

ARTICLES

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Lessons for Climate Change Reform from Environmental History: 19th Century Wildlife Protection and the 20th Century Environmental Movement

Introduction	3
I. State Wildlife Laws of The Late 19th Century.....	7
A. Background	7
B. Factors Contributing to Enactment of State Wildlife Laws	10
1. Changes in Philosophy	11
2. Demographic Changes and the End of the Frontier	14
3. The Role of Organized Groups.....	16
C. Challenges to State Wildlife Laws	18
1. Legal Challenges	19
2. Local Opposition and Problems with Enforcement....	20
II. The Environmental Reform Movement in 1969.....	23
A. Background	23

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1.	Air Pollution Control—An Early Response to a Toxic Environment.....	23
2.	1969—The Year of Ecology	26
B.	Popular Perception of the Need for Legal Environmental Protection.....	28
1.	Public Awareness of the Pollution Problem.....	29
2.	Influential Interest Groups.....	30
3.	Bipartisan Support.....	32
III.	Comparing the 19th Century Wildlife Movement with the 20th Century Environmental Movement	37
A.	The Role of Interest Groups	38
B.	Philosophy and Reform Vocabulary	40
C.	Public Perception and Media Coverage	42
IV.	History's Lessons and Climate Change.....	44
A.	Interest Groups & Climate Change	46
B.	Environmental Opposition & Media Framing.....	49
	Conclusion.....	53

The prospect of national climate change legislation currently seems dim, but protective legislation for the natural environment has not always been out of reach. State wildlife laws of the 19th century demonstrated that concerted action could persuade state legislatures to shift away from the fundamental paradigm of unregulated hunting when the declining populations of many species caused public alarm. Nearly a century later, in 1969, several high-profile incidences of acute pollution occurred, and a widespread environmental movement blossomed that prompted a previously indifferent President to champion the call for environmental policy. If this pattern held true, unusually strong storms or wildfires of increasing frequency and intensity in recent years should have generated public support for legislation to combat climate change. However, climate change reformers in the 21st century have not been able to convince Congress to seriously consider remedial legislation. This Article explores the factors that contributed to the success of the 19th century state wildlife movement and the 20th century environmental movement in order to better understand what climate change reform efforts may be missing.

INTRODUCTION

Environmental crises have historically prompted widespread public support for new environmental protections.¹ For example, exhaustion of wild game populations in the 19th century provoked public support for state laws to guard against extinction.² A century later, the Santa Barbara oil spill and the Cuyahoga River fire led Congress to enact the National Environmental Policy Act (NEPA).³ Support for NEPA cut across party lines.⁴ Today, however, the prospect of lawmakers addressing environmental issues in a bipartisan way seems dim.⁵ Hurricane Sandy failed to produce broad public support for comprehensive climate change legislation.⁶ Instead, the legislative response involved only reactive efforts seeking to ensure proper emergency management and cleanup funding.⁷ Apparently, by itself,

¹ See Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 91 (2001).

² See, e.g., JAMES A. TOBER, WHO OWNS THE WILDLIFE?: THE POLITICAL ECONOMY OF CONSERVATION IN NINETEENTH-CENTURY AMERICA 69 (1981) (describing the near extinction of white-tailed deer in Vermont by 1860). Vermont passed a law prohibiting deer hunting for 10 years in 1865. 1865 ACTS AND RESOLVES OF VERMONT 262.

³ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2012) [“NEPA”]. NEPA passed the United States Senate by unanimous vote on July 10, 1969. 115 Cong. Rec. 19013 (July 10, 1969). NEPA was signed into law on January 1, 1970. Pub. L. No. 91-190, 83 Stat. 852 (1970).

⁴ See, e.g., Coglianese, *supra* note 1, at 96 (describing Republican President Richard Nixon’s efforts to be seen as a champion of the environment to counter Democratic Senator Edmund Muskie’s likely presidential bid in 1972).

⁵ See, e.g., Hari M. Osofsky, *Diagonal Federalism and Climate Change Implications for the Obama Administration*, 62 ALA. L. REV. 237, 239 (2011) (discussing political obstacles to climate change legislation like problems with public support for emissions reductions and structural difficulties integrating local, national, and international participants).

⁶ Hurricane Sandy caused significant damage to all U.S. states on the Eastern seaboard and several Caribbean nations. See ERIC S. BLAKE ET. AL., NAT’L OCEANIC AND ATMOSPHERIC ADMINISTRATION, TROPICAL CYCLONE REPORT: HURRICANE SANDY 1–2 (2013), available at http://www.nhc.noaa.gov/data/tcr/AL182012_Sandy.pdf. The governor of New York attributed severe weather events such as Sandy to climate change, imperiling the financial stability of the state. See Thomas Kaplan, *State Tells Investors That Climate Change May Hurt Its Finances*, N.Y. TIMES, May 27, 2013, at A20.

⁷ See Amendment–National Flood Insurance Act, Pub. L. No. 113-1, 127 Stat. 3 (2013) (providing an example of a bill to temporarily increase the borrowing authority of the Federal Emergency Management Agency for carrying out the National Flood Insurance Program).

an environmental disaster no longer automatically includes public demand for environmental legislation.⁸

The bleak state of contemporary affairs is not the historical rule. In the late 1880s, the extinction of the passenger pigeon and near-extinction of bison shattered the American public's belief in the infinite nature of natural resources.⁹ Among the advocates for legal reform were a group of hunters, popularly known as "sportsmen," who campaigned to end the mass killing by commercial hunting enterprises.¹⁰ Commercial hunting of species such as the buffalo often led to rapid destruction of wild populations.¹¹ Cultural factors, including an appreciation of experiencing what Americans perceived to be a fast-disappearing wilderness frontier, may explain the 19th century impetus to protect wildlife and habitat.¹²

Sportsmen influenced legal protection for both "game" and "nongame" animals at a state level.¹³ But support for protecting wildlife was not limited to the cultural elite.¹⁴ Rural farmers living on the land had an interest in preserving wildlife as a way of life. As city-dwellers sought access to rural landscapes to pursue recreational hunting, the costs of hunting rose and new tourist interests developed.¹⁵ Wildlife laws of the late 19th century reflected a series of compromises between the existing rural population gathering sustenance from the land and the economic influence produced by the influx of urban sportsmen.¹⁶ The wildlife laws advanced by sportsmen

⁸ Before Hurricane Sandy, a majority of the American public surveyed did not believe climate change would cause problems in their lifetime. Frank Newport, *Americans' Worries About Global Warming Up Slightly*, GALLUP (Mar. 30, 2012), <http://www.gallup.com/poll/153653/Americans-Worries-Global-Warming-Slightly.aspx>.

⁹ See JAMES B. TREFETHEN, *AN AMERICAN CRUSADE FOR WILDLIFE* 130 (1975). By 1900 only roughly 20 bison existed in the wild. TOBER, *supra* note 2, at 102. The last known passenger pigeon died in the Cincinnati Zoo on September 1, 1914. See JOHN F. REIGER, *AMERICAN SPORTSMEN AND THE ORIGINS OF CONSERVATION* 94 (3d ed. 2001).

¹⁰ REIGER, *supra* note 9, at 95–96.

¹¹ See, e.g., TOBER, *supra* note 2, at 101.

¹² See FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* 2–3 (1920) [hereinafter *FRONTIER*]; Stephen D. Blackmer, *Of Wilderness and Commerce: A Historical Overview of the Northern Forest*, 19 VT. L. REV. 263, 267 (1995) (explaining the cultural appreciation of nature emerging in the 19th century).

¹³ REIGER, *supra* note 9, at 95–96.

¹⁴ RICHARD W. JUDD, *COMMON LANDS, COMMON PEOPLE: THE ORIGINS OF CONSERVATION IN NORTHERN NEW ENGLAND* 198 (1997).

¹⁵ *Id.* at 210.

¹⁶ *Id.* at 198.

in the states coalesced into a new cultural temperament toward controlling wildlife as a natural resource.¹⁷

Three-quarters of a century after the U.S. Supreme Court upheld the constitutionality of state wildlife laws,¹⁸ environmental issues again captured public attention—encouraged by substantial media exposure across the nation.¹⁹ The booming popularity of color television broadcasting brought the oil-slicked beaches in California into millions of homes across the United States.²⁰ Alarmed by the Santa Barbara and Cuyahoga River disasters,²¹ the public identified resolution of environmental issues as critical to public safety.²² Public awareness of environmental problems led to organized movements advancing legislation to remedy these ills.²³ The crises of 1969 illustrated the urgency of the environmental problem, provoking public demand for swift action.²⁴ The national media carried same-day news coverage of the environmental disasters, leading to broad public awareness, perhaps accounting for the sweeping and fairly sudden demand for legal reform at a federal level.

Throughout American history, changes in public attitude have prompted changes in environmental policy.²⁵ When public attention focuses on the limits to finite natural resources, that concern usually

¹⁷ See Michael E. Field, *The Evolution of the Wildlife Taking Concept from Its Beginning to Its Culmination in the Endangered Species Act*, 21 HOUS. L. REV. 457, 467–68 (1984) (citing state wildlife laws as forerunners of wildlife federal laws).

¹⁸ *Geer v. State of Connecticut*, 161 U.S. 519 (1896) (holding that a Connecticut law forbidding the transport of lawfully captured wildlife within the state was constitutional based upon the state ownership doctrine).

¹⁹ See, e.g., Coglianese, *supra* note 1, at 95 (“[F]rom 1968 to 1970 . . . press coverage of the environment in the New York Times quadrupled . . .”).

²⁰ See RICHARD N.L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 224 (2d. ed. 2006).

²¹ See WALTER A. ROSENBAUM, *THE POLITICS OF ENVIRONMENTAL CONCERN* 64 (1973).

²² Coglianese, *supra* note 1, at 91.

²³ See Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law’s First Three Decades in the United States*, 20 VA. ENVTL. L. J. 75, 79 (2001).

²⁴ *Id.* Of course, there was a considerable amount of federal legislation affecting the environment before NEPA. See KARL BOYD BROOKS, *BEFORE EARTH DAY: THE ORIGINS OF AMERICAN ENVIRONMENTAL LAW, 1945-1970* at 6–7, 14 (2009).

²⁵ ANDREWS, *supra* note 20, at 107–08.

generates demand for protective policies.²⁶ The preservation impulse informed the wildlife laws of the 19th century, when sportsmen zealously advocated for protections to ensure wildlife would be viable for future generations.²⁷ The same impulse informed the passage of NEPA: demand for expending limited natural resources wisely.²⁸ In both instances, the advocates clearly understood and communicated the need for immediate legal protections. Historically, when the public was aware of the need to take affirmative action to preserve natural resources for future use, preservation seemed to strike a chord resonating beyond partisan politics.²⁹

These historic environmental moments may provide lessons to environmental advocates seeking to advance climate change legislation in the 21st century. Understanding the underlying preservation efforts that state wildlife reformers advanced nearly a hundred years before the environmental decade of the 1970s helps explain the latent public interest that blossomed suddenly in 1969.³⁰ Broad public support was essential to the success of environmental reforms of the 1970s. This Article explores the factors that influenced support for environmental reforms, like state wildlife laws and NEPA, with the aim of drawing some lessons for today's reformers seeking effective laws to combat climate change.

This Article examines the efforts that produced the wildlife protection statutes of the late 19th century, and the dawn of the modern environmental movement in 1969. Section I provides background information on state wildlife laws during the 1870s and

²⁶ *See id.* at 237. Just as modern environmental laws do not protect against all pollution, early wildlife laws had shortcomings as well. *See, e.g.*, THOMAS R. DUNLAP, *SAVING AMERICA'S WILDLIFE* 8–18 (1988) (discussing the general failure of the early wildlife laws to recognize the ecological importance of predator species).

²⁷ REIGER, *supra* note 9, at 92.

²⁸ The Senate Committee report on NEPA explained that action was needed to address the issues regarding “air, water, soil and living space” and identifying the “environmental situation” a cause for action. 115 Cong. Rec. 19011 (daily ed. July 10, 1969) (statement of Sen. Jackson ordering print of the committee report). “The evidence requiring timely public action is clear. The Nation has in many areas overdrawn its bank account in life-sustaining natural elements.” *Id.* at 19012.

²⁹ *See, e.g.*, Coglianese, *supra* note 1, at 103 (describing the public response to Regan-era cutbacks in protective environmental policy during 1988 to through the early 1990s, including increased membership in environmental organizations, American's increased comfort labeling themselves as “environmentalists,” and President Clinton's refusal to sign two budget bills that environmentalists labeled as destructive to public health, as evidence illustrating latent widespread support for environmental protections).

³⁰ *See Lazarus, supra* note 23, at 79.

1880s. This section focuses on the major changes in public thinking toward wildlife that occurred during the late 19th century as well as cultural factors, like the “end of the frontier” thinking that coincided with the movement to protect wildlife. Section II provides background on the events in 1969 that caused a sudden resurgence of interest in environmental issues, examining the role of media and organized social groups in the environmental movement of 1969 and explaining how it quickly prompted widespread cultural appreciation for the environment. Section III focuses on the similarities and differences between these two reform movements, including the different roles of media in the reforms and the common identification of bad actors. This Article concludes that both the state wildlife law movement in the late 19th century and the more recent environmental legal reform efforts demonstrate that the underlying cultural appreciation of nature and ties to broader shifts in cultural thinking can provoke significant changes in public attitude toward a conservation perspective. However, the changing role of media, organized opposition, and general cultural apathy seem to currently prevent climate change legislation from happening.

I

STATE WILDLIFE LAWS OF THE LATE 19TH CENTURY

In the late 19th century, developments in technology and changes in demographics increased the efficiency of market hunters to the point that many species faced existential threats. Changes in cultural appreciation for nature and the need for an increased role in managing the environment created conditions favorable to groups interested in protecting wildlife. These groups successfully lobbied for protective legislation. But the change to the status quo the wildlife laws represented was radical and further efforts to enforce the laws were necessary. This section examines the factors that contributed to the success of the movement to save wildlife.

A. Background

North Americans hunted wildlife as long as 40,000 years before European settlers arrived.³¹ The sheer expanse of the landscape, the variety, and the quantity of wildlife on the North American continent

³¹ See Field, *supra* note 17, at 464.

inspired a “free take” system adopted by the colonies.³² Historian William T. Hornaday characterized wildlife in the first half of the 19th century by saying:

‘Abundance’ is the word with which to describe the original animal life that stocked our country, and all North America Throughout every state, on every shore-line, in all the millions of fresh water lakes, ponds, and rivers, on every mountain range, in every forest, and even on every desert, the wild flocks and herds held sway. It was impossible to go beyond the settled haunts of civilized man and escape them.³³

The prevailing attitude was that natural resources, such as wildlife, were inexhaustible and were created for human use.³⁴ At the same time, the expanding population in the United States in the early 19th century to unsettled areas made hunting restrictions, like the English system, undesirable.³⁵ The Constitutional Court of Appeals of South Carolina’s decision in *McConico v. Singleton*³⁶ reflected the importance of hunting on unenclosed lands, citing the right to hunt on unenclosed private lands as a fundamental notion attributable to the founding notions of the country.³⁷ Elsewhere along the American frontier, the system of “free taking” was encouraged by legislative silence or presumptions against trespass that affirmatively encouraged hunting.³⁸

³² See WILLIAM T. HORNADAY, OUR VANISHING WILDLIFE: ITS EXTERMINATION AND PRESERVATION 1 (1913).

³³ *Id.*

³⁴ See TOBER, *supra* note 2, at 10–11 (citing, as an example, THOMAS EWBANK, THE WORLD A WORKSHOP, OR THE PHYSICAL RELATIONSHIP OF MAN TO THE EARTH 1855).

³⁵ See Field, *supra* note 17, at 465 (“The sheer press of human numbers on the new continent also made regulated taking impractical.”).

³⁶ *McConico v. Singleton*, 9 S.C.L. 244 (S.C. Constitutional Ct. App. 1818).

³⁷ *Id.*

³⁸ See THOMAS LUND, AMERICAN WILDLIFE LAW (1980); Thomas Lund, *Nineteenth Century Wildlife Law: A Case Study of Elite Influence*, 33 ARIZ. ST. L.J. 935, 941–42 (2001) [hereinafter *Nineteenth Century Wildlife Law*]

[W]ildlife could feed and clothe the masses, and even create great fortunes. American conditions demanded that the resource be applied to survival and to the production of wealth, not to the amusement of gentlemen. As a consequence, American law, by its silence, affirmatively implemented a policy of free taking. The English ‘qualification laws’ were simply rejected as inapplicable the new American conditions.

Throughout the 19th century, hunting wildlife was economically important for subsistence and commercial purposes.³⁹ The meat gathered by hunting wildlife was a significant part of the American diet until the 1880s.⁴⁰ Wildlife skins and furs were also valuable commodities.⁴¹ As a result, the incentive to hunt wildlife was strong.⁴² These factors combined to create a dangerous policy in the expanding United States—the biggest wildlife capture produced the largest economic reward.

The unregulated commons of forests and wild places around the United States soon resulted in areas where wildlife abundance became wildlife scarcity because hunters' immediate financial concerns led to unsustainable overharvesting of the animals they killed.⁴³ Beginning as early as the mid-17th century in settled areas on the East Coast, but becoming more widespread in the late 19th century, the inevitable effects of overexploiting the wildlife commons became clear to some American localities.⁴⁴ By the late 1850s, concern over increasing scarcity of wildlife prompted sportsmen to begin to call for legislative action in the states.⁴⁵ Although some states enacted wildlife laws in the 1850s, the restrictions imposed by these early laws were lax, and enforcement was poor or non-existent.⁴⁶ Maryland, Wisconsin, Ohio, Massachusetts, Maine, Pennsylvania, Alabama, and Virginia all passed wildlife laws during this period, reflecting an intent to tighten restrictions and increase enforcement.⁴⁷ This movement continued

³⁹ See TOBER, *supra* note 2, at 14; *see also*, JUDD, *supra* note 14; *see also* *Nineteenth Century Wildlife Law*, *supra* note 38, at 939 (“Sport’s campaign was won by banning subsistence and commercial use of wildlife..”).

⁴⁰ *Id.*

⁴¹ *See id.* at 14–15.

⁴² *See id.* at 4–7.

⁴³ *See* Field, *supra* note 17, at 466–67 (identifying a Rhode Island seasonal hunting closure in 1646 as an early indication of the propensity for the unregulated commons to be overhunted). The situation was another example of the so-called tragedy of the commons. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

⁴⁴ *See* Field, *supra* note 18, at 467 (attributing state and territorial wildlife regulation to growing awareness of the depletion of previously abundant wildlife populations).

⁴⁵ REIGER, *supra* note 9, at 41–43; *see also* TOBER, *supra* note 2, at 17 (noting the failure of an 1857 Ohio bill to protect the passenger pigeon).

⁴⁶ *See* *Nineteenth Century Wildlife Law*, *supra* note 39, at 940.

⁴⁷ *See* REIGER, *supra* note 9, at 43 (listing the states that had passed laws in the 1850s in this order).

until at least 1860.⁴⁸ Growing concern over protecting wildlife may have spread to all the states and territories during the 1860s, but the nation was caught in the grips of the slavery debate and the ensuing Civil War.⁴⁹

The Civil War and its aftermath occupied national attention for most of the 1860s. It was not until the war ended that the issue of wildlife protection once again rose in public discourse. After the Civil War, the combination of the wide availability of carbine repeating rifles, the expansion of railroads into the West, and new refrigeration techniques increased the amount of wildlife that commercial hunters could harvest at once.⁵⁰ By 1870, some species became scarce or extinct.⁵¹ Beginning in 1871, sportsmen groups used the printing press to circulate newspapers that would bring attention to their cause and shape a coherent agenda.⁵² The proponents of wildlife protection garnered support in this decade.⁵³ By 1880, all states and territories passed laws limiting hunting of the remaining wildlife.⁵⁴

B. Factors Contributing to Enactment of State Wildlife Laws

Early state wildlife laws arose from an American psyche that was coming to grips with limits. Enactment of state wildlife laws in the 1870s and 1880s foreshadowed Frederick Jackson Turner's theory that the end of the frontier would signal a divide with early United States history enunciated in 1893.⁵⁵ The state wildlife laws of the 1870s and 1880s foreshadowed Turner's conclusion in 1893. The state wildlife laws may have been an early response to the newly discovered limits of a nation with a population that had grown beyond

⁴⁸ In 1860, New York passed a law called "An act for the Preservation of Moose, Wild Deer, Birds and Fish." Henry H. Havens, *General Index of the Laws of the State of New York, 1858–1865, Inclusive* 307 (Weed, Parsons & Co., 1866).

⁴⁹ See generally REIGER, *supra* note 9, at 44 (implying that the efforts were interrupted by the Civil War).

⁵⁰ See TOBER, *supra* note 2, at 99–100, 199; DUNLAP, *supra* note 26, at 6–7.

⁵¹ See TOBER, *supra* note 2, at 99–102; see also Michael C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Willdlife*, 35 ENVTL. L. 673, 690 (2005) (summarizing the mass killings by citing TOBER, *supra* note 2, at 74–75).

⁵² See REIGER, *supra* note 9, at 59.

⁵³ See DUNLAP, *supra* note 27, at 6–7.

⁵⁴ See Field, *supra* note 18, at 467–68 ("Because of this growing awareness, the states and territories began to enact wildlife regulations. Every state and territory had passed some form of fish or game legislation by 1880.").

⁵⁵ See FRONTIER, *supra* note 13, at 9.

what the wild landscape could support. Widespread wildlife scarcity emerged at the same time urban markets offered wild game at relatively inexpensive prices in the 1860s and 1870s.⁵⁶ Advocates for legal reform had a clear enemy—market hunters. Further, they had a clear solution—imposition of strict limits to end the commercial wildlife slaughter. Although the advocates who advanced the state wildlife laws of the 1870s have been criticized as self-serving elitists,⁵⁷ they nevertheless succeeded in producing legal reform that played a critical role in the preservation of wildlife in the United States.⁵⁸

1. Changes in Philosophy

The social movement to pass state wildlife laws in the 1870s coincided with a shift in public opinion generally—from resource disposition to resource conservation and preservation.⁵⁹ The philosophical connection to nature reflected in literature of the late 19th century also shows how public attitude shifted toward accepting the idea of state wildlife laws regulating hunting.⁶⁰

In 1864, George Perkins Marsh advocated a utilitarian perspective in *Man and Nature*.⁶¹ Marsh served as a foreign diplomat for President Lincoln and as an aid to the Governor of Vermont; he was considered a reputable public figure.⁶² His observations about resource exploitation—and the transformative effect on the landscape of conversion to agricultural uses, leading to arid and unfertile soil—demonstrated the damaging and self-defeating consequences of overuse.⁶³ Marsh expressed some concern for the native deer and

⁵⁶ See TOBER, *supra* note 2, at 76–77.

⁵⁷ See, e.g., *Nineteenth Century Wildlife Law*, *supra* note 39, at 938–39.

⁵⁸ See *id.*

⁵⁹ See, e.g., REIGER, *supra* note 9, at 68 (explaining that Theodore Roosevelt and Gifford Pinchot came late to the conservation movement that had been afoot since the beginning of the enactment of the state wildlife laws in the 1870s).

⁶⁰ See generally Blackmer, *supra* note 12, at 267 (“This growing awareness was epitomized by Henry David Thoreau’s journeys to the North Woods of Maine beginning in the late 1830s.”).

⁶¹ See GEORGE PERKINS MARSH, *MAN AND NATURE* (1864); see DAVID LOWENTHAL, *GEORGE PERKINS MARSH, PROPHET OF CONSERVATION* 302–04 (2000).

⁶² Paul S. Gillies, *Crossing the Tracks*, 34 VT. B.J. 16, 16 (2009); LOWENTHAL, *supra* note 61, at 218.

⁶³ See e.g., TOBER, *supra* note 2, at 13.

bison⁶⁴ and some qualified, yet biting, criticism about human-caused extirpation of wild birds.⁶⁵ His comments on wildlife seemed to support his larger theme that humans have an effect on their environment and may change the landscape only to a limited degree before man-made change produces fundamental and potentially irreversible degradation of the environment.⁶⁶

The growing cultural sensitivity to nature that arose at the same time that wildlife conservation laws became widespread suggests a large portion of the population—broader than just hunters and fishermen—approached the problem of dwindling wildlife populations with an appreciation of the intrinsic, as well as economic, value of wildlife. Henry David Thoreau and Ralph Waldo Emerson expressed a romanticized connection between humans and nature in their literary works.⁶⁷ In 1871, Charles Darwin challenged established

⁶⁴ See Marsh, *supra* note 61, at 76.

Although man never fails greatly to diminish, and is perhaps destined ultimately to exterminate, such of the larger quadrupeds as he cannot profitably domesticate, yet their numbers often fluctuate, and even after they seem almost extinct, they sometimes suddenly increase, without any intentional steps to promote such a result on his part.

⁶⁵ *Id.* at 84.

[E]xperience shows that when not protected by law, by popular favor or superstition, or by other special circumstances, [birds] yield very readily to the hostile forces of civilization, and, though the first operations of the settler are favorable to the increase of many species, the great extension of rural and mechanical industry is, in a variety of ways, destructive to tribes not directly warred upon by man.

Marsh also noted that “though we have no evidence that man has exterminated many species of birds, we know that his persecutions have caused their disappearance from many localities where they once were common, and greatly diminished their numbers in others.” *Id.* at 86.

⁶⁶ Marsh described the decline of the pigeon in the United States by saying,

[A]t the present day, the net and gun have so reduced its abundance, that its appearance in large numbers is recorded only at long intervals, and is never seen in the great flocks remembered by many still living observers as formerly very common. False Man both preys upon them and wantonly destroys them. The delicious flavor of game birds, and the skill implied in the various arts of the sportsman who devotes himself to fowling, make them favorite objects of the chase, while the beauty of their plumage, as a military and feminine decoration, threatens to involve the sacrifice of the last survivor of many once numerous species.

Id. at 85. Marsh popularized the notion that subjugation of the land to human purposes could lead the decline of the environment. *Id.*

⁶⁷ RALPH WALDO EMERSON, NATURE (1836); see Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1146–47 (2010).

notions of animals as beasts without thought or feeling.⁶⁸ This notion, combined with the increasingly popular study of natural history, exemplified by the paintings of James Audubon,⁶⁹ prompted a cultural reexamination of the human relationship to nature and wildlife.⁷⁰ During the late 19th century, these innovative thinkers and those who shared their sentiments sowed the seeds that generated, among other things, the movement among states to preserve wildlife.⁷¹

The state movement to preserve wildlife challenged the “myth of inexhaustibility” by raising awareness of the problem of wildlife exhaustion to the general public and zealously advocating for reform.⁷² At the root of the movement was a new understanding that there were inherent limits to the landscape that was now conquered, bought, or otherwise acquired by the United States. Also, the cultural impetus to protect wildlife may have been rooted in a growing appreciation for wilderness, as is evidenced by the creation of the

Ralph Waldo Emerson had proposed a view close to Kant’s and Wordsworth’s: the human mind and the natural world bodied forth the same organizing principles. To apprehend nature directly was to encounter one’s self in external form. That self-knowledge, in turn, enabled freedom of a certain sort: life governed only by the constraints indigenous to one’s own being.

HENRY DAVID THOREAU, *MAINE WOODS* (1864); HENRY DAVID THOREAU, *WALDEN* (1854); Purdy, *supra*, at 1147 (“In *Walden*, Henry David Thoreau tried to perform what Emerson had urged, setting out a practice of attentiveness to nature’s places and processes as a path to self-awareness.”). The works of Thoreau and Emerson are prime examples of the philosophical background providing the “moral imperatives” for the early state wildlife movement. See Paul S. Weiland, *Amending the National Environmental Policy Act: Federal Environmental Protection in the Twenty-First Century*, 12 J. LAND USE & ENVTL. L. 275, 278 (1997).

⁶⁸ See CHARLES DARWIN, *THE DESCENT OF MAN* 45 (1871).

⁶⁹ See JOHN JAMES AUDUBON, *ORNITHOLOGICAL BIOGRAPHY, OR AN ACCOUNT OF THE HABITS OF THE BIRDS OF UNITED STATES OF AMERICA; ACCOMPANIED BY DESCRIPTIONS OF THE OBJECTS REPRESENTED IN THE WORK ENTITLED THE BIRDS OF AMERICA, AND INTERSPERSED WITH DELINEATIONS OF AMERICAN SCENERY AND MANNERS* (1831).

⁷⁰ DUNLAP, *supra* note 26, at 18–22.

⁷¹ The work of these thinkers, already influential in the 1870s, became even more prominent at the end of the 19th century and early 20th century when they became pillars of The Progressive Conservation Movement. See Claire Riegelman, *Environmentalism: A Symbiotic Relationship Between A Social Movement and U.S. Law?*, 16 MO. ENVTL. L. & POL’Y REV. 522, 530–531 (2009); Blackmer *supra* note 12, at 267; Robert E. Manning, *Nature of America: Visions and Revisions of Wilderness*, 29 NAT. RESOURCES J. 25, 34 (1989).

⁷² REIGER, *supra* note 9, at 4.

Yosemite grant in 1864⁷³ and the Yellowstone reservation of 1872.⁷⁴ State wildlife laws were another example of the growing understanding that natural resources in the United States were limited and precious. This change in the philosophical underpinning is important in understanding the reason for the shift of public attitude in accepting the new restrictions on the jealously guarded privilege to hunt that had been engrained in the cultural fabric of prior generations.

2. *Demographic Changes and the End of the Frontier*

The late 19th century witnessed rapid U.S. population growth, along with expanding settled territory. In the 1870 census, the Secretary of the Interior calculated a total settled area of 1.27 million square miles, with a population of 38.5 million.⁷⁵ By 1880, this land area grew by 23 percent, expanding into Michigan (which was settled before the 1870s), Wisconsin, the Dakotas, Kansas, Colorado, and Nebraska—and during the decade, the population increased by 30 percent to over 50 million.⁷⁶ As the population became larger and increasingly urban, the notion of an infinitely abundant frontier was also dying in the minds of many Americans.⁷⁷

The concept of the “end of the frontier,” enunciated by Turner in 1893,⁷⁸ suggests that state wildlife laws may have been an early indicator of cultural perception of the limits to natural resources. Instead of importing wildlife from the abundant frontier, Americans

⁷³ Act of June 30, 1864, ch. 184 §§ 1, 2, 13 Stat. 325 (codified as amended at 16 U.S.C. § 48 (2014)) Congress granted the Yosemite Valley and the Mariposa Big Tree Grove to the State of California on the condition that the land be used for “public use, resort, and recreation . . . for all time.” *Id.* The federal government later created Yosemite National Park in 1906. Antiquities Act of 1906, 16 U.S.C. §§ 431–33 (2014).

⁷⁴ The legislation creating Yellowstone reserved land in the Montana and Wyoming near the headwaters of the Yellowstone River “as a public park or pleasuring-ground for the benefit and enjoyment of the people” under the control of the Secretary of the Interior. Act of March 1, 1872, ch. 24, 17 Stat. 32.

⁷⁵ DEP’T OF THE INTERIOR, CENSUS OFFICE, STATISTICS OF THE POPULATION OF THE UNITED STATES AT THE TENTH CENSUS, Introduction—General Discussion of the Movements of Population—1790 to 1880, XXII (1880), available at <http://www.census.gov/prod/www/decennial.html>.

⁷⁶ See *id.* at XXII, XVII–XXIV (including maps of the United States with settled areas shaded in with the data from the 1870 and 1880 census figures); see also FRONTIER, *supra* note 12, at 199–227.

⁷⁷ See HORNADAY, *supra* note 32.

⁷⁸ FRONTIER, *supra* note 12.

seem to have anticipated the hard reality that the frontier could no longer sustain their appetite for consuming wild animals.⁷⁹

The depletion of wildlife in the late 19th century coincided with a period where the idea about the role of nature in American culture was changing.⁸⁰ The role of the frontier in the late 19th century, as wealthy citizens of the eastern United States perceived it, was to provide new opportunities and an escape promoting personal autonomy for ambitious immigrants, settlers, and perhaps troublemakers.⁸¹ By 1890, many of the wild expanses of the western frontier in the United States had fundamentally changed in the American mind because these areas had been settled.⁸² Turner identified this period as a fundamental turning point in cultural thinking, suggesting that the opportunities that came along with an open frontier were no longer available.⁸³ The idea of an open western

⁷⁹ Before and during the movement to protect wildlife in the late 19th century, women's hats adorned with feathers from wild birds were fashionable and fueled an unsustainable harvest of these birds. See REIGER, *supra* note 9, at 94–95. Millions of buffalo were killed, stripped of their hides and tongues left otherwise whole until their skeletons could be profitably marketed. See TOBER, *supra* note 2, at 99–102 (explaining how advances in tanning technology created a larger commercial market for buffalo robes, railroads extended the reach into the plains, how advances in weapons made hunting easier, and how refrigeration made even the meat marketable). Many residents, especially those who did not own land, found buffalo hunting to be the easiest and quickest way to earn a living. *Id.* at 100 (“In 1870, bull hides brought the hunter \$2.00 each, and cow and calf hides \$1.75 each. Tongues, the portion of the meat most generally marketed, brought \$.25 on the range and \$.50 in most eastern markets.”).

⁸⁰ See TOBER, *supra* note 2, at 48–50.

⁸¹ Frederick Jackson Turner, *The Problem of the West*, ATLANTIC MONTHLY (Sept. 1896), reprinted in FRONTIER, *supra* note 12, at 9, available at <http://www.theatlantic.com/past/docs/issues/95sep/ets/turn.htm>.

⁸² *Id.* at 38. The crisis of conscience that wealthy Americans of the late 19th century suffered may have been grounded in anxiety more than reality, as many opportunities remained for entrepreneurs in the American West in the 20th century. See generally *New Perspectives on The West: Frederick Jackson Turner, 1861–1932*, PBS, (1996) (Ken Burns & Stephen Ives, Prod's.), available at http://www.pbs.org/weta/thewest/people/s_z/turner.htm (last visited Nov. 4, 2014).

⁸³ Specifically, Turner remarked:

For nearly three centuries the dominant fact in American life has been expansion. With the settlement of the Pacific coast and the occupation of the free lands, this movement has come to a check. . . . In the remoter West, the restless, rushing wave of settlement has broken with a shock against the arid plains. The free lands are gone, the continent is crossed, and all this push and energy is turning into channels of agitation. Failures in one area can no longer be made good by taking up land on a new frontier; the conditions of a settled society are being reached with suddenness and with confusion. . . . Senator Allen of Nebraska . . . saw the buffalo driven out

frontier shaped the cultural expectations of Americans throughout United States history. As this frontier era came to an end, the opportunity to earn a living by working the land and reaping its fruits, shrank in the American mind.⁸⁴

3. *The Role of Organized Groups*

The widespread adoption of state wildlife laws in the 1870s was a consequence of the concerted action of the well-connected advocates who organized themselves and seized upon a shift in cultural thinking for the express purpose of crafting a solution to a specific societal problem.⁸⁵ Organized groups, such as the New York Sportsmen's Club, the American Society for Prevention of Cruelty to Animals, the American Fisheries Society, and the National Rifle Association, formed around the principles of wildlife conservation.⁸⁶ The Boone and Crockett Club formed along the same lines in 1887 by Theodore Roosevelt.⁸⁷ Organized groups of sportsmen recognized the inevitable tragedy of continuing to allow commercial hunting practices to go unregulated.⁸⁸ Advocates harnessed this deep-seated appreciation for the resource in order to temper the desire for consumption.

The prevailing idea advanced by the organized groups was that overhunting was the source of wildlife scarcity.⁸⁹ Common-sense observations of mass killing in commercial hunts of the day bolstered

by the settlers; he saw the Indian retreat as the pioneer advanced. His training is that of the old West, in its frontier days. And now the frontier opportunities are gone.

Turner, *supra* note 81, at 219–20. Turner's comment about Senator Allen watching Native Americans recede along with the buffalo reflects the complicated relationship American society had with that particular species. On one hand, some thought that the dramatic reduction in the population of buffalo served the purpose of eliminating an important food source for Native American tribes, and therefore the slaughter of these animals served the purpose of advancing Euro-American settlement and Euro-American "manifest destiny." See, e.g., *Nineteenth Century Wildlife Law*, *supra* note 38, at 958 (citing an 1840 Massachusetts legislative report stating that eliminating game served the purpose of eliminating Native Americans). On the other hand, this travesty spurred some conservationists into action. See, e.g., Hornaday *supra* note 32, at 1.

⁸⁴ See Turner, *supra* note 81, at 219.

⁸⁵ See TOBER, *supra* note 2, at 50; REIGER, *supra* note 9, at 43.

⁸⁶ See Field, *supra* note 17, at 467.

⁸⁷ *Id.*

⁸⁸ See *Nineteenth Century Wildlife Law*, *supra* note 38, at 938 (adding, however that new hunting restrictions avoided the tragedy of wildlife exhaustion by transforming the "essential resource" into "the province of pleasant amusement").

⁸⁹ See *id.* at 961 ("[L]egislators were persuaded that game laws helped the poor by preventing them from improvidently consuming the seed stock of their sustenance.").

the claim that commercial hunts were the source of the scarcity.⁹⁰ The brutal efficiency of commercial hunts left little doubt as to the consequences of unchecked capture of wild game. Using the guns of the day, as many as ten passenger pigeons could be killed with one shot.⁹¹ For the state legislators, therefore, it was imperative to pass laws to preserve wildlife because the viability of wild animals as a food source seemed clearly at risk.⁹²

Sportsmen had strong self-interest in preserving wildlife in order to preserve their sport. However, the publications of these groups suggested that their members appreciated wildlife and nature for their intrinsic value as well.⁹³ For example, sportsmen sought protections even for species that they did not hunt.⁹⁴ Using advances in printing technology,⁹⁵ their magazines and journals served as a forum for discussing wildlife conservation problems.⁹⁶ The sportsmen's groups had local chapters throughout the nation that lobbied for state laws to protect wildlife.⁹⁷

⁹⁰ It is not entirely clear that limits imposed on hunting were solely responsible for population recovery of certain species. *See, e.g.*, JUDD, *supra* note 14 (suggesting deer habitat was increased in the northeast United States as a result of an overall reduction in the improved land in that region between 1880 and 1900); TOBER, *supra* note 2, at 82–83 (corroborating this relationship by citing US census figures showing a decline in farm lands as a proportion of total acreage between 1880 and 1900).

⁹¹ A.W. SCHORGER, *THE PASSENGER PIGEON: ITS NATURAL HISTORY AND EXTINCTION* 187 (1973). Other tactics to kill these birds and bring them to market included clearing land and salting the ground to attract a flock then capturing the entire flock with a spring-loaded net. *See* H.B. Roney, *Efforts to Check the Slaughter*, *AMERICAN FIELD*, Jan. 11, 1879, *reprinted in* *THE PASSENGER PIGEON* 77, 79–81 (W.B. Mershon ed., 1907).

⁹² *See* Blumm & Ritche, *supra* note 51, at 693 (citing George Cameron Coggins, *Wildlife and the Constitution: The Walls Come Tumbling Down*, 55 *WASH. L. REV.* 295, 305 (1980)).

⁹³ Sportsmen mourned the loss of wildlife as well as wildlife habitat. *See, e.g.*, REIGER, *supra* note 9, at 56.

⁹⁴ *See id.*; DUNLAP, *supra* note 26, at 12.

⁹⁵ Development and spread of large power presses made in mass printing made printing magazines an increasingly popular phenomenon around this time. Paul F. Gehl, *Printing*, *Encyclopedia of Chicago*, <http://www.encyclopedia.chicagohistory.org/pages/1010.html> (last visited Nov. 27, 2014).

⁹⁶ These journals included *Forest and Stream*, *The Rod and the Gun*, and *The American Sportsman*. *See Nineteenth Century Wildlife Law*, *supra* note 38, at 945–46 (discussing how these publications advanced the aims of state wildlife laws).

⁹⁷ REIGER, *supra* note 9, at 59.

Advancing the idea of regulated use of natural resources was revolutionary in the late 19th century. The observations of wholesale wasteful killing and the absence of wildlife in areas previously teeming with wildlife generated an active public concern for wildlife preservation.⁹⁸ Sportsmen groups were well-organized and connected to powerful players in government.⁹⁹ The success of the wildlife reform movement was due, in large part, to the sportsmen's organized rally to enact legal protections. Another significant factor in the success was that the movement for state wildlife laws ran parallel to a larger shift in cultural sensibilities in the late 19th century.

C. Challenges to State Wildlife Laws

Overcoming the obstacles to implementing wildlife laws involved confronting a historically rooted system of unchecked exploitation of the wildlife. State wildlife laws of the late 19th century fundamentally changed the old system of unregulated capture. This section examines the cultural drive to enforce state wildlife laws as evidenced by the obstacles faced in the implementation phase.¹⁰⁰ This section shows that serious opposition faced in the implementation of state wildlife laws, was not unlike the opposition encountered by the environmental movement during the 1970s. Even as the crisis of wildlife scarcity made hunting for the market a more challenging endeavor, state wildlife laws in the 1870s and 1880s faced several legal and practical

⁹⁸ See Hornaday, *supra* note 33, at 1.

⁹⁹ *Nineteenth Century Wildlife Law*, *supra* note 38, at 943.

The 'fraternity of sportsmen' who in fact took control were anything but inexperienced. They were led by very rich men, primarily from the east coast, who had the habit of government bred in their bones and who were adept at harnessing the law to serve their interests. In contrast to the grubbers for wildlife, these men were urban animals with the levers of power at their fingertips.

¹⁰⁰ Some are skeptical of the motives of those who championed these reforms. *See id.* at 953.

That sport intended itself to eat the share of its fallen rivals appears not only in the rules sport enacted, but also in the rules it chose not to implement. Bag limits, in particular, were an obvious way to end market hunting, but sport pursued no unseemly haste in that direction because sport hungered for the enormous bags on offer.

Nevertheless, other scholars maintain that the general conservation thrust of this movement was not so corrupt as has been suggested. *See id.* Cf. REIGER, *supra* note 9, at 43 (suggesting that sportsmen's conservation intentions were not merely a tactic to eliminate competition, but instead born of genuine concern for the wildlife).

obstacles to implementation.¹⁰¹ The brief outline of the legal and practical challenges below provides context for the response to state wildlife laws in the 19th century.

1. Legal Challenges

Opponents of the wildlife conservation laws challenged the constitutionality of restricting the deeply engrained free capture practices.¹⁰² The competing legal ideology to a state's authority to regulate the free capture of wild animals is best exemplified in the iconic 1805 decision of the Supreme Court of New York, *Pierson v. Post*.¹⁰³ The influential opinion suggested that a hunter gained title to wild animals on unsettled lands by physical capture or mortal wound.¹⁰⁴ But there apparently was no state law regulating fox hunting.

State wildlife laws faced challenges to regulating this freedom to capture.¹⁰⁵ For example, in *Gentile v. State of Indiana*, a net-fisherman challenged the state's authority to enact a law restricting an individual's ability to fish in a privately owned stream during certain times of the year.¹⁰⁶ In 1868, the Supreme Court of Indiana upheld the legislature's power to enact the law regulating the public's right to fish under its police power.¹⁰⁷ But in *Kansas v. C.A. Saunders*,¹⁰⁸ in a challenge to the constitutionality of a Kansas law that restricted the

¹⁰¹ See, e.g., *Magner v. Illinois*, 97 Ill. 320 (1881) (examining the constitutionality of Illinois game law in the context of a quail unlawfully netted in Kansas and sold in Chicago); see also *Kansas v. Saunders*, 19 Kan. 127 (1877) (examining the constitutional relationship between the capture and sale of prairie chickens, interstate commerce, and state and federal constitutional powers).

¹⁰² See, e.g., 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 256 (1st ed. 1826) (explaining the concept of free capture in early American law).

¹⁰³ 3 Cai. 175 (N.Y. Sup. Ct. 1805).

¹⁰⁴ See Blumm & Ritchie, *supra* note 51, at 686.

¹⁰⁵ See, e.g., *Phelps v. Racey*, 60 N.Y. 10, 13 (1875) ("The objection of a want of power in the legislature to pass the act is not tenable."); *State v. Norton*, 45 Vt. 258 (1872) (holding that the state wildlife law is act is constitutional on its face).

¹⁰⁶ 29 Ind. 409, 415 (1868).

¹⁰⁷ *Id.* at 417 (stating that cases cited by the appellant "[do not] at all deny the power of the legislature to pass laws for the preservation of fish by limiting the time or mode of taking them" and "fish are *feræ naturæ*, and as far as any right of property in them can exist, it is in the public, or is common to all").

¹⁰⁸ 19 Kan. 127 (1877). Saunders was an agent of Adams Express Company who shipped four prairie chickens to Illinois and was convicted of violating a provision of the Kansas's wildlife law.

sale of birds captured in compliance with the season and bag limit restrictions imposed by the state, the 1867 Kansas Supreme Court ruled that the state's restriction of the sale or transport of birds outside of its borders violated the Commerce Clause.¹⁰⁹ Challengers brought similar cases throughout the United States based on this rationale.¹¹⁰ The controversy centered on whether the state owned the wildlife within its borders. It was not until 1896 that the U.S. Supreme Court settled the issue in *Geer v. Connecticut*.¹¹¹ The Court upheld the state's authority to restrict transport of wildlife with appropriate laws to fulfill its trust to the public based upon a doctrine of state wildlife ownership.¹¹² After *Geer*, the idea that the states owned the wildlife within their borders was widely adopted throughout the states.¹¹³

The legal hurdles states encountered demonstrate that realizing legal protections for wildlife initially cut against established cultural expectations related to entitlement and the myth of inexhaustible natural resources in the United States. As a practical matter, however, states also needed to find a way to enforce these laws if they were to have any real effect.¹¹⁴

2. Local Opposition and Problems with Enforcement

The legal hurdles for state wildlife laws stemmed from practical problems to enforcing the laws. Enforcing limitations designed in the halls of the state house was difficult, if not impossible, in the beginning because hunters ignored the laws and suffered no

¹⁰⁹ *Id.* at 130 (holding that a law allowing birds to be legally captured but prohibiting subsequent interstate traffic violates the federal constitution's exclusive power to regulate interstate commerce).

¹¹⁰ See, e.g., *James Magner v. State of Ill.*, 97 Ill. 320 (1881).

¹¹¹ *Geer v. State of Conn.*, 161 U.S. 519 (1896).

¹¹² *Id.* at 529, 534. The court concluded that the reasoning contained in *Saunders*, 19 Kan. 127, and similar cases was flawed.

[It] did not consider the fundamental distinction between the qualified ownership in game and the perfect nature of ownership in other property, and thus overlooked the authority of the state over property in game killed within its confines, and the consequent power of the state to follow such property into whatever hands it might pass, with the conditions and restrictions deemed necessary for the public interest.

¹¹³ See MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 15 (1997); Blumm & Ritchie, *supra* note 51, at 699. The interstate commerce portion of the holding in *Geer* remained good law until 1979 when the United States Supreme Court overruled that portion of the holding while otherwise preserving the state's ability to regulate wildlife. See *Hughes v. Oklahoma*, 441 U.S. 322, 335–36 (1979).

¹¹⁴ See *Nineteenth Century Wildlife Law*, *supra* note 38, at 977–79 (“As sport set its agenda into law, excluded groups engaged in flagrant violations.”).

consequences. Cultural notions of individual property rights in wildlife ran counter to the effort to preserve wildlife that the law reform effort of the 1870s sought to achieve. Restricting the harvest of wildlife conflicted with a cultural distaste for such regulation that traced back to the settlement of the American colonies and independence from the Crown.¹¹⁵ British wildlife laws protected royal prerogatives with restrictions qualifying who could hunt.¹¹⁶ But in the United States, restricting free capture of wildlife ran counter to the idea of common property rights in wild animals.¹¹⁷ Thus, advocates had to convince lawmakers that additional action was needed to enforce the laws.¹¹⁸

State wildlife regulation systems initially depended upon local law enforcement.¹¹⁹ These local officials, in elected positions in many rural localities, often viewed the wildlife laws with distrust and declined to actively enforce them.¹²⁰ As a result, compliance dependent on local general law enforcement authorities to enforce the game laws proved to be unreliable.¹²¹ Consequently, sportsmen urged creation of specialized enforcement positions.¹²² New taxes and fees on sport hunting funded enforcement personnel charged with enforcing these laws.¹²³ The regulations and funding were controversial because the bag limits prevented market hunting, and subsistence hunters could not afford the additional costs of compliance.

¹¹⁵ *Id.* at 939 (“The sport program had to overcome American disdain for an English legacy which had made ‘gentleman’s game’ a rich man’s monopoly.”).

¹¹⁶ See Bean & Rowland, *supra* note 113, at 8; Field, *supra* note 17, at 461–64.

¹¹⁷ See Field, *supra* note 17, at 465; Pierson v. Post, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (establishing the right of capture by mortal wounding of a wild animal); McConico v. Singleton, 9 S.C.L. 244 (S.C. Constitutional Ct. App. 1818) (upholding the right of the inhabitants to hunt on unenclosed lands within 7 miles of the hunter’s residence).

¹¹⁸ Contemporary authors warned that overhunting could lead to extinction of game birds. See, e.g., Marsh, *supra* note 61, at 95.

¹¹⁹ See T.S. Palmer, U.S. Dep’t. of Agric., Biological Survey, Bulletin no. 41, Chronology and Index of the More Important Events in American Game Protection, 1776–1911, at 17 (1912).

¹²⁰ *Nineteenth Century Wildlife Law*, *supra* note 38, at 978 n.237.

¹²¹ See *id.* at 980.

¹²² *Id.*; see also Palmer, *supra* note 119, at 17 (listing the origins of the state warden services and game protection funds).

¹²³ *Nineteenth Century Wildlife Law*, *supra* note 38, at 980.

Opposition to state wildlife laws by farmers, market hunters and vendors, and subsistence hunters suggests these groups were unwilling to see their share of the market shifted to sport hunters, due to the enactment of protective legislation.¹²⁴ From the perspective of a concerned citizen, the alternative system of unregulated taking would inevitably lead to extinction.¹²⁵ Taxes on ammunition made hunting for some subsistence hunters cost-prohibitive. Similarly, the fees to obtain hunting licenses were a new cost imposed upon this economically fragile group. Sportsmen convinced legislatures that additional taxes and enforcement efforts were necessary to enforce the laws because, even for the poor segments of the population who may have hunted for sustenance, the enforcement of the laws was the best way to ensure the viability of the wildlife.¹²⁶

State wildlife laws of the late 19th century represented a major shift in public attitude toward conservation measures. In the post-Civil War era, the U.S. population grew and became increasingly urban. People's cultural relationship with nature changed—interest groups advocating for state laws to protect wildlife were part of this cultural shift in consciousness. The lobby to enact and enforce state wildlife laws faced considerable opposition, but the persistence of the interest groups overcame engrained cultural notions of a limitless right to hunt that led to the commercial slaughter of certain species. This accomplishment is historically significant because of the drastic departure from status quo that state wildlife laws represented. Understanding the role of interest groups, a clearly defined bad actor, and the context of a culture that was expanding with a growing appreciation for wildlife helps make sense of the significant departure the state wildlife laws of the 19th century signaled toward preservation.

¹²⁴ See *id.* at 937. The right to hunt was important to citizens in the 19th century, and the courts upheld protections of the right to hunt. See *McConico v. Singleton*, 9 S.C.L. 244 (S.C. Constitutional Ct. App. 1818) (affirming the right of the inhabitants to hunt on unenclosed lands within seven miles of the hunter's residence).

¹²⁵ See *Marsh*, *supra* note 61, at 84 (expressing the sentiment that it might be inevitable for non-domesticated species to become extinct at the hand of humans settling the wilderness).

¹²⁶ See *Nineteenth Century Wildlife Law*, *supra* note 38, at 937.

II THE ENVIRONMENTAL REFORM MOVEMENT IN 1969

A. Background

State air pollution management was a concern dating back to the 19th century. Repeated attempts to address the problem at a national level were stymied until there was a major shift in public attitude in 1969. This section provides background information on the years leading up to 1969 and examines the social, political, and moral factors that sparked this sudden change.

1. Air Pollution Control—An Early Response to a Toxic Environment

Problems with industrial pollution in the United States date at least to the 19th century. With the rise of automobile transport, air pollution became a public concern as early as the 1940s.¹²⁷ One of the earliest responses to smog was a Los Angeles City ordinance setting limits on smoke emissions from any single source in 1945.¹²⁸ But serious air pollution persisted because of enforcement problems created by conflicts between city and county jurisdictions. Resolving this complication required state-level response, which California enacted in 1947.¹²⁹ The smog problem, however, was not limited to California. A 1948 incident of acute smog in Donora, Pennsylvania prompted the congressional introduction of bills to study the problem, but none passed.¹³⁰

During the 1950s, the response at the federal level was to task states and localities with controlling the air pollution.¹³¹ However, a

¹²⁷ See JAMES E. KRIER & EDMUND URSIN, *POLLUTION & POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940–1975*, at 8 (1977).

¹²⁸ *Id.* at 54.

¹²⁹ *Id.* at 61. See Air Pollution Control Act, ch. 632, § 1, [1947] Cal. Stat. 1640.

¹³⁰ U.S. PUB. HEALTH SERV. & U.S. WEATHER BUREAU, *AIR POLLUTION IN DONORA, PA: EPIDEMIOLOGY OF THE UNUSUAL SMOG EPISODE OF OCTOBER 1948, PRELIMINARY REPORT (1949) reprinted in THE ENVIRONMENTAL MOMENT, 1968–1972*, 16–19 (David Stradling ed., 2012) [hereinafter *The Environmental Moment*]; KRIER & URSIN, *supra* note 127, at 8.

¹³¹ KRIER & URSIN, *supra* note 127, at 169. “The 1950s had closed with a substantial consensus that it was appropriate for the federal government to encourage and support research regarding the causes, effects, and control of air pollution. On the issue of control, however, there was marked disagreement. . . .”

1960 statute, the Schenck Act,¹³² did provide federal funding to study motor vehicle exhaust.¹³³ Supported by the American Municipal Association and the Conference of Mayors, the Kennedy Administration called upon Congress to enact legislation authorizing an active federal role in air pollution control.¹³⁴ Although resistance to federal enforcement was strong in 1962, additional support for federal air pollution enforcement came from an air pollution incident in London that caused up to 700 deaths.¹³⁵ Consequently, in 1963, the first federal Clean Air Act¹³⁶ enabled the Department of Health, Education, and Welfare (HEW) to abate interstate air pollution after conferencing with local officials.¹³⁷ But the statute did not authorize HEW to impose intrastate air pollution control measures unless requested by a state.¹³⁸ The 1963 legislation had symbolic value as well, reflecting congressional understanding that the air pollution problem was nationwide.¹³⁹ Congress continued to act on air pollution throughout the decade.

In 1965, Congress passed the Motor Vehicle Air Pollution Control Act (MVAPCA)¹⁴⁰ which authorized HEW to set emission standards for all new vehicles.¹⁴¹ Public pressure for federal air pollution

¹³² Act of June 8, 1970, Pub. L. No. 86-493, 74 Stat. 162 (1960).

¹³³ See KRIER & URSIN, *supra* note 127, at 169.

Concerning automotive emissions control in particular, Congressman Schenck had begun, in the late fifties, to urge legislation prohibiting the use in interstate commerce of motor vehicles discharging dangerous amounts of unburned hydrocarbons. Largely in response to objections from [the Department of Health, Education, and Welfare], Schenck's measure was diluted to provide merely for study by the surgeon general of the effects of motor vehicle exhaust on the public health. . . .

¹³⁴ *Id.* at 171.

¹³⁵ *Id.* at 171–72 (“The urban lobby was coalescing around broadened federal authority, and in 1962 . . . an air pollution episode . . . hit London . . . claimed to have caused up to 700 deaths,” further noting Congressman Roberts experienced a change of heart regarding the need for federal abatement authority after hearing about the London incident); see also BBC, *On This Day, 6 December 1962: Choking Fog Spreads Across Britain*, http://news.bbc.co.uk/onthisday/hi/dates/stories/december/6/newsid_3251000/3251001.stm (last visited Nov. 24, 2014).

¹³⁶ Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392.

¹³⁷ KRIER & URSIN, *supra* note 127, at 172–73.

¹³⁸ *Id.*

¹³⁹ See *id.* at 8.

¹⁴⁰ Motor Vehicle Air Pollution Control Act of 1965, Pub. L. No. 89-272, 79 Stat. 992.

¹⁴¹ See KRIER & URSIN, *supra* note 127, at 175.

The Motor Vehicle Air Pollution Control Act required HEW to set emission standards for new vehicles, taking into consideration the technological feasibility

controls continued because only about half of the urban population in the United States was protected by local air pollution control.¹⁴² In 1966, Governor Rockefeller of New York declared an emergency when a smog incident resulted in reports of eighty deaths in New York City.¹⁴³ President Johnson hoped to achieve national emission standards with the 1967 Air Quality Act,¹⁴⁴ but the final bill only funded a study for national standards and authorized regional air quality boards to establish air quality standards.¹⁴⁵ Although this legislation signaled progress, it was a far cry from effectively enforcing federal air pollution controls.

The turning point for federal air pollution controls arrived in 1969 because public support for pollution controls swelled.¹⁴⁶ That year, the Department of Justice concluded an investigation of the auto industry's efforts to delay implementation of air pollution controls.¹⁴⁷ The event contributed to a widespread negative perception of the industry.¹⁴⁸ Public support for pollution controls concerning air, water, and land increased substantially, evidenced by the passage of NEPA. Shortly thereafter, Congress enacted the first comprehensive federal emissions standards with the Clean Air Act Amendments of 1970.¹⁴⁹

and economic cost of compliance. A performance-standard approach was employed; the means of compliance were up to manufacturers, and HEW would simply test submitted prototypes and certify that those met the standards.

¹⁴² *Id.* at 179.

¹⁴³ *Id.*

¹⁴⁴ Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485.

¹⁴⁵ See KRIER & URSIN, *supra* note 127, at 183.

¹⁴⁶ See, e.g., *id.* at 194–95; see also DANIEL W. HANNAN, TESTIMONY BEFORE THE ALLEGHENY COUNTY COMMISSIONERS, SEPT. 24, 1969, *reprinted in* The Environmental Moment, *supra* note 130, at 49–51 (providing an example of organized labor unions calling for effective local and state air pollution controls in response to industrial pollution and health effects on the workers).

¹⁴⁷ KRIER & URSIN, *supra* note 127, at 195. The result of the investigation was a consent decree where the industry agreed to end the conspiracy without admitting that one ever existed. *Id.*

¹⁴⁸ *Id.* (“The hullabaloo surrounding the investigation and the decree, combined with the earlier fiasco involving attempts to discredit Ralph Nader, had eroded the industry’s image to the point that it ‘had hit rock bottom’ by the end of the decade.”) (citing ALLEN V. KNEESE & CHARLES L. SCHULTZE, POLLUTION, PRICES AND PUBLIC POLICY 48 (1975)).

¹⁴⁹ Pub. L. No. 91-604, 84 Stat. 1676.

2. 1969—*The Year of Ecology*

Grassroots support for environmental protection increased dramatically in the late 1960s and early 1970s¹⁵⁰ because a series of environmental disasters in the United States and abroad caused a sense of public alarm.¹⁵¹ Media coverage brought the environmental movement to American households with vivid pictures of the disasters as well as protests for the environment.¹⁵² *Time* magazine proclaimed that 1969 was the “Year of Ecology.”¹⁵³ Gallup polls indicated that the size of the group of Americans who believed that the environment should receive attention from the government tripled between 1965 and 1970.¹⁵⁴ These factors combined to form a public sense of an “ecological crisis.”¹⁵⁵ Public support for the environment culminated in the first Earth Day celebration on April 22, 1970, when an estimated 20 million people participated in events around the nation—what was then thought to be the “largest one-day outpouring of public support for any social cause in American history.”¹⁵⁶

The prominence of environmental protection as a political issue seemingly arose in a flash because politicians responded to massive public involvement in support of the environmental cause. Efforts to address pollution had been afoot for more than two decades in 1969,¹⁵⁷ but the political conditions necessary to achieve meaningful legal protections seemed to crystallize all at once.¹⁵⁸ Although

¹⁵⁰ Coglianesse, *supra* note 1, at 94 (“Membership in the twelve largest environmental organizations grew from about one hundred thousand in 1960 to more than one million by 1972.”).

¹⁵¹ See, e.g., The Environmental Moment, *supra* note 130, at 35.

¹⁵² See *id.* at 4–7.

¹⁵³ *Ecology: The New Jeremiahs*, TIME, Aug. 15, 1969, at 38; see Sam Kalen, *Ecology Comes of Age: NEPA’s Lost Mandate*, 21 DUKE ENVTL. L. & POL’Y F. 113, 124 (2010) (describing the popular media coverage of ecology and environmental issues).

¹⁵⁴ Coglianesse, *supra* note 1, at 95.

¹⁵⁵ *Id.* at 6 (describing environmental coverage *National Geographic* and *Ramparts* as evidence of the public’s sense of urgency in addressing pollution and environmental problems more broadly).

¹⁵⁶ MARK DOWIE, LOSING GROUND: AMERICAN ENVIRONMENTALISM AT THE CLOSE OF THE TWENTIETH CENTURY 23 (1995).

¹⁵⁷ Brooks, *supra* note 24, at 198–209 (suggesting that the Administrative Procedure Act, ch. 324, 60 Stat. 327 (1946) (codified as amended in scattered sections of 5 U.S.C.), originally passed in 1946 was the true beginning of the environmental movement); see also KRIER & URSIN, *supra* note 127, at 1–10 (outlining the history of the legislation concerning air pollution in California beginning in the 1940s and at the federal level).

¹⁵⁸ See ANDREWS, *supra* note 20, at 228–29. However, some critics of the notion that the environmental movement suddenly ripened in 1969 point to the earlier conservation movement that began around the time of the late 19th century wildlife laws. See SAMUEL

environmental issues were hardly discussed during the 1968 presidential election between Herbert Humphrey, Richard Nixon, and George Wallace, environmental issues soon dominated public discourse.¹⁵⁹ In 1970, President Nixon recognized the call to action on environmental protection, characterizing the situation as a product of neglect rather than a “search for villains.”¹⁶⁰ Nixon explained the neglectful behavior to the environment by stating that the nation was “[c]onditioned by an expanding frontier” and coming to a “late . . . recognition of how precious and how vulnerable our resources of land, water and air really are.”¹⁶¹

Widespread public concern following the environmental disasters, exemplified by Earth Day events, teach-ins, and other protests, elevated the topic of the environment to the forefront of public concern.¹⁶² Politicians believed it was in their self-interest to bolster their approval by building environmental credentials.¹⁶³ Given this heightened level of public concern and widespread calls for government action, NEPA and the early environmental laws represented a genuine political response to a public demand.¹⁶⁴

P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT 1890–1920 (1959) (describing the earlier conservation movement’s emphasis on preserving forests and public lands); *see also* Weiland, *supra* note 67, at 277 (“Despite assertions to the contrary, environmentalism emerged gradually.”).

¹⁵⁹ *See* The Environmental Moment, *supra* note 130, at 68–101 (providing examples of the discourse, including President Nixon’s 1970 address to Congress concerning environmental quality, speeches newspaper articles, political cartoons and letters from citizens to politicians urging action on environmental policies).

¹⁶⁰ *Id.* at 71; *see also* John T. Woolley & Gerhard Peters, *Richard Nixon: Special Message to Congress on Environmental Quality*, THE AMERICAN PRESIDENCY PROJECT (Feb. 10, 1970), <http://www.presidency.ucsb.edu/ws/index.php?pid=2757>.

¹⁶¹ The Environmental Moment, *supra* note 130, at 71.

¹⁶² *See* Senate Subcommittee on Air and Water Pollution of the Committee on Public Works, Water Pollution–1969, Part 4: Hearings on S.7 and S.544, 91st Cong. 1st. sess. 1969, 893–94 (statement of Dr. N.K. Sanders), *reprinted in* The Environmental Moment, *supra* note 130, at 54–55 (describing the effects on animal and sea life as well as the unquantifiable impact on the human environment caused by the oil spill and concluding that the ultimate effect was a reduction in the quality of human life) [hereinafter Sanders Testimony].

¹⁶³ *See* Lazarus, *supra* note 23, at 79.

¹⁶⁴ *See* J. BROOKS FLIPPEN, NIXON AND THE ENVIRONMENT 51 (2000).

Nixon had played no role in the passage of NEPA, but, recognizing its popularity, now sought to cast it as his own, portraying it as a demonstration of his personal concern for environmental quality. Chatting with reporters after signing the bill,

B. Popular Perception of the Need for Legal Environmental Protection

Three factors seem to be primarily responsible for the shift in thinking during the rise in environmental consciousness in 1969 that led to the legal protections in the 1970s. First, awareness of air and water pollution problems increased in part due to the publicity of environmental crises in the United States and abroad that caused health problems.¹⁶⁵ Media attention given to environmental issues broadened from stories limited to forests and wildlife to topics including industrial air and water pollution.¹⁶⁶ Widely read books like Rachel Carson's *Silent Spring* and Paul Ehrlich's *The Population Bomb* highlighted the scope of problems caused by pollution and the need to take immediate action.¹⁶⁷ Second, organized groups like the Sierra Club and the Natural Resources Defense Council seized upon the political timing of the environmental movement by multiplying in numbers, increasing membership, and framing the issue with new vocabulary.¹⁶⁸ Third, in a showing of bipartisanship, the environmental laws of the early 1970s were formed by a link between policymakers in government and popular environmental concern. This link necessitated a political response to the public's sense that pollution was out of control. The social context surrounding the enactment of NEPA included other turbulent social controversies, like the civil rights movement and the Vietnam anti-war movement. Politicians could make easy gains by responding to protests for the environment because environmental protection was a boon to all citizens, and therefore a unifying topic.

Nixon told how he had recently taken a friend, Charles 'Bebe' Rebozo, on a drive through the countryside of Orange County outside Los Angeles. In ten years, they agreed, development would scar forever the beauty of the land, an occurrence not unique to southern California. With NEPA and a slew of legislation planned in the near future, Nixon promised, his administration would not let such a tragedy unfold.

¹⁶⁵ See *The Environmental Moment*, *supra* note 130, at 35.

¹⁶⁶ Coglianesse, *supra* note 1, at 95.

¹⁶⁷ See *The Environmental Moment*, *supra* note 130, at 14, 35 (commenting on the effect of Carson's *Silent Spring* and Ehrlich's *The Population Bomb* on the public's sense of urgency in confronting environmental issues).

¹⁶⁸ See *infra* notes 175-84.

1. Public Awareness of the Pollution Problem

Color television became a staple of the middle-class American household in the late 1960s.¹⁶⁹ This technology gave individuals a new kind of information: the depiction of green sludge coming out of a pipe could be readily perceived by a home viewer.¹⁷⁰ Disasters like the Santa Barbara oil spill and the Cuyahoga River fire sparked attention with widespread television and other media coverage.¹⁷¹ These tragic events focused the public's attention on the problem of pollution. Moreover, the news reports of an increasingly toxic environment were juxtaposed with astronauts' photographs of earth as seen from outer space.¹⁷² Professor Richard N.L. Andrews postulated that the media portrayal of these two events at the same time formed an "obvious challenge: 'If we can send men to the moon, why can't we clean up pollution before we foul our own nest.'"¹⁷³

The books of the 1960s that addressed environmental problems and the limits of the natural world to sustain humans, including *Silent Spring*¹⁷⁴ and *The Population Bomb*, generated widespread interest in environmental protection.¹⁷⁵ The attention generated by media coverage of environmental disasters, coupled with the growing awareness of problems raised by these books, provided a vehicle for public discussion of problems about pollution, resource use, and the consumptive lifestyle in general.¹⁷⁶ Placing restrictions on destructive business practices like discharging waste into rivers was an easy target for environmental legal reformers.¹⁷⁷

¹⁶⁹ STEVEN WALDMAN, FED. COMM'N. COMM'N., THE INFORMATION NEEDS OF COMMUNITIES 72 (2011), available at http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

¹⁷⁰ See *Who Killed Lake Erie* (NBC documentary originally broadcast September 1969).

¹⁷¹ See ANDREWS, *supra* note 20, at 224.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ RACHEL CARSON, *SILENT SPRING* (1962).

¹⁷⁵ PAUL R. EHRLICH, *THE POPULATION BOMB* (1968).

¹⁷⁶ See Coglianesi, *supra* note 1, at 91.

¹⁷⁷ *Cf.* Market hunters of the 19th Century. See NINETEENTH CENTURY WILDLIFE LAW, *supra* note 38.

2. Influential Interest Groups

Organized environmental interest groups contributed to the sense of urgency felt by the American public in 1969.¹⁷⁸ Well-established interest groups dating back to the 19th century, such as the Sierra Club and the Audubon Society, pressed for new governmental reforms to protect the environment during this time.¹⁷⁹ New interest groups, such as the Natural Resources Defense Council, the Environmental Defense Fund, and Friends of the Earth formed with express goals of obtaining environmental protections.¹⁸⁰ These groups had broad national or international agendas, but local chapters were often devoted to solving a specific pollution problem and didn't have much opposition.¹⁸¹

The public's sense of alarm at the increasingly toxic environment overcame what little opposition industry advocates could muster.¹⁸² For example, the auto industry was under scrutiny for both the air pollution caused by automobiles and the lack of engineered safety features. In his 1965 book, *Unsafe at Any Speed*, Ralph Nader publicly criticized the automotive industry for its hazardous oversights.¹⁸³ The auto industry attempted to discredit Nader,¹⁸⁴ but as Professors James Krier and Edmund Ursin observed, the attempt was poorly executed and then backfired when the industry was forced to apologize for its actions.¹⁸⁵ The auto industry also signed a humiliating consent decree with the U.S. Attorney General in 1969 after an investigation upon allegations of conspiracy to delay implementation of air pollution controls.¹⁸⁶ The electric industry

¹⁷⁸ See The Environmental Moment, *supra* note 130, at 8.

¹⁷⁹ See *id.*

¹⁸⁰ See Coglianese, *supra* note 1, at 94–95.

¹⁸¹ See The Environmental Moment, *supra* note 130, at 8.

¹⁸² See SAMUEL P. HAYES, BEAUTY, HEALTH, PERMANENCE: ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955–1985 at 206 (1987); see also KRIER & URSIN, *supra* note 127, at 195.

¹⁸³ See, e.g., KRIER & URSIN, *supra* note 127, at 175; RALPH NADER, UNSAFE AT ANY SPEED (1965).

¹⁸⁴ See KRIER & URSIN, *supra* note 127, at 195.

¹⁸⁵ *Id.* at 176. (“The industry handled the matter with laughable ineptitude and ended up making the most public of apologies. The event revealed the industry’s guile and at the same time diluted its proud image and political power.”). Krier & Ursin provide an additional example of industry’s “laughable ineptitude,” noting that “[i]n January [1965] the Los Angeles County Board of Supervisors requested the United States attorney general to pursue evidence that members of the industry had conspired to delay the development and introduction of pollution control techniques.” *Id.*

¹⁸⁶ See *id.* at 195.

attempted to discredit Donald Widener by suing him for his documentary *Powers That Be*, which was critical of nuclear power.¹⁸⁷ Widener countersued and eventually obtained a settlement from Pacific Gas and Electric Company after a trial judge struck down a verdict awarding Widener \$7.75 million in damages.¹⁸⁸ Industry's response to public alarm at its practices was slow and initially uncoordinated. By contrast, interest group membership was growing rapidly.

The rapidly expanding membership of environmental groups highlights the broad support for the environmental movement.¹⁸⁹ Environmental crises portrayed in television media created public demand for action.¹⁹⁰ Government projects like the Trans-Alaska Pipeline also served to galvanize support for environmental reform.¹⁹¹ By 1972, more than one million Americans belonged to the twelve largest environmental interest groups.¹⁹² New terms such as "ecology" and "resource depletion" became commonly used words.¹⁹³ Polls demonstrated a rapid increase in the number of Americans who identified the environment as a problem in need of government action.¹⁹⁴ These organizations used participatory tactics, such as marches and protests, to demonstrate the popularity and urgency of the environmental issues.¹⁹⁵

¹⁸⁷ See FLIPPEN, *supra* note 164, at 139; Myrna Oliver, *Obituaries: Don Widener*, 73; *Writer, Producer of Documentaries on Dangers to Environment*, L.A. TIMES, May 1, 2003, <http://articles.latimes.com/2003/may/01/local/me-widener1>.

¹⁸⁸ See *Widener v. Pac. Gas & Elec. Co.*, 75 Cal. App. 3d 415, 422 (1977); Oliver, *supra* note 187.

¹⁸⁹ Coglianese, *supra* note 1, at 94.

Unlike many of the conservation organizations founded at the turn of the twentieth century, environmental organizations of the 1960s and 1970s secured a broad base of public support. The number of organizations demanding social change for the environment grew from several hundred to over three thousand by the end of the 1970s. The number of citizens who joined environmental organizations also increased dramatically. The Sierra Club's membership grew nearly tenfold between 1952 and 1969. Membership in the twelve largest environmental organizations grew from about one hundred thousand in 1960 to more than one million by 1972.

¹⁹⁰ See ANDREWS, *supra* note 20, at 224.

¹⁹¹ *Id.*

¹⁹² See Coglianese, *supra* note 1, at 94.

¹⁹³ See *id.* at 95.

¹⁹⁴ See *id.*

¹⁹⁵ See Reigelman, *supra* note 71, at 535.

3. *Bipartisan Support*

The notion of the “environment” took on new meaning during the 1950s and 1960s, and the study of the environment eventually began to seep into political circles.¹⁹⁶ Although the personal experiences of everyday Americans might not have included experience with toxic waste, television media brought discussions on the environment by professionals, scientists, and politicians into the household.¹⁹⁷ The remedy for the increasingly polluted environment involved discussions about deforestation, population growth, and resource scarcity.¹⁹⁸ In this sense, the environmental debate grew beyond the immediate problems of quality of life being adversely affected by industry-created pollution.

Eventually, members of Congress heeded the call for greater information on the environment in making agency decisions. President Kennedy first suggested a new advisory council to incorporate information on natural resource use.¹⁹⁹ President Lyndon B. Johnson supported a national environmental policy²⁰⁰—but it was not a Democratic administration that signed NEPA into law and created the Environmental Protection Agency. Instead, it was Republican President Richard Nixon.²⁰¹ Nixon’s support reflected the popularity of the environmental movement in 1969 and 1970.²⁰² NEPA reflected the public’s call for the federal government to

¹⁹⁶ See Kalen, *supra* note 153, at 128.

¹⁹⁷ See HAYES, *supra* note 182, at 208.

¹⁹⁸ Kalen, *supra* note 153, at 128.

¹⁹⁹ See *id.* (citing Terrance T. Finn, Conflict and Compromise: Congress Makes A Law, The Passage of the National Environmental Policy Act 54 (July 1973) (unpublished Ph.D. dissertation, Georgetown University), ProQuest Doc. No. 759122101).

²⁰⁰ *Id.* at 128–29 (citing 111 Cong. Rec. 2,085, 2,085–89 (1965)).

²⁰¹ The Environmental Moment, *supra* note 130, at 60.

²⁰² See ANDREWS, *supra* note 20, at 228–29.

The sudden and dramatic coalescence of the American environmental movement, most compellingly in the Earth Day demonstrations of 1970, had immediate effects on national policy. Both Democrats and Republicans responded with an outpouring of federal legislation to protect the environment. Senator Edmund Muskie, a leading Democratic presidential candidate, sponsored amendments to the federal air and water quality laws which shifted their emphasis from state to federal primacy.
. . . .

Nixon saw the environmental issue, however as both a political opportunity to lead on a consensual issue and the political necessity to lead on an issue of such widespread public concern. . . .

consider adverse effects on the environment before making significant decisions.²⁰³

Politically, environmental protections for all American citizens served as a unifying ambition in the context of the anti-war and civil rights movements.²⁰⁴ The facially race neutral topic of the “environment” made protection of the environment a seemingly “easy” topic to rally around, at least compared to the dramatic changes called for by the civil rights and anti-war movements.²⁰⁵ The

²⁰³ Kalen, *supra* note 153, at 129–31.

²⁰⁴ See ROSENBAUM, *supra* note 21, at 54. Nathan Hare critiqued the environmental movement’s failure to address the plight of the urban poor suffered by black Americans to a disproportionate degree. Nathan Hare, *Black Ecology*, *The Black Scholar* (Apr. 1970), reprinted in *The Environmental Moment*, *supra* note 130, at 87–89. Hare’s criticism of the environmental movement in 1970 illustrated how the mainstream environmental movement avoided the problems of racial inequality by ignoring the differences between the different physical environments that black and white Americans occupied. The proposed solutions to solve pollution problems ignored the social mobility gap that prevented black Americans from escaping dilapidated and hazardous urban environments because of the economic system in place. Hare’s poignant criticisms of the environmental movement highlighted the vast difference between the problems addressed by the civil rights movement and the problems addressed by the environmental movement. The civil rights movement was a struggle against deeply rooted racism, economic and cultural strictures systematically disadvantaging a portion of the population. On the other hand, the environmental movement was rooted in a deep-seated cultural appreciation for the physical environment and proposed an increased fidelity to this tenet of American culture. See Coglianese, *supra* note 1, at 89–90; Riegelman, *supra* note 71, at 531.

²⁰⁵ See Lazarus, *supra* note 23, at 79.

The time was also ripe in the United States for consensus. The civil rights movement and the antiwar movement had polarized the nation in the 1960s. Many citizens were ready for an issue about which there could be a national consensus rather than further polarization. To a large extent, the environmental movement satisfied that need.

Comparison to the civil rights movement shows that addressing environmental problems was an easier task than addressing civil rights reforms called for during this time period. Another prominent social movement in 1969 was the response to the United States presence in Vietnam, Laos, and Cambodia. Coglianese, *supra* note 1, at 91. The huge expense incurred in achieving only a military stalemate in 1968 shook American confidence in the war effort. ERIK VILLARD, *THE 1968 TET OFFENSIVE BATTLES OF QUANG TRI CITY AND HUE*, at v (2008) (stating that although the Viet Cong and North Vietnamese may have ultimately suffered military defeat, “they set the United States on a path of disengagement from the war that ultimately led to the fall of Saigon some seven years later”). Walter Cronkite said:

To say that we are closer to victory today is to believe, in the face of the evidence, the optimists who have been wrong in the past. To suggest that we are on the edge of defeat is to yield to unreasonable pessimism. To say that we are mired in stalemate seems to only realistic, yet unsatisfactory, conclusion. On the off chance

individuals associated with the anti-war movement were well familiar with large protests, marches, and demonstrations.²⁰⁶ As a result, these individuals were pre-disposed against the federal government's environmental policies.²⁰⁷

The divisiveness and increasing unpopularity of American involvement in Southeast Asia prompted President Lyndon Johnson to announce on March 31, 1968, that he would not seek a second full term in office.²⁰⁸ Johnson's assessment of his political losses created

that military and political analysts are right, in the few months we must test the enemy's intentions, in case this is his last gasp before negotiations. But it is increasingly clear to this reporter that the only rational way out then will be to negotiate, not as victors, but as an honorable people who lived up to their pledge to defend democracy, and did the best they could.

See DAVID F. SCHMITZ, *THE TET OFFENSIVE: POLITICS, WAR AND PUBLIC OPINION* 112 (2005). Americans increasingly viewed the conflict as a quagmire increasing taxes at home without an end in sight. See Schmitz, *supra*, at 84 (explaining that the stalemate achieved in response to the offensive against South Vietnamese and United States military forces in the region showed the American public the great economic and human costs of achieving minimal success). Baby boomers subject to the draft were dying in Vietnam at a disproportionate rate to volunteers. See JAMES WESTHEIDER, *FIGHTING IN VIETNAM: THE EXPERIENCE OF THE U.S. SOLDIER* 137 (2007).

²⁰⁶ Clyde Brown & Gayle K. Pluta Brown, *Moo U and the Cambodian Invasion: Nonviolent Anti-Vietnam War Protest at Iowa State University*, in *THE VIETNAM WAR ON CAMPUS: OTHER VOICES, MORE DISTANT DRUMS* 119, 121 (Mark Jason Gilbert ed., 2001).

²⁰⁷ For an example of the link between the Vietnam and the environmental movement see Purdy, *supra* note 67, at 1176 (discussing the Sierra Club's break from advocating a more narrowly focused nature agenda) (citing, *A Fable for Our Times*, 55 *SIERRA CLUB BULL.* 16, 16 (1970)).

²⁰⁸ President Lyndon B. Johnson, Address to the Nation announcing steps to limit the war in Vietnam (Mar. 31, 1968), in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1968-69, 469-70* (1970), available at <http://www.lbjlibrary.net/collections/selected-speeches/1968-january-1969/03-31-1968.html>. President Johnson stated:

There is division in the American house now. There is divisiveness among us all tonight. And holding the trust that is mine, as President of all the people, I cannot disregard the peril to the progress of the American people and the hope and the prospect of peace for all peoples. So, I would ask all Americans, whatever their personal interests or concern, to guard against divisiveness and all its ugly consequences. Fifty-two months and 10 days ago, in a moment of tragedy and trauma, the duties of this office fell upon me. I asked then for your help and God's, that we might continue America on its course, binding up our wounds, healing our history, moving forward in new unity, to clear the American agenda and to keep the American commitment for all of our people. United we have kept that commitment. United we have enlarged that commitment. . . . Believing this as I do, I have concluded that I should not permit the Presidency to become involved in the partisan divisions that are developing in this political year. With America's sons in the fields far away, with America's future under challenge right here at home, with

by the war shows how damaging public opinion could be when drafting U.S. citizens to fight and die overseas. By contrast, domestic environmental protection allowed politicians to support a policy that kept citizens safe at home.²⁰⁹ Politicians stood to gain by responding positively to mass protests in favor of environmental protections whereas responding to protests with regard to the war was more dubious.²¹⁰ President Nixon called for environmental protection at home and increased citizen participation in the process.²¹¹ Competing with presidential foe Senator Edmund Muskie for environmental credentials,²¹² Nixon embraced the popularity of environmental protection as a deflection from more controversial war and race issues.²¹³ Addressing the environment became a way for politicians to

our hopes and the world's hopes for peace in the balance every day, I do not believe that I should devote an hour or a day of my time to any personal partisan causes or to any duties other than the awesome duties of this office—the Presidency of your country. Accordingly, I shall not seek, and I will not accept, the nomination of my party for another term as your President.

Id. at 475–76.

²⁰⁹ See Purdy, *supra* note 67, at 1190 n.225.

This would be compatible with the thought that the “environmental crisis” and “revolution” borrowed some of their felt urgency from authentically divisive struggles: Vietnam abroad, race at home, and the disconcerting eruption of youthful dissent from norms of respectability and success. In this view, second-generation environmental public language would be an example of the great American genre of cheap talk: frisson-inducing dissent that does not make itself too inconvenient in practice for the current arrangement of interests and ideas.

(citing Editorial, *The Good Earth*, N.Y. TIMES, Apr. 23, 1970, at 36 (“Is the sudden concern for the environment merely another ‘nice, good middle-class issue,’ as one organizer put it, conveniently timed to divert the nation’s attention from such pressing problems as the spreading war in Indochina and intractable social injustice at home?”)).

²¹⁰ *Id.* (“From the start, the environmental crisis was perceived as a unifying challenge, even the occasion of a unifying change in values, for a divided country. See Editorial, *Earth Week—No Vogue*, N.Y. TIMES, Apr. 19, 1971, at 36 (“[The environment] has become deeply imbedded in politics—not in a partisan way but almost as a qualification for office.”)).

²¹¹ See Woolley & Peters, *supra* note 160, at 71–72 (stating that the solutions to environmental quality problems were too large to be solved by the government and calling for “fundamentally new philosophies of land, air, and water use” as well as stricter regulation and increased citizen participation in the process).

²¹² KRIER & URSIN, *supra* note 127, at 203. Nixon saw Muskie as a likely opponent in the upcoming 1972 presidential election. *Id.* Nixon’s political strategy could be characterized as beating Muskie at his own game.

²¹³ See Christopher H. Schroeder, *Rational Choice Versus Republican Moment: Explanations for Environmental Laws, 1969–73*, 9 DUKE ENVTL. L. & POL’Y F. 29, 55 (1998).

respond to a timely social issue without losing support from backing an overly controversial topic.²¹⁴

The change in presidential administrations between the initiation of the call for national environmental policy and the enactment of NEPA is significant because it demonstrates that despite some conservative skepticism that concerns for the environment were overblown,²¹⁵ the public's concern for the environment was met by a governmental response. While Congress considered NEPA, citizens wrote to President Nixon directly and demanded government action to combat pollution problems like lead poisoning.²¹⁶ Union leaders urged local officials to establish regulations to protect air and water quality, citing adverse effects on human health, and they called for organization among local residents to demonstrate the public's commitment to address these issues.²¹⁷ Senate testimony explained that the effect of the Santa Barbara oil spill on birds, sea mammals, and other sea life would also reduce the quality of human life.²¹⁸

The environmental movement of the 1960s and 70s may also have benefited in comparison with other national issues and themes. America was displaying a significant dark side on other fronts, including a divisive war, urban unrest, campus violence, riots and strife over civil rights. Environmentalism's ability to attract allegiance may have been enhanced by the favorable contrast of its positive image to these darker places in American society.

²¹⁴ See The Environmental Moment, *supra* note 130, at 8.

²¹⁵ See *id.* at 60 ("Some conservatives remained wary of the environmental movement, especially given its push for increased government regulation.").

²¹⁶ See Jack Newfield, *Lead Poisoning: Silent Epidemic in the Slums*, VILLAGE VOICE (N.Y.C.), Sept. 18 1969, at 3 reprinted in The Environmental Moment, *supra* note 130 at 43 (describing Brenda Scurry's letters to President Nixon and her daughter's death due to lead poisoning from ingesting plaster and paint in her apartment in the Bronx).

²¹⁷ See Hannan, *supra* note 146.

²¹⁸ Sanders Testimony, *supra* note 162, at 55.

Beach lovers and boat owners, a large percentage of the Santa Barbara population, have been deprived of their "rights" and are politically angry. The Chamber of Commerce fears lack of tourist revenue. Property owners are wondering about the beach frontage values. Even these intangibles are easier to quantify than the value a person places on being able to relax and reflect on a stretch of unpolluted coast. These factors, subjective though they may be, show where the real impact of the oil spill will be felt. A community is largely a state of mind. It can be nothing more or less than what the local inhabitants make of it. If oil continues to degrade the local environment, public apathy and disappointment replace optimism and pride. The blight will spread throughout the area and lead eventually to the production of yet another technological slum in a nation already over-endowed with wasted urban regions.

These real-life experiences demonstrated that the concern for the environment was significantly more than “alarmist” rhetoric.²¹⁹ The participants in the environmental movement were both young and old, conservative and liberal.²²⁰ These people asked for an answer to real-life problems caused by an increasingly toxic environment.²²¹ As a result, Congress came together on the environment.²²² This example of bipartisan support for the environmental movement shows the power of the broad public support for the call to action on the environment. For President Nixon, who had no track record advancing pollution control legislation, the public’s widespread concern prompted him to support protective legislation.²²³

During the late 1960s and early 1970s the public perceived that pollution was out of control. Television media, widely read books, as well as mass protests calling for action, all facilitated awareness of the problem. New environmental groups including, the Environmental Defense Fund, the Natural Resources Defense Council, Friends of the Earth, the Sierra Club, Environmental Action, Greenpeace, Wilderness Society, and the National Audubon Society seized upon the political timing of the environmental movement by multiplying in numbers and increasing their membership.²²⁴ Congress responded to the public’s demand for action with bipartisan support for environmental laws.

III COMPARING THE 19TH CENTURY WILDLIFE MOVEMENT WITH THE 20TH CENTURY ENVIRONMENTAL MOVEMENT

The achievements of the successful movement for state wildlife laws in the 1870s and the environmental movement coalescing in 1969 reflect the power of motivated and organized groups to

²¹⁹ See The Environmental Moment, *supra* note 130, at 35.

²²⁰ *Id.* at 10.

²²¹ *Id.*

²²² See KRIER & URSIN, *supra* note 127, at 182 (citing ALVIN DAVID SOKOLOW, AB 357: THE PASSAGE OF CALIFORNIA’S “PURE AIR” LAW IN 1968, at 9 (1970)). For example, one representative said, “Air pollution is a bigger issue than Vietnam in California, and every Democrat and Republican in the delegation will fight to the last ditch,” referring to the California delegation’s mission to preserve California’s ability to have its own air quality standards. KRIER & URSIN, *supra* note 127, at 182.

²²³ See ANDREWS, *supra* note 20, at 229.

²²⁴ Coglianesse, *supra* note 1, at 93.

influence a fundamental change in American society.²²⁵ These two movements enacted successful legal reforms largely because of the interest groups' efforts to advance their cause within legislative bodies. The appeal and influence these interest groups wielded is explained by the cultural values and understanding of social problems advanced by prominent thinkers. The plodding pace and relatively narrow focus of the sportsmen's 19th century wildlife laws in contrast to the seemingly explosive pace of environmental reforms in the 1960s and 1970s may be attributed to the media that was available during each time period.

A. The Role of Interest Groups

The emergence of civic organizations was a phenomenon of the post-Civil War era.²²⁶ The reformers of the late 19th century introduced the concept of the "public interest" in response to waste and corrupt politics of the day.²²⁷ In response to societal problems, these reformers proposed expert-managed public systems.²²⁸ The new understanding of both social and natural problems emerging in the late 19th century helped make publicly-managed systems seem appropriate, given the obvious adverse effects of leaving management solutions to the unregulated market.²²⁹

In the late 19th century, populations of species—hunted as game—rapidly declined. Previously abundant game species were no longer viable for hunting. The disappearance of buffalo, deer, fish, and birds provoked widespread public demand for wildlife reform in states across the nation. Sportsmen organized in national organizations and local clubs to lobby state legislatures to enact and enforce protective policy. These organizations were numerous and well-connected.²³⁰ For example, Theodore Roosevelt founded the Boone and Crockett Club.²³¹ The groups acted swiftly to end market hunting in order to

²²⁵ See *Nineteenth Century Wildlife Law*, *supra* note 38, at 938–39 (explaining the competing interests, such as subsistence hunting and market hunting, ultimately lost a battle in harvesting wildlife because "sport's campaign was waged by the most powerful men in America").

²²⁶ See JULIE HUSBAND & JIM O'LOUGHLIN, *DAILY LIFE IN THE INDUSTRIAL UNITED STATES, 1870–1900*, at 234 (2004).

²²⁷ Purdy, *supra* note 67, at 1151–52.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See Field, *supra* note 17, at 467.

²³¹ *Id.*

preserve wildlife.²³² State wildlife laws aggravated market hunters, vendors, and some rural people because the right to hunt was important to them.²³³ But opposition to these laws lacked the organization and influence of the sportsmen's groups. The approach taken to the state wildlife laws eventually achieved a complete victory over the opposing commercial market hunters.²³⁴

The enactment of state wildlife laws in the 1870s is an example of organized interest groups achieving political success.²³⁵ During the early part of the 20th century, interest groups advocated progressive reforms in public land management and conservation that set aside most of the national forests and parks.²³⁶ But environmental interest groups achieved an impressive level of public participation in the 1960s and 1970s. As previously mentioned, an estimated 20 million Americans attended the first Earth Day demonstrations across the United States.²³⁷ From about one hundred thousand members in 1960, membership in environmental interest groups exceeded one million in 1972.²³⁸ By the end of the 1970s, there were active members in more than three thousand groups advocating environmental reform.²³⁹ But lobbying for federal environmental protections also came from the lobbying efforts of unions and local governments.²⁴⁰ The work of these groups produced a persuasive effect on Congress and the President.²⁴¹ The environmental laws passed under pressure of interest

²³² See *Nineteenth Century Wildlife Law*, *supra* note 38, at 961 (“[L]egislators were persuaded that game laws helped the poor by preventing them from improvidently consuming the seed stock of their sustenance.”).

²³³ See, e.g., *McConico v. Singleton*, 9 S.C.L. 244, 351-53 (S.C. Constitutional Ct. App. 1818).

²³⁴ *Nineteenth Century Wildlife Law*, *supra* note 38, at 957.

²³⁵ See TOBER, *supra* note 2, at 50 (stating that the 1870s was the time “in which the protectionist spirit among sportsmen emerged to an important degree”).

²³⁶ See ANDREWS, *supra* note 20, at 149–52.

²³⁷ Dowie, *supra* note 156.

²³⁸ See Coglianesi, *supra* note 1, at 94.

²³⁹ *Id.*

²⁴⁰ See *The Environmental Moment*, *supra* note 130, at 35, 49, 52, 56; see also KRIER & URSIN, *supra* note 127, at 171 (“The urban lobby was coalescing around broadened federal authority. . . . Th[is] lobby [was composed] primarily [of] the Conference of Mayors, the American Municipal Association, and the National Association of Counties. . . .”).

²⁴¹ See *The Environmental Moment*, *supra* note 130, at 35, 49, 52, 56.

groups during the 1970s are an example of the power of an organized and motivated population.²⁴²

B. Philosophy and Reform Vocabulary

The interest groups that drove change drew upon the cultural themes expressed by writers to articulate a path for change. The language that the public used to describe the social problems at hand influenced the ideas and values of the wildlife protection and environmental movements.²⁴³ The work of Marsh, Thoreau, Turner, and others in the late 19th century had the effect of challenging Americans to come to grips with limits of the natural environment. Marsh's *Man and Nature* provoked a radical change in American environmental attitudes.²⁴⁴ Marsh warned Americans about the devastating effect on the natural environment caused by civilization.²⁴⁵ Thoreau advocated reserving wild areas as crucial aspects of American culture.²⁴⁶ These themes were central to both the movement to preserve wildlife and a contemporaneous effort to set aside public lands for recreation and aesthetic enjoyment.²⁴⁷ Turner's frontier thesis challenged Americans to confront the reality that turning to the frontier would no longer overcome natural resource limitations.²⁴⁸

²⁴² See generally DENNIS C. MUELLER, PUBLIC CHOICE: AN INTRODUCTION, 32 1979 (discussing the origins of public choice political theory).

²⁴³ See Purdy, *supra* note 67, at 1139.

²⁴⁴ See LOWENTHAL, *supra* note 61, at 303 ("Marsh's timely book . . . now taught Americans 'to attribute unwelcome changes to our restless disturbance of the equilibrium of nature' and showed them how to protect their heritage from waste and abuse.").

²⁴⁵ See *id.* (explaining the impact of Marsh's work following the 1874 reprint of *Man and Nature*, entitled *The Earth as Modified by Human Action*).

²⁴⁶ See RODERICK FRAZIER NASH, WILDERNESS AND THE AMERICAN MIND 102 (4th ed. 2001). Although Thoreau died in 1862, his work helped to create cultural appreciation for wilderness long after his death. See Blackmer, *supra* note 12, at 267.

This growing awareness was epitomized by Henry David Thoreau's journeys to the North Woods of Maine beginning in the late 1830's. Along with many other thinkers, explorers, writers, scientists, and artists of the second half of the century, Thoreau became a champion of preserving the wildness that still could be found: "According to Thoreau, wildness and refinement were not fatal extremes but equally beneficent influences Americans would do well to blend. With this concept Thoreau led the intellectual revolution that was beginning to invest wilderness with attractive rather than repulsive qualities."

(quoting NASH, *supra*, at 95).

²⁴⁷ See Purdy, *supra* note 67, at 1148 (describing John Muir's use of the romantic literary tradition as the foundation of political organization).

²⁴⁸ See FRONTIER, *supra* note 12, at 9.

The 19th and 20th century movements were responses to groups overusing resources and creating undesirable living conditions. The wildlife laws of the late 19th century shared an “anti-monopolistic” trait with contemporaneous calls for public management of sanitization and water management.²⁴⁹ The spirit of reform for wildlife protection coincided with an increasing interest in the outdoors to escape unsanitary urban areas.²⁵⁰ Just as the advocates of appropriative surface water rights sought to prevent better-funded enterprises from usurping the water in the arid west, sportsmen sought to prevent market hunters from hunting animals into extinction. Similar to the movement for cleaner cities, the proponents of state wildlife laws saw public management as the solution to the problem of wildlife in decline.

The antimonopoly sense rose again in the environmental reform movement of the 1960s and 1970s.²⁵¹ Concern that humans were monopolizing the environment by the widespread use of chemicals at the expense of wildlife was a catalyst for legal reform concern.²⁵² In the 1960s, Rachel Carson’s *Silent Spring* called into question the conventional wisdom of “better living through science.” *Silent Spring* showed the devastating impact of indiscriminate use of pesticides upon wildlife.²⁵³ But Carson’s prose also prompted an emotional response to this tragedy.²⁵⁴ Even though the use of pesticides, like

²⁴⁹ See David Schorr, *THE COLORADO DOCTRINE: WATER RIGHTS, CORPORATIONS AND DISTRIBUTIVE JUSTICE ON THE AMERICAN FRONTIER*, 65–97 (2012) (explaining the origin of western water doctrine arose from an effort to prevent large businesses from usurping development opportunities by outspending self-made entrepreneurs); ANDREWS, *supra* note 20, at 112–20 (explaining the development of public management in sanitization was response to the failure of the free-market solution to provide satisfactory living conditions).

²⁵⁰ See ANDREWS, *supra* note 20, at 114–16 (explaining the unsanitary, crowded, and increasingly consumptive conditions of major cities such as New York, Chicago, Cleveland, and Detroit in the late 19th century).

²⁵¹ See *id.* at 204–18 (explaining that the nationalization of environmental issues from clean water to clean air arose from a skepticism of experts declaring products and policies to be safe).

²⁵² See *id.*

²⁵³ See, e.g., *id.* at 202.

²⁵⁴ Rachel Carson wrote:

Through all these new, imaginative and creative approaches to the problem of sharing our earth with other creatures there runs a constant theme, the awareness that we are dealing with life—with living populations and all their pressures and counterpressures, their surges and recessions. Only by taking account of such life

DDT, was supposed to be a great boon to public health, the declining populations of birds, fish, and other species catalyzed a public backlash against this supposedly beneficial scientific advance.

The ideas and values expressed by prominent thinkers in their own works influenced public opinion by reappearing in newspapers, public hearings, and in Congress.²⁵⁵ The effect of these ideas is seen by those messages as they appeared in widely circulated media.

C. Public Perception and Media Coverage

Mass media coverage affects the public policy process.²⁵⁶ Although the exact effect of news media coverage is hard to pinpoint, research suggests that a prominent function of the news is to set an agenda.²⁵⁷ Public concern for a particular issue does not necessarily correlate with the “objective” conditions that cause the problem.²⁵⁸ Some have suggested that environmental issues in the media first garner attention and enthusiasm because of the widespread effects on the population.²⁵⁹ By that same token, however, the widespread impacts also carry large costs associated with change—and when these costs are discovered, the enthusiasm for reform fades.²⁶⁰

Information sources that disseminated reform ideas shaped the pace and character of wildlife protection as well as the environmental movement. In the late 19th century, the sportsmen’s newspapers served as forum for advancing their cause.²⁶¹ The sportsmen of the 1870s forged a long state-by-state campaign for wildlife laws. Similarly, the environmental movement in 1969 benefited from broadcast television that disseminated the news of environmental

forces and by cautiously seeking to guide them into channels favorable to ourselves can we hope to achieve a reasonable accommodation between the insect hordes and ourselves. The current vogue for poisons has failed utterly to take into account these most fundamental considerations. As crude a weapon as the cave man’s club, the chemical barrage has been hurled against the fabric of life—a fabric on the one hand delicate and destructible, on the other miraculously tough and resilient, and capable of striking back in unexpected ways.

CARSON, *supra* note 174 (quoted in ANDREWS, *supra* note 20, at 201).

²⁵⁵ See Purdy, *supra* note 67, at 1139.

²⁵⁶ See Jon Angone, *Amplifying Public Opinion: The Policy Impact of the U.S. Environmental Movement*, 85 SOC. FORCES 1593, 1603 (2006–2007).

²⁵⁷ See ALISON ANDERSON, *MEDIA CULTURE AND THE ENVIRONMENT* 24 (1997).

²⁵⁸ *Id.* at 25, 29.

²⁵⁹ *Id.* at 30.

²⁶⁰ *Id.*

²⁶¹ See REIGER, *supra* note 9, at 49.

disasters and public protest with daily national broadcasts. These historical moments provide examples of environmental issues drawing public concern.²⁶² However, some of the changes that took place in the media between the 1870s and 1970s may help to explain how the environmental reformers of the later era succeeded in producing a national movement in a relatively short time period—in comparison to the movement to enact wildlife laws, which advanced through the states over more than a decade.²⁶³

In the 1870s, wood pulp developed as a raw material for newspaper print, meeting an increasing demand for printed media sources such as the sportsmen's publications.²⁶⁴ The news format for a privately held and interest specific publication provided a fertile ground for groups to develop their agendas.²⁶⁵ The sportsmen, like the other interest groups of the 19th century, produced their own publicity, and their cause did not enjoy the benefit of mass media.²⁶⁶ Ultimately, the state wildlife laws were a specific redress to the problem of species decline.

By the late 1960s, however, television news changed the way Americans framed environmental issues.²⁶⁷ By 1969, two-thirds of Americans reported that television news was their primary source for news.²⁶⁸ Television news media has a particular propensity to simplify and dramatize events.²⁶⁹ After Americans watched hunters scurry across the tundra in Arctic Canada to club baby seals and drag bloody

²⁶² See generally ANDERSON, *supra* note 257, at 5, 18 (explaining the phenomenon of environmental issues and “capacities” in the realm of public concern and suggesting that the judgments about “newsworthiness” influence the political process).

²⁶³ See *supra* notes 45–54 (describing the timeframe of the state wildlife movement); see also ANDERSON, *supra* note 257, at 18 (explaining the change in the use of mass media from a more informational and editorial perspective prior to 1900 to a tactic for “manipulation and propaganda” from 1900-1940).

²⁶⁴ See JOEL MOKYR, *THE SECOND INDUSTRIAL REVOLUTION, 1870–1914*, 12 (1998), available at <http://faculty.wcas.northwestern.edu/~jmokyr/castronovo.pdf> (stating that wood pulp was perfected around 1873).

²⁶⁵ See ANDERSON, *supra* note 257, at 56 (describing attributes of various formats of news media).

²⁶⁶ See *id.* at 81–82 (describing the shift from the suffragists movement in the early 19th century, who relied heavily upon their own efforts to publish, to the effect of television coverage on publicizing the civil rights movement in the 1950s).

²⁶⁷ *Id.*

²⁶⁸ Waldman, *supra* note 169, at 72.

²⁶⁹ See ANDERSON, *supra* note 257, at 57.

pelts across the ice, the United States banned the importation of seals in 1972.²⁷⁰ Footage of water pollution from factories and oil polluted beaches served as a national call to action.²⁷¹ The messages contained in television news coverage on pollution catalyzed public support for the environmental movement, but it also reduced the problem to a “shallow” or self-interested agenda.²⁷² The influence of television, cultivating broad-based support for environmental protection in the 1960s and 1970s, correlated with congressional actions to reform the federal government’s environmental policy and regulate industrial polluters.²⁷³ Television media dramatized industry’s bad acts and fostered the government’s corresponding inaction.²⁷⁴

These movements succeeded on different scales because media framed the scope of ecological problems at issue. The self-publicizing sportsmen of the 19th century achieved a surgically specific redress in state legislatures to the threat of wildlife extinction. Environmental reformers of the 1960s and 1970s achieved a broader national regulatory response to pollution problems because of mass media’s ability to capture their message and disseminate it to television audiences across the whole nation.

IV

HISTORY’S LESSONS AND CLIMATE CHANGE

The legislative accomplishments of the 1960s and 1970s were substantial victories that seem surreal given the repeated failures to enact climate change reforms.²⁷⁵ If the environmental laws of the 20th

²⁷⁰ See Jeremy David Sacks, *Culture, Cash or Calories: Interpreting Alaska Native Subsistence Rights*, 12 ALASKA L. REV. 247, 251 (1995) (citing H.R. REP. NO. 707 (1971), reprinted in 1972 U.S.C.C.A.N. 4144). For an example of the type of television news described, Seal hunt: “barbaric and cruel” (CBS New television broadcast Apr. 6, 1976), available at, <http://www.cbc.ca/archives/categories/economy-business/business/pelts-pups-and-protest-the-atlantic-seal-hunt/barbaric-and-cruel.html>.

²⁷¹ See Donnalynn Pompper, *From Loch Ness Monsters to Global Warming: Framing Environmental Risk in a Supermarket Tabloid*, in ENVIROPOP: STUDIES IN ENVIRONMENTAL RHETORIC AND POPULAR CULTURE 115 (Mark Meister & Phyllis M. Japp eds., 2002).

²⁷² See JOHN S. DRYZEK, *THE POLITICS OF THE EARTH 183–85* (2005) (discussing Arne Naess’s distinction between those who sought to reform industrial pollution practices in the 1970s and those who desired even greater environmental protections because of nature’s intrinsic value).

²⁷³ See Lazarus, *supra* note 23, at 79.

²⁷⁴ See ANDREWS, *supra* note 20, at 210–11.

²⁷⁵ Ted Nordhaus & Michael Shellenberger, *The Death of Environmentalism: Global Warming Politics in a Post-environmental World*, 1 GEOPOLITICS, HISTORY, & INT.

century seem distant, the 19th century state wildlife laws are all but publicly forgotten. As a result, the failure to enact legislative reform to combat climate change legislation is a source of pessimism.²⁷⁶ Politicians are unlikely to act because the benefits of doing so would only be realized long after the next election.²⁷⁷

The unappealing task of taking up climate change, as opposed to the historically successful movements previously mentioned, can be explained by several factors. Public perception of climate change may involve trusting scientific experts to a larger extent than seeing a decline in wildlife or witnessing smoke or sludge come from a factory.²⁷⁸ Further, scientific consensus does not translate into public acceptance in today's world.²⁷⁹ The distrust of scientists, their work, and government regulatory solutions may also be a product of organized environmental opposition and climate change deniers. The decline of credible professional journalism amid the multitude of cable news networks, and Internet news sources has changed the news

RELATIONS, 19, 20 (2009) (“Our parents and elders experienced something during the 1960s and 70s that today seems like a dream: the passage of a series of powerful environmental laws too numerous to list, from the Endangered Species Act to the Clean Air and Clean Water Acts to the National Environmental Policy Act.”).

²⁷⁶ See Purdy, *supra* note 67, at 1132.

The basis of pessimism about climate politics is not elusive. Climate change threatens to be the externality that ate the world. Within a year of its release, carbon dioxide is dispersed uniformly through the earth's atmosphere. Whoever uses energy derived from fossil fuels gets the full benefit of that power while evenly dividing the atmospheric harm with somewhat more than 6.8 billion others. That is a ratio of benefit to harm all but certain to induce overindulgence. The standard solution to negative externalities, of course, is to change the incentives of individual choices by legally internalizing some of the costs of the harms. The difficulty is that both the spatial and the temporal scales of political choice replicate the basic externalities problem of individual choice. In addressing a global problem, a national public must absorb the full cost of any measure it adopts, but will receive only a fraction of the globally distributed benefit. Climate policy distributes costs and benefits in the pattern of a foreign-aid project—distributing, in the case of an American action, ninety-five percent of its benefits to foreigners.

²⁷⁷ *Id.* at 1134.

²⁷⁸ See Susanne C. Moser & Lisa Dilling, *Communicating Climate Change: Closing the Science-Action Gap*, in *THE OXFORD HANDBOOK OF CLIMATE CHANGE AND SOCIETY* 161, 163 (John S. Dryzek et al. eds., 2011).

²⁷⁹ See Sheila Jasanoff, *Cosmopolitan Knowledge: Climate Science and Global Civic Epistemology*, in *THE OXFORD HANDBOOK OF CLIMATE CHANGE AND SOCIETY* 129, 130 (John S. Dryzek et al. eds., 2011).

media.²⁸⁰ As a result, climate change-focused interest groups today do not have the same corner on the mass media market that environmentalists did during the 1960s and 1970s.

A. Interest Groups & Climate Change

Climate change reformers have earned low returns on their investments in lobbying for protective legislation.²⁸¹ Some critics attribute part of this shortcoming to the strategy to litigate and lobby for reform rather than build grassroots support.²⁸² Citizens know that government institutions already enforce environmental protection in the United States, contributing to the general apathy toward involvement in climate change.²⁸³ But climate change presents a problem too large for existing institutions or interest groups to tackle.²⁸⁴

Environmental interest groups of the 1960s and 1970s capitalized on a heightened spirit of public involvement.²⁸⁵ Though the United States public is not presently engaged in widespread activism, the example of the 1960s and 1970s may provide some valuable lessons. The notion of the environment, as we understand it today, was an

²⁸⁰ See Lydia Saad, *TV Is Americans' Main Source of News*, Gallup (July 8, 2013) <http://www.gallup.com/poll/163412/americans-main-source-news.aspx> (listing 13 networks, television generally as the news source for 55% of U.S. adults followed by 21% getting news from the internet, 9% from print, and 6% from radio).

²⁸¹ See Nordhaus & Shellenberger, *supra* note 275, at 121 (“Despite the scale of the impacts that may occur, however, very little effective action has occurred since climate change first entered the public consciousness in the late 1980s.”).

²⁸² See, e.g., James Gustave Speth, *Environmental Failure: A Case for a New Green Politics*, Yale Environment 360, (Oct. 28, 2008), http://e360.yale.edu/feature/environmental_failure_a_case_for_a_new_green_politics/2075.

²⁸³ See Coglianese, *supra* note 1, at 112–13.

²⁸⁴ Speth, *supra* note 282 (arguing that environmentalism should expand its range of interest issues in order to gain more grassroots support); see also NORMAN MILLER, ENVIRONMENTAL POLITICS: INTEREST GROUPS, THE MEDIA, AND THE MAKING OF POLICY 9–10 (2002) (noting the alliance of religious and environmental groups in order to expand influence and maximize interest group economy).

²⁸⁵ See Purdy, *supra* note 67, at 1178.

Second was a change in the connection between environmental problems and public health. This link had been a persistent but attenuated theme of both Sierra Club and New Nationalist strands of nineteenth-century conservation, and was even more badly stretched in the early efforts of the Wilderness Society to establish a public-health rationale for wilderness. In the 1960s, the environmental problem came to be understood as one of a “poisoned world,” a self-inflicted crisis of industrial society. Where earlier public-health arguments had focused on the restorative power of recreation, the new environmentalism took some of its urgency from the perception of an unfolding public-health disaster.

invention of that period.²⁸⁶ The sense of crisis was folded into an environmental movement that combined primarily public health, nature, and conservation interests.²⁸⁷ This combination provided a morally righteous platform for the environmental movement.²⁸⁸ It may be that this moral platform served as the currency for the appeal of the movement.

The moral platform of the late 19th century wildlife laws is less studied, but it has a logical foundation—market hunters would hunt wildlife into extinction if there were no laws to stop them.²⁸⁹ Similarly, environmental interest groups of the 1960s and 1970s attributed blame for the increasingly toxic environment to industry and the government for failure to regulate.²⁹⁰ Even though the late 19th century wildlife laws were enacted without mass protests, the pragmatic approach of the sportsmen achieved both legislation and enforcement efforts because they identified a bad actor and persisted in efforts to eliminate the bad acts.

Climate change reformers have not yet systematically dismantled the appeal of opposition from the far right.²⁹¹ However, armed with

²⁸⁶ Purdy, *supra* note 67, at 1177. He describes the societal issue as framed in the 1960s–1970s as:

[R]unaway faith in technological instruments, in defiance of nature’s order, delicacy, and limits. Once invented, the environmental crisis could encompass many crises. A set of innovations emerged together in this period and remade environmental public language. The first two were the discovery or invention of the environment as a unified phenomenon and the use of environmental crisis as a moral master narrative of modern life. The others can be understood as elaborations on these two. The first subsidiary development was apocalypse: the claim arose suddenly from every editorial board, social-movement publication, and even congressional debate that an environmental crisis threatened the survival of the species or the planet. The literal warning of human extinction was a new theme in environmental public argument.

²⁸⁷ See MILLER, *supra* note 284, at 8–9.

²⁸⁸ See Purdy, *supra* note 67, at 1179, 1188–89.

Congress was in the process of implementing a new set of defining commitments in response to intense public ferment. It was establishing the ideas that human interests depend on a web of ecological interdependence; the natural world matters morally as such and not only as a source of human convenience, and we disregard these complex facts at peril to both our interests and our duties.

²⁸⁹ See *supra* notes 115–26 and accompanying text.

²⁹⁰ See ANDREWS, *supra* note 20, at 220–21.

²⁹¹ See Nordhaus & Shellenberger, *supra* note 275, at 20 (“The domination of American politics by the far-right is a central obstacle to achieving action on global

information that attributes a disproportionate share of the cause of climate change to a select few enterprises, a “finger-pointing” attack may be effective. To date, it has been difficult to point a finger at a particular bad actor because of the shared contributions of carbon emissions from automobiles. However, a recent study attributes 63 percent of the cumulative worldwide emissions of industrial CO₂ and methane between 1751 and 2010 to just ninety “carbon major entities,” including investor-owned entities, state-owned enterprises, and nation-states.²⁹² Identifying bad actors played a significant part in the appeal of both the wildlife protection and environmental movements, and perhaps identifying these bad actors could generate support for climate change reform.

Americans are resistant, however, to imposing additional regulations on industry for fear of weakening the economy.²⁹³ In light of these concerns, climate change reformers should employ economic arguments to bolster their cause. For example, climate change reformers should employ 19th century arguments, such as tying species conservation to food supply security, to reframe the economic importance of carbon emissions reduction.²⁹⁴ Reframing the issue in economic terms relies on both empirical knowledge and cultural values.²⁹⁵ Unfortunately, the issue of climate change has joined the ranks of gun control, taxes, and abortion as a social identity marker closely associated with one’s political affiliation.²⁹⁶ But if the issue of climate change can appeal on a moral and economic level, these motives could overcome current cultural stigma and appeal across the political spectrum.²⁹⁷

warming. Yet almost none of the environmentalists we interviewed thought to mention it.”).

²⁹² Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 122 CLIMATIC CHANGE 229, 229 (2014).

²⁹³ See Riley E. Dunlap & Aaron M. McCright, *Organized Climate Change Denial*, in THE OXFORD HANDBOOK OF CLIMATE CHANGE AND SOCIETY 144, 146–49 (John S. Dryzek et al. eds., 2011).

²⁹⁴ See Blumm & Ritchie, *supra* note 50, at 693 (citing George Cameron Coggins, *Wildlife and the Constitution: The Walls Come Tumbling Down*, 55 WASH. L. REV. 295, 305 (1980)).

²⁹⁵ Purdy, *supra* note 67, at 1197.

²⁹⁶ See Matthew C. Nisbet, *Public Opinion and Participation*, in THE OXFORD HANDBOOK OF CLIMATE CHANGE AND SOCIETY 355, 360–61 (John S. Dryzek et al. eds., 2011).

²⁹⁷ See Purdy, *supra* note 67, at 1198.

B. Environmental Opposition & Media Framing

Critics of environmental legislation in the 1960s and 1970s were slow to mobilize. Initial efforts to discredit activists were botched.²⁹⁸ Industry executives in the 1960s believed that the environmental movement was a passing fad.²⁹⁹ But, in the wake of Earth Day demonstrations in 1970, industry leaders felt an increasing need to take action to counter the environmental movement.³⁰⁰

Opposition to the environmental regulatory controls began with Lewis Powell's *Confidential Memorandum: Attack on The American Free Enterprise System* in 1971.³⁰¹ The future U.S. Supreme Court Justice characterized broad social changes, including new environmental laws, as an assault on American values and said industry leaders "responded—if at all—by appeasement, ineptitude and ignoring the problem."³⁰² Powell outlined the influence of media and urged the Chamber of Commerce to serve as an organized force to resist sources of what he considered to be "socialism."³⁰³ Powell also called for monitoring television and other media to assure that business-minded points of view had equal influence.³⁰⁴ Industry took these suggestions to heart, creating their own publications and waging campaigns.³⁰⁵

Industry's counter-movement to environmental regulations gained steam in the 1970s, but blossomed in the Reagan era.³⁰⁶ In the early 1970s, business groups began by publishing magazines and funding advertising campaigns on television and radio.³⁰⁷ Nixon reversed

²⁹⁸ See KRIER & URSIN, *supra* note 127, at 195 (describing the auto industry's backfiring attempt to discredit Ralph Nader and humiliating consent decree with the United States attorney general after an investigation upon allegations of conspiracy to delay implementation of air pollution controls); see also Flippen, *supra* note 164, at 139 (describing Pacific Gas and Electric Company's the attempt to discredit Donald Widener in response to his documentary critical of the nuclear power industry).

²⁹⁹ See Flippen, *supra* note 164, at 138.

³⁰⁰ *Id.*

³⁰¹ Memorandum from Lewis F. Powell, Jr. to Mr. Eugene B. Snyder, Jr., Chairman, Education Committee., U.S. Chamber of Commerce (Aug. 23, 1971), available at <http://law.wlu.edu/deptimages/Powell%20archives/PowellMemorandumTypescript.pdf>.

³⁰² *Id.* at 8.

³⁰³ *Id.* at 3–4, 11.

³⁰⁴ *Id.* at 21–24.

³⁰⁵ See Flippen, *supra* note 164, at 139–40.

³⁰⁶ Hayes, *supra* note 181, at 491–93.

³⁰⁷ See Flippen, *supra* note 164, at 139.

course on the environment by 1973, estimating that Americans placed higher priority on employment than on the environment.³⁰⁸ Despite subsequent political scandal for Nixon, the anti-environmental sentiment lived on in politics. President Ronald Reagan's successful presidential bid in the 1980 election was aided by a large effort to reverse government "overregulation."³⁰⁹ This sentiment has waxed and waned in subsequent decades, but the strategy first used by the tobacco industry—to deny that a problem exists—lives on in the climate change denial movement.³¹⁰

Scientific consensus establishing the reality of climate change fails to produce popular support for climate change legislation because the issue remains associated with political identity.³¹¹ Media has an effect on how the American public incorporates information into their existing values and beliefs.³¹² Americans today get information from a large number of broadcast, cable, and internet-based news networks. Many popular news sources present contradictory views; this is especially true for issues concerning climate change.³¹³ Americans choose to consume news that correlates with a partisan perspective.³¹⁴ The type of balancing urged by Powell has led to a media portrayal of evidence against the existence of climate change appearing to be of equal weight to the evidence for the existence of climate change.³¹⁵ Republicans appear to be roughly split on the existence of human-caused global warming, and about three-quarters of Democrats and Independents believe in the existence of a climate change problem.³¹⁶ Most Tea Party members believe that global warming is not

³⁰⁸ *See id.*

³⁰⁹ *See* ANDREWS, *supra* note 20, at 256.

³¹⁰ *See* Nisbet, *supra* note 296, at 358.

³¹¹ *Id.* at 360–61.

³¹² *Id.* at 361.

³¹³ *See, e.g.,* Maxim Lott. *Climate Models Wildly Overestimated Global Warming, Study Finds*, FOX NEWS (Sept. 12, 2013), <http://www.foxnews.com/science/2013/09/12/climate-models-wildly-overestimated-global-warming-study-finds/>. *But see* Justin Gillis, *Arctic Ice Makes Comeback from Record Low, but Long-Term Decline May Continue*, N.Y. TIMES, Sept. 21, 2013, at A8.

³¹⁴ KEVIN ARCENEUX & MARTIN JOHNSON, CHANGING MINDS OR CHANGING CHANNELS?: PARTISAN NEWS IN AN AGE OF CHOICE 8 (2013).

³¹⁵ Nisbet, *supra* note 296, at 358.

³¹⁶ Yale Project on Climate Change Communication & George Mason University Center for Climate Change Communication, Politics & Global Warming: Democrats, Republicans, Independents and the Tea Party 4 (2011), *available at* <http://environment.yale.edu/climate-communication/files/PoliticsGlobalWarming2011.pdf>.

happening.³¹⁷ The cacophony of conflicting information contributes to the partisan divide about the existence and causes of climate change.³¹⁸ This leads to a policy-making dynamic based more on culture than scientific thinking.³¹⁹

Americans today do not perceive climate change as the same kind of threat perceived at the time of state wildlife reform or environmental reform of the 1960s and 1970s.³²⁰ While roughly two-thirds of Americans are convinced of global warming,³²¹ few ever speak publicly, attend a public demonstration on the issue, or even discuss global warming with friends or family.³²² The apathetic responses should be understood in light of the media framing a partisan divide on the matter.³²³ But Nixon and Powell's positions

³¹⁷ *Id.*

³¹⁸ See Nisbet, *supra* note 296, at 361 (explaining that the gap between the expert opinion and public opinion is due to biased news coverage, irrational beliefs, the influence of climate skeptics, or a combination of these factors).

³¹⁹ Hans von Storch et al., *The Physical Sciences and Climate Politics*, in THE OXFORD HANDBOOK OF CLIMATE CHANGE AND SOCIETY 113, 122–24 (John S. Dryzek et al. eds., 2011).

³²⁰ See Kari Marie Norgaard, *Climate Denial: Emotion, Psychology, Culture, and Political Economy*, in THE OXFORD HANDBOOK OF CLIMATE CHANGE AND SOCIETY 399, 399–400 (John S. Dryzek et al. eds., 2011). The threat to the environment is a significant factor that contributed to the legal reforms in the late 19th century and in the 1960s–1970s. See Erik W. Johnson & Scott Frickel, *Ecological Threat and the Founding of U.S. National Environmental Movement Organizations, 1962–1998*, 58 SOC. PROBLEMS 305, 308 (2011), available at <http://www.jstor.org/stable/10.1525/sp.2011.58.3.305> (explaining that the ecological threat is a significant factor explaining environmental activism in the late 1960s and 1970s).

³²¹ Yale Project on Climate Change Communication & George Mason University Center for Climate Change Communication, *Climate Change in the American Mind: Americans' Global Warming Beliefs and Attitudes in April 2013* 4 (2013), available at <http://environment.yale.edu/climate-communication/files/Climate-Beliefs-April-2013.pdf>.

³²² Yale Project on Climate Change Communication & George Mason University Center for Climate Change Communication, *How Americans Communicate About Global Warming in April 2013* 4 (2013), available at <http://environment.yale.edu/climate-communication/files/Communication-April-2013.pdf>. However, the seeds of change may have been sown on September 20–21, 2014, with protests around the world with the People's Climate March. See Lisa W. Foderaro, *Taking a Call for Climate Change to the Streets*, N.Y. TIMES, Sept. 22, 2014, at A1.; see also <http://peoplesclimate.org/wrap-up/>. This event may be the signal that the public apathy may be waning, and may also coincide with an improving economy. See Floyd Norris, *Household Net Worth Has Rebounded*, N.Y. TIMES, Sept. 20, 2014, at B3.

³²³ See, e.g., Lott, *supra* note 313; cf. Gillis, *supra* note 313 (providing an example of editorial spin based on similar information).

have been taken to heart—American’s concerns about the economy seem to trump concerns over the environment.³²⁴

The public is willing to accept higher levels of pollution if doing so preserves jobs.³²⁵ While Americans seem to be growing increasingly concerned that global warming is causing extreme weather in the United States,³²⁶ weather-related events, such as “Superstorm Sandy” or the back-to-back devastating wildfire seasons in recent years,³²⁷ have not yet led Americans to call for government action to combat climate change. Even more confounding is the lack of public response in the wake of the Deepwater Horizon oil spill.³²⁸

The media coverage and the devastating impact of the Deepwater Horizon spill mirror the catalyst Santa Barbara oil spill in 1969, but public response was markedly different with each.³²⁹ Environmental protests in the 1960s and 1970s helped translate the shift in public opinion to legislative reform.³³⁰ The Deepwater Horizon Oil Spill spewed oil into the Gulf of Mexico from April 20 until July 15, 2010.³³¹ The events of both were well documented in the news media.³³² The percentage of the population expressing interest in

³²⁴ See Dunlap & McCright, *supra* note 293, at 146–49.

³²⁵ See Nordhaus & Shellenberger, *supra* note 275, at 21.

According to a survey of 1,500 Americans by the market research firm Environics, the number of Americans who agree with the statement, “To preserve people’s jobs in this country, we must accept higher levels of pollution in the future,” increased from 17 percent in 1996 to 26 percent in 2000. The number of Americans who agreed that, “Most of the people actively involved in environmental groups are extremists, not reasonable people,” leapt from 32 percent in 1996 to 41 percent in 2000.

³²⁶ Yale Project on Climate Change Communication & George Mason University Center for Climate Change Communication, *Extreme Weather and Climate Change in the American Mind*, April 2013 4,10 (2013), available at <http://environment.yale.edu/climate-communication/files/Extreme-Weather-Public-Opinion-April-2013.pdf>.

³²⁷ Paul Tullis, *Into the Wildfire—What Science Is Learning about Fire and How to Live With It*, N.Y. TIMES MAGAZINE, Sept. 19, 2013, <http://www.nytimes.com/2013/09/22/magazine/into-the-wildfire.html?pagewanted=all>.

³²⁸ See Oliver Houck, *Who Will Pay to Fix Louisiana?*, THE NATION, July 12, 2010 (describing the long-term adverse environmental and economic impacts of the state of Louisiana’s dependent relationship with the oil industry), available at <http://www.thenation.com/article/36610/who-will-pay-fix-louisiana#>.

³²⁹ See Nisbet, *supra* note 296, at 358.

³³⁰ See Angone, *supra* note 256, at 1597, 1599, 1608–09 (noting, however, that his conclusion that protest amplifies the effect of public opinion into legislative change to other situations is an open question).

³³¹ See Campbell Robertson & Clifford Krauss, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, N.Y. TIMES, Aug. 13 2010, at A14.

³³² See, e.g., *id.*

climate change reform in 2010 was similar to the percentage of Americans who marched on Earth Day 1970.³³³ However, in 2010, there were no widespread public demonstrations. Without more active public participation, a shift in public opinion is not likely to be translated into legislative reform.³³⁴

CONCLUSION

The fundamental desire for a clean and hospitable environment can be the basis of popular support for climate change legislation. The movements studied in this Article provide two historical examples where interest groups successfully lobbied for protective legislation. The success of the state wildlife movements in the 1870s can be tied to the combination of the active interest groups' proposal for direct legislative solutions and the movement's timing with larger shifts in cultural attitudes toward nature. The environmental movement in 1969 achieved success because of the devastating scale of the pollution problems and the spirit of political activism popular during this time. More than acting upon scientific certainties, both of these movements drew upon public sentiment to enact legislative changes.³³⁵ Climate change reformers can generate greater public support by appealing to the public on a moral and economic level to overcome partisan divide, identifying bad actors, generating publicity

³³³ See Nisbet, *supra* note 296, at 356–57 (stating that the about 15 percent of Americans are engaged in participation in the climate change debate, a number that roughly correlates with Americans who identify themselves as “active environmentalists”). In 1970, an estimated 20 million Americans marched during Earth Day. See Dowie, *supra* note 156, at 23. Roughly 1 in 10 Americans participated. The resident population of the United States, according to the 1970 census was 204,053,325. U.S. DEP'T OF COMM., 1970 CENSUS OF POPULATION, VOLUME 1, PART A, SECTION 1, at VIII (1972), available at http://www2.census.gov/prod2/decennial/documents/1970a_v1pAs1-01.pdf.

³³⁴ See Nisbet, *supra* note 296, at 357 (explaining that the public opinion does not place climate change at the top of legislative objectives and lack of importance creates little incentive for lawmakers to address the problem); Angone, *supra* note 256, at 1608–09 (explaining the amplifying effect of protest in achieving legislative reform).

³³⁵ As Abraham Lincoln said,

With public sentiment, nothing can fail; without it, nothing can succeed. Consequently, he who molds public sentiment goes deeper than he who enacts statutes or pronounces decisions.

See ABRAHAM LINCOLN, THE COMPLETE LINCOLN–DOUGLAS DEBATES of 1858 121 (Paul M. Angle ed., The University of Chicago Press 1991).

for their cause, and crafting strategies to use new mass media formats to frame the issue.

Crafting the moral and social environment is equally important, if not more important, than conveying information about climate change threats alone. Public opinion on climate change shows that many people distrust facts presented when they do not conform to their social and moral vision of the world.³³⁶ Further scientific information may be useful to clarify some issues about climate change, but the lack of scientific information or certainty is not the cause of apathy and inaction.³³⁷ If the goal of climate change reformers is to enact protective laws, casting the social and moral arguments for climate change reform are actually more important than additional scientific study of the problem itself. A possible example of an appeal to moral sensibility could draw upon history and evoke the “end of the frontier” analogy to prompt energy consumption and emissions consciousness. Similarly, identifying specific bad actors could be effective at curtailing major contributors to the problem.

The philosophical foundations of a climate change movement likely already exist.³³⁸ As discussed above,³³⁹ contemporary media had an effect on how philosophical attitudes were translated into legislative reforms. The achievements of the sportsmen in the 19th century were incremental because they largely relied upon print media self-publication.³⁴⁰ The environmental movement spread like wildfire in 1969 because of the influence of mass media.³⁴¹ Today, media sources are more numerous and constantly connected to consumers. In 1969, however, the public likely had greater confidence in the media.³⁴² Today, television news is viewed as overly

³³⁶ Purdy, *supra* note 67, at 1196.

³³⁷ See Moser & Dilling, *supra* note 278, at 163.

³³⁸ See Purdy, *supra* note 67, at 1138 (citing Jared Diamond’s book *Collapse* and Michael Pollan’s book *The Omnivore’s Dilemma* as work building upon the foundational work of 19th century authors as well as environmental concerns manifested in the 1960s–1970s).

³³⁹ See *supra* notes 254–72 and accompanying text.

³⁴⁰ See *supra* notes 259–60 and accompanying text.

³⁴¹ See *supra* notes 265–69 and accompanying text.

³⁴² See *Confidence in Institutions*, GALLUP (June 5–8, 2014), <http://www.gallup.com/poll/1597/confidence-institutions.aspx#1> (showing growing distrust in television media since Gallup started polling in 1993 and also greater distrust in newspapers since the polls began in 1973).

partisan.³⁴³ Climate change reformers should develop strategies to use new media formats as both the state wildlife movement in the late 19th century and the environmental movement of 1969 did. However, climate change reformers face an uphill battle as organized climate change deniers have ongoing well-funded and dynamic media operations of their own.³⁴⁴ The organized opposition against climate change reform likely accounts for the slow pace and discouraging setbacks to climate change reform.³⁴⁵ In order to overcome this opposition, climate change reformers should consider utilizing the tactic of identifying bad actors to build the moral and cultural platform that could spur public involvement.

³⁴³ See Elizabeth Mendes, *In U.S., Trust in Media Recovers Slightly from All-Time Low*, GALLUP (Sept. 19, 2013), <http://www.gallup.com/poll/164459/trust-media-recovers-slightly-time-low.aspx>.

³⁴⁴ See Dunlap & McCright, *supra* note 293, at 152–53.

³⁴⁵ See *id.* at 154–55.

