimed at the federal level. This was explicit in the various ESA 2.0 bills⁵³ that the House Resources Committee, under the leadership of Richard Pombo, debated in the 1990s. Though the Committee recognized that the ESA was “[b]orn of the best intentions,”⁵⁴ the committee chair emphasized that the law had become “fatally flawed”; that the law was a “failing form of managed care” which “checks species in, but never checks them out.”⁵⁵ Amendments ran the gamut from supporting do-not-resuscitate orders to promoting endangered species health insurance that would

POLICY AND PRACTICE WITHIN THE EUROPEAN UNION 43, 45 (Susan Baker et al. eds., 1997).

⁵⁰ See *To Amend the Endangered Species Act of 1973 to Reform the Process for Designating Critical Habitat Under that Act: Hearing on H.R. 2933 Before the H. Comm. on Resources*, 108th Cong. 156–58 (2004) [hereinafter *Hearing on H.R. 2933*] (statement of Joseph K. Sheldon, Ph.D., Professor of Biology and Environmental Science, Messiah College).

⁵¹ *Id.* at 91 (statement of Steven E. Webster, Executive Director, Florida Marine Contractors Associates).

⁵² *Id.*

⁵³ Hearings about the Critical Habitat Reform Act, see *supra* note 50, and the Threatened and Endangered Species Recovery Act of 2005, see *supra* note 33, provide clear examples of this outrage. This was also the case in the much earlier Kempthorne Bills, see S. 1180, 105th Cong. (1997) and S. 1364, 104th Cong. (1995); the Young-Pombo Bill, see H.R. 2275, 104th Cong. (1995); and the Gorton-Johnston Bill, see S. 768, 104th Cong. (1995).

⁵⁴ See *Hearing on H.R. 2933*, *supra* note 50, at 1 (statement of Rep. Richard Pombo, Chairman, H. Comm. on Resources).

⁵⁵ *Id.* at 2.

guarantee all species, regardless of size, shape, or stature, access to the best recovery machinations that science could generate.

A heightened stage of conflict followed in the aftermath of several high-stakes court opinions, building on the earlier *Palila* cases⁵⁶ and leading to the *Sweet Home* decision.⁵⁷ During the reauthorization debates, these cases fueled the fact that neither side viewed the other as amenable to sensible arguments. Discussions developed into verbal confrontations in the courtroom and in the court of public opinion. Many groups began to feel that their wider position was at stake, sending them in search of other sympathetic groups with which to join. For example, the victory of the Republican Party and its Contract with America⁵⁸ in 1994 rallied the Rugged Individualists. Though failing to mention the ESA in particular, or even environmental regulation more generally, this Contract highlighted the ascendancy of wise use conservation, property rights, small government, and economic growth as the touchstones of national success. The Contract valued everything that was Rugged Individualist and nothing that was Environmentalist. Two of its planks, compensation for lost property value and the need to perform cost-benefit analyses prior to promulgating regulations, were particularly telling.

Thus was born an inchoate tribalism. Cognitive theory, particularly the role of availability cascades, can help us understand the mechanics behind this escalation from sporadic conflict to tribal warfare. It can also help explain how the conflict married the fate of the ESA to the future direction of U.S. growth.

B. Equal and Opposite Availability Cascades

Competing availability cascades⁵⁹ consolidated tribal orthodoxies. Availability cascades enable a particular perspective to become a widely held belief. What may have been a minority opinion suddenly appears increasingly plausible to the general public.⁶⁰ Cascades

⁵⁶ *Palila v. Haw. Dep't of Land & Natural Res.*, 639 F.2d 495 (9th Cir. 1981); *Palila v. Haw. Dep't of Land & Natural Res.*, 852 F.2d 1106 (9th Cir. 1988).

⁵⁷ *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

⁵⁸ REPUBLICAN MEMBERS OF THE HOUSE OF REPRESENTATIVES, REPUBLICAN CONTRACT WITH AMERICA (1994), <http://www.house.gov/house/Contract/CONTRACT.html>.

⁵⁹ See Kuran & Sunstein, *supra* note 13, at 683.

⁶⁰ *Id.*

depend on an otherwise disinterested public free riding on the public discourse and becoming aware of an issue in an entertaining or cost-free manner. Environmental debates are highly prone to such dynamics given their combination of complex and uncertain information with regulatory expression that must somehow choose among competing values and worldviews.⁶¹ In the case of the ESA reauthorization debate, opposing availability cascades tipped because of a mixture of divergent epistemologies, conflicting case studies, and contrary narratives.

1. Whose Expertise?

Endangered species policy, like most environmental regulation, is as much a question of social choice and social preference as it is of biology. In a world of scarce resources and negotiated decision making, policies have to reflect the opportunity cost of species protection.⁶² But how decision-makers reflect preferences, under what circumstances, and according to which priority schema differs. In the reauthorization debate, the conflict over what constituted relevant expertise helped to fuel competing cascades based on divergent epistemologies. Environmentalists privileged science, holding scientists in high esteem as prime sources of epistemic authority.⁶³ Rugged Individualists asserted the primacy of common sense, wanting economics and pragmatism to guide decision making. They challenged the notion of science speaking truth to policy.⁶⁴ Indeed, Representative Pombo described ESA 2.0 as an effort to

⁶¹ See generally Kysar & Salzman, *supra* note 41 (discussing the polarization of views on the presence or absence of environmental harms).

⁶² Jason F. Shogren et al., *Why Economics Matters for Endangered Species Protection*, 13 CONSERVATION BIOLOGY 1257, 1258–59 (1999).

⁶³ See Reed F. Noss, *Toward a Pro-Life Politics*, 15 CONSERVATION BIOLOGY 827, 828 (2001).

⁶⁴ See Eva Lövbrand & Gunilla Öberg, *Comment on ‘How science makes environmental controversies worse’ by Daniel Sarewitz, Environmental Science and Policy*, 7, 385–403 and ‘When Scientists politicise science: making sense of the controversy over The Skeptical Environmentalist’ by Roger A. Pielke Jr., *Environmental Science and Policy*, 7, 405–417, 8 ENVTL. SCI. & POL’Y 195, 195 (2005) (“This widespread scientization of environmental policy rests upon the assumption that sound science can provide an objective body of facts from which rational policy decisions can be drawn.”).

elevate common sense within the workings of the ESA, tying common sense to science in the term “sound science.”⁶⁵

The reliability of data used in listing decisions was especially controversial. Both sides coalesced ever more tightly in favor of their own epistemology in the face of dynamic information that suggested a species might be endangered, extinct, or stable. For example, Rugged Individualists used listing changes to suggest that science was merely a mask for best guesses and could not be the sole guide to listing decisions.⁶⁶ Meanwhile, Environmentalists heralded new data as proof of the integral role of science as arbiter of listing decisions. Nonetheless, both claimed that ESA decisions were too often the result of “opinions, interpretations of limited anecdotal observation, and hypothetical threats [that] are sometimes given equal or greater weight than conclusions reached through hypothesis testing.”⁶⁷ Environmentalists wanted science to guide this testing, while Rugged Individualists preferred common sense.

Both tribes consistently attacked each other’s standpoint on the question of expertise. Rugged Individualists decried science as theoretical and too narrow in scope; Environmentalists dismissed common sense as overly subjective.⁶⁸ The latter saw political interests and social concerns as contaminants of science;⁶⁹ their counterparts viewed supposed scientific objectivity as an enemy of common sense. Moreover, the rise of the focused advocate,⁷⁰ characterized by scientists who openly and often advocate for a preferred policy outcome, led Rugged Individualists to cry foul in the face of what they saw as science serving an agenda. Conversely, Environmentalists did not accept the difference between scientific data and the negotiated reality of political decision making.⁷¹ They

⁶⁵ *Hearing on H.R. 2933, supra* note 50, at 2 (statement of Rep. Richard Pombo, Chairman, H. Comm. on Resources).

⁶⁶ *See id.* at 16–17 (statement of Rep. Dennis Cardoza).

⁶⁷ *Id.* at 66 (statement of Rob Roy Ramey II, Ph.D., Department of Zoology Chair and Curator of Vertebrate Zoology, Denver Museum of Nature & Science).

⁶⁸ WALTER F. BABER & ROBERT V. BARTLETT, *DELIBERATIVE ENVIRONMENTAL POLITICS: DEMOCRACY AND ECOLOGICAL RATIONALITY* 8 (2005).

⁶⁹ *See* Abby J. Kinchy & Daniel Lee Kleinman, *Organizing Credibility: Discursive and Organizational Orthodoxy on the Borders of Ecology and Politics*, 33 *SOC. STUDIES SCI.* 869, 873 (2003).

⁷⁰ *See* James Salzman, *Scientists as Advocates: The Point Reyes Bird Observatory and Gill Netting in Central California*, 3 *CONSERVATION BIOLOGY* 170, 178 (1989).

⁷¹ Kinchy & Kleinman, *supra* note 69, at 871.

believed that any tradeoff that incorporated economic or political realities at the expense of so-called scientific “truth” was inherently flawed. From this conflict arose the “wide latitude for interpretation of what constitutes best available science in making ESA decisions.”⁷²

2. Case Studies: *Full of Sound and Fury, Signifying Nothing?*

Case studies were also important in fueling availability cascades. Each tribe cherry picked case studies to tip its standpoints into a cascade. The tribes framed these respective anecdotes as central to their own cause. For example, beginning as far back as the *Camfield* decision,⁷³ the courts and their decisions have been viewed either as too green or too corporate, with the *Sweet Home* case⁷⁴ on one hand and those of *Lucas*⁷⁵ and *Dolan*⁷⁶ on the other. Building on their peculiar epistemologies, tribes employed folk economics,⁷⁷ cost-benefit analyses, or population viability analyses to underscore their points of view. Rugged Individualists believed that development receipts foregone were the equivalent of a new Pigouvian property tax—a tax levied on a market activity to correct that market’s outcome when it spurs negative externalities. Rugged Individualists often cited the example of the Bonneville Power Administration, which reportedly lost \$1.7 billion because of the ESA during the West Coast energy crisis in 2001.⁷⁸ Similarly, they asserted that governments lost between \$74 and \$183 million in taxes because of dampened development, an impact of the 31,000 hectares of critical

⁷² *Hearing on H.R. 2933, supra* note 50, at 65 (statement of Rob Roy Ramey II, Ph.D., Department of Zoology Chair and Curator of Vertebrate Zoology, Denver Museum of Nature & Science).

⁷³ *Camfield v. United States*, 167 U.S. 518 (1897) (upholding the Unlawful Enclosures Act that prevented private purposes from enclosing parts of public lands).

⁷⁴ *Babbitt v. Sweet Home Chapter Cmty. for a Great Or.*, 515 U.S. 687, 708 (1995) (finding the word “harm” encompassed habitat modification that resulted in actual injury or death to endangered or threatened species).

⁷⁵ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (holding that when a regulation reduces all or close to all economic opportunity on that private property the landowner must be compensated).

⁷⁶ *Dolan v. City of Tigard*, 114 U.S. 374, 393–94 (1994) (finding in favor of private property and against takings for public use).

⁷⁷ *See Hearing on H.R. 2933, supra* note 50, at 74–75 (statement of Jamie Rappaport Clark, Executive Vice President, Defenders of Wildlife).

⁷⁸ *Hearing on H.R. 3824, supra* note 33, at 4 (statement of Rep. Nick J. Rahall, Ranking Democrat Member, H. Comm. on Resources).

habitat designated for the Preble's meadow jumping mouse in Colorado.⁷⁹ They used these anecdotes to illustrate that the ESA was a tax on development and private investment.

Environmentalists used the same technique, but to the opposite effect. Cases they often cited included that of a Texan rancher who earned \$14,000 in one year from groups that visited his land to see the endangered golden-cheeked warbler and black-capped vireo.⁸⁰ Another anecdote they often employed was to highlight the \$5 million generated annually in the local economy from whooping cranes surrounding the Arkansas National Wildlife Refuge in Texas.⁸¹ Using these cases, they promoted the benefits of having endangered species on private property to include increased visitation and its potential revenue stream. They decried public compensation as unnecessary for lost private development rights.

In particular, each tribe used real estate and land development cases to underscore their own economic perspectives. Again and again, Rugged Individualists would criticize court decisions that "block, stall or delay any kind of use or development of land in its adjacent areas."⁸² They looked to the courts to save "the endangered farmers of America" from extinction rather than endangered species.⁸³ Moreover, they used real estate case studies to tout an "unequal application of the [ESA] between the East versus the West."⁸⁴ They claimed that listing, particularly designation of critical habitat, had three impacts on housing starts that found their way to consumers: costs were increased, output was reduced, and completion was

⁷⁹ See *The Endangered Species Act and the Roles of States, Tribes, and Local Governments: Hearing Before the Subcomm. on Fisheries, Wildlife, and Water of the S. Environment and Public Works Comm.*, 109th Cong. 3 (2005) (statement of Rep. Cory Gardner, Colorado).

⁸⁰ See Basilevac, *supra* note 28, at 177 n.21.

⁸¹ See *id.*

⁸² See, e.g., *Hearing on H.R. 2933, supra* note 50, at 28 (statement by Rep. Jim Gibbons, Vice Chairman, H. Comm. on Resources).

⁸³ *Id.* at 39 (statement of Rep. Stevan Pearce, Member, H. Comm. on Resources). Representative Pearce goes further to suggest that not only farmers, but extractive industries are at risk because listings enforce a moratorium on noise-making industries that could upset the breeding rituals of the lesser prairie chicken, concluding: "I wonder if maybe we should not be piping in Bolero or maybe some Vivaldi to help these poor chickens." *Id.*

⁸⁴ *Id.* at 169 (inquiry made by Rep. Dennis Rehberg, Member, H. Comm. on Resources).

delayed.⁸⁵ Indeed, during a hearing before the House Resources Committee in April 2004, panelists argued that listing had a chilling effect on property values.⁸⁶ In fact, they maintained that listing species under the ESA redlined property values,⁸⁷ and that “you can make a very strong general argument that environmental regulations are both driving up housing prices and . . . pushing consumers to more and more distant locations, forcing them to commute longer and longer distances to their jobs, which causes all kinds of other regional[,] economic[,] and environmental problems.”⁸⁸ The California bay area, a region which people regularly blamed average house prices in the mid-\$400,000s on environmental regulations,⁸⁹ provided fodder for many of these case studies.⁹⁰

Conversely, Environmentalists regularly dismissed these cases and instead touted the case of timber production and the northern spotted owl controversy. They pointed to the myriad factors involved in the decline in Douglas fir production in the 1980s, ranging from speculation in the timber market to increased timber imports from Canada. They highlighted a study showing that the relative affordability of a new house was driven more by demand for larger houses than by the unit cost of lumber, and that, *ceteris paribus*, additional listed species actually led to an increase in real estate industry performance.⁹¹

As with the cases marketed by the Rugged Individualists, these cases often substituted correlation for causation; they were anecdotal

⁸⁵ *Id.* at 45 (statement of David L. Sunding, Professor, University of California at Berkeley).

⁸⁶ *See id.* at 142 (statement of Rep. Dennis Cardoza, Member, H. Comm. on Resources).

⁸⁷ *Id.* at 52 (statement of Lawrence R. Liebesman, Esq., Holland & Knight, LLP).

⁸⁸ *Id.* at 79 (statement of David L. Sunding, Professor, University of California at Berkeley). Another complaint argued the link between ESA listing decisions, ballooning house prices, and the increasing incidence of adult children still living in their parents' home. *See id.* at 146 (statement of Michael F. Martini, Council Member, City of Santa Rosa, California).

⁸⁹ *See id.* at 147.

⁹⁰ Indeed, some research contends that the erosion of property values is more evident the more species are listed in any particular state, thus suggesting an explanation for the fiery opposition to the ESA emanating from California, as well as Texas. *See* Sayeed R. Mehmood & Daowei Zhang, *A Roll Call Analysis of the Endangered Species Act Amendments*, 83 AM. J. AGRIC. ECON. 501, 511 (2001).

⁹¹ *See* Stephen M. Meyer, *The Economic Impact of the Endangered Species Act on the Housing and Real Estate Markets*, 6 N.Y.U. ENVTL. L.J. 450, 466 (1998) (showing that the data reflects no harmful effect on real estate markets).

rather than evidentiary. Neither tribe could prove that its litany of legal, economic, or real estate cases added up to a genuine pattern.⁹² Instead, the tribes provided politically expedient explanations in the place of more fundamental and complex renderings of, for example, the market phenomena that drive real estate and housing starts up and down. Nonetheless, social entrepreneurs, people who have the networks and social standing to tip one perspective into an availability cascade, repeatedly referred to these cases as evidence of a larger trend.

A media that increasingly adopted a courtroom epistemology in its reporting and recycling of the debates aided these dynamics. In its search for a dramatic narrative, the media often presents dueling experts. Each side portrays competing case studies lending each case study equal weight. Absent a discernible difference in importance afforded to either case, the media only consolidated existing leanings in the general public.⁹³ This led to some mass media coverage of the ESA that confused rather than informed the public.⁹⁴ During the reauthorization debates, noisy cases supplanted salient evidence⁹⁵ in just such a manner, creating the enabling environment necessary to ignite competing availability cascades.

3. *What's in a Word?*

The importance of narratives and meta-anchors⁹⁶ plays a critical role in the ability of social entrepreneurs to tip a perspective into a cascade. Part of an effective narrative relies on framing information to draw attention to favorable elements of a problem while obscuring or minimizing others. Both tribes understood the ESA as a tangled web of intersecting and competing social values and economic

⁹² See N. Castree, Editorial, *The Epistemology of Particulars: Human Geography, Case Studies and 'Context'*, 36 GEOFORUM 541, 541 (2005).

⁹³ Cf. Maxwell T. Boykoff & Jules M. Boykoff, *Climate Change and Journalistic Norms: A Case-Study of US Mass-Media Coverage*, 38 GEOFORUM 1190 (2007) (explaining this phenomenon through the lens of climate change debates that pitted dueling scientists against each other, one representing the scientific consensus and the other representing a fringe opinion).

⁹⁴ See *Gazette and Tribune Coverage of Preble's Mouse Hearing Omitted Key Scientific Conclusion*, COLO. MEDIA MATTERS, Sept. 19, 2006, <http://colorado.media.matters.org/items/200609200002>.

⁹⁵ See Ted Williams, *Lynx, Lies, and Media Hype*, AUDUBON MAG., May 2002, at 25.

⁹⁶ A term used to capture the use of all-embracing metaphors employed by a mediator to set the tone for a negotiation. See David A. Lax & James K. Sebenius, *Anchoring Expectations*, NEGOTIATION (Harvard Bus. Sch., Boston, Mass.), Nov. 2004, at 11.

interests.⁹⁷ Both contested the nature and gravity of endangered species' problems, the dynamics underlying them, and their optimal solutions. As a result, both tribes wove very different narratives to campaign for and against wildlife in the ESA. These narratives defined the reauthorization debate differently, emphasizing either endangered species or endangered property owners.

The side that succeeds in elaborating a narrative that definitively describes the problem has an enormous advantage. The way people think about a problem shapes what they are willing to do about it, and a compelling definition can build coalitions and inspire leadership.⁹⁸ The Rugged Individualists were especially adept in the 1990s at crafting a narrative that was sufficiently idealist to appeal to the true believers, but not so extreme as to repel other potential supporters.⁹⁹ Veteran politicians from the Sagebrush Rebellion,¹⁰⁰ the county supremacy movement,¹⁰¹ and the property rights movement created the Alliance for America in 1991. Ultimately, the Alliance brought together over 400 groups to advocate for cornucopian values, individual freedoms, and economic growth using the tried and trusted rhetoric of the powerful American dread of federal government tyranny.¹⁰² Representative Richard Pombo, who has publicly supported the Alliance for America,¹⁰³ was effective at claiming to speak for the majority of Americans, emphasizing that "Congress never dreamed that [the ESA] would turn into a tool used by vocal and well-funded special interest groups seeking to impose court-ordered Federal land and water controls on the [use by a] majority of

⁹⁷ See generally Andrew Metrick & Martin L. Weitzman, *Patterns of Behavior in Endangered Species Preservation*, 72 LAND ECON. 1 (1996).

⁹⁸ See JUDITH A. LAYZER, *THE ENVIRONMENTAL CASE: TRANSLATING VALUES INTO POLICY* 3-9, 494 (2d ed. 2006).

⁹⁹ *Id.* at 346 (describing anti-environmental backlash of the 1990s).

¹⁰⁰ This conflict pitted ranchers, loggers, miners, and others in the Western United States against the federal government in a fight over the land, water, and mineral resources in the West. See *The Sagebrush Rebellion*, U.S. NEWS & WORLD REP., Dec. 1, 1980.

¹⁰¹ This movement brought together people who believed the U.S. federal government had no right to own land. See William Chaloupka, *The County Supremacy and Militia Movements: Federalism as an Issue on the Radical Right*, 26 PUBLIUS 161, 163 (1996).

¹⁰² See LAYZER, *supra* note 98, at 352.

¹⁰³ See 147 CONG. REC. E1377 (daily ed. July 20, 2001) (statement of Rep. Richard Pombo, Chairman, H. Comm. on Resources).

Americans.”¹⁰⁴ Representative Don Young captured the mood in his view of H.R. 3824 appended to the Bill:

For too long, the Endangered Species Act has been used not as a tool for protecting the environment but as a roadblock. The original intent of species protection has been lost by those eager to wield the ESA’s power for legal and bureaucratic ensnarement. The problems with the current Act ensure that it will remain primarily used in this dilatory role instead of its higher calling.¹⁰⁵

Though the Environmentalists were largely caught with their history down when a strong Rugged Individualist narrative first emerged, they soon rebounded by articulating the connections between community, cooperative resource management, civic engagement, and responsible citizenship common across landscapes.¹⁰⁶

In weaving their narratives, each tribe borrowed from historically resonant discourses that its constituencies took for granted.¹⁰⁷ These discourses built upon each of the divergent imaginings of the U.S. Origin Myth. Each narrative also included reference to two tenets of everyday life: religion and labor. Each tribe invoked a religious righteousness in its own image as part and parcel of its narrative. Some in the Rugged Individualist tribe heralded the end of species as signaling the coming of the Rapture, a highly anticipated end-of-days scenario described in the Bible in which Christians spontaneously ascend into heaven.¹⁰⁸ More broadly, this tribe acceded to God’s command in the Old Testament that mankind shall have dominion over nature to subdue it.¹⁰⁹ Conversely, religionists among the Environmentalists brought verses from a different Old Testament book, Ecclesiastes, to the Environmentalist narrative: “Man’s fate is like that of the animals; the same fate awaits them both: As one dies, so dies the other. All have the same breath. . . .”¹¹⁰ They identified

¹⁰⁴ *Hearing on H.R. 2933, supra* note 50, at 2 (statement of Rep. Richard Pombo, Chairman, H. Comm. on Resources).

¹⁰⁵ THREATENED AND ENDANGERED SPECIES RECOVERY ACT OF 2005, H.R. REP. NO. 109–237, at 113 (2005).

¹⁰⁶ Curt Meine, *Roosevelt, Conservation, and the Revival of Democracy*, 15 CONSERVATION BIOLOGY 829, 830 (2001).

¹⁰⁷ See Kinchy & Kleinman, *supra* note 69, at 872–73.

¹⁰⁸ See generally Bill Moyers, *There Is No Tomorrow*, STAR TRIB., Jan. 30, 2005.

¹⁰⁹ See *Genesis* 1:26–28.

¹¹⁰ *Ecclesiastes* 3:19; *Hearing on H.R. 2933, supra* note 50, at 157 (statement of Joseph K. Sheldon, Ph.D., Professor of Biology and Environmental Science, Messiah College)

the ESA as an act that bolstered the birthright of God's creatures, the curtailment of which would be blasphemous; after all, "[o]nly the creator has the right to determine when it is time to call a species home."¹¹¹

Each narrative also mirrored how blue- and white-collar work was valued differently.¹¹² Environmentalists equated extractive work with the liquidation of nature; conversely, they celebrated the virtues of recreation in nature.¹¹³ Meanwhile, Rugged Individualists saw extractive labor as a fulfillment of the American dream to work the land. Thus, each tribe articulated a clear labor divide that appealed to its constituencies. For example, Rugged Individualists marketed the divide as a war between those who worked for a living and the "privileged leisure class. . . . [of] quaint reactionaries . . . oblivious to the realities of the modern world."¹¹⁴

Each tribal narrative cemented a different imagining of the U.S. Origin Myth. They strongly diverged over different constructions of nature despite employing, to different ends of course, a shared language of social justice, environmental health, and cost-benefit asymmetries. In the face of these stark divides, as well as conflict over the value of expertise, evidence, and every word, tribes fomented terminal loyalties.¹¹⁵

C. Descent into Stereotype

Following competing cascades, the Environmentalists and Rugged Individualists became exclusive coalitions of albeit wide-ranging interests that represented urban and rural constituencies, and white- and blue-collar workers united for or against wildlife in the ESA reauthorization debates. These debates became increasingly divisive,

("As stated by theologian Steven Bouma Predager, all creatures are designed to sing the praises of God. . . . A focus only on human use, even if wise use, is a stunted viewpoint that fails to acknowledge intrinsic value in a world that is not of our making.")

¹¹¹ See *Hearing on H.R. 2933*, *supra* note 50, at 158 (statement of Joseph K. Sheldon, Ph.D., Professor of Biology and Environmental Science, Messiah College).

¹¹² Lynn White, Jr., *The Historical Roots of Our Ecologic Crisis*, 155 *SCI.* 1203, 1205 (1967).

¹¹³ Richard White, "Are You an Environmentalist or Do You Work for a Living?": *Work and Nature*, in *UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE*, *supra* note 20, at 171, 171.

¹¹⁴ *Id.* at 181.

¹¹⁵ See Cronon, *supra* note 36, at 52.

and arguments were polarizing.¹¹⁶ During testimony before the House Resources Committee, Defenders of Wildlife lamented that “[t]he greatest gift one generation leaves another is a better world.”¹¹⁷ They noted that the American “legacy has always included a deep and abiding appreciation for the natural world.”¹¹⁸ Environmentalists considered both this imagining of the U.S. Origin Myth and their preferred interpretation of the ESA to be at stake because their opponents, the Rugged Individualists, tend to “sacrifice tomorrow’s bounty for today’s gains.”¹¹⁹

As such, each tribe believed that a consensus reauthorization was improbable. Images, attitudes, and interpretations were reduced to the simplest common denominator. This led to a far-reaching loss of differentiation within each tribe, as seen from the outside. The feelings of unity and shared predicament were strong, further reducing the capacity to relate to the concerns and perspectives of the other. The tribes viewed each other as stereotypical, highly fixed, and very resistant to change, even in the face of new information.

Environmentalists imagined on the other side a convergence of economic forces wishing to be unrestrained by environmental regulations and evangelical Christians who believed in the imminence of the end times.¹²⁰ Environmentalists believed that for these individuals, the ESA was “the enemy.”¹²¹ They stereotyped their opponents as Cornucopians who interpreted nature as a wealth of assets to liquidate in the pursuit of progress. As the Rugged Individualists rallied around the flag of small government,¹²²

¹¹⁶ See Mehmood & Zhang, *supra* note 90, at 501.

¹¹⁷ See *Hearing on H.R. 2933*, *supra* note 50, at 73 (statement of Jamie Rappaport Clark, Executive Vice President, Defenders of Wildlife).

¹¹⁸ *Id.* Indeed, during testimony before the House Committee on Resources in April 2004, Representative Jay Inslee spoke of “this American value of keeping species around for our grandchildren,” *id.* at 22, and even Chairman Richard W. Pombo affirmed that saving species “is a moral value that we as Americans share,” *id.* at 167.

¹¹⁹ *Id.* at 72 (statement of Jamie Rappaport Clark, Executive Vice President, Defenders of Wildlife).

¹²⁰ See David W. Orr, *Rewriting the Ten Commandments of American Politics*, 15 CONSERVATION BIOLOGY 821, 821 (2001).

¹²¹ See *Hearing on H.R. 2933*, *supra* note 50, at 91 (statement of Steven E. Webster, Executive Director, Florida Marine Contractors Association).

¹²² Many Cornucopians contend that the federal government is overreaching in its protection of biodiversity at the expense of private property, citing the Fifth Amendment, U.S. CONST. amend. V; the 1918 Migratory Bird Treaty Act, 16 U.S.C. §§ 703–12 (1964) (originally enacted as Act of July 3, 1918, ch. 128, § 2, 40 Stat. 755); and the opinion in *Missouri v. Holland*, 252 U.S. 416 (1920). Conversely, in *Camfield v. United States*, 167

Environmentalists imagined that they refused to acknowledge even the entertainment value of saving nature, especially when, through the lens of the ESA, they so clearly recognized its inconvenience. Forests were lumber yards to feed the inexorable march towards greater civilization, not an obstacle to growth. And, there were no limits to growth, natural or otherwise, that human ingenuity could not overcome.

Conversely, Rugged Individualists imagined Environmentalists advocating the ESA as the last best place to prevent the rapacious liquidation of the planet, even at the expense of national development and national growth. They saw these tree huggers as a group that interpreted nature as something to revere, somewhere to pray and play. Rugged Individualists believed the Environmentalists to be self-assured and quixotic, articulating their interests as a higher form of rational and enlightened self-interest based on a belief that their prospects and those of nature were then and forever inextricably linked.¹²³ The Rugged Individualists believed them to think questions about both nature and the ESA were about figuring out the best way of doing what they already knew to be right and necessary.¹²⁴ To this end, the Rugged Individualists dismissed the tomes of literature and scientific data the Environmentalists amassed as a biased desire to shock everyone into action and instill the precautionary principle in everyday living.¹²⁵

Such images served an important role in providing each tribe with a sense of orientation to the other, giving them each a feeling of knowing what to expect. As such, the tribes actively exploited these images to enlist members from what was once the silent majority by consciously seeking to stage their confrontations in public. The media conveniently obliged. Tribes attacked the identity, attitude, behavior, position, and relationships of their counterpart. They

U.S. 518 (1897), and again in *United States v. Alford*, 274 U.S. 264 (1927), the Supreme Court held unequivocally that the federal government had the right to legislate biodiversity. See William S. Boyd, *Federal Protection of Endangered Wildlife Species*, 22 STAN. L. REV. 1289 (1970). In the 1969 Endangered Species Conservation Act, Pub. L. No. 91-135, 83 Stat. 275 (1969), Congress used the Interstate Commerce Clause, U.S. CONST. art. 1, § 8, cl. 3, to reinforce its ability to protect wildlife.

¹²³ Orr, *supra* note 120, at 823.

¹²⁴ David Ehrenfeld, *A Postscript to Orr's Commandments*, 15 CONSERVATION BIOLOGY 825, 825 (2001).

¹²⁵ See Richard White, *Environmental History, Ecology, and Meaning*, 76 J. AM. HIST. 1111, 1115–16 (1990).

presented the conflict as arising, not from opposing points of view, but from the very nature of their counterpart's character. For example, Representative Richard Pombo was not merely a proponent of injecting elements from the property rights and wise use movements into the ESA; rather, he was the epitome of the privileged fat cat who works to gut all environmental regulations in favor of small government and big profits. Likewise, Al Gore was not simply an advocate of increased environmental protection, but rather an exemplar of the urban, educated, and privileged set that promotes wholesale cultural genocide against rural Americans and their lifestyles.

III

INVENTING OPTIONS FOR MUTUAL GAIN

In the midst of stalemate, the ESA continued to list and delist species and designate critical habitat. This outcome was not optimal for either tribe. Limited funding left many listed species with no chance of real recovery. Limited assurances concerning enforcement dampened investment in private property. As a result of the seemingly intractable nature of this trench warfare, both sides championed several initiatives to break the stalemate. The Clinton administration amended the ESA in 1994 and 1995 to include two new policies, No Surprises¹²⁶ and, under the Ten Points of Light strategy, Safe Harbors.¹²⁷ Both of these policies provided regulatory relief to private landowners in an effort to increase their acceptance of the ESA.¹²⁸ Under the ESA, prior to these new policies, habitat conservation plans¹²⁹ included a provision for incidental take permits

¹²⁶ No Surprises Rule, 50 C.F.R. §§ 17.22, 17.32 (2008). In general, the No Surprises Rule assures landowners they will not be subject to further costs or restrictions on the use of their property to benefit the species without mutual consent after that landowner develops a habitat conservation plan.

¹²⁷ Safe Harbor Agreements and Candidate Conservation Agreements With Assurances, 50 C.F.R. §§ 17.22(b), 17.32(b). In general, safe harbor agreements are voluntary agreements that protect landowners from later penalty if they agree to conduct certain activities believed likely to increase the abundance of a listed species for a specified term of years.

¹²⁸ See, e.g., Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 279 (1998).

¹²⁹ Added to the ESA in 1982 under the new section 10(a), Pub. L. No. 97-304, 96 Stat. 1411 (1982) (codified as amended at 16 U.S.C. § 1539(a) (2006)).

on private lands.¹³⁰ These permits immunized private property owners from all liability arising out of any harm to the endangered species identified in the permit. More recently, the government enacted conservation banks and cost-share programs with nongovernmental organizations¹³¹ to incentivize conservation on private lands.¹³² The government intended these initiatives to move landowners from shooting, shoveling, and shutting up the species on their land to minimizing, mitigating, and managing damage to critical habitats.

Such initiatives signaled the federal government's recognition of its sometimes incompatible role to both develop and protect the natural resources on which its existence depends. They were also attempts to bridge tribal trenches, and in so doing, ease the tension between two fundamental tenets of several U.S. Origin Myths that coexist in the United States but clash in the ESA: that nature played an important role in the founding of the United States as both metaphor for greatness and resource base, and that the right to own and use property was a component of individual freedom integral to the writings of Thomas Jefferson and the Constitution. This duality was recognized in a section-by-section analysis of H.R. 3824, which was described as “[p]roviding such a mechanism [that] not only reflects the societal commitment to conservation of endangered and threatened species but also reduces the unintended and counterproductive consequence of devaluing private property through regulations.”¹³³

¹³⁰ The addition of Incidental Take Permits, similar to Clinton's later initiatives, was an attempt to end a decade-long battle over the privately owned habitat of an endangered butterfly on San Bruno Mountain in San Mateo, California. See NAT'L RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT 78 (Nat'l Acad. Press 1995).

¹³¹ For example, the Landowner Conservation Assistance Program was sponsored by Environmental Defense in the Texas Hill Country in 1999. See David S. Wilcove & Joon Lee, *Using Economic and Regulatory Incentives to Restore Endangered Species: Lessons Learned from Three New Programs*, 18 CONSERVATION BIOLOGY 639, 641 (2003).

¹³² Also providing incentives was section 13 of H.R. 3824, which provides for both conservation grants and conservation aid to private landowners. H.R. 3824, 109th Cong. (2005). According to the dissenting view of H.R. 3824, signed by Representatives Rahall, Markey, Pallone, Grijalva, Kind, Kildee, Udall, Udall, Miller, and Napolitano, together these programs would cost tens of millions of dollars a year and would amount to a new and potentially open-ended entitlement program for property developers and speculators. See STAFF OF H. COMM. ON RESOURCES, 109TH CONG., REPORT ON H.R. 3824 TOGETHER WITH ADDITIONAL AND DISSENTING VIEWS (Comm. Print 2005).

¹³³ THREATENED AND ENDANGERED SPECIES RECOVERY ACT OF 2005, H.R. REP. NO. 109-237, at 50 (2005).

The Western Governor Association's Enlibra Principles¹³⁴ and the Bush administration's Cooperative Conservation Initiative¹³⁵ (CCI) built yet more bridges. These initiatives were aimed at providing both tribes a voice in place-based problem sets to move decision making from communities with common interests to those with a common geography. CCI attempted to reverse the trend of litigation in environmental decision making by celebrating collaboration and public participation at the site level. It specifically directed federal agencies that oversaw environmental and natural resource policies and programs to promote conservation in full partnership with states, local governments, native tribes, and individuals.

But CCI also employed a narrative that revealed a preferred outcome in favor of Rugged Individualists. For example, though the public participation process envisioned by CCI mirrored the federal government's dual mandate to preserve and produce, the emphasis on "citizen-stewards" in the CCI appeared to place it firmly in the Rugged Individualists' construction of reality.¹³⁶ The Rugged Individualists saw the environment as a dynamic system, open for multiple uses, and necessitating the active involvement of private landowners. At first glance, this reflects Leopold's land ethic.¹³⁷ However, CCI also gave prominence to securing a dynamic economy, a central reason behind much of the administrative advocacy for CCI. This diverged from Leopold's construct; indeed, Leopold himself was quick to point out that a system of conservation solely concerned with economic self-interest is hopelessly lopsided and doomed to failure.¹³⁸ Similarly, the appeal to a "productive harmony with nature"¹³⁹ suggested a utilitarian take on nature. So too, did proselytizing the notion of "common sense conservation of the Nation's lands, waters and wildlife by people from every walk of life."¹⁴⁰ This suggested

¹³⁴ Western Governor's Association, *Enlibra: A New Shared Doctrine for Environmental Management*, Oct. 10, 1998, available at <http://www.uhuh.com/control/enlibra/enlib-qu.htm>.

¹³⁵ Exec. Order No. 13,352, 69 Fed. Reg. 52,989 (Aug. 26, 2004).

¹³⁶ See COUNCIL ON ENVIRONMENTAL QUALITY, *FACES AND PLACES OF COOPERATIVE CONSERVATION: PROFILES IN CITIZEN STEWARDSHIP* 15 (2005), <http://www.cooperativeconservationamerica.org/FacesPlacesPartOne.pdf>.

¹³⁷ See ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 201–26 (1949) ("[A]n ethic dealing with man's relation to land and to the animals and plants which grow upon it.").

¹³⁸ See *id.* at 203–04.

¹³⁹ See COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 136, at i.

¹⁴⁰ See *id.* at 2.

that the CCI wanted to simultaneously widen and wither science and expertise: widen to include a broader notion of expertise that was not Newtonian in design, but instead focused on the legitimacy of local knowledge over formal learning; wither by preferring to place greater weight on opinion and conjecture, “of ‘on-the-ground, in-the-dirt, everyday, nose-to-the-grindstone’ knowledge,”¹⁴¹ over scientific extrapolation and modeling.

This focus on building bridges between tribes was not a substitute for reauthorization. Sometimes the bridges served to dilute accountability and shifted the burden of implementation from regulatory to action agencies, and from government to private citizens.¹⁴² Sometimes these cooperative undertakings avoided tackling the most contentious problems, particularly the issue of compensation, as well as the role of science and consultation.¹⁴³ In effect, they satisfied different tribes at different times and in different spaces. The best that these efforts at deliberative democracy and participatory environmental decision making offered was a temporary truce on how to implement the ESA in certain circumscribed situations.

IV AN INEVITABLE RESOLUTION?

Despite their differences, both tribes are working to make the best of good-faith, bridging initiatives in order to co-opt greater and greater numbers of the general public. Though mostly rallied only in reaction to the flag of small government and private property flown by the Rugged Individualists, Environmentalists are increasingly effective at crafting a successful narrative that focuses on the reciprocal nature of the ESA. The Environmentalists advocate that we must know the value of what is obtained as well as the value of what must be sacrificed.¹⁴⁴ Understanding that preserving wildlife and wild lands is dependent on building a clientele for it,

¹⁴¹ U.S. DEP'T OF INTERIOR, COOPERATIVE CONSERVATION SUCCESS THROUGH PARTNERSHIPS 6 (2004), http://permanent.access.gpo.gov/websites/doigov/www.doi.gov/news/CoopConserv_PRINT.pdf.

¹⁴² For example, requiring citizens to obtain incidental take permits and develop habitat conservation plans. See Endangered Species Act § 10, 16 U.S.C. § 1539 (2006).

¹⁴³ See LAYZER, *supra* note 98, at 498.

¹⁴⁴ See generally Robin Attfield, *Existence Value and Intrinsic Value*, 24 ECOLOGICAL ECON. 163 (1998).

Environmentalists have been proactive at inculcating newer generations in a love for nature. The Environmentalists have also been successful at reorienting their narrative in the early twenty-first century to focus on human needs at human scales. They recognized early on that the planet will outlast us all and survive even our darkest doomsday scenarios. Thus, they propose that saving nature is a form of enlightened self-interest that resonates now, and not in an impossibly distant planetary future.¹⁴⁵

Meanwhile, Rugged Individualists are struggling to maintain cohesion in the face of a growing tendency of the general public to perceive them as they are caricatured by the Environmentalists. The main tenets of their narrative, asserting the primacy of common sense, defending private property, and protesting big government, are under assault everywhere as the Environmentalists deepen and widen the appeal of their own tenets. With the success of Barack Obama's presidential campaign, smart became cool again. The anti-intellectual sentiment embraced by the Republican Party and championed throughout the Bush presidency¹⁴⁶ was overthrown in the face of evidence elevating intellect and experience over loyalty and common sense.¹⁴⁷ President Obama referenced this sea change when he spoke at the Department of the Interior in March 2009 to dedicate a presidential memorandum that reaffirmed the role of consultation in ESA decision making as an effort to "help restore the scientific process to its rightful place at the heart of the Endangered Species Act, a process undermined by past administrations."¹⁴⁸

Similarly, the explosion in voices and stories decrying the pursuit of private wealth, including private property, at the expense of the public good has weakened the case made by the Rugged Individualists. This is especially true as the facts of climate change and the realities of disasters like Hurricane Katrina become commonplace, marking the need to elevate the public good over deleterious private decisions to pollute or build on unsuitable land.

¹⁴⁵ STEPHEN JAY GOULD, *EIGHT LITTLE PIGGIES: REFLECTIONS IN NATURAL HISTORY* 50 (1993).

¹⁴⁶ See generally Colleen J. Shogan, *Anti-Intellectualism in the Modern Presidency: A Republican Populism*, 5 *PERSP. ON POL.* 295 (2007).

¹⁴⁷ Michael Hirsh, *Brains are Back!*, *NEWSWEEK*, Nov. 7, 2008, <http://www.newsweek.com/id/168032>.

¹⁴⁸ Transcript, *Obama Celebrates the Interior Department's 160th Anniversary*, *WASHINGTONPOST.COM*, Mar. 3, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/03/AR2009030302316.html>.

The bailout of Wall Street firms and the anger engendered over the AIG bonus controversy only served as yet another sharp counter to Rugged Individualists who continued to push for private gain over the public good.¹⁴⁹ Crashing home prices, blamed no longer on environmental regulation but on a speculative bubble, helped to further undermine the suite of Rugged Individualists' go-to case studies.

Rugged Individualists have also seen their small government narrative ring hollow following the events of September 11, 2001. With the consequent wars in Afghanistan and Iraq, big government was no longer seen as the bogeyman it once was. The Patriot Act¹⁵⁰ only strengthened arguments against the inviolability of individual freedoms and, with it, of private property. The *Kelo v. New London*¹⁵¹ ruling, though disputed in several states, further limited the primacy of private property, and indeed pitted two tenets of the Rugged Individualist narrative against each other: the primacy of private property and the pursuit of private wealth.

In addition to narrative dissonance, other changes assailing Rugged Individualists have only further weakened their cause. The nonconsumptive service industry is quietly replacing the consumptive manufacturing interests that have long provided deep pockets for Rugged Individualists and many in their ranks. In addition, the dynamics of internal migration in the United States have seen Environmentalists on the move, flocking westward to the previous strongholds of the Rugged Individualists.¹⁵² After all, in the United States, appreciation for wild nature is, ironically, most firmly rooted among the urban and suburban peoples who, unlike the pioneers of old¹⁵³ and the Rugged Individualists of today, are least likely to face

¹⁴⁹ See James Oliphant, *The AIG Bailout: Outrage Over Bonuses*, L.A. TIMES, Mar. 20, 2009, at A1; Brady Dennis & David Cho, *Rage at AIG Swells As Bonuses Go Out: Fed Decided Payouts Couldn't Be Stopped*, WASH. POST., Mar. 17, 2009, at A1.

¹⁵⁰ United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

¹⁵¹ *Kelo v. New London*, 545 U.S. 469 (2005).

¹⁵² See Joseph P. Ferrie, *Internal Migration*, in 1 HISTORICAL STATISTICS OF THE UNITED STATES: MILLENNIAL EDITION 489, 489 (Susan B. Carter et al. eds., 2006). Western and mountain states in particular have seen increased in-migration from other regions. The same is true for increased in-migration in the south Atlantic region, another previous stronghold of the Rugged Individualist.

¹⁵³ Perhaps best parsed by Daniel Boone, in whose 1784 autobiography wrote of the "howling wilderness" and its readiness for conversion, thus capturing the dominant

its harsh realities. Indeed, this idealization of a life closer to nature¹⁵⁴ is the hallmark of the educated and urban middle classes that are increasingly moving west. By contrast, as rural livelihoods become more constrained, the cities and the suburbs swell with Rugged Individualists who nonetheless remain swamped by Environmentalists.

Finally, the current economic crises have produced an exhaustion with business as usual among the public at large. Indeed, as early as the summer of 1995 when some Republicans¹⁵⁵ broke ranks with the Contract with America over its environmental implications, the Rugged Individualist tribe was beginning to fracture into a less coherent hodgepodge of rugged individuals.¹⁵⁶ Partially a perfect storm of cause and symptom, increasing gas prices and a deep recession have pushed people to step off the treadmill of consumption in favor of a more sustainable and affordable lifestyle.¹⁵⁷ These people have turned towards the Environmentalists. What had seemed like doomsday scenarios only ten years earlier suddenly appear prophetic. The tomes of information gathered by Environmentalists to teach temperance suddenly resonate more strongly in a changing world marked by an increasingly out-of-touch Rugged Individualist philosophy.

Also failing are attempts to use the current economic crisis as a wedge to force Congress to respond with growth-at-any-cost measures. Rugged Individualists decried language in the Omnibus

antipathy displayed by many pioneers despite a smattering of appreciation for nature's beauty found here and there. See NASH, *supra* note 19, at 63.

¹⁵⁴ See *id.* at 51.

¹⁵⁵ See LAYZER, *supra* note 98, at 365 (listing Representative Jim Saxton from New Jersey, Representative Sherwood Boehlert from New York, and Representative John Chafee from Rhode Island).

¹⁵⁶ As late as November 2004, Rugged Individualists were still claiming cohesion and victory at the state and local levels, as happened following the approval of Measure 37 in Oregon, a ballot initiative petition entitled "Governments Must Pay Owners, or Forgo Enforcement, When Certain Land Use Restrictions Reduce Property Value." See BILL BRADBURY, VOTERS' PAMPHLET VOL. 1—STATE MEASURES 103 (mandating that state and local governments compensate property owners for any reduction in the value of their land), available at <http://oregonvotes.org/nov22004/guide/pdf/vpvol1.pdf>.

¹⁵⁷ In the theory of sustainable development, an ideal model of sustained sufficiency exists that places greater importance on quality of life than on standard of living. See Susan Baker et al., *Introduction: The Theory and Practice of Sustainable Development in EU Perspective*, in THE POLITICS OF SUSTAINABLE DEVELOPMENT: THEORY, POLICY, AND PRACTICE WITHIN THE EUROPEAN UNION, *supra* note 49, at 1, 23.

Spending Plan¹⁵⁸ that allowed the Obama administration to overturn the Bush administration's last minute changes to the ESA. They criticized this reversal as undermining recovery and working against job creation.¹⁵⁹ Nonetheless, the Rugged Individualists saw their attempts to remove the language voted down in the Senate. Furthermore, the Obama administration signed a public works stimulus package¹⁶⁰ into law in February 2009 that included a heavy focus on green building and green investments. Together, these circumstances temper an already waning fear of environmental regulation with a better understanding of the urgent need to tap into green entrepreneurship for jobs and economic growth, thereby turning even more people into Environmentalists. President Obama best summed up these changing beliefs as follows:

Throughout our history, there's been a tension between those who've sought to conserve our natural resources for the benefit of future generations and those who have sought to profit from these resources. But I'm here to tell you this is a false choice. With smart, sustainable policies, we can grow our economy today and preserve the environment for ourselves, our children, and our grandchildren.¹⁶¹

V

THE ENDANGERED SPECIES ACT: A PRIORITY FOR THE NEW CONGRESS?

America's fascination with nature has embedded it and the wildlife it sustains as central tenets of the U.S. Origin Myth. With this Myth came a conservation ethic that protected species at a reasonable cost. Soon, however, this conservation ethic was lost in translation as the tension between private rights and the public good was highlighted by ESA listing decisions that appeared to limit freedom of action on private property. In its place grew a silent majority buffered by interest and advocacy groups that fought over implementation of the ESA. Following the expiration of the Act's last reauthorization in 1992, the subsequent debates, coupled with competing availability

¹⁵⁸ Omnibus Appropriations Act, H.R. 1105, 111th Cong. (2009).

¹⁵⁹ See Press Release, Nat'l Ass'n of Mfrs., NAM Says Proposed Overturn of Interior Rule Will Delay Energy Development, Construction (Mar. 3, 2009), *available at* <http://news.thomasnet.com/companystory/557078>.

¹⁶⁰ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

¹⁶¹ See Transcript, *supra* note 148.

cascades and the success of the Republican Contract with America, provided the platform from which these groups engaged in a battle for the hearts and minds of that silent majority, constructing opposing tribes in the process. Sixteen years of fierce debate have enmeshed these tribes in trench warfare. Meanwhile, attempts to build bridges between them have amounted to battles lost and won, but the ESA reauthorization remains stalled.

The unresolved debate notwithstanding, there is some evidence to suggest that Rugged Individualists may be losing the war. They are fracturing because of a failing narrative that has been exposed under the harsh light of external events as well as the internal migration of people and ideas that favor the Environmentalist cause. Nonetheless, Environmentalists are no closer to actually reauthorizing the ESA in favor of nature. However, the rapid reversal of the Bush administration rule change under the Obama administration suggests that the ESA will be a strong champion of wildlife and wild lands, with or without actual Congressional reauthorization to that effect. This leaves the new administration and new Congress room to focus on other environmental priorities. All of this may very well forecast another imagining of the U.S. Origin Myth that is predicated not on the virgin frontier or its domestication, but on the essential value of wildlife and wild lands to yet another American century.