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## BOOK REVIEW

### THE CONSULTANTS' REPUBLIC

Break Through: From the Death of Environmentalism to the Politics of Possibility. By Ted Nordhaus & Michael Shellenberger. New York: Houghton Mifflin Co. 2007. Pp. 344. \$25.00.

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In the conventional telling, environmentalism's modern history begins at spring. It is silent. Or, at least, it would be silent, if only the destructive din of postwar industrialism would subside long enough to reveal the stillness of a vacant, dying natural landscape. A lone female voice manages to pierce through this din, seizing the American consciousness with careful but passionate prose, documenting our toxicological sins and imploring us to return to the holistic, ecological worldview that once animated our moods and moves. The unregulated market is an unhealthy system, the voice tells us, since it fails to attend to the long-term consequences of its constantly escalating patterns of production, consumption, and dispossession, its presentist, materialist, and individualist biases. As her message begins to reach deeply into our culture, this writer of science and poetry finds herself attacked by unscrupulous defenders of the unsustainable status quo, who challenge her expertise and cast aspersions on her character in an organized campaign of suppression, disinformation, and manipulation. But to no avail: the public has awakened to the truth about its chemical legacy. Now, it is only a matter of time before the crafters of law will respond, bringing us back from a precipice of irreversible environmental loss.

In reverential tones, environmentalists tell this story — of Rachel Carson and her book, *Silent Spring*<sup>1</sup> — as a reminder of how the movement's modern successes began. What would it mean for this cherished narrative, however, if the “Rachel Carson Paradigm”<sup>2</sup> had emerged from a book that was not actually heartfelt in its plea for en-

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<sup>1</sup> RACHEL CARSON, *SILENT SPRING* (1962).

<sup>2</sup> Zygmunt J.B. Plater, *From the Beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 *LOY. L.A. L. REV.* 981, 982 (1994).

environmental awakening? What if instead the book were a carefully constructed “framing” of environmental policy goals, one whose content emerged not from the thoughts and beliefs of a trained marine biologist turned nature writer, but from the research and advice of psycholinguists, neuroscientists, social psychologists, and other consulting experts who had been retained to determine how best to “sell” national pesticide policy reform? Would *Silent Spring* carry the same enduring resonance for environmentalists if they knew that its theme of opposition to unchecked industrialization, its emphasis on humanity’s detrimental impacts in the natural world, and its repositioning of conservationist thought for modern readers had been meticulously focus group-tested in advance of publication, evaluated for subconscious affective impact through brain imaging, and double-checked for “fit” within various metaphorical structures that are believed to shape cognition, language, and, by extension, politics?

Strategic marketing, of course, is nothing new. In fact, *Silent Spring* was quite self-consciously positioned by Carson and her publisher, Houghton Mifflin, to maximize its political impact.<sup>3</sup> Fixation on the interaction of marketing and politics seems to have reached a new level recently, however, with the national Democratic Party in particular interviewing all manner of wonkish academics, from cognitive linguist Professor George Lakoff<sup>4</sup> to psychologist Professor Drew Westen,<sup>5</sup> in an effort to match the behind-the-curtains omnipotence that they attribute to Frank Luntz, the infamous Republican spin doctor who rebranded the estate tax a “death tax” and, in consequence, seems to have forever altered perceptions of how American politics functions. The latest entrants to this carnival of consultants are Ted Nordhaus and Michael Shellenberger, authors of *Break Through: From the Death of Environmentalism to the Politics of Possibility* and self-

<sup>3</sup> For instance, Houghton Mifflin shrewdly promoted *Silent Spring* through serialization in the *New Yorker*, through advance distribution to key politicians, conservationists, and opinion leaders, and through widely promoted television appearances by the author on *CBS Reports* and *The Tonight Show*. Carson, for her part, recruited prominent authors, journalists, and other figures to support her awareness crusade, including Supreme Court Justice William O. Douglas, who touted *Silent Spring* in a pamphlet accompanying the work’s Book-of-the-Month club printing. See LINDA LEAR, RACHEL CARSON: WITNESS FOR NATURE 396–427 (1997).

<sup>4</sup> Examples of his work include: GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE — THE ESSENTIAL GUIDE FOR PROGRESSIVES (2004); GEORGE LAKOFF, MORAL POLITICS: WHAT CONSERVATIVES KNOW THAT LIBERALS DON’T (1996); GEORGE LAKOFF, WHOSE FREEDOM? THE BATTLE OVER AMERICA’S MOST IMPORTANT IDEA (2006); GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980); GEORGE LAKOFF & ROCKRIDGE INST., THINKING POINTS: COMMUNICATING OUR AMERICAN VALUES AND VISION (2006).

<sup>5</sup> See DREW WESTEN, THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION (2007), purporting to be “of particular interest to the 50 million Democratic voters who can’t figure out why their party has lost so many elections.” *Id.* at 1.

described “research, policy, and strategy consultants to environmental and progressive foundations and organizations” (pp. 278–79 n.9). Nordhaus and Shellenberger first achieved notoriety by releasing an essay in 2004 entitled *The Death of Environmentalism*, in which the authors brashly proclaimed that “modern environmentalism, with all of its unexamined assumptions, outdated concepts and exhausted strategies, must die so that something new can live.”<sup>6</sup> As the publisher of *Break Through* — again, Houghton Mifflin — proudly notes in the book’s publicity materials, Nordhaus and Shellenberger’s essay “triggered a firestorm of controversy,”<sup>7</sup> due in substantial part to the essay’s release at an “annual conference of environmental donors and grantees” (p. 1). This staged event enabled Nordhaus and Shellenberger later to be depicted as “the bad boys of American environmentalism” who upset the complacent mainstream of the movement by shouting with “the voice of the post-boomer generation.”<sup>8</sup>

Again, marketing of this sort is nothing new. What does appear novel about *Break Through*, though, is the degree to which marketing’s logic has invaded the product itself. According to Nordhaus and Shellenberger, the future of environmentalism, and of American politics more broadly, lies not in stronger evidence, better science, or more reasoned appeals to the public, but instead in sheer marketing acumen, in forming and framing policy goals in a manner that activates the deeply embedded values and cognitive metaphors of the public. To Nordhaus and Shellenberger, environmentalists currently suffer from a form of “policy literalism” that leads them, like liberals more generally, to vastly overstate the significance of science, empiricism, and means-

<sup>6</sup> MICHAEL SHELLENBERGER & TED NORDHAUS, THE DEATH OF ENVIRONMENTALISM: GLOBAL WARMING POLITICS IN A POST-ENVIRONMENTAL WORLD 10 (2004), available at [http://www.thebreakthrough.org/images/Death\\_of\\_Environmentalism.pdf](http://www.thebreakthrough.org/images/Death_of_Environmentalism.pdf). Around the same time, former Sierra Club president Adam Werbach delivered a similar message in a speech to the Commonwealth Club in San Francisco, in which he declared, “Environmentalism is dead in no small part because it could never match the right’s power to narrate a compelling vision of America’s future.” Adam Werbach, *Is Environmentalism Dead?: A Speech on Where the Movement Can and Should Go from Here*, GRIST, Jan. 13, 2005, <http://www.grist.org/news/maindish/2005/01/13/werbach-reprint>.

<sup>7</sup> Press Release, Houghton Mifflin Co., *Break Through: From the Death of Environmentalism to the Politics of Possibility* (Oct. 4, 2007) (on file with the Harvard Law School Library).

<sup>8</sup> *Id.* (quoting Bill McKibben, *Bad Boys, Bad Boys, Whatcha Gonna Do*, GRIST, Jan. 26, 2005, <http://www.grist.org/comments/dispatches/2005/01/25/mckibben/index1.html>). When launching *Break Through*, Houghton Mifflin carried this intergenerational conflict theme further, announcing that “[t]he publishers who brought you *Walden* [and] *Silent Spring* . . . now bring you a new politics for a new century,” and that “*Break Through* signals a radical break from the past and marks a generational changing of the guard.” *Id.* The authors themselves take up the theme in *Break Through* by invoking Thomas Kuhn’s theory of scientific revolution and by casting themselves as the leading edge of a coming paradigm shift in environmental thought (pp. 108–11).

ends instrumental reasoning within American politics (p. 9).<sup>9</sup> Against this rational positivism, which Nordhaus and Shellenberger regard as philosophically untenable (not to mention passé), the authors argue for a more visionary yet practical metaphysics, one in which science and other depictions of reality are assessed, not for their supposed truth-value in corresponding to the world as it is, but rather for their qualities of social usefulness. Invoking the romantic pragmatism of Professor Richard Rorty, Nordhaus and Shellenberger contend that environmentalists “must no longer put concepts like nature or ‘the environment’ at the center of [their] politics” (p. 17). Instead, they must move “beyond environmentalism” (p. 17) to become culturally and linguistically savvy promoters of an actively imagined social future, one that works to embody the values and enable the policies that environmentalists desire.<sup>10</sup> Nordhaus and Shellenberger argue that environmentalists will not succeed by emphasizing the rude facts about climate change, browbeating the public with the dire anticipated consequences of its profligacy. Instead, environmentalists must deliberately frame the meaning of the global climate change issue in a manner that resonates, rather than reasons, with the public.

In this respect, Nordhaus and Shellenberger fit comfortably beside Lakoff, who argues that “many progressives were brought up with the old 17th Century rationalist view of reason that implies that, if you just tell people the facts, they will reason to the right conclusion,”<sup>11</sup>

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<sup>9</sup> The authors are certainly not alone in their characterization of mainstream environmentalism as unduly technocratic and literalist. Professor Zygmunt Plater, for instance, has argued that the environmental movement deserves a special place in the “circle of dumb” that accounts for the dismal record of environmentalism during the last three decades of American politics: “[O]ur most significant dumbness has been the naïve assumption that the merits of our positions — backed by science, rational logic over time, and a holistic overview that is a basic necessity in any complex society — would somehow inevitably find legs of their own.” Zygmunt J.B. Plater, *Dealing With Dumb and Dumber: The Continuing Mission of Citizen Environmentalism*, 20 J. ENVTL. L. & LITIG. 9, 58 (2005); see also Richard O. Brooks, *A New Agenda for Modern Environmental Law*, 6 J. ENVTL. L. & LITIG. 1 (1991) (criticizing environmental lawyers and bureaucrats for proposing unimaginative technical fixes aimed at symptoms rather than root causes of environmental problems); Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 109 (2001) (determining that the mainstreaming of environmentalism has resulted in a “steady state that resists significant changes in the institutional status quo”); Richard Toshiyuki Drury, *Rousing the Restless Majority: The Need for a Blue-Green-Brown Alliance*, 19 J. ENVTL. L. & LITIG. 5 (2004) (criticizing the environmental movement for relying on litigation and lobbying, rather than grassroots activism and coalition-building).

<sup>10</sup> See also Werbach, *supra* note 6 (“The moment we free ourselves from this modern way of thinking by creating a new language, a new set of strategic initiatives, a new set of institutions, and a new metric for evaluating our success, we cease to be ‘environmentalists’ in any meaningful sense of the term and open ourselves up to the possibility of becoming progressive Americans.”).

<sup>11</sup> George Lakoff, *When Cognitive Science Enters Politics: A Response to Steven Pinker’s Review of Whose Freedom? in The New Republic*, <http://www.rockridgeinstitute.org/research/lakoff/whencognitivescienceenterspolitics/view> (last visited May 12, 2008).

and Westen, who contends that “[a]lthough the marketplace of ideas is a great place to shop for policies, the marketplace that matters most in American politics is the *marketplace of emotions*.”<sup>12</sup> Unlike those left-leaning commentators, however, Nordhaus and Shellenberger claim to have offered much more than just an effective means (for example, linguistic framing or emotional appeals) by which to achieve certain desired policy ends (for example, national health care or greater income equality); instead, they claim to have offered a comprehensive account of, among other things, the status of scientific knowledge, the origin of value, and the nature of the human individual. As a result of this ambitious course, the authors end up in the uncomfortable position of having denied the very basis on which their preferred values and policies appear urgent. That is, they trash the “antiquated” (p. 141) ideas that science can reveal empirical truths about the world, that a natural realm can be identified free of human influence, that the realm so identified can have value or meaning other than that which occurs through sheer human construction, and that environmental beliefs and attitudes can flourish outside a context of pre-existing material affluence and social stability. All of this postmodernist trashing is undertaken in order to explain why environmentalists, in the authors’ view, have lost cultural and political relevance.

Nordhaus and Shellenberger’s peculiar brand of postmodernism, however, is only marketing deep; it is *almost*-postmodernism. It accepts the demise of Enlightenment conceptualizations and methodological convictions only insofar as that demise gives rise to better — that is, more fluid, empowering, and ultimately persuasive — appeals to the citizenry in furtherance of environmental policy goals. The basic content and direction of those policy goals, however, somehow remain fixed throughout *Break Through*, even as the book purports to upend the very conceptual ground on which environmentalists have defined themselves and established their agenda. “Image is nothing,” the makers of Sprite once told us with a wink; “framing is everything,”

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<sup>12</sup> WESTEN, *supra* note 5, at 35–36. The authors also sit comfortably beside academics who advanced similar arguments before Nordhaus and Shellenberger released their 2004 missive. *See, e.g.*, DALE JAMIESON, *MORALITY’S PROGRESS: ESSAYS ON HUMANS, OTHER ANIMALS, AND THE REST OF NATURE* 213–14 (2002) (“Environmentalists have all too often been trapped by their own rhetoric, and the movement as a whole has suffered from its use of misleading metaphors . . .”); Michael Bruner & Max Oelschlaeger, *Rhetoric, Environmentalism, and Environmental Ethics*, 16 ENVTL. ETHICS 377 (1994) (contending that with the right rhetoric, an ecocentric value system could compete with mainstream utilitarianism); Holly Doremus, *The Rhetoric and Reality of Nature Protection: Toward a New Discourse*, 57 WASH. & LEE L. REV. 11 (2000) (examining rhetorical strategies for reframing environmentalism goals); Eric T. Freyfogle, *Five Paths of Environmental Scholarship*, 2000 U. ILL. L. REV. 115 (describing and criticizing a mode of environmental law scholarship that sees the environment purely as an economic or technological problem, rather than as a medium for the engagement of human imagination, hope, and values).

Nordhaus and Shellenberger now tell us with a similar glint. Neither group of ironists has a way of evaluating its wares, other than how well they sell. Taken for all they are worth, then, Nordhaus and Shellenberger's arguments leave us with a republic not of citizens, scientists, or environmentalists, but of consultants. In the authors' schema it is only the professional message-framing class that retains access to a form of privileged knowledge on which to base policy appeals. But what appeals should the consultants offer? At whose behest? With what values in mind? Nordhaus and Shellenberger never address these questions. As a result, the authors have told us essentially nothing about whether their preferred message frames will actually sell or, if they do, at what cost.

In short, what Nordhaus and Shellenberger needed, but failed, to do was to describe and theorize a *constitution* for their consultants' republic — a set of structural provisions that would govern the nature of the products and the level of competitiveness present in a market for meaning creation, along with the appropriate liberties and protections that individuals might require within such an overdetermined and highly manipulable social imaginary. The authors instead simply proclaim that “[t]he crises we face demand . . . that we *dream differently*” (p. 272),<sup>13</sup> never explaining how it is we know that these “crises” exist, or how we can be confident that the politicians, consultants, and other “dream” purveyors who come to our aid will not induce a collective nightmare.

This Review proceeds in four Parts. Part I provides a fuller rendition of Nordhaus and Shellenberger's critique, along with the authors' proposed alternative to conventional environmentalism, which they dub the “politics of possibility” (p. 15). Part II demonstrates that Nordhaus and Shellenberger, by relying on a monolithic and unsupported depiction of the environmental movement, have failed to follow their own advice of “[p]luralizing singular categories [as] a simple way to free ourselves from essentialism” (p. 239); as a consequence, they overlook the diversity that exists within the environmental movement and that, to a large extent, anticipates the themes they claim to be introducing. Part III argues that the authors' Rorty-inspired romantic irony ultimately provides little to respond to the crisis of meaning they have asserted, most notably because their conception fails to consider which actors will be ironizing, to which audiences, and with what values and purposes in mind. Part IV takes a more constructive turn, situating Nordhaus and Shellenberger's account within the legal and political theory literatures from which they

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<sup>13</sup> See also Werbach, *supra* note 6 (arguing that “saving ourselves depends not on our ability to shock but rather to inspire”).

have sampled and suggesting some vital questions that a *truly* post-environmental politics would be required to answer in order to avert the nightmare of the consultants' republic.

### I. THE ENVIRONMENTAL MOVEMENT: A POSTMORTEM?

Although Nordhaus and Shellenberger's earlier missive, *The Death of Environmentalism*, spawned a great deal of online critical reaction and soul-searching among leaders and members of the environmental establishment,<sup>14</sup> the essay actually offered little in the way of concrete fodder for discussion, the authors having deliberately "resisted the exhortations from early reviewers of th[e] report to say more about what [they] think must now be done."<sup>15</sup> Now, three years after their "dramatic and petulant critique essay,"<sup>16</sup> Nordhaus and Shellenberger deliver *Break Through*, which promises readers not simply a book-length rehashing of the authors' postmortem of the environmental movement, but instead a revivifying journey, one that will lead, as the book's subtitle proclaims, "from the death of environmentalism to the politics of possibility."

Still, before the authors' more positive vision begins to emerge in *Break Through*, Nordhaus and Shellenberger do devote a substantial portion of the book to recounting and expanding on their reasons for viewing environmentalism in America as a deceased political movement: environmentalism, it turns out, killed itself. By relying chiefly on "doomsday discourse" (p. 1) and the rationalist authority of science to rouse public concern over environmental problems, by preaching an unduly moralized and misanthropic narrative regarding humanity's

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<sup>14</sup> For instance, Carl Pope, Executive Director of the Sierra Club, wrote that Shellenberger and Nordhaus's essay, "because it is unfair, unclear and divisive, has actually muddied the water and made the task of figuring out a comprehensive and effective set of strategies more difficult." Carl Pope, *And Now for Something Completely Different: An In-Depth Response to "The Death of Environmentalism,"* GRIST, Jan. 13, 2005, <http://www.grist.org/news/maindish/2005/01/13/pope-reprint/>. Others complained that Shellenberger and Nordhaus's few concrete policy proposals, such as their proposal for large public funding of clean energy research, "are hardly novel ideas." Amanda Griscom Little, *Over Our Dead Bodies: Green Leaders Say Rumors of Environmentalism's Death Are Greatly Exaggerated*, GRIST, Jan. 13, 2005, <http://www.grist.org/news/maindish/2005/01/13/little-responses/> (quoting Phil Clapp, President, National Environmental Trust). Dan Carol, a board member of the Apollo Alliance of organizations supporting massive public investment in clean energy research, noted that Shellenberger and Nordhaus's paper seemed to reflect "cyclical hand-wringing that always occurs at a time of loss, when screechy, angry complaints connect with disappointed people." *Id.* (quoting Dan Carol). Activist and writer Adrienne Maree Brown similarly observed that "[s]tepping back and thinking about a vision for a movement is absolutely necessary," but "[d]ramatizing its slow and agonizing death borders on indulgent." Adrienne Maree Brown, *Rainbow Warrior: Dramatizing the "Death" of Environmentalism Doesn't Help Urban People of Color, or Anyone Else*, GRIST, Mar. 15, 2005, <http://www.grist.org/comments/soapbox/2005/03/15/brown/index.html>.

<sup>15</sup> SHELLENBERGER & NORDHAUS, *supra* note 6, at 7.

<sup>16</sup> Plater, *supra* note 9, at 10.

causal responsibility for those problems, and by limply offering as the only solution to those problems various technical policy instruments that aim to “limit[]” or “constrain” human ambition (p. 17), the environmental movement, at least according to Nordhaus and Shellenberger, stopped connecting with the public at the level of its core values.<sup>17</sup> Thus, *Silent Spring*, which, as noted above, figures as the key moment of awakening in most retellings of environmentalism’s modern history,<sup>18</sup> represents to Nordhaus and Shellenberger the most tired page of a very tired playbook: to wit, “wrap the latest scientific research about an ecological calamity in a tragic narrative that conjures nostalgia for Nature while prophesying ever worse disasters to come, unless human societies repent for their sins against Nature and work for a return to a harmonious relationship with the natural world” (p. 130).

In Nordhaus and Shellenberger’s view, this strategy is not only politically naïve, but also philosophically indefensible. Borrowing from the likes of anthropologist of science Professor Bruno Latour, who famously proclaimed that “we have never been modern,”<sup>19</sup> Nordhaus and Shellenberger argue that the environmentalists’ approach relies on a series of fundamental categorical distinctions that do not withstand critical scrutiny. Most basically, environmentalism seems to depend on a dualistic ontology in which “humans and nature” (p. 15) are given as separate, distinct spheres of existence. Accordingly, the environmentalists’ narrative almost always takes the form of an “[e]co-traged[y]” (p. 130) in which the twin Enlightenment faculties of reason and empiricism are used to demonstrate that a previously balanced, pristine, and harmonious “Nature” is being despoiled by the rapacious desires of “humankind[]” (p. 130).<sup>20</sup> To Nordhaus and Shellenberger, this narrative form leads inexorably to a “politics of limits” (p. 17), in which the choices and behaviors of individuals, acting most typically through the market, are said to be in need of suppression by the government in order to protect the larger community of life from further human encroachment and taint. Lurking within this “[e]nvironmental tale[] of tragedy” (p. 131), Nordhaus and Shellenberger see a series of familiar

<sup>17</sup> See also Werbach, *supra* note 6 (“Instead of a narrative for America, instead of a vision, we were preparing for maximum daily allowable loads of toxic chemicals.”).

<sup>18</sup> See *supra* p. 2041.

<sup>19</sup> BRUNO LATOUR, WE HAVE NEVER BEEN MODERN (Catherine Porter trans., 1993) (1991).

<sup>20</sup> Cf. Daniel A. Farber, *Building Bridges over Troubled Waters: Eco-Pragmatism and the Environmental Prospect*, 87 MINN. L. REV. 851 (2003) (urging the abandonment of “eco-pessimism”); Robert H. Nelson, *Environmental Religion: A Theological Critique*, 55 CASE W. RES. L. REV. 51, 62 (2004) (describing the environmental movement and its dominant strategies as “Calvinism minus God” (quoting Robert H. Nelson, *Calvinism Minus God*, FORBES, Oct. 5, 1998, at 143) (internal quotation marks omitted)); Stefano Nespore, *Environmentalism and the Disaster Strategy*, 19 UCLA J. ENVTL. L. & POL’Y 211, 224–29 (2001) (critiquing environmentalism’s “disaster strategy”).



categorical distinctions — nature/culture, reason/romance, science/politics, government/market, community/individual — that are philosophically untenable and, more significantly in their account, have outlived their social usefulness.

Nordhaus and Shellenberger argue that, in addition to espousing a dubious metaphysics, the environmentalists' narrative also threatens "to short-circuit democratic values by establishing Nature as it is understood and interpreted by scientists as the ultimate authority that human societies must obey" (p. 132). Put differently, "[l]ike the fundamentalist who believes his religion only can speak for God, environmentalists believe that only Science, in a singular and objective way, can speak for Nature" (p. 141). In the authors' view, environmentalists depend on an outdated conception of science, one in which the professional orthodoxy of ecologists, oceanographers, and other natural scientists is seen to embody the "Truth" about the state of the world (p. 138), rather than merely the contingent empirical and theoretical claims of a particular community of experts. In this respect, Nordhaus and Shellenberger join the many commentators who have contended that the science at the heart of environmental, health, and safety regulation is always "non-normal science,"<sup>21</sup> even "trans-science."<sup>22</sup> It concerns matters and controversies that may be framed within the discourse of science — for example, as revolving around empirical questions concerning the scope and magnitude of an environmental, health, or safety risk — but that cannot be resolved within that framework, given their dependency on questions concerning model selection, uncertainty adjustment, risk preference, and other matters that are not strictly technical in nature. Moreover, scientific outputs are not merely a function of the rigor and intelligence of scientific investigators; they are also deeply affected by myriad sociopolitical variables, such as research funding priorities and intellectual property rules,<sup>23</sup> by sociological aspects of science as a profession, such as university tenure standards and journal selection criteria, and by more cognitive and emotive factors, such as researchers' self-perception of ranking within a social hierarchy or their belief in the inherently progressive tendencies of history.<sup>24</sup> In short, the empirical and theoretical claims of scien-

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<sup>21</sup> Cf. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 23–34 (3d ed. 1996) (explaining that normal science focuses attention on a small range of esoteric problems and allows for investigation of some part of nature in depth and detail).

<sup>22</sup> See Alvin Weinberg, *Science and Trans-Science*, 10 *MINERVA* 209, 209 (1972).

<sup>23</sup> Increasingly, for instance, researchers are affected by overt political attempts to control the content and the cultural reception of scientific investigations. See Holly Doremus, *Science Plays Defense: Natural Resource Management in the Bush Administration*, 32 *ECOLOGY. L.Q.* 249 (2005).

<sup>24</sup> See, e.g., Melissa L. Finucane et al., *Gender, Race, and Perceived Risk: The 'White Male' Effect*, 2 *HEALTH, RISK & SOC'Y* 159 (2000) (describing cognitive heuristics and other influences

tists are unavoidably contingent, both because the scientific community subjects its knowledge to constant revision and occasional wholesale abandonment, and because the community itself is a constructed enterprise subject to social, political, and cultural influence.

Nordhaus and Shellenberger contend that this post-positivist view of science, once the controversial position of members of science and technology studies departments, is now predominant everywhere save for the executive offices of mainstream environmental organizations, where environmental leaders hold onto the “antiquated view that there are facts separate from values and interpretations” (pp. 141–42). Because of this scientific dogmatism, the authors claim, environmentalists seriously hamstring themselves in the competition for public mind-share, restricting their discourse to a kind of policy literalism that fails to connect with the romantic dimensions of culture and politics.<sup>25</sup> What, after all, is the sense in feeling guilty about humanity’s impact on the environment if we no longer believe that the latter exists outside of our sphere of impact? Environmentalists try mightily to develop scientific measures of the size of humanity’s “ecological footprint” — such as the share of the planet’s photosynthetic product that is diverted to human use<sup>26</sup> — as if the shock of these figures alone will prompt us to squeeze into smaller shoes. As Nordhaus and Shellenberger argue, however, we might just as easily regard the figures as a fitting occasion to declare, once and for all, the whole planet ours, without guilt or embarrassment, and simply trust in our ability to manage it: “We are as gods and might as well get good at it” (p. 271).<sup>27</sup>

A related consequence of environmentalists’ scientific dogmatism, in Nordhaus and Shellenberger’s view, is that members of the movement tend to misunderstand the reasons for their 1970s-era successes. As evidenced by their continuing reliance on the strategy of policy literalism, “environmentalists [have] convinced themselves that it was their representation of Truth through Science that was responsible for

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on risk perception that render it culturally inflected, even among experts); Dan M. Kahan et al., *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465 (2007) (same).

<sup>25</sup> To demonstrate these failings, Nordhaus and Shellenberger smartly contrast Tony Blair’s 2005 World Economic Forum speech at Davos on climate change, which proved highly ineffectual, with Winston Churchill’s “United States of Europe” speech, which helped to precipitate the Marshall Plan and the restoration of Europe (pp. 262–69). While Blair focused darkly on threats, calamities, and the pressing need for limits, Churchill offered a stirring clarion call for renewed greatness. As Nordhaus and Shellenberger observe, “[t]hankfully for history, Churchill didn’t see the postwar rubble of Europe as a laundry list of problems to be solved by technical solutions” (p. 266).

<sup>26</sup> See Douglas A. Kysar, *Law, Environment, and Vision*, 97 NW. U. L. REV. 675, 724–25 (2003) (describing ecological footprint studies).

<sup>27</sup> The authors quote John Tierney, *An Early Environmentalist Embraces ‘New Heresies’*, N.Y. TIMES, Feb. 27, 2007 (quoting Stewart Brand).

antipollution and conservation laws” (p. 138). To Nordhaus and Shellenberger, this self-congratulatory account is simply “a *faith* — a scientism, not a science — one that overlooks the specific historical and social conditions that gave rise to the ecological values” (pp. 138–39). Rather than being a simple case of scientific fact and human reason prevailing over the passions of an ugly culture, the emergence of modern federal environmental law instead depended on a slew of contingent historical conditions. Most importantly, economic growth, social and political stability, and the creation of a robust middle class in America after World War II created the basis for widespread expression of “postmaterialist desires” (p. 164). Riffing loosely on Maslow’s hierarchy of needs, Nordhaus and Shellenberger contend that environmental values and other such “higher” sentiments only emerge when individuals and families feel comfortable, not merely in terms of affluence and material goods, but also in terms of equality, progress, and social stability. Absent these crucial social and economic conditions, Nordhaus and Shellenberger believe the popular response to *Silent Spring* would have been, well, silent.

With vague gestures, Nordhaus and Shellenberger adapt this account to the consumerist cornucopia of late capitalism, arguing that individuals in the United States are now reasserting the survival values of distrust, selfishness, and materialism that had largely been left behind during the 1960s and early 1970s. Interestingly, Americans are reasserting “‘Darwinist and exclusion values’ of acceptance of violence, just deserts, ecological fatalism, sexism, . . . and xenophobia” (p. 169),<sup>28</sup> despite a significant increase in absolute material standards of living. As economists such as Professors Thorstein Veblen,<sup>29</sup> Robert Frank,<sup>30</sup> and Juliet Schor<sup>31</sup> have argued, many individuals in consumerist societies seem compelled to rely on greater and greater levels of expenditure and debt in order to maintain their *relative* social status. Consumption thus becomes, at least in many contexts and for many goods, a positional game, such that the steady increase of wealth ine-

<sup>28</sup> The authors quote MICHAEL ADAMS, *AMERICAN BACKLASH* 34 (2005).

<sup>29</sup> See THORSTEIN VEBLÉN, *THE THEORY OF THE LEISURE CLASS* 29–30 (Penguin Books 1979) (1899). For additional variations on Professor Veblen’s themes, see JAMES S. DUESENBERRY, *INCOME, SAVING AND THE THEORY OF CONSUMER BEHAVIOR* 28–32 (1949); FRED HIRSCH, *SOCIAL LIMITS TO GROWTH* 6, 102–07 (2d ed. 1999); H. Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers’ Demand*, 64 Q.J. ECON. 183, 190–99 (1950). For a review of “thicker” sociological and cultural studies accounts of similar phenomena, see Douglas A. Kysar, *Kids & Cul-de-Sacs: Census 2000 and the Reproduction of Consumer Culture*, 87 CORNELL L. REV. 853 (2002) (book review).

<sup>30</sup> See ROBERT H. FRANK, *LUXURY FEVER* (1999); Robert H. Frank, *The Demand for Unobservable and Other Nonpositional Goods*, 75 AM. ECON. REV. 101 (1985).

<sup>31</sup> See JULIET B. SCHOR, *THE OVERSPENT AMERICAN: UPSCALING, DOWNSHIFTING, AND THE NEW CONSUMER* (1998); JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* (1992).

quality in America over the last three decades may have left people feeling *more* status insecure, even as their absolute material position has improved, a phenomenon that Nordhaus and Shellenberger term “insecure affluence” (p. 14). The authors believe that, under such conditions, the “[m]aterialist liberalism” of the New Deal and the postwar period is simply an outmoded language (p. 171). It provides, for instance, “no framework for understanding or addressing problems like obesity” (p. 171), since it can only implore citizens to abandon the prevailing individualistic, consumerist, and transactional mindset, rather than appeal to them from within that mindset (p. 176). Likewise, the standard environmentalists’ narrative seems tailor-made to alienate listeners under circumstances of insecure affluence, since it basically commands them to want less and to think harder, lest they destroy the natural world. Nordhaus and Shellenberger believe that environmentalists and other liberals talk down to ordinary Americans through such commands, rather than inviting them to climb up, a not-so-subtle elitism that Nordhaus and Shellenberger entertainingly demonstrate by skewering Thomas Frank’s book, *What’s the Matter with Kansas?* (pp. 157–60).

At this point, Nordhaus and Shellenberger’s alternative to what they regard as mainstream environmentalism begins to take shape. For Nordhaus and Shellenberger, “postenvironmental” politics will be “*anthrophilic*” (pp. 160, 153) rather than biophilic, emphasizing at its core the potential for human belief and technological ingenuity to unleash a new era of flourishing. The most critical political assets in this new era will not be reason and fact, but creativity and optimism, for those attributes will, by necessity, guide decisionmaking once the categories of nature and market have been thoroughly deconstructed. Therefore, rather than lament the loss of an unblemished environment that never was, Nordhaus and Shellenberger urge environmentalists to embrace “the end of nature”<sup>32</sup> with confidence and zeal: “Once we abandon the belief that there exists a nature or a market separate from humans, we can start to think about creating natures and markets to serve the kind of world we want and the kind of species we want to become” (p. 235).

The authors’ own vision of “the kind of world we want” is built on a heavily Nietzschean account of the heroic potential of the human individual, dressed up with a somewhat incongruous social democratic spin. Nordhaus and Shellenberger urge a “new social contract” (p. 15) that would provide healthcare (pp. 177–78), childcare, social security (p. 175), and other essential bases for a stable quality of life (p. 171). This social democratic state they urge, not for the traditional liberal

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<sup>32</sup> See generally BILL MCKIBBEN, *THE END OF NATURE* (1989).

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reasons of egalitarianism and social justice, but because the authors believe that individuals are only able to realize their better selves — and to express such “higher” values as altruism and environmentalism — after they have attained the level of material and social security that such progressive policies would provide. Thus, “[t]he new social contract must . . . provide a basis for people to seek individuation and self-creation” (p. 179). As with their views on the nature of nature, Nordhaus and Shellenberger want to reject the idea that “humans are *essentially* anything” (p. 152), believing that the future of humanity lies instead in constant entrepreneurial self-invention. They see such heroic individualism today in Arcata architects, Burlington telecommuters, Chattanooga sous chefs, and other individuals who already express a “more flexible and more creative relationship to work, employment, and one’s identity as a laborer” (p. 247).

These individuals attract Nordhaus and Shellenberger’s admiration because the individuals “aspire as much to uncommon greatness as they do to the common good” (p. 179). They do not, for instance, risk environmental hypocrisy out of rigid attachment to place, in the manner of the well-heeled liberals in Nantucket Sound who have opposed the Cape Wind renewable energy project (pp. 89–90). They are instead members of an emerging “postmaterial” society (p. 160), one characterized by “communities of unique, self-creating, highly autonomous individuals” (p. 214). Rather than being fitted within rigid, hierarchical social institutions, these “self-creators” are constantly “*becoming*” (p. 214), dropping in to and out of prayer groups, hiking clubs, and social-networking websites with far greater flexibility and openness than witnessed in traditional, brick-and-mortar (let alone clapboard) communities. Thus, to thicken commitment to environmentalism, and to inspire environmentalists to move from merely “giving money and buying green products” to actually “manifest[ing] their environmental identities or . . . recruit[ing] others to join them” (p. 203), Nordhaus and Shellenberger propose the creation of social networks that resist the dichotomy between individual and community, such that the centrality of the self is neither unwisely attacked nor unduly reified by the political program. Much as in the evangelical Christian movement, which the authors describe as perhaps the most powerful sociopolitical movement to emerge in the last two decades, this “web of new pre-political associations” (p. 205) would bring individuals together by appealing to their practical needs and their desire for social ties, rather than directly (and superficially) to their environmental politics.

In addition to this soft-sell environmental proselytizing, Nordhaus and Shellenberger want to put a more feel-good spin on environmental

policies themselves. From Nordhaus and Shellenberger's vantage point, the conceptual bias long expressed in Western thought of mankind's predominance over nature<sup>33</sup> is simply reversed by mainstream environmentalists, such that "humans are still separate from but *subordinate* to Nature" (p. 135). Nordhaus and Shellenberger instead would have environmentalists abandon altogether the categories of nature and humanity, along with the related idea that environmentalists "have arrived at their values and worldview through a rational and considered process" (p. 34). Such a self-serious orientation should be abandoned most notably because it leads environmentalists and other liberals to frame their policy discourse with all the emotional allure and rhetorical resonance of a home appliance instruction manual. This is not the route to an effective environmentalism, Nordhaus and Shellenberger tell us, for politics is "an exercise not in speaking truth to power but in creating new truths in the polity" (p. 160).<sup>34</sup>

For example, the authors would reorient environmental proposals around the goals of "investment and assets," rather than "regulation and deficits" (p. 18), since the former resonate with individuals' deep desire for progress and affirmation, while the latter suggest only dread and deprivation. To Nordhaus and Shellenberger, the bold technological optimism expressed by such commentators as Amory Lovins and Paul Hawken should become the primary message of the environmental movement, rather than a little-heard alternative view.<sup>35</sup> Along these lines, one of the few concrete policy proposals mentioned in *Break Through* — what the authors call "a new Apollo project" — demands from the public "a major investment in clean-energy jobs, research and development, infrastructure, and transit, with the goal of achieving energy independence" (p. 8).<sup>36</sup> Nordhaus and Shellenberger argue that if environmentalists reframed their policy platform in this manner, such that they were not seen to be against emissions, but rather for clean energy (pp. 127–28), then their opponents would be

<sup>33</sup> For a canonical, albeit controversial, statement, see Lynn White, Jr., *The Historical Roots of Our Ecologic Crisis*, 155 *SCIENCE* 1203 (1967).

<sup>34</sup> See also Werbach, *supra* note 6 ("Categories — indeed, all of language — should be evaluated not for their timeless ability to represent a truth that, like the fiction of nature, is 'out there,' but rather for their ability to meet our present needs.").

<sup>35</sup> See, e.g., PAUL HAWKEN, *THE ECOLOGY OF COMMERCE* (1993); PAUL HAWKEN, AMORY LOVINS & L. HUNTER LOVINS, *NATURAL CAPITALISM: CREATING THE NEXT INDUSTRIAL REVOLUTION* (1999); AMORY B. LOVINS, *SOFT ENERGY PATHS: TOWARD A DURABLE PEACE* (1977); Amory B. Lovins, *Energy Strategy: The Road Not Taken?*, 55 *FOREIGN AFF.* 65, 78 (1976).

<sup>36</sup> Again, this proposal does little to distinguish Nordhaus and Shellenberger from the environmentalists and scholars they claim to be displacing. See, e.g., D. Paul Emond, *Co-Operation in Nature: A New Foundation for Environmental Law*, 22 *OSGOODE HALL L.J.* 323 (1984) (seeking to replace environmental law's adversarial approach with a more cooperative approach premised on public investment and incentivizing of environmentally responsible development).

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placed on the defensive, forced to account for how *they* could be against clean energy and independence from foreign oil.

Failing to embrace such an approach is an unforgivable tactical error in the authors' view, given that the cultural space available for framing and reframing policy disputes in the current era is so capacious. With respect to climate change, for instance, the authors argue that "[t]he relevant question is not 'What does global warming mean?' but 'Which of global warming's meanings should we elevate into a pragmatic politics?'" (pp. 221–22). Contrary to most environmental organizations, which have tended to focus on abatement of greenhouse gas emissions rather than on adaptation to a warming world, Nordhaus and Shellenberger argue that a policy approach focused on adaptation and preparedness offers a compelling, hopeful, and therefore marketable, vision of the future. The vision implied by emissions abatement simply continues the environmentalists' theme of long-term catastrophe that can only be avoided through present restriction. Adaptation, in contrast, "makes people feel more in control of their future," "offer[ing] immediate, perceptible impacts that can be observed and directly addressed in the present" (p. 222). Conveniently for the authors, adaptation also does not require "radically downgrading one's quality of life"; as such, it is more likely to attract popular support, given that individuals "are less likely to acknowledge a threat that makes us feel guilty than one that does not" (p. 222). Finally, although mainstream environmental organizations to date have resisted an adaptation-focused strategy because they believe that it would undercut the effort to achieve significant long-term emissions abatement,<sup>37</sup> Nordhaus and Shellenberger contend that adaptation actually would offer the thin edge of a wedge, achieving buy-in from the public on the significance of climate change in a manner that would enable eventual adoption of "wider action" (p. 224).

In sum, for several reasons — because the movement attempts to mobilize public support based on culturally abandoned and philosophically unsupportable categories such as nature and science, because the narrow and technocratic policy tools that make up the entirety of the movement's positive vision for the future are incapable of capturing the public's imagination, and because the preachy narrative of sin-

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<sup>37</sup> Carl Pope supports abatement for the separate reason that he believes it will activate a more resonant set of values than adaptation, one focused on prudence and prevention, rather than on risk and retaliation. See Pope, *supra* note 14. Experimental research in the somewhat analogous context of tort law, however, suggests that the "hot" language of negligence analysis may be more resonant with lay jurors than the "cold" language of a strict liability standard, such that jurors are comparatively more likely to find responsibility and impose greater damages when harm and care are evaluated through negligence's overtly moralized terminology. See Richard L. Cupp Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874 (2002).

fulness that the movement espouses is unlikely to find reception amidst a populace whose affluence masks a deep and growing state of insecurity — environmentalism is, to Nordhaus and Shellenberger, dead. In its place, the authors offer a brand of romantic pragmatism that aims to turn the demise of environmentalism's categories into a strategic advantage. In the authors' telling, this "postenvironmentalism" will provide an optimistic, life-affirming "politics of pragmatism," one that is centered around "the liberal imagination" and a "metaphysics of becoming," rather than around rational positivism and a "metaphysics of stasis" (p. 219).<sup>38</sup> Having set for themselves the challenge of "dreaming" a new social future, Nordhaus and Shellenberger thus dream a nation of yeoman windfarmers forming Toquevillian associations on MySpace. Much as the rapturous prose of Romantic naturalists did for earlier generations of Americans,<sup>39</sup> this utopian vision, the authors believe, will sell environmental policies with far greater effectiveness than the movement's conventional dystopian approach.

## II. PLURALIZING THE MOVEMENT

Nordhaus and Shellenberger's criticisms of environmentalism occasionally hit their mark, most notably in their contention that the "pollution paradigm" (p. 111) — in which environmentalists repeatedly put forth scientific evidence of harm in order to identify a pollution externality, a commons tragedy, or some other market failure that can justify their demand for corrective government regulation — has become a liability to the environmental movement. Something *is* amiss when global climate change is simply forced into the familiar rubric of a Pigouvian externality problem, treated as a mere side effect or an ancillary consequence of economic activity that does not require more fundamental reform of the way in which we theorize environmental law and policy. So long as environmentalists continue to play this game of spot-the-externality, they will mischaracterize the nature of an economic system that, rather than generating climate change as an incidental side effect, depends at its very foundation on large-scale, climate-altering activities such as fossil fuel combustion and land use alteration. In turn, environmentalists will reinforce the primacy of a policymaking framework that squarely places the burden of proof on *them* to justify any governmental policy aimed at ensuring sustainability, rather than on the defenders of the status quo. As Professor Herman Daly, a founder of the field of ecological economics, put it more than a decade before Nordhaus and Shellenberger, "[w]hen increasingly vital facts, including the very capacity of the earth to support

<sup>38</sup> Emphasis has been omitted.

<sup>39</sup> See *infra* pp. 2058–59.



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life, have to be treated as ‘externalities,’ then it is past time to change the basic framework of our thinking so that we can treat these critical issues internally and centrally.”<sup>40</sup>

Nordhaus and Shellenberger also score easy points when they critique aspects of environmentalism’s dark side, such as the strong opposition to population growth and apparent disdain for humanity that is shown by some environmental leaders (pp. 126–27); the related lack of sympathy for subsistence farmers and other individuals in conditions of distress whose efforts to survive often adversely impact the environment (pp. 61–63); the embrace of an “[i]mmiseration theory” that appears almost to relish human suffering as the most reliable way to bring about cultural change (p. 36); the sometimes scornful dismissal of Middle America and its alleged “false consciousness” by authors such as Frank (p. 158); and the occasional aloofness of wealthy liberals, such as John Kerry, who apparently once emphasized the fact that three of his cars were hybrid electric vehicles as evidence of what he had done personally for the environment (p. 125). Still, whatever the entertainment value derived from criticizing these attitudes and beliefs, the authors unfairly impute them to an entire “environmental movement” (p. 98), rather than to particular strands or particular purveyors of environmentalism.

The result of this clumsy personification is that environmentalism, in the hands of Nordhaus and Shellenberger, becomes schizophrenic. Apparently obsessed with the Enlightenment ideals of reason and empiricism — as evidenced by strong adherence to instrumentalist policy discourse and reliance on scientific evidence to frame environmental goals — environmentalists nonetheless also continue to wage their long battle against the centrality of the liberal individual subject — as evidenced by frequent elevation of aestheticism and naturalism over rationalism and technology, and by various theoretical and political efforts to expand the sphere of human concern outward to encompass animals and other nonhuman life forms, not simply as objects of use or admiration by humankind, but as interest holders in their own right. Obviously, these latter two strands of post-Enlightenment environmentalism, the first associated with the Romantic tradition and the second with various rejections of individualism and anthropocentrism, are not in complete harmony with *each other*, let alone with the rational positivism that Nordhaus and Shellenberger attribute to the entire environmental movement. The categories, instead, are plural.<sup>41</sup>

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<sup>40</sup> HERMAN E. DALY, *BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT* 45 (1996).

<sup>41</sup> Indeed, some in the academy might say the categories are too plural to constitute a unified field, at least insofar as environmentalism has been embodied in law. *See, e.g.*, Richard J. Lazarus, *Restoring What’s Environmental About Environmental Law in the Supreme Court*, 47 *UCLA*

The Romantic tradition of environmentalism is particularly troubling for Nordhaus and Shellenberger because it makes plain that environmentalists' use of terms like "nature" is not so naïve and essentialized as the authors contend. Instead, Romantic writers quite self-consciously shape the natural realm to serve artistic and political purposes.<sup>42</sup> By critiquing environmentalists for their emphasis on the illusory ideal of nature, separate and apart from — that is, untainted by — human influence, Nordhaus and Shellenberger fail to consider the *regulative* function of such a concept, irrespective of its merit as an ontological truth claim. More so than the actuality of nature, as gleaned through the positivistic lens of Enlightenment science and empiricism, Romantic writers are interested in the idea of nature, as actively depicted, even constructed, through language, literature, and the visual arts. A historically antecedent example makes this point even more clearly: Nordhaus and Shellenberger complain that, because "the meaning of the word *pollution* depends on the concept of nature as pure, harmonious, and separate from humans" (pp. 24–25), the word provides no analytic value, now that the nature-humanity divide has been thoroughly deconstructed. However, beginning with its fourteenth-century etymological origins, at which time it was used to indicate the "ejaculation of semen without sexual intercourse,"<sup>43</sup> the word *pollution* has always been used in a moralized sense to denote those activities that should be treated by a political community as defiling or desecrating, and hence restricted. The word therefore does not depend on an outmoded nature-humanity divide; instead, it actively works to

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L. REV. 703 (2000) (studying Supreme Court voting patterns and concluding that the Justices fail to see environmental law as a distinct field); Peter Manus, *Our Environmental Rebels: An Average American Law Professor's Perspective on Environmental Advocacy*, 40 NEW ENG. L. REV. 499, 515 (2006) (querying whether environmental law has any greater claim to distinctiveness as a legal field than does "trailer park law"); A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENVTL. L. 213, 217–18 (2004) (observing that "when one sums up the cases, statutes, and administrative regulations that make up the core of what most people consider environmental law, one is hard pressed to reduce them to a set of distinctive, fundamental principles, let alone rules that can be applied to a wide range of current and future issues, as one can do in other areas of 'real law'" (footnotes omitted)); David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 621 (1994) ("Environmental law has no explicit unifying principles that could serve to organize the jumble of statutes, regulations, cases, and academic analyses that collectively form the academic subject of environmental law."). *But see* Jay D. Wexler, *The (Non)Uniqueness of Environmental Law*, 74 GEO. WASH. L. REV. 260, 316 (2006) (raising doubts but concluding that "[e]nvironmental law addresses a unique set of problems and seeks to protect a unique set of resources, and those facts alone suffice to set the field apart as an area of inquiry and study").

<sup>42</sup> See LAWRENCE BUELL, *THE ENVIRONMENTAL IMAGINATION: THOREAU, NATURE WRITING, AND THE FORMATION OF AMERICAN CULTURE* (1995).

<sup>43</sup> OXFORD ENGLISH DICTIONARY ONLINE (Draft Revision Mar. 2008) (defining and providing the etymology of "pollution"); see also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1756 (1971).

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construct a divide between permissible and impermissible human activities, using “natural” and “non-natural” designations more in the sense of Aquinas’s natural laws than Newton’s laws of nature. Today, concepts such as the “environment,” “precaution,” “sustainability,” “ecological footprint,” “smart growth,” “community,” and “place” continue this tradition, standing in for a complex value assessment regarding the pace and direction of human activity, rather than strictly for a claim about the actual condition of the physical world.

Nordhaus and Shellenberger might respond that, even if this Romantic redescription of environmentalist rhetoric is accepted, it is still objectionable for the more prosaic reason that the rhetoric no longer carries persuasive force. One way of understanding the Romantic project is that it sought to advance a particular vision of the individual — as self-reliant, self-creating, and self-expressive — by appealing to individuals’ interest in communing with the natural world, far outside the influence of human institutions. During the late nineteenth and early twentieth centuries, this heroic vision readily lent itself to the conservationist agenda of early American environmentalists such as John Muir. Today, however, the share of the physical world that might plausibly accept cultural encoding as “natural” or “wild” is plummeting;<sup>44</sup> meanwhile, the Romantic vision of self-creating individuals has been so thoroughly co-opted by the consumerist economy that it is hard to imagine how it ever led to Walden, rather than to Wal-Mart. Perhaps for these reasons, environmentalists today seem much more likely to appeal to individuals’ interest in avoiding harm to themselves or their children than in bettering themselves through appreciation, alongside Muir, of “how completely everything in wild nature fits into us, as if truly part and parent of us.”<sup>45</sup>

Still, even if the Romantic branch of environmentalism has withered, many other branches remain unexplored by Nordhaus and Shellenberger. The authors seem unaware, for instance, that at the same moment environmental activists and scholars were developing the movement’s primary science- and litigation-based policy strategy in the 1970s, they also were plotting far more radical inroads against liberalism’s idealization of the human individual, the private sphere, and the nation-state, including, for instance, calls to grant legal standing to “forests, oceans, rivers and other so-called ‘natural objects’ in the envi-

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<sup>44</sup> See MCKIBBEN, *supra* note 32; Westbrook, *supra* note 41, at 677 (“Technology has made management ubiquitous, so the law has no place for the alien nature revered by preservationists.”).

<sup>45</sup> Diary entry of John Muir (estimated date 1872), in JOHN OF THE MOUNTAINS: THE UNPUBLISHED JOURNALS OF JOHN MUIR 92, 92 (Linnie Marsh Wolfe ed., 1938).

ronment” via appointed guardians,<sup>46</sup> to imbue future generations with similar legal status and protection,<sup>47</sup> to interpret or amend the Constitution to create an affirmative right to a healthy environment,<sup>48</sup> to revive the ancient public trust doctrine with a contemporary environmental focus,<sup>49</sup> to establish specialized environmental tribunals,<sup>50</sup> and even to create a world habeas court for the environment.<sup>51</sup> Much of

<sup>46</sup> Christopher D. Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 456 (1972). Famously cited by Justice Douglas in his dissent in *Sierra Club v. Morton*, 405 U.S. 727, 742 (1972) (Douglas, J., dissenting), this article was among the first in the legal literature to explicitly suggest giving legal rights to nonhumans. See also Clarence Morris, *The Rights and Duties of Beasts and Trees: A Law Teacher's Essay for Landscape Architects*, 17 J. LEGAL EDUC. 185, 191 (1964) (arguing for a perception of legal rights that would include a “presumption in favor of the natural”); Christopher D. Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1, 9 (1985) (advocating a “[m]oral pluralism” that supports the provision of legal rights to unconventional entities). See generally RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* (1989).

<sup>47</sup> See, e.g., EDITH BROWN WEISS, *IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY* (1989); Edith Brown Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 *ECOLOGY L.Q.* 495 (1984).

<sup>48</sup> See, e.g., Bernard S. Cohen, *The Constitution, the Public Trust Doctrine, and the Environment*, 1970 UTAH L. REV. 388 (supporting right to healthy environment stemming from the interaction of the public trust doctrine with the Ninth Amendment); John C. Esposito, *Air and Water Pollution: What To Do While Waiting for Washington*, 5 HARV. C.R.-C.L. L. REV. 32, 47-48 (1970) (promoting constitutional right, rooted in the Ninth Amendment, directly enforceable against private polluters); James Huffman, *Energy: The Limit to Growth*, 5 ENVTL. L. 1 (1974) (proposing amendment to curb energy consumption); Ronald E. Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 IND. L.J. 203 (1974) (seeking due process protection against harm caused by environmental degradation); Richard L. Ottinger, *Legislation and the Environment: Individual Rights and Government Accountability*, 55 CORNELL L. REV. 666 (1970) (proposing environmental amendment); Harry W. Pettigrew, *A Constitutional Right of Freedom from Ecocide*, 2 ENVTL. L. 1 (1971) (combining Ninth Amendment and substantive due process considerations to argue for an environmental right); E.F. Roberts, *The Right to a Decent Environment; E = MC<sup>2</sup>: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674 (1970) (suggesting substantive due process right to a healthy environment); Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205 (1974) (advancing constitutional entitlement to the preservation of nature as a symbol of cultural traditions).

<sup>49</sup> See JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); see also Cohen, *supra* note 48; Ved P. Nanda & William K. Ris, Jr., *The Public Trust Doctrine: A Viable Approach to International Environmental Protection*, 5 *ECOLOGY L.Q.* 291 (1976) (advocating the establishment of an international public trust doctrine through a multilateral convention); John S. Winder, Jr., *Environmental Rights for the Environmental Polity*, 5 SUFFOLK U. L. REV. 820 (1971).

<sup>50</sup> See Scott C. Whitney, *The Case for Creating a Special Environmental Court System*, 14 WM. & MARY L. REV. 473 (1973).

<sup>51</sup> See Luis Kutner, *The Control and Prevention of Transnational Pollution: A Case for World Habeas Ecologicus*, 9 LAW. AM. 257 (1977). For further examples of boundary-pushing proposals, see William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: The Who's*, 39 WASHBURN L.J. 1 (1999).

this literature traversed the very terrain that Nordhaus and Shellenberger now claim to be discovering. Seminal contributions by Professors Laurence Tribe<sup>52</sup> and Mark Sagoff,<sup>53</sup> for instance, discuss at length the instability of the nature-humanity conceptual divide, the possibility and desirability of overcoming law's anthropocentrism, and the limits of utilitarian or instrumental, as opposed to virtue-based or symbolic, justifications for environmental policy. Sagoff, in particular, presages much of Nordhaus and Shellenberger's account. He does this especially in three areas: his parodic dismissal of environmentalists' attempt to base their policy appeals on scientific claims regarding the "needs" of nature;<sup>54</sup> his insistence that utilitarian accounts of environmentalism's urgency will inevitably be undermined by the availability of technological substitutes for nature and by the pliability of human wants in the hands of institutional want-makers;<sup>55</sup> and, most significantly, his suggestion that environmentalists should mine the myths and metaphors of America's cultural history in relation to the environment — the country's various attempts "to locate in nature the symbols of national character and destiny" — in order to shore up public commitment to environmentalism.<sup>56</sup> As discussed below in Part III,<sup>57</sup> Tribe's ensuing rejoinder to Sagoff also mirrors the most fundamental critique to be laid against Nordhaus and Shellenberger's pro-

<sup>52</sup> Laurence H. Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974). Tribe's article was inspired, in part, by an essay that had mused:

What's wrong with plastic trees? My guess is that there is very little wrong with them. Much more can be done with plastic trees and the like to give most people the feeling that they are experiencing nature. We will have to realize that the way in which we experience nature is conditioned by our society — which more and more is seen to be receptive to responsible interventions.

Martin H. Krieger, *What's Wrong with Plastic Trees?*, 179 SCIENCE 446, 453 (1973) (citation omitted).

<sup>53</sup> Sagoff, *supra* note 48.

<sup>54</sup> Professor Sagoff writes:

Environmentalists always assume that the interests of these objects are *opposed* to development. How do they know this? Why wouldn't Mineral King want to host a ski resort, after doing nothing for a billion years? In another few millennia it will be back to original condition just the same. The Sequoia National Forest tells the developer that it wants a ski lift by a certain declivity of its hills and snowiness during the winter — immediately obvious to the sight — and that it needs a four lane highway by the appearance of certain valley passages and obvious scenic turnouts on the mountainsides. The seashore, meanwhile, indicates its willingness to entertain poor people from Oakland by becoming covered with great quantities of sand. Finally, it is reasonable to think that Old Man River might do something for a change, like make electricity, and not just keep on rolling along.

*Id.* at 222.

<sup>55</sup> See *id.* at 225 ("Our technology is still somewhat inadequate; nature, therefore, is not yet wholly obsolete. Except for the limit of our technology, however, there is no economic or even utilitarian rationale available for preserving the natural environment.")

<sup>56</sup> *Id.* at 232; see also James Huffman, *Wilderness and Freedom*, 16 IDAHO L. REV. 407 (1980).

<sup>57</sup> See *infra* p. 2072.

ject, namely that Sagoff overstates the marketability of “the symbolic network he seeks to defend,” such that “one is led to wonder not only about the limits of his argument but also about its dangers.”<sup>58</sup>

Nordhaus and Shellenberger also fire carelessly with their charge of scientism, since environmentalist scholars and commentators have long critiqued the notions that science can provide an objective basis for resolving environmental policy issues<sup>59</sup> and that ecology can provide a unitary, stable conception of “nature” to fix environmental conservation goals.<sup>60</sup> Many in the international environmental movement embrace what is known as the precautionary principle out of similar concern over science’s limitations as a neutral and comprehensive basis for fixing environmental, health, and safety regulation.<sup>61</sup> Indeed, the precautionary principle can be seen as a direct response to Latour’s call for an abandonment of the distinctions between science, society, and nature.<sup>62</sup> Rather than treat the production of knowledge as something that happens *out there*, the precautionary principle instead makes it a direct subject of regulatory concern. By shifting the burden of proof onto the promoters of uncertain, but potentially harmful, activities and technologies, the precautionary principle aims to reform the relationship between regulation and science in at least three significant ways. First, recognizing that the risk assessment process implicates a host of ethical considerations — not merely in the sense of how to handle inevitable scientific uncertainties, but also in the more basic sense of how to frame what knowledge we aim to acquire — advocates of the precautionary principle promote a broadly inclusive and

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<sup>58</sup> Laurence H. Tribe, *From Environmental Foundations to Constitutional Structures: Learning from Nature’s Future*, 84 YALE L.J. 545, 549 (1975).

<sup>59</sup> See, e.g., Donald T. Horstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562, 616–29 (1992); Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1628–50 (1995).

<sup>60</sup> See, e.g., Manus, *supra* note 41, at 501–03; A. Dan Tarlock, *The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law*, 27 LOY. L.A. L. REV. 1121, 1128–29 (1994); Jonathan Baert Wiener, *Beyond the Balance of Nature*, 7 DUKE ENVTL. L. & POL’Y F. 1, 4 (1996). See generally DANIEL B. BOTKIN, *DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY* (1990). In addition to the critique based on nonequilibrium ecology, the “balance of nature” concept also has been critiqued for its frequent failure to acknowledge pre-European human impact on the North American environment. See, e.g., Nelson, *supra* note 20, at 72–73 (observing that, through the assumption that evidence of pre-European colonization ecological conditions represents our best understanding of nature untouched by humankind, “the modern environmental movement comes uncomfortably close to the old Puritan dismissal of the humanity of American Indians”). See generally SHEPARD KRECH III, *THE ECOLOGICAL INDIAN* (1999).

<sup>61</sup> For discussion of the precautionary principle, its possibilities, and the critiques that have been levied against it, see Douglas A. Kysar, *It Might Have Been: Risk, Precaution and Opportunity Costs*, 22 J. LAND USE & ENVTL. L. 1 (2006).

<sup>62</sup> See LATOUR, *supra* note 19, at 144 (“Half of our politics is constructed in science and technology. The other half of Nature is constructed in societies. Let us patch the two back together, and the political task can begin again.”).

participatory process, one that seeks to democratize science and regulation, rather than to delegate knowledge-shaping to technocratic elites. Second, despite Nordhaus and Shellenberger's claim that environmentalists are unduly positivistic about science, supporters of the precautionary principle deeply internalize the Kuhnian conception of science as an evolving set of contingent beliefs and practices; thus, their principle aims to commence an *incremental* regulatory decisionmaking process — one that can adapt over time as information and experience with a particular hazard cause knowledge to accumulate, shift, and, occasionally, collapse. Finally, promoters of precaution recognize that knowledge itself is a subject of power and influence in society; accordingly, the content of scientific knowledge and the manner of its production are made direct subjects of environmental, health, and safety regulation, rather than merely regarded as exogenous inputs that determine the outcome of policymaking but are never affected by it. Shifting the burden of proof onto the promoters of new technologies and activities, as the precautionary principle does, serves the practical purpose of providing incentives for research and understanding by those parties who are thought to be best able to develop knowledge of imperfectly characterized threats.

Nordhaus and Shellenberger's failure to attend to the precautionary principle — and to the sophisticated, post-positivist conception of science that it espouses — is symptomatic of a more general failure by the authors to address international and global dimensions of environmentalism. Although Nordhaus and Shellenberger admittedly aim their critique in *Break Through* at the environmental movement within the United States, their lack of attention to international environmentalism is still a strange omission, given that U.S. environmental organizations in recent years have directed a larger and larger share of their energies to activities and policies outside of the domestic context.<sup>63</sup> Importantly, much of the international agenda of environmental and other civil society organizations seeks to reevaluate traditional categories — such as the Westphalian state system, the orthodoxy of trade liberalization, the equity-efficiency dichotomy of welfare economics, and the related public-private divide — in a critical spirit that Nordhaus and Shellenberger presumably would appreciate.<sup>64</sup> In broad outline, for instance, promoters of sustainable development seek to integrate economic efficiency, distributive equity, and environmental sustainability as coequal concerns within a unified policymaking framework, in contrast to market liberalism's approach of

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<sup>63</sup> Cf. Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENVTL. L.J. 1, 18 (2007) ("Perhaps the most stunning development in the last twenty-five years of environmental law's evolution has been the globalization of environmental concerns.")

<sup>64</sup> See, e.g., Nesper, *supra* note 20, at 224–29.

positioning efficiency as the preeminent policy aim while relegating the attainment of equity and sustainability to various ex post corrective devices, many of which upon scrutiny seem to stack the deck against those concerns.<sup>65</sup> Thus, when Nordhaus and Shellenberger proclaim that “[a]ny successful effort to stabilize the climate will destroy the distinctions between environmental protection, economic development, and global equity” (p. 269), they fail to acknowledge that this integrative vision is precisely what proponents of sustainable development have been attempting to accomplish for over two decades.

A similar oversight in *Break Through* occurs with respect to the domestic environmental justice movement, which has grappled with the interaction of environmental hazards and economic conditions in pursuit of an integrated vision of social justice since its inception in the late 1980s.<sup>66</sup> Significantly, the rhetoric and policy platform of the environmental justice movement has tended to rest “on ethical rather than technical grounds,”<sup>67</sup> much in the manner that Nordhaus and Shellenberger urge for the environmental movement more generally. Yet, in their initial *Death of Environmentalism* essay, Nordhaus and Shellenberger made no mention of the environmental justice movement, an omission that attracted widespread criticism immediately after the essay’s release.<sup>68</sup> In *Break Through*, the authors respond not by

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<sup>65</sup> Although first made internationally salient by the 1987 Brundtland Report, see WORLD COMM’N ON ENV’T & DEV., OUR COMMON FUTURE 43 (1987), the concept of sustainable development is generally traced even earlier to a 1980 report issued by the International Union for the Conservation of Nature in cooperation with the World Wildlife Fund and the United Nations Environment Programme, see Norman J. Vig, *Introduction to THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY* 1, 6 (Regina S. Axelrod, David Leonard Downie & Norman J. Vig eds., 2d ed. 2005). For discussion of the sustainable development concept, see Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109 (2005).

<sup>66</sup> See, e.g., LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001); CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY, AND REGULATION (2002); Sheila Foster, *The Challenge of Environmental Justice*, 1 RUTGERS J.L. & URB. POL’Y 6 (2004); Eileen Gauna, *An Essay on Environmental Justice: The Past, the Present, and Back to the Future*, 42 NAT. RESOURCES J. 701 (2002); Richard J. Lazarus, *Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993).

<sup>67</sup> Gauna, *supra* note 66, at 705.

<sup>68</sup> As Swati Prakash wrote, “My perspective is that many people of color and indigenous people who have been disproportionately affected by pollution, and by the exploitative relationship human beings have to our natural resources, learned [Nordhaus and Shellenberger’s] lessons and were often arguing them years ago.” *Life After “Death,”* GRIST, Feb. 22, 2005, <http://www.grist.org/comments/dispatches/2005/02/22/elp/index.html>; see also MICHEL GELOBTER ET AL., THE SOUL OF ENVIRONMENTALISM: REDISCOVERING TRANSFORMATIONAL POLITICS IN THE 21ST CENTURY 9–10 (2005), available at <http://www.rprogress.org/soul/soul.pdf>; Ludovic Blain, *Ain’t I An Environmentalist?*, GRIST, May 31, 2005, <http://www.grist.org/comments/soapbox/2005/05/31/blain-death/index.html>; Vivian Chang & Manami Kano, *Panel Surfing*, GRIST, Mar. 3, 2005, <http://www.grist.org/comments/dispatches/2005/03/04/chang/index.html>; John M. Meyer,



acknowledging but by castigating the environmental justice movement, stating that the movement is out of touch with the communities it aims to represent. Specifically, the authors argue that, by focusing on environmental hazards that pose “a far smaller threat than smoking, alcohol, and diet” (p. 74) to members of minority communities, “environmental justice activists often end up focusing on concerns that are neither particularly significant nor particularly salient to the communities in question” (p. 83).<sup>69</sup>

Nordhaus and Shellenberger’s critique of the environmental justice movement seems odd, since the issues that they cite as being more important than environmental threats — substandard housing, meager job opportunities, poor health care, and failing schools — are tightly correlated with the same conditions of economic inequality and political disempowerment that lie at the heart of the environmental justice movement’s concerns.<sup>70</sup> As Sheila Foster observes: “From the civil rights movement, environmental justice activism has inherited a perspective that recognizes that the disproportionate distribution of environmental hazards is not random or the result of ‘neutral’ decisions, but is instead a product of a larger discriminatory social structure . . . .”<sup>71</sup> Because of this orientation, environmental justice activists pursue remedies that are not narrowly defined around pollution problems, but instead reflect “broader, structural reforms that will alleviate a variety of problems, including environmental degradation, which these poorer communities endure.”<sup>72</sup> Nordhaus and Shellenberger might contest whether minority neighborhoods’ disproportionate exposure to environmental risks, as opposed to other issues such as housing or healthcare, provides an effective light with which to illuminate underlying conditions of injustice and to pursue visionary progressive reforms. The authors, however, have no basis for claiming that “[t]he environmental justice movement ignores all of these [re-

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*The Afterlife of Environmentalism*, AM. PROSPECT, Sept. 18, 2005, available at [http://www.prospect.org/cs/articles?article=the\\_afterlife\\_of\\_environmentalism](http://www.prospect.org/cs/articles?article=the_afterlife_of_environmentalism).

<sup>69</sup> Cf. Orson Aguilar, *Why I Am Not An Environmentalist*, S.F. CHRON., May 19, 2005, at B9 (“For communities like mine, environmentalism has seemed to be about preserving places most of us will never see.”); Prakash, *Life After “Death,”* *supra* note 68 (noting that the framing of environmental concerns through the justice lens “resonates among many who find themselves alienated by the message inadvertently sent by the environmental movement that we only matter inasmuch as we are the problem”).

<sup>70</sup> See, e.g., Luke W. Cole & Caroline Farrell, *Structural Racism, Structural Pollution and the Need for a New Paradigm*, 20 WASH. U. J.L. & POL’Y 265 (2006) (exploring connection between zoning and housing law and racially disproportionate exposure to environmental hazards).

<sup>71</sup> Foster, *supra* note 66, at 10.

<sup>72</sup> *Id.* at 11.

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lated] concerns because, like the mainstream environmental movement, it sees them as separate from the environment” (p. 87).<sup>73</sup>

At one point in *Break Through*, Nordhaus and Shellenberger do seem to recognize that their stylized personification of the environmental movement sweeps too broadly. Specifically, they note that some environmental justice organizations already have been working to improve conditions in health, housing, income, transportation, and other areas of significant development need for minority neighborhoods, as the authors urge. However, in a pointed effort to continue their Oedipal theme, Nordhaus and Shellenberger claim that these organizations are “most[ly] headed by younger leadership” (p. 88) — leadership that presumably has accepted the challenge of *Break Through* and embraced the authors’ postenvironmental politics.

This attempt at recategorization seems to be Nordhaus and Shellenberger’s chief response to any who would claim to be overlooked or mischaracterized in the authors’ construction of the environmental movement. Indeed, at the outset of *Break Through*, the authors explicitly ask “those readers who do not see themselves in our descriptions and definitions of environmentalism [to] consider whether they themselves have already moved beyond environmentalism” (p. 17). Either you are against us or, it seems, you are already with us. Such a sleight of hand to justify slighting so many diverse strands of the environmental movement might have been acceptable if *Break Through* had actually delivered on its promise to provide a novel and path-breaking postenvironmentalism. Regrettably, as the next Part argues, the book does not so deliver.

### III. THE POLITICS OF ALMOST-POSTMODERNISM

Like *Break Through*’s claims regarding the instability of conceptual categories, the book’s call for greater attentiveness to affective and metaphorical aspects of cognition in policy formulation is also not original to Nordhaus and Shellenberger. In fact, legal scholars, psychologists, and other social scientists have developed a sophisticated and compelling account of how individuals’ perceptions of environmental, health, and safety issues, among lay and expert observers alike, are deeply imbricated with the values and visions that comprise their “cultural worldviews,” rather than simply with the mechanisms of reason and neutral discourse that are thought to be necessary to

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<sup>73</sup> A further oddity of Nordhaus and Shellenberger’s critique is the fact that, between the release of their initial essay and the publication of *Break Through*, issues of environmental justice and disproportionate vulnerability to hazards became unmistakably salient through the tragedy of Hurricane Katrina, yet that disaster is scarcely mentioned in *Break Through*.

guide public deliberation within a liberal state.<sup>74</sup> Thus, just as Nordhaus and Shellenberger chide the environmental movement for failing to frame its policy appeals in ways that connect to individuals' values and hopes, legal scholars criticize the conventional account of risk regulation for failing to acknowledge numerous psychological findings suggesting that "there is no such thing as 'real risk' or 'objective risk,'"<sup>75</sup> at least not in the rational positivist sense of a perspective-free depiction of material reality.<sup>76</sup>

Consistent with this view, psychological studies also suggest that individuals' acceptance of the seriousness or credibility of a threat can be influenced by their perception of likely policy responses to the threat, including, in particular, their perception of whether a particular response will reinforce or undercut their cultural worldviews. Seen in this light, for instance, the remarkable confluence of support that emerged for tradable emissions permits as an environmental policy tool during the late 1980s and early 1990s can be understood as a result of the amenability of tradable emissions permits to multiple cultural interpretations. Environmentalists, having gotten over their initial qualms about creating a "license to pollute,"<sup>77</sup> and having recognized that conventional technology-based approaches had become a political dead end, perceived in tradable emissions permits a prospect for additional publicly defined and enforced pollution limits. Across the aisle, skeptics of environmentalism became more willing to accept evidence regarding the need for further pollution reductions, once they saw at the back end of the policy cycle a "market-based" response that would express their cultural *gründnormen* of individualism and efficiency.<sup>78</sup> A similar tale can be told with respect to the recent finding that survey respondents whose cultural outlook is individualist or hierarchical in orientation are more willing to agree that climate

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<sup>74</sup> See generally, e.g., Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741 (2008); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 150 (2006); Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003); Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071 (2006) (book review); Dan M. Kahan et al., *The Second National Risk and Culture Study: Making Sense of — and Making Progress in — the American Culture War of Fact*, (Yale Law Sch. Pub. Law Working Paper No. 154, 2007) [hereinafter Kahan et al., *Second National Risk and Culture Study*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1017189](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017189).

<sup>75</sup> Paul Slovic, *Trust, Emotion, Sex, Politics and Science: Surveying the Risk-Assessment Battlefield*, in THE PERCEPTION OF RISK 390, 392 (Paul Slovic ed., 2000).

<sup>76</sup> See Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1763–66 (2003).

<sup>77</sup> STEVEN KELMAN, WHAT PRICE INCENTIVES?: ECONOMISTS AND THE ENVIRONMENT 109 (1981) (internal quotation marks omitted); see also *id.* at 107–17.

<sup>78</sup> See John Gastil, Dan M. Kahan & Donald Braman, *Ending Polarization: The Good News About the Culture Wars*, BOSTON REV., Mar./Apr. 2006, at 18, 19.

change is a serious threat if they have been primed to believe that nuclear power will be the policy solution, rather than antipollution regulations.<sup>79</sup> In short, individuals' willingness to perceive a problem appears to be, at least partially, a function of how they perceive its solution, that is, whether the solution codes as a threat to, or a buttress of, their fundamental norms and values.

When discussing the significance of such findings for law and policy, Professors Dan Kahan and Donald Braman are careful to emphasize that “[n]othing in [their] account implies either that there is no empirical truth of the matter on public policy issues or that citizens can’t ever be expected to see it.”<sup>80</sup> For Nordhaus and Shellenberger, on the other hand, *there is no empirical truth of the matter*, only socially constructed narratives of varying degrees of persuasiveness. Accordingly, Nordhaus and Shellenberger argue that environmentalists “must abandon the environmentalism that thinks of itself as representing and defending — but never imagining, constituting, or creating — nature” (p. 238). Environmentalists instead must enlist the aid of imagination consultants (such as the authors themselves<sup>81</sup>), so that they can “start to think about creating natures and markets to serve the kind of world we want and the kind of species we want to become” (p. 235). As this Part argues, the fundamental problem with this position is that — unlike scholars such as Kahan and Braman who are careful to hold onto a broadly welfarist framework to guide policy analysis amidst culturally inflected modes of perceiving and communicating risk — the authors of *Break Through* accept no discernable policy foundation other than pure message massage. As a result, Nordhaus and Shellenberger’s views on the role of romantic imagination within politics are insightful, but dangerously incomplete.

The incompleteness of Nordhaus and Shellenberger’s account arises from their inability to explain why, having accepted the importance of “creating new truths” (p. 160) as part of environmental politics, any *particular* set of new truths should be supported or accepted. Throughout *Break Through*, Nordhaus and Shellenberger chide environmentalists for orienting their politics around an outmoded conception of nature, yet the authors themselves repeatedly invoke various substitute formulations for nature — such as “ecological crises” (p. 238), “the nonhuman world” (p. 95), and the vaguely ominous phrase, “what is at stake” (p. 94) — all of which seem to be equally lacking in foundation, equally susceptible to deconstruction, as nature. Thus, the authors tell us that what we need to do in order to achieve progress on

<sup>79</sup> See Kahan et al., *Second National Risk and Culture Study*, *supra* note 74, at 4–6.

<sup>80</sup> Kahan & Braman, *Cultural Cognition and Public Policy*, *supra* note 74, at 151.

<sup>81</sup> See *infra* p. 2082.

“global warming and the destruction of the Amazon” (p. 273) is to stop talking to the public as if scientists and environmentalists hold privileged knowledge about the state of the environment. Likewise, they tell us that “if we are to overcome ecological crises, we must no longer put concepts like nature or ‘the environment’ at the center of our politics” (p. 17). But the authors’ own critique of environmentalism now turns against them: who is this “we” and what are these “ecological crises”? If not because of environmentalists opining on science, if not out of concern for the wellbeing and sustainability of some inchoate natural world and the many life forms within it, what do we really care about “global warming and the destruction of the Amazon”?

Nordhaus and Shellenberger similarly critique environmentalists for thinking of themselves as a distinct “special interest[]” (p. 4) and for failing to form creative political coalitions or reach more broadly across the public conscience,<sup>82</sup> yet in *Break Through*’s publicity materials, the authors appear on an unequivocally environmentalist timeline, one that includes *Walden*, *Silent Spring*, and *Earth in the Balance*.<sup>83</sup> Likewise, the authors invoke Martin Luther King, Jr. (p. 1), John F. Kennedy (p. 2), and other liberal luminaries, even as they criticize the civil rights strategies that emerged during the era of those icons and even as they bemoan liberals’ seemingly “inexhaustible reservoir of nostalgia for the 1960s” (p. 4). Thus, although Nordhaus and Shellenberger never actually identify their intended audience in *Break Through*, their strategy seems plain: they are speaking to insiders and believers, to the environmentalists and liberals who will continue to support the old policy agenda, derived through the old rational positivist methods, even though the authors’ constructive advice is to abandon those same methods when it comes to marketing the agenda. Apparently, then, it is only when speaking to outsiders and nonbelievers — to individuals who are not members of environmentalists’ “tribe”<sup>84</sup> — that the authors’ new imaginative politics will come to the fore. These shifting convictions become most evident in Nordhaus and Shel-

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<sup>82</sup> Again, this critique is far from original to Nordhaus and Shellenberger. See, e.g., Drury, *supra* note 9 (arguing that the environmental movement should overcome the false dilemma of environmental protection versus economic competitiveness to explore overlap between the interests of the labor and environmental movements).

<sup>83</sup> The timeline, prepared by Houghton Mifflin, includes not only the publication of *Walden* and *Silent Spring*, but also a projected future showing the impact of *Break Through*, which apparently will prompt nearly one trillion dollars in clean energy investment from the United States and the G8, as well as complete cancellation of the national debt of Brazil, which in turn will enable protection of the majority of the remaining Amazonian rainforest. See Press Release, *supra* note 7.

<sup>84</sup> See Douglas A. Kysar & James Salzman, *Environmental Tribalism*, 87 MINN. L. REV. 1099 (2003) (describing psychological and political mechanisms by which participants in environmental debates tend to organize into competing “tribes,” with each group claiming exclusive access to accurate scientific and economic information regarding environmental policy issues).

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lenberger's concession that adaptation-focused climate change policies are intended primarily to get the public on board with climate action, so that more stringent policy responses eventually can become palatable.<sup>85</sup> At that point, the authors' politics of possibility seems reduced to an appetizer — an amuse-bouche even — designed to ease us into a main course of limits.

These various tensions suggest that Nordhaus and Shellenberger have not transcended the Enlightenment framework as fully as they claim. Undoubtedly, they do stress *the idea* that the framework must be transcended, but they seem to do so only because, whatever the idea's intellectual merit, they believe it will enable more effective framing of policy appeals on behalf of environmental goals. But this selective embrace of the malleability of meaning leads to complications that Nordhaus and Shellenberger have not begun to analyze. When they argue, for instance, that the "logical remedy" for climate change is "to construct some alternative meaning for global warming, one that would inspire excitement, aspiration, and innovation" (p. 146), they fail to recognize that they no longer can account for why climate change is a problem at all, given their rejection of the concepts that have been used to reveal climate change as a matter of political urgency.

Stripped of all posturing, then, Nordhaus and Shellenberger's approach appears to be little more than rhetorical icing on what remains a decidedly Enlightenment cake. The authors are almost-postmodernists, deploying the insights of postmodernist and deconstructionist theory only insofar as they provide effective means to achieve ends that remain very much determined by an Enlightenment framework. Nordhaus and Shellenberger may be correct to critique environmentalists for being occasionally unduly "sectarian" (p. 145) and claiming to be entirely above politics through their invocations of science;<sup>86</sup> the authors, however, offer us *nothing but politics*, and in particular, nothing but the politics of perceptual and cultural manipulation. This vacuum becomes most evident when the authors cite approvingly to the unnamed senior Bush Administration official who was described and quoted by Ron Suskind in a much-discussed *New York Times Magazine* piece:

The [Bush Administration] aide said that guys like me were "in what [the Bush Administration] call[s] the reality-based community," which he defined as people who "believe that solutions emerge from your judicious study of discernible reality." I nodded and murmured something about enlightenment principles and empiricism. He cut me off. "That's not the

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<sup>85</sup> See *supra* p. 2055.

<sup>86</sup> See Doremus, *supra* note 23, at 259 ("The mix of conservation science and conservation advocacy is so pervasive that it has produced a quiet confidence within the conservation community that they hold the scientific high ground almost as a matter of natural law.").

way the world really works anymore,” he continued. “We’re an empire now, and when we act, we create our own reality. And while you’re studying that reality — judiciously, as you will — we’ll act again, creating other new realities, which you can study too, and that’s how things will sort out. We’re history’s actors . . . and you, all of you, will be left to just study what we do.” (p. 241)<sup>87</sup>

Rather than scorn the unbridled relativism and will to power of this unnamed official, Nordhaus and Shellenberger instead urge environmentalists and liberals to embrace it, for they contend that the official’s account of post-Enlightenment truthmaking is “dead on” (p. 242). Still, what prospects for success does the politics of possibility really offer environmentalists once the “reality-based world” is left behind, once science is reduced to slogan, fact to frame, and constitutions to contingencies? What reasons do Nordhaus and Shellenberger have for believing that the competition for truth creation will favor environmentalists? If the relevant determinants of success in the consultants’ republic are marketing budget and psycholinguistic savvy, why should environmentalists be more successful than the beneficiaries of the status quo, who will likely invest mightily, and successfully, in its preservation?<sup>88</sup> If policy goals are so amenable to cultural encoding — and cultural values so embedded in cognition and metaphor, rather than in reason and evidence — then what remains to distinguish Nordhaus and Shellenberger’s preferred policies from those that would promote plastic trees?<sup>89</sup> Having rejected “limits” in favor of “possibilities,” having demoted science to a form of poetry, having determined not to “constrain” human activity but to “unleash” it (p. 120),<sup>90</sup> with what are we actually left to guide us through the coming decades of climate instability, resource stress, and culture-rattling technological advance?

<sup>87</sup> The authors quote Ron Suskind, *Without a Doubt*, N.Y. TIMES MAG., Oct. 17, 2004, at 44, 51 (quoting an unnamed senior advisor to President Bush).

<sup>88</sup> See Kysar, *supra* note 65, at 2161–64.

<sup>89</sup> For instance, Michael Griffin, who became head administrator of the National Aeronautics and Space Administration during President Bush’s second term in 2005, shares Nordhaus and Shellenberger’s post-positivist views on climate change, but the pliability of meaning in his hands leads to a dramatically different policy conclusion:

To assume that [climate change] is a problem is to assume that the state of Earth’s climate today is the optimal climate, the best climate that we could have or ever have had and that we need to take steps to make sure that it doesn’t change. First of all, I don’t think it’s within the power of human beings to assure that the climate does not change, as millions of years of history have shown. And second of all, I guess I would ask which human beings — where and when — are to be accorded the privilege of deciding that this particular climate that we have right here today, right now is the best climate for all other human beings. I think that’s a rather arrogant position for people to take.

*Morning Edition: NASA Chief Questions Urgency of Global Warming* (NPR radio broadcast May 31, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=10571499>.

<sup>90</sup> Emphasis has been omitted.

Undoubtedly, environmentalists *would* be naïve if they believed that simply by marshalling scientific evidence of humanity's detrimental impact on nature, they would persuade the former to yield to the needs of the latter. Nordhaus and Shellenberger, however, are even more naïve to believe that inspirational speech nuggets alone can safely and effectively guide environmental law and policy, once the intellectual basis for characterizing and communicating the significance of environmental issues has been left behind. More than two decades before Nordhaus and Shellenberger arrived on the scene, Tribe responded to Sagoff's quite similar invocation of Romanticism and the importance of cultural history, aesthetics, and symbolism in the framing of environmental law and policy by noting that Sagoff "presents at best an argument against blacktopping the entire country."<sup>91</sup> Nordhaus and Shellenberger do not even provide this argument, for on their account an asphalted America could be boxed and branded no differently than Muir's Yosemite.

As Pierre Schlag has noted, deconstruction cannot be selectively deployed; it "must start everywhere at once."<sup>92</sup> Nor can it be reduced to a mere instrumentality, tucked alongside history, sociology, welfare economics, rhetoric, and other components of a pragmatic policy "tool-box." Such a reduction would ensure that the instrument could be deployed by any interest, for any purpose: "If traditional legal discourse succeeds in transforming deconstruction into just another *technique*, just another *theory*, just another *method* for making arguments, then deconstruction will have no particular politics — which is to say that it will have the conservative effect of preserving the politics of the status quo."<sup>93</sup> Nordhaus and Shellenberger do not recognize this self-undermining aspect of their proposal. They argue that "[w]hat's needed today is a politics that seeks authority not from Nature or Science but from a compelling vision of the future that is appropriate for the world we live in and the crises we face" (p. 142). Yet they fail to acknowledge that our understanding of "the world we live in and the crises we face" has been mediated through the very concepts and categories they aim to jettison. To embrace postmodernism and deconstruction only in an effort to better "frame" environmentalism is to expose the movement to the superior marketing of any other psycholinguistic huckster. To promote the idea that postmodernism and deconstruction legitimate a kind of sloppiness about meaning is to give in to, indeed to affirmatively embrace, a politics of manipulation. Environmentalists on Nordhaus and Shellenberger's approach would be

<sup>91</sup> Tribe, *supra* note 58, at 546.

<sup>92</sup> Pierre Schlag, "Le Hors de Texte, C'est Moi": *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631, 1648 (1990).

<sup>93</sup> *Id.* at 1636.



left not with a politics, but a pornography of possibility, in which virtually any policy aim could be packaged and marketed to activate virtually any cultural worldview: *Clear Skies. Healthy Forests.*

#### IV. ENVIRONMENTALISM, THE ENLIGHTENMENT, AND THE OTHER

Scholars in the risk regulation field have begun to pay attention to challenges to liberal theory like those raised by Nordhaus and Shellenberger's dalliance with creative nihilism. In a recent article, for instance, Kahan observes that the culturally inflected basis of risk perception — and of cognition more generally — creates a practical dilemma for the liberal ideal of state neutrality among competing conceptions of the good; namely, “we lack the psychological capacity . . . to make, interpret, and administer law without indulging sensibilities pervaded by our attachments to highly contested visions of the good.”<sup>94</sup> Because of the inevitably expansive psychological influence of our partisan worldviews, a phenomenon that Kahan terms “cognitive illiberalism,” efforts to locate completely neutral and secular bases for regulatory decisionmaking are likely to fail. Accordingly, Kahan argues that political theorists and constitutional law scholars should abandon the liberal norm of public reason, which instructs government officials and citizens acting in the public sphere to offer only reasons and arguments that could be accepted universally, irrespective of the comprehensive views that particular individuals or groups might hold.<sup>95</sup> As Kahan writes, “cognitive illiberalism reveals the practice of public reason to be a conceit — a form of false consciousness that compounds the impulse to enforce a moral orthodoxy by enabling its agents to deny (to *themselves* even more than to others) that this is exactly what they are doing.”<sup>96</sup> In place of the public reason doctrine, Kahan therefore argues for a practice of “expressive overdetermination,” in which laws and policies would be self-consciously constructed to admit of multiple cultural interpretations.<sup>97</sup> Given both a plurality of worldviews in liberal society and the seeming impossibility of cleansing public discourse of the cognitive effects of those worldviews, the only available alternative for liberal theorists, in Kahan's view, is to promote the suffusion of law and policy with as many cultural meanings as practicable, thereby expanding the degrees of freedom available

<sup>94</sup> Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 116–17 (2007).

<sup>95</sup> *Id.* at 143–45 (citing JOHN RAWLS, POLITICAL LIBERALISM 175, 217–19 (1993)).

<sup>96</sup> *Id.* at 118.

<sup>97</sup> *Id.* (emphasis omitted).

to policymakers as they seek overlapping consensus on issues of social choice.<sup>98</sup>

This approach of letting a thousand worldviews bloom bears some resemblance to the romantic pragmatism of Rorty, which itself provides the inspiration for Nordhaus and Shellenberger's argument in *Break Through*. Urging the need for a new vocabulary that "revolves around notions of metaphor and self-creation rather than around notions of truth, rationality, and moral obligation,"<sup>99</sup> Rorty contends that liberalism should be reimagined as "the hope that culture as a whole can be 'poeticized' rather than as the Enlightenment hope that it can be 'rationalized' or 'scientized.'"<sup>100</sup> Just as Rorty wants to "poeticize" the culture, and just as Nordhaus and Shellenberger want to "creat[e] new truths in the polity" (p. 160), Kahan wants to promote an ethos of "expressive overdetermination." To be sure, Kahan never quite joins Rorty's assertion that "every specific theoretic view [should] be seen as one more vocabulary, one more description, one more way of speaking."<sup>101</sup> He instead retains the primacy of a liberal welfarist framework in which "[r]easonable persons of all cultural persuasions *would* desire that they be able to converge, notwithstanding their cultural differences, on the best empirical knowledge available on how to use law to promote their safety, health, and economic well-being."<sup>102</sup> From this perspective, a central objective of academic research and policy analysis becomes the development of risk communication strategies that affirm individuals' cultural worldviews and that thereby enable better, less polarized public evaluation of what Kahan elsewhere refers to as "scientifically sound information."<sup>103</sup>

Significantly, this restabilizing move by Kahan is not available to Nordhaus and Shellenberger, since those authors argue that *any* body of theoretical and empirical knowledge — whether of toxicology, at-

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<sup>98</sup> Cf. MICHEL ROSENFELD, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS 201 (1998) (urging an approach of "comprehensive pluralism" that "requires the legal interpreter to be guided by second-order norms while urging those who submit claims calling for legal interpretation to remain as true to the first-order norms to which they are committed as is possible consistent with genuine acceptance of the dictates of legitimate judicial adjudication").

<sup>99</sup> RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 44 (1989).

<sup>100</sup> *Id.* at 53.

<sup>101</sup> *Id.* at 57.

<sup>102</sup> Kahan, *supra* note 94, at 152; see also Kahan et al., *Second National Risk and Culture Study*, *supra* note 74, at 16 (asserting that most Americans would, if stripped of the cognitive influence of cultural worldviews, converge to support policies that "secure society's collective well-being," and urging scholars to "identify[] deliberative process[es] that make it possible to fashion regulatory policies that are both consistent with sound scientific data *and* congenial to persons of diverse cultural outlooks").

<sup>103</sup> Kahan, *Two Conceptions of Emotion in Risk Regulation*, *supra* note 74, at 23 ("The prospects for making members of the public receptive to sound empirical information . . . depend[] on whether scientifically sound information can be made to bear a social meaning that fits citizens' cultural values.").

mospheric science, welfare economics, or cognitive and social psychology itself — is merely a contingent language practice, in Rorty's strong ironist sense. Consequently, Nordhaus and Shellenberger are forced to agree with Rorty's assertion that "[a] liberal society is one which is content to call 'true' (or 'right' or 'just') whatever the outcome of undistorted communication happens to be, whatever view wins in a free and open encounter."<sup>104</sup> Something about this position is deeply unsettling, both because the notion of neutral competition in the market for mindshare itself begs to be deconstructed, and because the unabashed relativism of the position seems to leave us too far at sea. As Professor David Kennedy has noted, even the most ardent postmodernist tends to recoil at the prospect of law so thoroughly trashed: "It is all right to postmodernize other areas or culture zones, but law is too associated with power or authority, or order, or whatever to feel comfortable once modernity is left behind. . . . [Law] must know which side is just, in its aspiration, if not its reality."<sup>105</sup> Perhaps for this reason, Rorty retreats to the familiar "institutions of bourgeois liberal society," contending that we achieve our best version of the truth "when the press, the judiciary, the elections, and the universities are free, social mobility is frequent and rapid, literacy is universal, higher education is common, and peace and wealth have made possible the leisure necessary to listen to lots of different people and think about what they say."<sup>106</sup>

Nordhaus and Shellenberger, for their part, do not broach these subjects at all, apparently confident that their language practices will simply prevail in the competition to capture the social imaginary, irrespective of the market within which such competition unfolds. As argued in Part III, however, Nordhaus and Shellenberger offer little reason to actually expect this outcome. Instead, the process that Professor Jürgen Habermas calls the "colonization of the lifeworld"<sup>107</sup> — that is, the steady redefinition of culture, sociality, and identity within the in-

<sup>104</sup> RORTY, *supra* note 99, at 67; *see also id.* at 68 (describing a view of "truth as what comes to be believed in the course of free and open encounters").

<sup>105</sup> David Kennedy, *Some Comments on Law and Postmodernism: A Symposium Response to Professor Jennifer Wicke*, 62 U. COLO. L. REV. 475, 481 (1991).

<sup>106</sup> RORTY, *supra* note 99, at 84. Given the overall thrust of his ironist philosophy, Rorty's embrace of liberalism in this manner appears to rest primarily on historical accident and private whim, much as Nordhaus and Shellenberger's embrace of environmentalism seems to lack a clear foundation from within their own espoused philosophy. Indeed, despite its postmodernist trappings, Rorty's approach seems oddly simpatico with Jürgen Habermas's effort to resuscitate the Enlightenment political project through identification of an "ideal speech situation," in which individuals can engage in an undominated discourse, free of power relations, ideology, and misrecognition. *See* 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy trans., 1984); Jürgen Habermas, *Towards a Theory of Communicative Competence*, 13 *INQUIRY* 360 (1970). The difference is that Rorty also denies that such an ideal speech situation can exist. *See* RORTY, *supra* note 99, at 60–69.

<sup>107</sup> *See* 2 HABERMAS, *supra* note 106, at 391–96.

strumentalist language of economy, technology, and administration — seems likely to continue with abandon, despite the best efforts of environmentalists and their consultants. Especially as once-stable categories become radically unmoored, and especially if we come to agree with Rorty that “anything can be made to look good or bad by being redescribed,”<sup>108</sup> the various meanings associated with environmentalism will face stiff competition from those that further consumer culture, corporate capitalism, and bureaucratized politics (and, indeed, the former may be skillfully deployed in service of the latter). Thus, if Nordhaus and Shellenberger really desire a postenvironmental politics, in which environmental values become so widespread and so deeply integrated within our culture and our legal system that both environmentalism and environmental law as such can safely be left behind, then the authors must confront head-on the structural conditions supporting contrary trends. They must become political theorists and constitutional scholars, not merely psycholinguists and cultural pundits.

Even then, Nordhaus and Shellenberger’s task would not be complete; that is, even assuming that something like a Habermasian discourse utopia could be achieved — thereby making democracy safe for postmodern conversation — the challenge facing environmentalists is greater still, for they seek to make democracy safe not only for presently living citizens, but also for members of other nations, other generations, and other species.<sup>109</sup> They desire “free and open” encounter not only across inevitably contingent and contested language practices, but also across boundaries of geography, temporality, and speciation that separate us from countless others whose existence and well-being depend critically on our decisionmaking,<sup>110</sup> despite the real and imagined distances between us. In order to respect those who dwell in these removes, environmentalists contend that we must undertake an engaged effort to anticipate and consider the details of their plight and to support the specific resources and institutions they need in order to endure it.

This task environmentalists regard as a theoretical and political challenge of the highest order. It will require, for instance, the relinquishment of our comfortable habit of existing as “two people — with

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<sup>108</sup> RORTY, *supra* note 99, at 73.

<sup>109</sup> See Tarlock, *supra* note 41, at 235 (observing that environmental law “seeks to protect two communities, natural systems and future generations, that have traditionally lacked a legal personality”).

<sup>110</sup> And vice versa. See Douglas A. Kysar & Ya-Wei Li, *Regulating from Nowhere: Domestic Environmental Law and the Nation-State Subject*, in 2 THE IMPACT OF GLOBALIZATION ON THE UNITED STATES (Beverly Crawford, Michelle Bertho & Ed Fogarty eds., forthcoming 2008) (reviewing evidence of detrimental impacts of foreign activities on domestic United States air quality and species preservation goals).

one set of moral judgments and social aspirations and legal expectations within our own national society, and another set . . . for everything that happens beyond the frontiers of our national society.”<sup>111</sup> It also will require development of an ethic of care for members of future generations, individuals whose *self-expressed* needs and interests are definitionally unknowable and thus who cannot, even in principle, meet the standard of communicative autonomy demanded by modern liberal theory. The normative challenges posed by these two endeavors, already humbling, will become even more fraught as we begin to seriously consider the status of animals and other nonhuman forms of life — for which we have even less innate affinity to guide us — and *potential* forms of life such as radically engineered persons, over which our powers of design and control will stress our ethical resources to an almost unfathomable degree. Along with a deepening of our moral thinking regarding such dilemmas, environmentalists contend that we will need to develop concrete mechanisms for bringing into view the needs and interests of foreign citizens, future generations, and nonhuman life forms. In an ideal discourse community that extends across space and time, these entities would themselves be present, not merely represented. Their faces would be visible, and their needs unmistakable.<sup>112</sup> In the absence of such an idealized situation, scholars have proposed various practical methods of expanding environmental impact assessment and natural resource planning in order to begin a process of recognition of environmental law’s others.<sup>113</sup> The hope is that those would-be interest holders will be better recognized as such, and might eventually join the political community as full members, if the community were required to assess its biological inventory and natural resources, to monitor the deleterious impacts of its activities on life forms outside its territorial borders, to project its future population and the state of the environment, and to consider thoughtfully its engineered life forms and the quality of their existence.

As numerous scholars have recognized, expanding the sphere of interest holders to encompass foreign citizens, future generations, and nonhuman life forms will require significant adjustment to the existing

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<sup>111</sup> PHILIP ALLOTT, *INTERNATIONAL LAW AND INTERNATIONAL REVOLUTION: RECONCEIVING THE WORLD* 16 (1989).

<sup>112</sup> For instance, the written version of the Iroquois Nations Constitution contains a much-storied injunction to decision makers to “listen for the welfare of the whole people,” including “those whose faces are yet beneath the surface of the ground — the unborn of the future Nation.” IROQUOIS NATIONS CONST., *Tree of the Long Leaves* § LI, *reprinted in* ARTHUR C. PARKER, *THE CONSTITUTION OF THE FIVE NATIONS* 38–39 (Iroqrafts Ltd. 1991) (1916).

<sup>113</sup> *See, e.g.*, Alyson C. Flournoy et al., *Harnessing the Power of Information To Protect Our Public Natural Resource Legacy*, 86 *TEX. L. REV.* (forthcoming 2008) (proposing a National Environmental Legacy Act that would require substantive consideration of the needs and interests of future generations).

foundation of our laws — and to the individualistic, anthropocentric, rationalist, and utilitarian basis upon which our ordering strongly depends.<sup>114</sup> Many environmental law commentators seek these adjustments immediately, for they see the Enlightenment ethos as an impediment not only to the assertion of cosmopolitan, intergenerational, and interspecies justice, but also to the achievement of more immediate environmental goals.<sup>115</sup> Accordingly, they urge environmental law scholars to regain the spirit of intellectual chutzpah that once led the field to promote legal standing for trees, constitutional guardianships for future generations, a world environmental habeas court, and other such revolutionary devices of recognition.<sup>116</sup> Like Nordhaus and Shellenberger, they also would abandon the present heavy reliance on science, economics, and instrumental rationality that characterizes mainstream environmental policymaking, for they believe such an approach forces environmentalists to couch their goals within a liberal individualist framework that inevitably understates the case for sustainabil-

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<sup>114</sup> See, e.g., Paul A. Barresi, *Beyond Fairness to Future Generations: An Intragenerational Alternative to Intergenerational Equity in the International Environmental Arena*, 11 TUL. ENVTL. L.J. 59, 86–87 (1997) (concluding that the norm of intergenerational equity is inconsistent with liberalism’s emphasis of individual over group rights and national over cosmopolitan conceptions of justice); Alyson C. Flournoy, *In Search of an Environmental Ethic*, 28 COLUM. J. ENVTL. L. 63, 80–83 (2003) (concluding that, if anything, the unifying ethic of environmental law is homocentric and utilitarian in nature, rather than ecocentric and aesthetic); Keith Hirokawa, *Some Pragmatic Observations About Radical Critique in Environmental Law*, 21 STAN. ENVTL. L.J. 225, 227 (2002) (arguing that an ecocentric approach to environmental law is “naïve”); Manus, *supra* note 41, at 516 (arguing that environmental law “is a complex and extensive body of law built on a legal system that essentially has no capacity for recognizing, much less addressing, environmental concerns”); Mark Sagoff, *Can Environmentalists Be Liberals? Jurisprudential Foundations of Environmentalism*, 16 ENVTL. L. 775, 785–86 (1986) (arguing that environmentalism is inconsistent with state institutional neutrality on competing conceptions of the good); Joseph L. Sax, *Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History*, 88 CAL. L. REV. 2375, 2378–79 (2000) (arguing that environmental law’s current focus on biodiversity preservation and restoration is in considerable tension with modern anthropocentric and development-oriented society); Westbrook, *supra* note 41, at 693–94 (surveying intellectual and historical underpinnings of environmental law and concluding that liberal legal institutions do not accommodate core environmental values); see also Thomas D. Barton, *Troublesome Connections: The Law and Post-Enlightenment Culture*, 47 EMORY L.J. 163, 192–211 (1998) (observing substantial lag between cultural and legal acceptance of post-Enlightenment theory).

<sup>115</sup> See, e.g., Erin Englebrecht, *Three Fallacies of the Contemporary Legal Concept of Environmental Injury: An Appeal To Enhance “One-Eyed Reason” with a Normative Consciousness*, 18 TUL. ENVTL. L.J. 1, 5–6 (2004) (criticizing individualist and anthropocentric bases of environmental law); Freyfogle, *supra* note 12, at 120 (“Environmental ills are best understood as manifestations of underlying cultural problems — problems arising out of, and easily traced back to, the entire Enlightenment world view with its overreliance on reason and empirical data, its diminished moral and spiritual visions, and its unquestioned acceptance of human domination.”); Westbrook, *supra* note 41, at 624 (“Future environmental law awaits a vision of human association more powerful than the doctrinaire liberal political economy that currently informs and limits environmental law.”).

<sup>116</sup> See *supra* pp. 2059–60.

ity.<sup>117</sup> Instead, they would restore the Romantic, even illiberal spirit that once animated environmentalism, before it evolved into a technically oriented advocacy movement.<sup>118</sup>

Other commentators, however, view with skepticism the effort to craft a post-Enlightenment environmentalism out of the existing legal order, believing instead that environmentalists must continue to assert a science-based, anthropocentric, instrumentalist agenda.<sup>119</sup> It may well be that the final goal for environmentalism is to become diffused within the generative grammar of society, such that sustainability simply emerges from the constitutional system as a matter of habit, rather than of choice or coercion.<sup>120</sup> Presently, however, “there is no long-standing social consensus about the central question of modern environmentalism — the ‘correct’ human stewardship relationship to the natural world.”<sup>121</sup> Nor has a viable method for constitutionalizing environmentalism been identified, given that the ultimate goals of envi-

<sup>117</sup> Cf. A. Dan Tarlock, *Environmental Law, But Not Environmental Protection*, in NATURAL RESOURCES POLICY AND LAW 162, 167–68 (Lawrence J. MacDonnell & Sarah F. Bates eds., 1993); Tarlock, *supra* note 41, at 241 (observing the inherent contingency of a science-based, as opposed to an ethically based, environmental law, given that “[a] science-based environmental law will inevitably lead to processes that require [a] constant production of knowledge”); Westbrook, *supra* note 41, at 711 (“To date, contemporary liberal ideology has tried to appropriate the essentially religious implications of the concept of nature as either personal preference, and hence of highly limited importance for politics, or as objective truth, certified by the new science, and hence profoundly alienated from individual experience.”).

<sup>118</sup> As David Westbrook writes, “[r]endering our encounter with the world humane will require this polity to decide on a dream of the beautiful, and the springs of that consensus lie beyond the liberal ken.” Westbrook, *supra* note 41, at 711–12.

<sup>119</sup> See Carol M. Rose, *Environmental Law Grows Up (More or Less), and What Science Can Do To Help*, 9 LEWIS & CLARK L. REV. 273, 293 (2005) (advocating continued reliance on science as the fundamental basis of environmental law); A. Dan Tarlock, *Environmental Law: Ethics or Science?*, 7 DUKE ENVTL. L. & POL’Y F. 193, 223 (1996) (concluding that environmental law must remain science-based); Tarlock, *supra* note 41, at 254 (concluding that, if environmental law “is to evolve into a permanent check on the full range of resource consumption decisions, it must be grounded in the enlightenment values of knowledge and reason”); Paul Wapner, *Environmental Ethics and Global Governance: Engaging the International Liberal Tradition*, 3 GLOBAL GOVERNANCE 213, 213 (1997) (suggesting the reframing of international environmental concerns in the nationalist and individualist terms liberalism cognizes). In his strong rebuttal to Nordhaus and Shellenberger’s original essay, Carl Pope agreed with the continued assertion of a science-based paradigm, but largely for traditional Enlightenment reasons, rather than out of concern over legal barriers:

Without being too precious, the environment is a real thing. There is a global carbon cycle, human interventions are a small if meaningful part of the evolutionary process, homo sapiens depend upon a complex web of both geochemical and biological processes. Natural processes — eutrophication, competition, speciation, nutrient cycling, sequestration — continue around us according to their own dynamics. We influence, but do not control, the climate.

Pope, *supra* note 14.

<sup>120</sup> Cf. Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295 (2003) (advocating a “constitutive approach” to environmentalism that calls for explicitly clarifying and debating the goals of environmental law).

<sup>121</sup> Tarlock, *supra* note 41, at 223 (footnote omitted).

ronmentalism — those that go beyond the protection of nature merely for anthropocentric reasons — “do not draw upon the philosophical, religious, and jurisprudential bases of the constitution, all of which are rooted in the enhancement of human dignity.”<sup>122</sup> Thus, in the opinion of these observers, environmental organizations should not abandon the familiar strategies that once garnered them a seat at the policymaking table, however calcified and unreceptive to environmentalism the current political context may appear to be.<sup>123</sup> Similarly, environmental scientists should not abandon their particular disciplinary methods simply because the problem of the “environment” is a much broader and more integrated problem than their methods can fully reveal. Nor, finally, should environmental law scholars abandon their field-specific technical and doctrinal analyses in favor of radical constitutional proposals simply because the existing legal regime is inadequate to ensure sustainability. As with Nordhaus and Shellenberger’s hasty and undirected musings, premature advancement of an environmental constitutionalism, without deeper specification of what the society’s environmental goals and values actually are, and without adequate examination of the political terrain within which they must become established, would risk erasure of the environmental law field and a forgetting of its goals. What looks like diffusion would instead be dissolution.<sup>124</sup>

Without wishing to question the significance of bold theoretical endeavors to envision a more sustainable and ethically inclusive society, it is nevertheless worthwhile to note that recent events provide some

<sup>122</sup> *Id.* at 224.

<sup>123</sup> In a cautionary tale about the effort to break out of conventional special interest/party politics, Greenpeace in 2007 launched a campaign to remove Representative John Dingell of Michigan from his post as chairman of the House Energy and Commerce Committee, and Representative Rick Boucher as chairman of the Energy and Air Quality Subcommittee, despite the fact that both Dingell and Boucher are Democrats. See Alex Kaplun, *Greenpeace Launches Effort to Oust Dingell, Boucher*, ENV’T & ENERGY DAILY, June 20, 2007 (on file with the Harvard Law School Library). Greenpeace opposed the two congressmen based on their support for coal-to-liquids plants and federal preemption of state climate change laws. The congressmen, however, seemed distinctly unconcerned: “Frankly, if Greenpeace campaigns against me in my re-election campaign, that would make not a w[h]it of difference in terms of results,” Boucher said. Dingell, in turn, was quoted as saying, “I am not concerned with threats from extremist organizations like Greenpeace.” Darren Samuelsohn, *Both Parties Pan Greenpeace Bid to Oust Reps. Dingell, Boucher*, ENV’T & ENERGY NEWS PM, June 20, 2007 (on file with the Harvard Law School Library). In fact, the irrelevance of “extremist” groups like Greenpeace seemed to be one of the rare positions that could attract bipartisan support: senior Republican member of the Energy and Commerce Committee Joe Barton chimed in to support his Democratic peers, “It’s a sa[d] day when members of Congress can’t present responsible legislative proposals in draft form without having some of the radical fringe groups demanding their removal.” *Id.*

<sup>124</sup> Cf. Tarlock, *supra* note 41, at 230 (“Despite its success to date, it is still possible that environmental law could suffer the fate of other lens courses [such as poverty law]: total assimilation and marginalization.”).



support for the cautionary view of those who would stay the Enlightenment liberal course, at least in the near term. Between the release of Nordhaus and Shellenberger's *Death of Environmentalism* essay and the publication of *Break Through*, a series of high-profile markers — including Hurricane Katrina, Al Gore's *An Inconvenient Truth*,<sup>125</sup> the Stern Review,<sup>126</sup> the fourth assessment report of the Intergovernmental Panel on Climate Change,<sup>127</sup> *Massachusetts v. EPA*,<sup>128</sup> and the Nobel Peace Prize Committee's decision to focus on climate change for its 2007 award<sup>129</sup> — directed unprecedented attention to the issue of global warming, leading to a virtual sea change in American politics around the issue. For nearly thirty years prior to those moments, an industry-led coalition of political forces deftly held U.S. climate change policy hostage by meticulously framing the issue using many of the techniques Nordhaus and Shellenberger now champion.<sup>130</sup> It is hard to say whether Nordhaus and Shellenberger's approach, if deployed with vigor and consistency by the environmental movement, would have turned the tide on climate change earlier. It is worth noting, though, that the moments that eventually *did* work to overcome the opposition's message framing and to shift U.S. climate politics partook very heavily of science, economics, litigation, and the unmistakably dire metaphor of Katrina — key prongs of the conventional environmentalists' approach that Nordhaus and Shellenberger deride throughout *Break Through*.

Whatever its intrinsic merit, Nordhaus and Shellenberger's message already seems to have affected environmental politics, as perhaps best indicated by California Governor Arnold Schwarzenegger's high-profile speech at the Georgetown University 2007 Environmental Conference. Governor Schwarzenegger began his remarks in unmistakably postenvironmental fashion, castigating the green movement for its relentlessly negative issue framing:

For too long the environmental movement has been powered by guilt. . . .  
I don't think that any movement . . . has ever made much progress based

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<sup>125</sup> AL GORE, *AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCY OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT* (2006).

<sup>126</sup> NICHOLAS STERN, *THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW* (2007).

<sup>127</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007*, <http://www.ipcc.ch/ipccreports/ar4-syr.htm>.

<sup>128</sup> 127 S. Ct. 1438 (2007).

<sup>129</sup> The Nobel Peace Prize 2007, [http://nobelprize.org/nobel\\_prizes/peace/laureates/2007](http://nobelprize.org/nobel_prizes/peace/laureates/2007) (last visited May 12, 2007) (announcing Al Gore and the Intergovernmental Panel on Climate Change as co-recipients of the 2007 Nobel Peace Prize in recognition of "their efforts to build up and disseminate greater knowledge about man-made climate change, and to lay the foundations for the measures that are needed to counteract such change").

<sup>130</sup> See Aaron M. McCright & Riley E. Dunlap, *Challenging Global Warming as a Social Problem: An Analysis of the Conservative Movement's Counter-Claims*, 47 SOC. PROBS. 499 (2000).

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on guilt. Guilt is passive, guilt is inhibiting, and guilt is defensive. . . . [S]uccessful movements are built on passion, they're not built on guilt. They're built on passion, they're built on confidence, and they're built on critical mass.<sup>131</sup>

Schwarzenegger therefore urged environmentalists to make the cause “much more positive [and] much more dynamic,” arguing that “[w]e have to make it sexy. We have to make it attractive so that everyone wants to participate.”<sup>132</sup>

No doubt political candidates, advocacy groups, and others will clamor to make environmentalism sexy in just this fashion, many of them with the aid of Nordhaus and Shellenberger's consulting firm, American Environics, which is described on its website as “a vision and values-driven company . . . committed to bringing cutting edge social science tools to inform social change strategies with the goal of creating a politics that grows self-expression and fulfillment values in the culture.”<sup>133</sup> Just as assuredly, however, other politicians and interest groups will huddle with their own consultants, watching intently as metaphors and message frames are tuned for maximum cognitive and affective response, aiming with precision to “grow” their own set of values in the culture. Through one-way glass, the history they dream will be sold like Sprite.

The consultants' republic needs a constitution.

#### CONCLUSION

Ironically, most of the questions that are intentionally raised by *Break Through* are quite familiar: How should the system of environmental laws grapple with the emergence of nonequilibrium ecology, which presents a far more dynamic and complicated object of protection than the idealized “balance of nature” that has long figured prominently in environmental thought? Was the “balance of nature” concept already fatally flawed by its failure to acknowledge longstanding and expansive human influence in the environment, even by indigenous populations whose relationship to nature often is taken to provide a model of holism and humility? Can the myriad ways in which scientific knowledge is incomplete and uncertain — not to mention socially situated — be made more transparent within environmental lawmaking, so that unavoidable value judgments and presuppositions are laid bare for broad engagement by lay constituencies, rather than cloaked within a “science charade”? Can environmental

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<sup>131</sup> Governor Arnold Schwarzenegger, Speech at Georgetown University Environmental Conference (Apr. 11, 2007) (transcript available at <http://gov.ca.gov/index.php?speech/5864>).

<sup>132</sup> *Id.*

<sup>133</sup> American Environics: About Us, <http://www.americanenvironics.com/about/index.shtml> (last visited May 12, 2008).

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law be better fused with economic policy to serve the needs of poor, often racially segregated communities in the United States? Of destitute populations abroad? Can the other remote beneficiaries of environmental law's protection — not only members of other nations, but also members of other generations and other species — be made to appear within the liberal democratic framework as legal subjects in themselves, rather than merely as objects of valuation by presently living national citizens? Does environmental law even exist as a stable and coherent field? If it does, should the goal of environmentalists nonetheless be to diffuse their norms and values broadly throughout the entire legal system, such that the field as a separate, specialized entity eventually disappears from view?

In contrast to these long-discussed matters, the genuinely new questions raised by *Break Through* do not really concern the environment at all. They concern instead the challenge of accommodating, within political theory and constitutional law, a far greater malleability of meaning than the tradition of Enlightenment liberalism has tended to presuppose. The conceptual dilemmas raised by this challenge can be illustrated through a simple and not unduly fanciful thought experiment: imagine that biotechnology develops to a point at which environmental values — such as biophilia, altruistic regard for future generations, antimaterialism, and various other traits that Nordhaus and Shellenberger associate with the “higher” rungs of Maslow's ladder — could be introduced in a safe and effective manner via genetic engineering techniques. Thus, rather than needing to activate individuals' better selves through careful marketing of policies that create economic prosperity and social stability, as Nordhaus and Shellenberger urge, we could instead directly alter their genetic makeup. If such a technology develops, should environmentalists support its voluntary use by prospective parents? Should they support its mandatory imposition by government regulators? On what basis can these decisions be made, if not with reference to some categorical distinction — such as the distinction between nature and humanity, things and persons, or allonomy and autonomy — that is placed in jeopardy by the very technology being decided upon?

If they arrive, technologies such as this one will force recognition of the contingent nature of our categories with far greater clarity and impact than the almost-postmodernism of *Break Through*. In the hypothetical scenario, not only the individuals who are made to be biophilic, but also the objects of their biophilia, the very “nature” that individuals are engineered to revere, will *unmistakably* appear as matters of choice and technological control. Nordhaus and Shellenberger's argument, somewhat inadvertently, demonstrates that our existing political theories provide few resources for understanding, let alone resolving, the challenges posed by such futures. The goal is obvious enough, even if its actual attainment, at present, seems unimaginable:

between the extremes of an essentialist environmentalism that regards nature as sacrosanct and inviolable, and a human imperialism that regards nature — even human nature — as just one more plaything, one more palette for human expression, there must be some intermediate orientation, one that acknowledges the constructedness of our categories without sliding into relativism, nihilism, or worse.

This is the breakthrough we need.