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ENVIRONMENTAL RESISTANCE: DEFYING CAPITALISM'S STRUCTURE OF FALSE REBELLION

LAURA A. CISNEROS*

I. INTRODUCTION

Since Rachel Carson published *Silent Spring* in 1962, Americans have bought into the falsehood that the modern environmental movement is the antidote to capitalist excess.¹ The 1970s ushered in an era of landmark environmental protection statutes grounded in ethical responsibility.² These statutes were intended to address the degradation of land, water, and air in the United States, and to stem the loss of plant and animal species throughout the nation and its territories. The 1980s saw the development of ecological or environmental economics, in part, to push back on some of the gains of environmentalists of the previous decade.³ As a result, key environmental statutes were amended to “balance” ecological interests with those of business and industry. Environmental protection would now be tempered by the need to maintain economic growth and competitiveness.

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¹ RACHEL CARSON, *SILENT SPRING* (1962). In *Silent Spring*, Carson exposed the dangerous effects of the then-widespread practice of indiscriminate aerial spray on crops of a pesticide known as DDT to kill mosquitos. Carson argued that the poisonous pesticide entered the wildlife food chain, which led to a drastic reduction in bird and mammal populations. Moreover, Carson pointed out the poison also threatened human health as people consumed animals that had been exposed to the toxin.

² See Clean Air Act, 42 U.S.C.A. § 7401 et seq. (Westlaw 2015); Endangered Species Act, 16 U.S.C.A. § 1531 et seq. (Westlaw 2015); Clean Water Act, 33 U.S.C.A. § 1251 et seq. (Westlaw 2015); National Environmental Policy Act, 42 U.S.C.A. § 4321 et seq. (Westlaw 2015).

³ See DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* 6–7 (1999) (discussing the widespread acceptance of cost-benefit analysis of environmental protection and noting that an executive order issued by President Ronald Reagan “requiring all government agencies to base their decisions on cost-benefit analysis . . . remains in place today”).

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Currently, there is a resurgence in market-based ecological strategies to meet the pressures of increased environmental deterioration and looming global environmental crises.⁴ The theory behind these strategies is that top-down, government-driven environmental protection has failed to produce the ecological results intended, and that the dynamic forces of the market, if freed of some (not all) regulation, would bring about real environmental change quickly, effectively, and permanently. Both the environmental legislation of the 1970s and current market-based ecological strategies project an image of modern environmentalism as a movement diametrically opposed to capitalism. In the first case, environmentalism is presented as a check against the abuses of business and industry; in the second, environmentalism is presented as an obstacle to both economic prosperity and true ecological sustainability—an obstacle to be overcome by the dynamism and transformative power of business models and technology.

Many theories of environmental protection are premised on this antagonistic opposition between environmentalism and capitalism. The truth of the matter, however, is that the antagonism that gives American environmental law its particular shine—the conflict that gives market-based ecology theory its cachet—is a false antinomy. A close reading of federal environmental statutes, many of which provide the template for similar laws in the fifty states, reveals that they include many concessions to capitalism and, in fact, are designed so that when push comes to shove, environmental interests yield to those of business. Market-based environmentalism assumes this same false antinomy but seeks to transcend it by more obviously privileging capitalist enterprise and simply assigning to the market the additional task of fixing the environment. The problem is that none of these modern ecological strategies can construct a theory of environmental protection outside of the traditional tropes of (a) dispensing with capitalism altogether (which is unrealistic), (b) giving the appearance of opposing capitalism while actually conceding to it and being subsumed within it, or (c) embracing capitalism as the key to resolving environmental issues.

Based on the realization that neither market-based ecology strategies nor the current suite of environmental laws is sufficient because they are embedded in, and make concessions to, the capitalist paradigm, this

⁴ See Catherine M. H. Keske, *How To Value Environmental and Non-Market Goods: A Guide for Legal Professionals*, 39 *DENV. J. INT'L L. & POL'Y* 423, 423 (2011); James Salzman et al., *Protecting Ecosystem Services: Science, Economics, and Law*, 20 *STAN. ENVTL. L.J.* 309, 327 (2001) (introducing symposium issue devoted to the topic of “ecosystem services”); Barton H. Thompson, Jr., *Markets for Nature*, 25 *WM. & MARY ENVTL. L. & POL'Y REV.* 261 (2000); Miriam Montesinos, Comment, *It May be Silly, But It's An Answer: The Need To Accept Contingent Valuation Methodology in Natural Resource Damage Assessments*, 26 *ECOLOGY L.Q.* 48, 78 (1999).

Article asks a fundamental question: Is there a place for environmental resistance in a society utterly consumed and defined by capitalism? What is environmental resistance? Rather than offering a conceptual definition, this article approaches resistance as a problematic and elusive practice that calls for reflective judgment. This Article aims to think about a philosophical basis, grounded in resistance, which reconceptualizes modern environmentalism in a way that liberates it from operating at the margins of capitalism's totalizing structure. Understanding environmentalism's capacity to resist allows us to reimagine environmentalism's relationship to capitalism and provides space to create a new dialogue between environmentalism and capitalism that no longer conceives of environmentalism as a systemic loser to capitalism's values.

This Article advances the claim that environmental resistance, if it is to evolve as an effective force for change, must aspire to an "equilibrium of enmity" with respect to capitalism—a relational position that removes environmentalism from market pressures and confronts them on select fields of debate, where parity of force with capitalism can be maintained. This, I argue, will allow environmental resistance to escape the hold that capitalism has always had on the ecology movement. Such transcendence will encourage environmental resistance to evolve on its own terms rather than as an instance of mere (and often marginal) reaction to capitalist-induced damage.

This Article analyzes a collection of landmark environmental protection laws and mainstream ecological strategies to point out their concessions to the overarching capitalist paradigm and to begin thinking about resistance as a distinctive experience that has the ability to move environmentalism beyond the constraints currently imposed on it by capitalist structures, language, and psychology. Part II examines the theories of and arguments for market-based environmental protection strategies, concluding with a critique of those strategies. Part III explores the false antinomy between capitalism and environmentalism as it is currently expressed within United States environmental law. Part IV discusses how the false antinomy between environmental protection and capitalism (that environmental laws and market-based ecologies can operate as a check on capitalist excess) masks the true antipathies between them (that environmental protection and capitalism are inherently oppositional), antipathies so fundamental that they make current environmental protection laws inadequate and market-based ecology ineffective.

After tracing the relationship between environmental protection and capitalism through the various discourses according to which it has been framed and showing the limitations of the dominant frame, in Part V of this Article, I propose a nascent philosophical analysis of environmental

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resistance and provide some preliminary conditions for reframing such resistance in terms of force.

II. MARKET-BASED ENVIRONMENTAL PROTECTION STRATEGIES

The state of the world on which people have come to depend is in distress.⁵ Global warming, depleted natural resources such as fish and timber, and diminishing (or contaminated) freshwater sources all attest to that fact. Environmentalists have responded to this predicament by embracing various forms of sustainability. The goal of each of these sustainability alternatives, to varying degrees, is to approach environmental protection in a way that respects and accommodates the needs of the industrialized way of life in the West. Generally speaking, sustainability alternatives operate on the premise that the rate of industrial production and growth must not outpace the rate at which natural resources are created or renewed (either by nature or by human activity).

A. SUSTAINABLE DEVELOPMENT

The emergence of the concept and vernacular of sustainable development can be traced to the early 1970s.⁶ However, the concept has been slow to translate to domestic environmental protection policies.⁷ Although not specifically using the phrase, the groundbreaking 1972 publication *The Limits to Growth* was derived from the basic premise of

⁵ See Patrick Webb, *Water and Food Insecurity in Developing Countries: Major Challenges for the Twenty-First Century*, in *WATER: GLOBAL COMMON AND GLOBAL PROBLEMS* 17 (Velma I. Grover ed., 2006) (estimating that by 2025, thirty countries will qualify as “water scarce,” with approximately four billion people inhabiting so-called “water stressed” countries); U.N. ENV’T PROGRAMME, *THE ENVIRONMENTAL FOOD CRISIS: THE ENVIRONMENT’S ROLE IN AVERTING FUTURE FOOD CRISES* (Christian Nellemann et al. eds., 2009), available at http://www.grida.no/files/publications/FoodCrisis_lores.pdf (indicating the necessary transition to sustainable agriculture to address the climate crisis and the lack of access to sufficient, affordable food in developing countries); see also INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS* (Susan Solomon et al. eds., 2007), available at http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg1_report_the_physical_science_basis.htm (analyzing a multitude of publications addressing all conceivable aspects of global warming and together representing consensus among scientists, especially climatologists, science writers, and many more that global warming is real, in progress, and capable of enormous adverse consequences for all life forms on the planet).

⁶ In 1993, sustainable development entered the cultural consciousness when President Clinton created The President’s Council on Sustainable Development. Exec. Order No. 12,852, 58 Fed. Reg. 35,841 (June 29, 1993), *revoked by* Exec. Order No. 13,138, § 3(f), 64 Fed. Reg. 53,879, 53,880 (Sept. 30, 1999).

⁷ See John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1, 3–4 (1998) (noting that while sustainable development has dominated discussions at the international level, domestic policymakers have not embraced the concept with similar vigor).

sustainable development.⁸ The authors created a computer simulation model to explore the consequences of interactions between exponential economic and population growth within the context of finite resource supplies.⁹ The model considered five main variables: world population, industrialization, pollution, food production, and resource development.¹⁰ The model explored the likelihood of achieving a sustainable feedback pattern by altering growth trends among the five variables under multiple scenarios.¹¹ Although intended to be informative rather than predictive, two of the scenarios predicted collapse of the global system by the mid to latter part of the twenty-first century,¹² while a third scenario resulted in a “stabilized” world.¹³

The term and the concept of “sustainable development” formally appeared on the international stage in 1987, in the United Nations’ World Commission on Environment and Development report.¹⁴ Note that the very name of the U.N. commission perpetuates the false antinomy between ecology and capitalism, using it to achieve an equally false transcendence in which development can continue while being respectful of the environment. The report defined sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹⁵

The definition sets up a formula for thinking about the interaction between the human system and the ecosystem that anticipates growth and consumption; it does not, in and of itself, address equity issues other than

⁸ DONELLA H. MEADOWS, DENNIS L. MEADOWS, JØRGEN RÅNDERS, WILLIAM W. BREHRENS III, *THE LIMITS TO GROWTH: A REPORT FOR THE CLUB OF ROME’S PROJECT ON THE PREDICAMENT OF MANKIND* (1974).

⁹ DENNIS L. MEADOWS, DONELLA H., MEADOWS & JØRGEN RÅNDERS, *LIMITS TO GROWTH: THE 30-YEAR UPDATE* 13 (2004).

¹⁰ *Id.* at 136.

¹¹ *Id.*

¹² MEADOWS ET AL., *supra* note 8, at 142 (“Although we have many reservations about the approximations and simplifications in the present world model, it has led us to one conclusion that appears to be justified under all the assumptions we have tested so far. *The basic behavior mode of the world system is exponential growth of population and capital, followed by collapse.* As we have shown in the model runs presented here, this behavior mode occurs if we assume no change in the present system or if we assume any number of technological changes in the system.”).

¹³ *Id.* at 165–69. In the “stabilized” world model, the authors assumed both technological solutions and deliberate social policies to be implemented to achieve equilibrium states for key factors, including population, material wealth, food, and services per capita. Examples of actions implemented in the “stabilized world” model included perfect birth control and desired family size of two children, preference for consumption of services and health facilities over material goods, pollution-control technology, maintenance of agricultural land through diversion of capital from industrial use, and increased lifetime of industrial capital).

¹⁴ WORLD COMM’N ON ENV’T & DEV., *OUR COMMON FUTURE* (Mar. 30, 1987), <http://www.un-documents.net/our-common-future.pdf>.

¹⁵ *Id.* at 41.

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intergenerational equity. Moreover, the definition has been criticized for failing to endorse the inherent value of the natural world.¹⁶ Indeed, the term “sustainable growth” is something of a double-entendre. On one hand, it means growth that nevertheless sustains the underlying natural world. On the other, it means perpetual growth achieved by applying pressure to the natural world, but not so much as to induce ecological collapse, as this would bring down capitalist society as well. Either way, the phrase tends to cement the subordinate role of nature as compared to economic expansion.¹⁷

B. SPECIFIC MARKET-BASED ENVIRONMENTAL PROTECTION STRATEGIES

1. *Natural Capitalism*

Since its publication in 1999, *Natural Capitalism* has become one of the best-known books among the sustainability literature. The book espouses an approach to sustainability based on the principle that future economic prosperity is dependent on natural—rather than human-generated—capital.¹⁸ The authors, Paul Hawken, Amory Lovins, and Hunter Lovins, argue that the problem of non-sustainability derives not from the principles of industrial capitalism in themselves, but instead from the fact that, as currently practiced, industrial capitalism fails to assign value to the natural resources and living systems, as well as the social and cultural systems, that underlie the basis of human capital.¹⁹ In other words, non-sustainability results from a failure to properly “commodify” the ecosystem and each of its component parts. Once natural resources are assigned their correct value (and here we are talking more about “exchange” value than “use” value), those resources will be given their proper place in the market, supposedly guaranteeing their protection.

¹⁶ See Gwendolyn Io Earnshaw, Comment, *Equity as a Paradigm for Sustainability: Evolving the Process Toward Interspecies Equity*, 5 ANIMAL L. 113, 116–18 (1999).

¹⁷ In 1993, the phrase “sustainable development” entered the American cultural consciousness when President Clinton created The President’s Council on Sustainable Development. Exec. Order No. 12,852, *supra* note 6. However, the recent trend in the United States is to address sustainability under the more business-oriented moniker of “Sustainable Capitalism.” See, e.g., Al Gore & David Blood, Op-Ed., *A Manifesto for Sustainable Capitalism: How Businesses Can Embrace Environmental, Social and Governance Metrics*, WALL ST. J., Dec. 14, 2011, <http://www.wsj.com/articles/SB10001424052970203430404577092682864215896>; see also JOHN IKERD, SUSTAINABLE CAPITALISM: A MATTER OF COMMON SENSE (2005) (advocating the use of capitalism as a vehicle for the incorporation of living organizations, businesses, economics, social, and ethical values into an economics of sustainability).

¹⁸ PAUL HAWKEN, AMORY LOVINS & L. HUNTER LOVINS, NATURAL CAPITALISM: CREATING THE NEXT INDUSTRIAL REVOLUTION 1–21 (1999).

¹⁹ *Id.* at 5.

While industrial capitalism limits its recognition of value primarily to money and goods as capital, the authors of *Natural Capitalism* contend that this valuation system should be extended to natural and human capital.²⁰ Environmental problems such as air and water pollution and depletion of resources can then be understood as the consequences of a failure to properly account for natural resources as capital.²¹ The authors assert that extending the notion of value in industrial capitalism to encompass human and natural resources will increase resource productivity, provide for economic growth, and thereby break out of the old mode of thinking that there is an inherent trade-off between business values and ecological values.²² Natural capitalism attempts to displace the abstractions of neoclassical economics and accountancy with the practical realities of biology and nature.

If Generally Accepted Accounting Principles²³ recognized that human and natural resource capital are not in reality free amenities and in inexhaustible supply, then the basic principles of capitalism could integrate them as valuable factors of production. As discussed below, however, the commodification of natural resources—i.e., assigning them an exchange value and then inserting them into the production-profit equation—does not ensure their protection. As commodities, they become subject to the same vagaries of the market as any other product with an exchange value. Natural capitalism also disregards (or at least obscures) the basic fact that natural resources cannot—except in the highly specific instances—be recreated by human activity. It is this fundamental characteristic of natural resources—including broadly defined resources such as a stable climate—that distinguish them from capital-created commodities.

2. *Environmental Economics*

Generally speaking, Environmental Economics applies market principles to assess how economic activity and policies affect the environment.²⁴ Environmental economists do not analyze *whether* economic

²⁰ *Id* at 9.

²¹ *Id* at 9–11.

²² *Id* at 9–10.

²³ Generally Accepted Accounting Principles (GAAP) refers to the officially established accounting standards and pronouncements developed by the Federal Accounting Standards Advisory Board. GAAP includes standard accounting principles and practices that a reporting entity should look to for accounting and financial reporting authoritative guidance.

²⁴ For a history of the founding and early development of environmental/ecological economics, see Inge Ropke, *The Early History of Modern Ecological Economics*, 50 *ECOLOGICAL ECONOMIES* 293, 293–314 (2004) (providing a history of the founding and early development of

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activities or policies will impact the environment; rather, they seek to determine what level of impact on the environment is acceptable.²⁵ For example, in trying to determine how much money should be spent on policies to regulate pollution control, environmental economists would weigh cost factors like labor, capital, and profit against environmental benefits derived from cleaner air.²⁶ The goal of this balancing is to determine whether the projected environmental gains are sufficient to justify the associated economic costs.²⁷ Note again the subordinate role that environmental values play in this analysis. Economic stability is assigned the *a priori* position of privilege, and environmental protection must “justify” itself in terms of its cost relative to that stability. Environmental economics also looks at how market principles and strategies may be used to form beneficial environmental policies, for example, by requiring firms to install energy efficient machinery to reduce pollution, assessing a pollution tax, or allowing emissions trading.

Economists’ basic orientation toward problem-solving and policymaking is founded in market principles; starting from the presumption that a market-based economy “leads to socially desirable outcomes.”²⁸ Environmental Economics embeds environmental considerations into this basic orientation.²⁹ Thus, it is not surprising that one of the main organizing principles of this ecological approach is the concept of market failure.³⁰ Markets have the structural ability, theoretically, to manage and allocate limited resources, such as labor, capital, and natural resources, to

environmental/ecological economics); see also ROBERT COSTANZA ET AL., AN INTRODUCTION TO ECOLOGICAL ECONOMICS 5 (1997).

²⁵ See STEPHEN SMITH, ENVIRONMENTAL ECONOMICS: A VERY SHORT INTRODUCTION 1-2 (2011).

²⁶ See *id.* For a discussion of government agency orientation to the cost-benefit analysis paradigm, see Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609 (2014).

²⁷ SMITH, *supra* note 25, at 7–8; see also THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 117 (2005) (“Many proponents of regulatory analysis believe that [cost-benefit analysis] can go a long way toward specifying a result that is the ‘correct’ solution to the regulatory problem.”); S. Rep. No. 104-87, at 10 (1995) (“Improving risk assessment and requiring cost-benefit analysis in the regulatory process will provide a more understandable and rational basis for government officials to manage risk through the regulatory process.”); H.R. Rep. No. 104-33(I), at 58 (1995) (explaining that the cost-benefit analysis requirement “aims to ensure rationality in both the decisionmaking process and the ultimate decisions by Federal agencies”).

²⁸ SMITH, *supra* note 25, at 11.

²⁹ *Id.* at 9.

³⁰ See generally LAW AND THE ENVIRONMENT: A MULTIDISCIPLINARY READER 49 (Robert V. Percival & Dorothy C. Alevizatos eds., 1997) (summarizing the economic perspective on environmental problems); Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1503–08 (1999) (describing market failures as an underlying cause of environmental harms).

maximize their value.³¹ The manipulation of these resources on the market, as well as the manipulation of prices, both up (to create surplus) and down (to create scarcity), coordinate economic activity that results in competitive markets.³² Market failure occurs when “there are systematic impediments to the normal functioning of the market system, which have the effect [of destroying a particular market outright], and in other cases [setting] prices [in a way] that fail[s] to promote the common good.”³³

The category of market failure most connected to environmental policy is known as “externalities.” A general definition of externality is “a situation where the actions of some firm or individual have consequences for someone else who has no say in the matter.”³⁴ Externalities can be negative (e.g., air pollution from airplanes affecting the residential neighborhood within an airport’s vicinity) or positive (the classic example is a beekeeper who keeps the bees for their honey, with the side effect that the bees pollinate surrounding crops).³⁵ Externalities point to market failures because without regulation, the market may not naturally tend toward an efficient level of the externality, in which case society ends up with either too much noise or pollution from too many airports, or too many bees with too few beekeepers.³⁶ The concept of externalities allows environmental economists to deduce the origin of a particular market failure and thereby tailor the most effective remedy (i.e., the most environmentally beneficial remedy at the least economic cost).

In many respects, Environmental Economics exemplifies the notion that market-created environmental problems (i.e., externalities) can themselves be corrected with market forces. This is the “if capitalism got us into this mess, it can get us out of it” argument. As with many market-based ecological theories, however, Environmental Economics seeks environmental protection only to the extent needed to safeguard and/or perpetuate capital and capital markets. In all cases, environmental protection is tolerated only until its drag on economic growth becomes too severe.

³¹ SMITH, *supra* note 25, at 10.

³² *Id.*

³³ *Id.* at 11.

³⁴ *Id.*

³⁵ ARTHUR CECIL PIGOU, *THE ECONOMICS OF WELFARE*, pt. II, ch. 9 (1932). Pigou developed the theory of externalities, which deals with cases in which some of the costs or benefits of an activity spill over onto third parties. There are negative and positive externalities. When a cost is imposed on third parties, there is a negative externality. The benefit to third parties deriving from an activity in which they are not directly involved is instead called a positive externality. *See id.*

³⁶ SMITH, *supra* note 25, at 12.

3. *Reconciliation Ecology*

Reconciliation Ecology advances a dramatic “transcendence” of the environment-versus-capital antinomy, one in which capitalism works to *re-create* natural environmental features within human-occupied spaces. With the publication of *Win-Win Ecology: How the Earth’s Species Can Survive in the Midst of Human Enterprise*, Michael L. Rosenzweig emerged as the primary theorist of this approach. In *Win-Win Ecology*, Rosenzweig attempts to answer the question of how nature and humanity can best coexist.³⁷ Rosenzweig argues that the traditional approaches of restoration (restoring nature after the fact of its destruction) and reservation ecology (protecting nature in small, pristine reserves) are not sufficient to address the sheer magnitude of the environmental challenges currently confronting humanity.³⁸ To supplement the traditional ecological approaches, Rosenzweig argues for what he calls Reconciliation Ecology, defined as “the science of inventing, establishing, and maintaining new habitats to conserve species diversity in places where people live, work, or play.”³⁹

Rosenzweig’s ecological strategy is grounded in species-area relationship “law”—sometimes referred to as “biogeography”:⁴⁰ that large islands (whether natural or human-made) support more species than smaller ones, so that loss and fragmentation of habitat lead to an escalating loss of species.⁴¹ In other words, as land use changes and species’ habitats shrink, fewer species will be supported. Rosenzweig explains

³⁷ MICHAEL L. ROSENZWEIG, *WIN-WIN ECOLOGY: HOW THE EARTH’S SPECIES CAN SURVIVE IN THE MIDST OF HUMAN ENTERPRISE* (2003).

³⁸ *Id.* at 143–44.

³⁹ *Id.* at 7.

⁴⁰ The theory of biogeography coalesced in the 1960s from work on actual islands by Robert MacArthur and Edward Wilson and was represented as an “area-diversity curve.” See ROBERT H. MACARTHUR & EDWARD O. WILSON, *THE THEORY OF ISLAND BIOGEOGRAPHY* 6 (1967). This curve expressed an equilibrium of species with losses and gains balanced between immigration (colonization) and extinction. *Id.* Islands, “[b]y their very multiplicity, and variation in shape, size, degree of isolation, and ecology, . . . provide the necessary replications in natural ‘experiments’ by which evolutionary hypotheses can be tested.” *Id.* at 3. MacArthur and Wilson’s research led them to posit that area alone and proximity to the mainland together account for most of the variation in biodiversity, *id.* at 65, but subsequent research refined this conclusion. See, e.g., REED F. NOSS & ALLEN Y. COOPERRIDER, *SAVING NATURE’S LEGACY: PROTECTING AND RESTORING BIODIVERSITY* 3 (1994) (“Typically, a tenfold decrease in habitat area cuts the number of species by half.”). Nonetheless, the equilibrium theory fell victim to subsequent controversy and today is regarded by many ecologists and conservation biologists as mistaken. See *id.* at 46 (“Modern ecological theory holds that equilibrium conditions are often fleeting and can be recognized at some spatial scales but not at others.”); DANIEL B. BOTKIN, *DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY* 51–71 (1990); CRAIG W. THOMAS, *BUREAUCRATIC LANDSCAPES: INTERAGENCY COOPERATION AND THE PRESERVATION OF BIODIVERSITY* 54–61 (2003).

⁴¹ ROSENZWEIG, *supra* note 37, at 104–10.

that if humans alter 95% of the Earth's land-area ecosystems, by extrapolation that means that approximately 95% of land-area biodiversity will be reduced.⁴² Conversely, biodiversity increases as area increases.

Reconciliation Ecology adopts this basic logic of conservation theory and expands it beyond the exclusively contained pristine natural areas of nature. Indeed, the crux of Rosenzweig's Reconciliation Ecology is his argument to re-embed conservation strategies within *human-dominated* landscapes.⁴³ Note, however, that these conservation strategies are human-directed, human-produced, and ultimately subject to human-related failures. As an example Rosenzweig describes constructing nest boxes and affixing them to trees as a way of increasing densities of bluebirds in areas where natural tree cavities are scarce because of short-rotation forestry.⁴⁴ This example tends to prove that Reconciliation Ecology is still trapped in the extractive paradigm of capitalist economics. The nest boxes are not natural nor would they even be necessary but for the practice of short-rotation forestry. One could argue that what Rosenzweig calls "reconciliation" is in reality "capitulation"—the complete surrender of nature to artifice. Rosenzweig makes the point that much biodiversity not only exists but thrives beyond formally protected areas.⁴⁵ To that end, he argues that many areas (e.g., marine, terrestrial, wetland, freshwater) can simultaneously service human needs and, with some caveats, offer environmental protection and conservation opportunities.⁴⁶

C. CRITIQUE OF MARKET-BASED ENVIRONMENTAL PROTECTION STRATEGIES

The above-discussed market-based ecological strategies are not well-suited to meaningfully check capitalist excesses and curb environmental deterioration, because these strategies are embedded within capitalism's structural paradigm, whose goals, needs, and values are contrary to environmental protection. The three strategies that I have compiled here all subordinate their principal aim of environmental protection to capitalism to varying degrees.

⁴² *Id.* at 127–28, 131–35.

⁴³ *Id.* at 2 ("We are all human beings. We share a stake in the world we are building. No one wants it to be sterile and lonely. And no one wants us to destroy our technology and reduce our future to the harsh, subsistence-level lives led by our Stone-Age forebears. Reconciliation ecology gives us a conservation strategy that recognizes these simple truths and unites us in our common goals.")

⁴⁴ *Id.* at 71–74.

⁴⁵ *Id.* at 69–83.

⁴⁶ *Id.* at 9–10.

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Natural capitalism essentially expands capitalist principles of valuation to the environment. In so doing, it commodifies nature by assigning it value along the same lines as labor and other goods and services. This move theoretically makes sense because it attempts to include natural resources under the capitalist system in the hope that environmental protection, once included, can make demands on the controlling hegemony. Unfortunately, inclusion does not coincide with parity, which means that once included, environmental protection can be managed and subordinated to the demands of the market.

Environmental Economics is the most extreme example of concession to capitalism, given that it completely formulates environmental protection around market principles. Environmental Economics structurally and analytically overlays capitalist economics onto questions of environmental protection. An objective statement of the general formula—that the analysis is meant to balance the needs of the environment against the needs of the economy—suggests parity. The reality, however, is that the act of overlaying one system onto another automatically subordinates the second system (here, environmentalism) to the dictates of the first or *a priori* system (here, capitalism). Consequently, not only are the principles of the *a priori* system controlling, but so too is its normative rationale. This is suggested by articulations of the approach that frame the goals of Environmental Economics as assessing whether the environmental benefits justify the economic costs. This framing places the burden on the environment to prove that the anticipated benefits will outweigh the economic costs. The difficulty with this assignment of the burden is that it requires *potential* benefits to overshadow *actual* costs.

This burden is at best problematic and at worst nearly impossible. By changing the question “What is a cause of what?” to “What is a cost of what?” environmental economics replaces the moral framework of environmental protection with the technocratic framework of microeconomics. Moreover, the environmental economist’s very notion of “cost” is tightly corseted within the capitalist fabric. It includes only those items that factor into the short-term profit-and-loss calculation of a run-of-the-mill businessperson. It does not treat as “costs” the eventual (and perhaps permanent) degradation of the resources necessary to sustain any sort of economic life—capitalist or otherwise.

As discussed previously, the goal of Reconciliation Ecology is to reconcile human needs with those of native species by designing our surroundings in ways that will also meet their habitat requirements.⁴⁷ The approach requires modifications to human land use so that wild species

⁴⁷ *Id.* at 2.

can support themselves within human-appropriated areas.⁴⁸ Although the strategy presents a wonderfully optimistic view of the future cohesion of nature and industrialization/urbanization, regrettably, Reconciliation Ecology is likely to experience the same marginal effectiveness for environmental protection as the previously discussed strategies. This cynical projection stems from the simple fact that Reconciliation Ecology does not seek to disrupt the manifestations of capitalism (i.e., industrialism or urbanization); rather, it looks to embed conservation strategies within those manifestations.

The problem with this approach is that it accepts the capitalist structure that appropriated the area for industrial or urban use in the first place. Thus, any intervention that Reconciliation Ecology attempts to make into the capitalism/environmentalism dialectic will always already have conceded primacy of place to capitalism. In addition, Reconciliation Ecology is substantially self-limiting, as it operates only within human-held environments. It does not really address the need for, and benefits of, preserving land outside human occupation. Reconciliation Ecology also seems ill-suited to address the more-comprehensive problems of climate change, drought, resource depletion, and mass habitat loss.

III. FALSE ANTINOMIES

This Part explores the false antinomy between capitalism and environmentalism as it is expressed in current United States environmental protection law. Here I argue that business and industry interests have cultivated the perception that American environmental law creates a significant drag on economic development and disables the nation's growth potential, reducing the ability of the United States to compete in the global market. The government has acquiesced in this perception and, on occasion, actively perpetuated it, to create the appearance of a strong commitment to environmental protection. The truth, however, is far different from the perception. In fact, the statutes that make up American environmental law are designed to provide only as much environmental protection as profit margins will allow. Thus, the alleged antinomy between business interests and American environmental law is a false one.

Although environmental protection laws are constructed to operate as a check on capitalist excesses and in so doing protect natural resources from excessive deterioration, they nevertheless concede to market pressures, resulting in continued degradation of the environment. I will

⁴⁸ *Id.*

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demonstrate this dynamic by focusing on key provisions in three of the most heralded statutes in the federal environmental law canon: the Endangered Species Act, the Clean Water Act, and the National Environmental Policy Act.

These same statutes provide the template for similar laws enacted within the fifty states. Most of these state environmental laws make similar concessions to business interests and economic growth. By way of example, I will briefly discuss three California statutes—the California Endangered Species Act,⁴⁹ the California Environmental Quality Act,⁵⁰ and the Planning and Zoning Law⁵¹—and show how each requires environmental protection to yield to economic growth when profit margins are threatened.

A. ENDANGERED SPECIES ACT

Congress enacted the Endangered Species Act (ESA)⁵² to identify and protect those plants and animals whose populations have dwindled to the point where further declines may result in the extinction of the species.⁵³ A species in this situation is listed as either “threatened” or “endangered,” depending on such factors as current population size, number and seriousness of threats, and the success or failure of past conservation efforts.⁵⁴ A major component of the ESA is the designation of “critical habitat” for those species listed as threatened or endangered.⁵⁵ In theory, critical habitat provides those natural elements necessary to sustain the species in question.⁵⁶ Therefore, the ESA is designed to conserve critical habitat for the benefit of the threatened and endangered species that need it to survive.⁵⁷

Generally, the public perceives the ESA as the “gold standard” of environmental protection because of its prohibitive character.⁵⁸ Not only do environmentalists and courts consider the ESA the most robust ecological statute in federal law, many business interests—e.g., develop-

⁴⁹ CAL. FISH & GAME CODE § 2050 et seq. (Westlaw 2015).

⁵⁰ CAL. PUB. RES. CODE § 21000 et seq. (Westlaw 2015).

⁵¹ CAL. GOV'T CODE § 65000 et seq. (Westlaw 2015).

⁵² 16 U.S.C.A. § 1531 et seq. (Westlaw 2015).

⁵³ *Id.* § 1531(a); *see also* *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 698 (1995).

⁵⁴ 16 U.S.C.A. § 1533(a), (b) (Westlaw 2015).

⁵⁵ *Id.* § 1533(a)(2).

⁵⁶ *Id.* § 1532(5).

⁵⁷ *Id.*

⁵⁸ Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 *ECOLOGY L.Q.* 1, 5 (1996) (“Litigants, courts, and legal scholars have emphasized the enforcement of the Act’s specific prohibitions . . .”).

ers—view it as the biggest hurdle to economic progress. For many, the statute places the interests of plants and animals above those of human beings.

In spite of the prohibitive features of the ESA, there are significant concessions to capitalism embedded within the Act. The ESA allows the United State Fish and Wildlife Service (USFWS) to issue permits for the “incidental taking” of listed species, provided certain “reasonable and prudent” measures are taken to minimize the number of species killed.⁵⁹ This allows economic development to continue, even when doing so will directly harm threatened and endangered species.

The ESA requires the USFWS to take economic loss factors into account when designating critical habitat.⁶⁰ In other words, if the economic analysis shows that certain lands within the proposed critical habitat designation have high economic value—value that may be lost if the land is classified as critical habitat—the USFWS may, and in some cases must, remove those lands from the designation.⁶¹ Land owners-developers whose properties fall within proposed critical habitat often petition to have their land excluded from the designation.⁶² As a result of granting these petitions, large areas of habitat deemed biologically critical to listed species are laid open for development, resulting in further losses for the species whose continued viability is already in jeopardy.

B. CLEAN WATER ACT

The purpose of the Clean Water Act (CWA)⁶³ is to protect the quality of water within the nation’s rivers, streams, lakes, estuaries, and near-shore oceans.⁶⁴ To achieve this objective, the CWA declares an interim goal of attaining a level of water quality that “provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.”⁶⁵ The Act further declares an ultimate goal of eliminating the discharge of pollutants into the nation’s navigable waters.⁶⁶ The CWA also protects wetlands, as “[w]aters of the United

⁵⁹ 16 U.S.C.A. § 1536(b)(3), (4) (Westlaw 2015); *see also* 16 U.S.C.A. § 1539(a) (Westlaw 2015); *Bennett v. Spear*, 520 U.S. 154, 157 (1997).

⁶⁰ 16 U.S.C.A. § 1533(b)(2); *see also* *Ariz. Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1172 (9th Cir. 2010).

⁶¹ 16 U.S.C.A. § 1533(b)(2); *see also* *Salazar*, 606 F.3d at 1172.

⁶² 16 U.S.C.A. § 1533(b)(2); *see also* *Salazar*, 606 F.3d at 1172.

⁶³ 33 U.S.C.A. § 1251 et seq. (Westlaw 2015).

⁶⁴ *Id.* § 1251(a) (“The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”).

⁶⁵ *Id.* § 1251(a)(2).

⁶⁶ *Id.* § 1251(a)(1).

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States.”⁶⁷ Wetlands are among the most important and biologically protective habitats in the country. Of the wetlands that existed 150 years ago, more than ninety percent have been filled or otherwise destroyed.⁶⁸

The public generally credits the CWA with eliminating the country’s most significant water pollution problems.⁶⁹ No longer do rivers catch fire. Our streams, lakes, bays, and estuaries are relatively clean and able to support such “beneficial uses” as recreation, human contact, fishing, and wildlife habitat. The CWA also includes some fairly robust enforcement mechanisms, such as stiff fines⁷⁰ and citizen suits.⁷¹

Like the ESA, the CWA is also embedded with significant concessions to capitalism. Generally, the CWA prohibits the discharge of pollutants into waters of the United States without a permit.⁷² Such permits, however, are not difficult to secure. Although the CWA’s discharge-permitting system does reduce the amount of pollutants entering the nation’s

⁶⁷ 40 C.F.R. § 122.2 (Westlaw 2015) (subdiv. (g) of definition of “Waters of the United States”); *see also* *Rapanos v. United States*, 547 U.S. 715, 760, 766 (2006) (Kennedy, J., concurring) (applying the significant-nexus test, and concluding that because wetlands perform critical functions such as pollutant trapping, flood control, and runoff storage, wetlands in general possess the requisite nexus to come within the statutory language of “navigable waters,” so that if the wetlands “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable,’” they are within the scope of the CWA’s protection).

⁶⁸ Until the 1950s there appears to have been little awareness of the costs of draining and filling swamp and marsh areas. Such areas were seen as “wastelands, sources of mosquitos and impediments to development and travel.” *See* J. KUSLER, *OUR NATIONAL WETLAND HERITAGE: A PROTECTION GUIDEBOOK 1* (1983). In a report on wetlands published in 1956, the U.S. Fish and Wildlife Service reported that nearly forty percent of the nation’s wetlands had already been destroyed. U.S. FISH & WILDLIFE SERV., *WETLANDS OF THE UNITED STATES* 39 (1956). Since that time wetlands have been disappearing at an annual rate of approximately 458,000 acres in the lower forty-eight states. U.S. FISH & WILDLIFE SERV., *WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS* 31 (1984). By 1984, fifty-four percent of the original wetland area of the United States had been lost. *See* OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, *WETLANDS: THEIR USE AND REGULATION* 87 (1984); *see also* NAT’L WILDLIFE FED’N, *STATUS REPORT ON OUR NATION’S WETLANDS* (1987); U.S. FISH & WILDLIFE SERV., *AMERICA’S ENDANGERED WETLANDS* (1984); COUNCIL ON ENVTL. QUALITY, *OUR NATION’S WETLANDS: AN INTERAGENCY TASK FORCE* (1978).

⁶⁹ *See* NANCY STONER, NATURAL RES. DEF. COUNCIL, *CLEAN WATER AT RISK: A 30TH ANNIVERSARY ASSESSMENT OF THE BUSH ADMINISTRATION’S ROLLBACK OF CLEAN WATER PROTECTIONS 3–4* (Oct. 2002), available at <http://www.nrdc.org/water/pollution/cwa30/cwa30.pdf>; Jaclyn McDougal, *The Clean Water Act Turns 40: Groups Celebrate 40th Anniversary of the Clean Water Act and the Historic Results This Keystone Legislation Has Achieved*, NAT’L WILDLIFE FED’N (Oct. 17, 2012), <http://www.nwf.org/news-and-magazines/media-center/news-by-topic/wildlife/2012/10-17-12-the-clean-water-act-turns-40.aspx>.

⁷⁰ 33 U.S.C.A. § 1319(d), (g)(2)(A), (B) (Westlaw 2015); 40 C.F.R. § 19.4 (Westlaw 2015).

⁷¹ 33 U.S.C.A. § 1365(a) (Westlaw 2015).

⁷² *Id.* § 1311(a).

waters,⁷³ it is careful not to limit such discharges to the point where it becomes a significant economic burden to business owners.⁷⁴

The CWA also prohibits the placement of “fill” material in waters of the United States, including wetlands, but this prohibition can also be circumvented via a permit.⁷⁵ Specifically, the U.S. Army Corps of Engineers (Corps) may issue a permit to “dredge” or “fill” waters of the United States, provided that the applicant has designed the project to reduce dredge and fill impacts to the extent feasible.⁷⁶ Such a project is known as the Least Environmentally Damaging Practicable Alternative (LEDPA).⁷⁷ Note, however, that the CWA allows the LEDPA to be shaped by the “project purpose” defined by the applicant.⁷⁸ In addition, when determining whether a particular alternative is “practicable,” the Corps is required to consider that alternative’s economic impact on the applicant.⁷⁹ Due to the “project purpose” and “practicability” loopholes, many “fill” permits are issued that result in damage to U.S. waters and wetlands.

C. NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act of 1969 (NEPA)⁸⁰ has been heralded as the Magna Carta of the country’s environmental move-

⁷³ The discharge of a pollutant to navigable waters is defined to mean, as relevant here, “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C.A. § 1362(12) (Westlaw 2015). Although courts have broadly interpreted the term “addition” to include almost any introduction of a pollutant into a body of water, the scope of the term has been limited by the requirement that there must be an addition of new material into an area or an increase in the amount of type of material that is already present. *See* United States v. Wilson, 133 F.3d 251, 259 (4th Cir. 1997) (“While sidecasting moves excavated dirt from one particular locus in the wetland to another, it does not involve the addition of any material to the wetland. ‘Addition’ requires the introduction of a new material into the area, or an increase in the amount of a type of material which is already present. While soil may be definitionally transformed, through the act of excavation, from a part of the wetland into ‘dredged spoil,’ a statutory pollutant, it is not *added* to the site.”); *see also* Friends of Santa Fe Cnty. v. LAC Minerals, Inc., 892 F. Supp. 1333, 1354 (D.N.M. 1995) (holding that migration of residual contamination resulting from previous release was not addition within meaning of CWA). The Supreme Court has also held that the transfer of polluted water from one part of a water body to another part of the same water body does not constitute an “addition.” *L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.* 133 S. Ct. 710, 713 (2013).

⁷⁴ 40 C.F.R. § 122.44 (Westlaw 2015).

⁷⁵ 33 U.S.C.A. § 1344 (Westlaw 2015).

⁷⁶ 40 C.F.R. § 230.10 (Westlaw 2015); *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1188–89 (10th Cir. 2002).

⁷⁷ *See Utahns for Better Transp.*, 305 F.3d at 1189.

⁷⁸ *Sylvester v. U.S. Army Corps of Eng’rs*, 882 F.2d 407, 409 (9th Cir. 1989).

⁷⁹ 40 C.F.R. § 230.10(a) (Westlaw 2015); *see Sylvester*, 882 F.2d at 409; *see also* *Jones v. Nat’l Marine Fisheries Serv.*, 741 F.3d 989, 1001 (9th Cir. 2013).

⁸⁰ 42 U.S.C.A. § 4321 et seq. (Westlaw 2015).

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ment.⁸¹ The purpose of the NEPA is to “encourage productive and enjoyable harmony between man and his environment,” and to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.”⁸² More specifically, the purpose of NEPA is to force federal agencies to assess the potential environmental effects of any proposed federal action, including the issuance of permits such as a CWA “dredge and fill” permit (discussed above).⁸³ For moderate to large projects, this assessment is accomplished through the preparation of an Environmental Impact Statement (EIS).⁸⁴ The EIS must not only analyze the project’s impacts on the environment, but also consider alternatives to the project and discuss mitigation measures.⁸⁵

Generally, NEPA is viewed as the ultimate “public participation” environmental statute, as it requires the acting agency to release the Draft

⁸¹ Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH. U. J.L. & POL’Y 293, 293 (2010); see, e.g., Arthur W. Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace?*, 72 COLUM. L. REV. 963, 988 (1972) (explaining that “NEPA has received a very broad interpretation from the courts” and “is viewed as a congressional mandate to agencies to consider environmental goals equally with their traditional objectives”); see also Sam Kalen, *Ecology Comes of Age: NEPA’s Lost Mandate*, 21 DUKE ENVTL. L. & POL’Y F. 113, 118 (2010) (suggesting that the history surrounding NEPA’s passage indicates Congress intended the Act to be more than simply procedural “when it passed the Magna Carta of environmental laws”); 40 C.F.R. § 1500.1(a) (Westlaw 2015) (describing NEPA as the “basic national charter for protection of the environment”).

⁸² 42 U.S.C.A. § 4321 (Westlaw 2015).

⁸³ If a project requires federal approval, such as a permit or a lease, appropriate environmental documentation (often including an EIS) may be required. Although the project may not be a “major federal action,” it still may trigger NEPA requirements under what is commonly known as the “small handle” problem. As an example of this problem, in *Colorado River Indian Tribes v. Marsh*, a federal district court held that the environmental impacts of a private development project had to be discussed in an environmental document. The document was originally necessary because a permit for work along a river bank was required from the U.S. Army Corps of Engineers. See *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1433 (C.D. Cal. 1985).

⁸⁴ 42 U.S.C.A. § 4332 (Westlaw 2015).

⁸⁵ *Id.* § 4332(C)(iii) (Westlaw 2015); see also 40 C.F.R. § 1502.14 (Westlaw 2015) (“[The EIS] should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall: (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits. (c) Include reasonable alternatives not within the jurisdiction of the lead agency. (d) Include the alternative of no action. (e) Identify the agency’s preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference. (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.”).

EIS for public review and comment.⁸⁶ The agency must respond to these comments, adjust the analyses as required, and then recirculate the Final EIS for a second round of public review and input. NEPA is sometimes referred to as a “stop, look, and listen” statute,⁸⁷ which means it forces the government to closely consider the consequences of its proposed action before actually committing to the decision to act. In this way, NEPA also fosters government transparency.

As with the prior two federal statutes, NEPA contains provisions that concede to capitalism. Most people do not realize, however, that NEPA is essentially a *procedural* statute.⁸⁸ It requires federal agencies to take a hard look at the environmental effects of their actions, but it does not require agencies to “achieve [any] particular substantive environmental results.”⁸⁹ An agency must *consider* alternatives to the proposed project, but it need not choose the most environmentally sensitive alternative.⁹⁰ Agencies must *consider* mitigation measures to reduce project impacts, but they need not impose such measures on the applicants, nor must agencies demand that impacts be reduced to particular levels.⁹¹ As a result, many projects are approved despite having serious environmental impacts. This ensures that the environmental review process—despite its importance—never operates to completely stifle any particular development project.

Part of the reason that current environmental protection laws are inadequate is that while the bases of these laws are aspirational, the implementation components of, for example, the ESA, CWA, and NEPA are grounded in market principles and expressly designed to respond to market pressures.

⁸⁶ Although NEPA itself requires only that an EIS and the comments of federal, state, and local agencies be made available to the public, *see* 42 U.S.C.A. § 4332 (Westlaw 2015), the Council on Environmental Quality’s implementing regulations go much further. The regulations create extensive opportunities for public input into the EIS scoping process, *see* 40 C.F.R. §§ 1501.7(a)(1), 1508.22 (Westlaw 2015), public review of the analysis and underlying documents, *see id.* § 1503.1(a)(4), and public comments on the draft EIS before the final document may be issued, *see id.* § 1503.4.

⁸⁷ *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005).

⁸⁸ *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978).

⁸⁹ *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989).

⁹⁰ 40 C.F.R. § 1500.2(e) (Westlaw 2015).

⁹¹ *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)).

D. STATE ENVIRONMENTAL LAWS: THE CALIFORNIA EXPERIENCE

California has long been considered the bellwether state for purposes of environmental protection.⁹² It has some of the most advanced and strict environmental laws in the nation. Because *federal* environmental laws only apply when a project has a federal nexus—such as a Clean Water Act permit—*state* environmental laws must address the majority of environmental issues posed by development.

It is perhaps no surprise that state environmental laws—even those in California—tend to (a) follow the lead of the federal statutes and (b) include similar concessions to business and industry. For example, the California Endangered Species Act (CESA), which provides protection for those plants and animals within the state that are threatened with extinction,⁹³ is patterned after the federal ESA. Although CESA does not provide for the designation of critical habitat, it does include a process for listing threatened and endangered species and mechanisms for protecting them.⁹⁴ Like the ESA, CESA also allows the California Department of Fish and Wildlife to issue “incidental take” permits to developers and other applicants whose projects may harm or kill listed species.⁹⁵ If a project mitigates its impacts to the extent feasible and will not completely jeopardize the continued existence of the species, the incidental take permit will be granted.⁹⁶

Another statute, the California Environmental Quality Act (CEQA),⁹⁷ is also patterned after a federal law, in this case NEPA. Like NEPA, CEQA requires the permitting or “lead” agency to analyze a project for its potential impacts on the environment and to publish that analysis in an Environmental Impact Report (EIR).⁹⁸ The public is invited to review and comment on the EIR, and the lead agency must respond to the comments and adjust the EIR accordingly.⁹⁹ Among the many required components of the EIR is a discussion of project alternatives and a

⁹² Elise O’Dea, Note, *Reviving California’s Public Trust Doctrine and Taking a Proactive Approach to Water Management, Just in Time for Climate Change*, 41 *ECOLOGY L.Q.* 435, 455 (2014) (“California has been a progressive leader in environmental regulation, from passing the nation’s strongest tailpipe emissions rule to adopting one of the nation’s strongest environmental protection acts, the California Environmental Quality Act.”).

⁹³ CAL. FISH & GAME CODE § 2050 et seq. (Westlaw 2015).

⁹⁴ *Id.* §§ 2055, 2061, 2070–2079.

⁹⁵ *Id.* §§ 2080–2085.

⁹⁶ *Id.* § 2081(b); CAL. CODE REGS. tit. 14, § 783.4(a), (b) (Westlaw 2015).

⁹⁷ CAL. PUB. RES. CODE § 21000 et seq. (Westlaw 2015).

⁹⁸ *Id.* §§ 21002.1, 21080.

⁹⁹ *Id.* §§ 21002.1, 21080, 21082.1, 21091.

list of mitigation measures that, if adopted, would reduce the project's impacts to less than significant levels.¹⁰⁰

CEQA, however, much like NEPA, is a *procedural* statute only, meaning that it merely demands that the lead agency fully examine a project for potential impacts on the environment.¹⁰¹ CEQA does not mandate that lead agencies disapprove projects with serious environmental effects; it requires only that those effects be disclosed, assessed, and mitigated to the extent feasible.¹⁰² A lead agency is free to approve a project whose significant impacts cannot be mitigated, provided the agency issues a Statement of Overriding Considerations—a short policy document outlining the economic and social benefits of the project.¹⁰³ Note also that, with respect to mitigation measures, “feasibility” is defined by economic, financial, and technological factors.¹⁰⁴ If a proposed mitigation measure or alternative is too costly, it fails the “feasibility” test.¹⁰⁵

California's Planning and Zoning Law¹⁰⁶ offers another example of a law that appears environmentally driven on the surface but in reality makes major concessions to development. Simply put, the Planning and Zoning Law requires cities and counties in California to prepare land-use plans, complete with zoning designations, for the property within their respective jurisdiction.¹⁰⁷ The purpose of such plans is to encourage the orderly development of property and conserve natural resources as best as possible. Most of the land-use designations and zoning classifications dictate the type and intensity of use allowed on any given parcel of land.¹⁰⁸ Unfortunately, however, a land-use designation or zoning classification can be altered by requesting an amendment to the city or county's approved general plan and seeking a zone change.¹⁰⁹ By granting these requests, cities and counties are effectively undercutting the “best-laid plans” for the community as a whole. This practice not only encourages speculation by developers, who buy land designated for less intensive uses and then seek reclassification for more intensive uses; it also tends to cause suburban sprawl and habitat loss.

¹⁰⁰ *Id.* §§ 21003.1, 21081.6.

¹⁰¹ *Id.* §§ 21002.1, 21081, 21081(b); CAL. CODE REGS. tit. 14, § 15091 (Westlaw 2015).

¹⁰² CAL. PUB. RES. CODE §§ 21002, 21002.1 (Westlaw 2015); CAL. CODE REGS. tit. 14, §§ 15002(a)(1)–(4), 15126.2, 15126.4 (Westlaw 2015).

¹⁰³ CAL. PUB. RES. CODE § 21081(a)(3) (Westlaw 2015).

¹⁰⁴ CAL. CODE REGS. tit. 14, § 15364 (Westlaw 2015).

¹⁰⁵ *Id.*

¹⁰⁶ CAL. GOV'T CODE § 65000 et seq. (Westlaw 2015).

¹⁰⁷ *Id.* §§ 65030–65031, 65067, 65300.

¹⁰⁸ *Id.* § 65302.

¹⁰⁹ *Id.* §§ 65350–65362, *see especially id.* § 65358.

IV. DIALECTICAL RELATION OF CAPITALISM AND ENVIRONMENTALISM

This Part discusses how the false antinomy between environmental protection and capitalism (that environmental laws and market-based ecologies can operate as a check on capitalist excess) masks the true antipathies between them (that environmental protection and capitalism are inherently oppositional)—antipathies so fundamental that they make environmental protection laws inadequate and market-based ecology ineffective. As explained above, the dominant discourse on the relationship between environmental protection and capitalism draws a line between the two along an antagonistic axis. Existing environmental law, while claiming to maintain that line through opposition to capitalist excess, actually allows that line to soften by conceding to market interests when environmental protection becomes too expensive. Market-based ecology also posits the same antagonistic axis but argues it can be overcome by enlisting business in the fight to reverse environmental depletion and damage. As can be seen, neither approach really addresses the true conflict between capitalism and nature; rather, they set up a false conflict with a built-in hierarchy—one in which capital always holds sway over the environment. Below, I discuss what I consider the deep-seated antagonism between capitalism and ecology. This dialectical relationship must be understood in its fundamental form before any truly effective environmental protection strategy can be devised.

The antagonism is based on the claim that capitalism's inherent characteristics and orientation run contrary to environmental protection. The goals, values, and needs of capitalism are in direct opposition to the goals, values, and needs of environmental protection. Scholars frequently describe capitalism in terms of its inherent drive toward wealth-optimization:

Capitalism is wealth whose value does not inhere in its physical characteristics but in its use to create a larger amount of capital. Typically, this use takes place as money is converted into commodities such as raw materials, the raw materials converted into finished goods and services, and the finished goods sold on the market—not to make a profit and retire to a life of ease, but to buy more raw materials to start the process over again. . . . Capital thus differs from wealth in its intrinsically dynamic character, continually changing its form from commodity into money and then back again in an endless metamorphosis that already makes clear its integral connection with the changeful nature of capitalism itself.¹¹⁰

¹¹⁰ ROBERT HEILBRONER, 21ST CENTURY CAPITALISM 46–47 (1994).

Capitalism's inherent orientation toward profit growth through accumulation, and its tendency to evaluate investment decisions along a short time horizon, prevent capitalism structurally from providing viable solutions to environmental problems.¹¹¹

Modern capitalism is based on an "exchange value" system.¹¹² As a result, it is defined by certain characteristics that put it fundamentally at odds with sustainable ecologies. Capitalism is extractive and exploitative, which means that to survive, it must have constant access to natural resources, many of which are non-renewable. Capitalism is also inherently competitive and expansive. As a result, business interests must constantly enter or develop new markets.¹¹³ Markets are organized systems; they have dynamics but no goals. Markets cannot be reduced to the particular items being exchanged or the places where those exchanges occur;¹¹⁴ rather, markets are the "interactions of buyers and sellers and the aggregate results of their transactions."¹¹⁵ This, in turn, puts additional pressure on natural resources. Finally, capitalism requires consumers with strong appetites and high metabolisms. In other words, capital has to produce the conditions for its own expansion. Market-driven consumption is anathema to conservation, and vice versa.

¹¹¹ JOHN BELLAMY FOSTER, *ECOLOGY AGAINST CAPITALISM* 10 (2002).

¹¹² See DAVID HARVEY, *THE LIMITS TO CAPITAL*, 5–14 (1982). Use values and exchange values are two concepts central to Karl Marx's conception of commodity production and exchange. Harvey notes that Marx derived these concepts from the basic premise that human beings appropriate nature in order to satisfy their wants and needs. The use value of a commodity is measured in its relation to its ability to satisfy certain human wants and needs. For example, "Food satisfies our hunger, clothing our need for warmth and housing our need for shelter." *Id.* at 5. Harvey describes exchange value as the foundation of capitalist society: "Nothing is more basic to the functioning of capitalist society than the elemental transaction in which we acquire a certain quantity of use value in return for a certain sum of money. The information generated by such transactions – that wheat sells at so much a bushel, that shoes cost so much a pair, that steel trades at so much a ton, etc. – provide[s] signals that guide both production and consumption decisions. Producers decide how much of a commodity to produce given an average selling price and purchase certain quantities of commodities at some buying price in order to undertake commodity production. Households decide how much of a commodity to buy given its price in relation to their wants and needs and their disposable income. These transactions – so fundamental to daily life under capitalism – constitute the 'world of appearance' or the 'phenomenal form' of economic activity." *Id.* at 9.

¹¹³ See ROSA LUXEMBURG, *ACCUMULATION OF CAPITAL*, 426–27 (Agnes Schwarzschild trans., 2003) (arguing that imperial expansion across space must accompany capital accumulation over time). Failure to open new markets in the colonies, Luxemburg argued, would render metropolitan capitalism unable to dispose profitably of its glut of commodities, and crises of overproduction would doom the system. *Id.*

¹¹⁴ CHARLES E. LINDBLOM, *THE MARKET SYSTEM*, 52 (2001) ("The market system is not a place or a thing or even a collection things. It is a set of activities of distinctive pattern.").

¹¹⁵ Bruce Parady, *The Logic of Ecosystems: Capitalism, Rights and the Law of "Ecosystem Services,"* 5 J. HUM. RTS. & ENV'T 136, 147 (2014).

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Environmentalism's inherent orientation is geared toward maintenance and regeneration of natural resources.¹¹⁶ True environmentalism assigns the highest priority to conservation and natural sustainability.¹¹⁷ True environmentalism sees no exchange value in natural resources. That is, natural resources have no profit potential. Their value is inherent in their natural characteristics and their ability to sustain ecological balance.¹¹⁸ True environmentalism views extraction as the ultimate injury to nature—one that can be justified only in the narrowest of circumstances.¹¹⁹ Given this orientation, true environmentalism considers the reversal of existing ecological damage (e.g., climate change) as paramount to all economic concerns, including and especially profit-related concerns.

Capitalism has been defined as “a process in which money is perpetually sent in search of more money.”¹²⁰ Nature, however, poses a potential barrier to capital's quest for continuous accumulation.¹²¹ If natural resources turn out to be unavailable, then this constitutes a barrier to further capital accumulation. For example, the auto industry cannot expand without more rubber to make tires. Although capitalism depends on nature for wealth accumulation (as much as capital depends on labor

¹¹⁶ FOSTER, *supra* note 111, at 12 (“[R]eal protection of the environment requires a view of the needs of generations to come.”); see also CELIA CAMPBELL-MOHN, BARRY BREEN & J. WILLIAM FUTRELL, ENVIRONMENTAL LAW: FROM RESOURCES TO RECOVERY 111 (1993) (“Most environmental objectives can be described as promoting either preservation or conservation.”).

¹¹⁷ True environmentalism understands the environmental movement in terms of protecting the natural world from the demands of what it perceives as an extracting culture. True environmentalism places itself in contrast with what it defines as the conservation-industrial complex, represented by green organizations, environmental foundations, and neo-environmentalists. True environmentalism claims these other forms of environmental movements have elevated sustainability objectives of environmentalism over all others, and in so doing devalued sustainability by replacing concerns about natural sustainability with concerns about sustaining the extractive culture that is causing environmental deterioration. See also Derrick Jensen & Leirre Keith, *Reclaim Environmentalism!*, ECOLOGIST (Feb. 13, 2015), http://www.theecologist.org/blogs_and_comments/commentators/2751996/reclaim_environmentalism.html.

¹¹⁸ The concept of true environmentalism has been represented by such figures as John Muir, Aldo Leopold, Rachel Carson, and Bill McKibben. These figures have been fundamental in raising the level of environmental consciousness and allowing generations to discover for themselves that humans are one with the natural environment. True environmentalism is the concept of a long-term dedication to thinking, writing, and acting deeply about ecology, which requires us to “ask harder questions, such as: Where are we from? What is our relationship to the rest of the world? Are we really at the apex of evolution?” BILL MCKIBBEN, THE END OF NATURE 195 (2003) (quoting Dave Foreman, former leader of Earth First!).

¹¹⁹ CAMPBELL-MOHN ET AL., *supra* note 116, at 119–20 (1993) (“[S]ustainability assumes that the consequences of depleting resources outweigh the likelihood that the resource base will be expanded. In other words, human behavior should conform to maintain natural systems so that these systems are not depleted even though future generations may invent technology that avoids the consequences of resource depletion.”).

¹²⁰ DAVID HARVEY, THE ENIGMA OF CAPITAL AND THE CRISES OF CAPITALISM 40 (2010).

¹²¹ *Id.* at 71.

sources), individual capitalists tend to prioritize their own short-term interests with respect to the depletion of natural resources.¹²² Subjective motivations aside, continuous accumulation steadily exhausts natural resources while at the same time demanding that ecosystems take accelerated waste levels generated by increased production and consumption.

This oppositional position places nature and capitalism in a dialectical relationship.¹²³ The question is whether this dialectical opposition can be overcome—transcended—in a way that yields new perspectives on, and new policies for, environmental protection. There are two main approaches to navigating this dialectical opposition. The first conceptualizes environmental protection and capitalism as a strict dualism. This approach is similar to the one I described above, in which the very characteristics that define capitalism as “capitalism” make it unsuitable for any paradigm that seeks to privilege environmental protection. This strictly dualistic perspective grounds the relationship between environmental protection and capitalism in stark contradiction. Environmental protection laws mediate that contradictory relationship with the hope of curbing the excesses of capitalism.

Reliance on the mediating function of environmental laws is problematic. They are insufficient to negate the excesses of capitalism because environmental protection laws (as discussed above) are grounded on market principles and consistently concede to capitalism. Furthermore, holding out environmental protection laws as a panacea to the evils of capitalist excess creates a larger problem because it creates a false sense of security that the government is taking care of the problem. This has the unfortunate effect of foreclosing alternative attempts to rein in capitalism’s destructive impacts on the environment.

The second approach, while acknowledging the dualistic nature of the relationship between environmental protection and capitalism, seeks to unify them by using the principles of capitalism to address issues of environmental deterioration. Advocates of this approach posit that because capitalism is responsible for environmental deterioration, capitalism can be used to protect the environment. These protective ecological approaches incorporate market-based strategies under the assumption that self-regulation principles inherent in the market will translate to environmental protection. These approaches, each laudable in their own right, ultimately suffer from the same inherent flaw, which is that they all sublimate environmental protection into the larger capitalist paradigm.

¹²² *Id.*

¹²³ *Id.* at 74.

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Under either a strict dualistic approach or a unification approach, the outcome of the environmental protection/capitalism dialectical process subordinates environmental protection to market concerns. The question I address next is this: Can we develop a third approach that sidesteps the defects of the first two and ultimately raises environmental protection to a station of parity with (and occasional dominance over) market forces? The answer, I believe, is yes. However, the approach I envision is one that reconceptualizes modern environmentalism less as a movement that operates at the margins of a totalizing capitalist system, and more as one that uses the power of resistance to force changes, both individually and institutionally, in the way we behave as economic actors. In other words, I see “resistance” as creating a new dialogue between capitalism and nature, in which both sets of interests rest on equal platforms, and in which the outcome will, as often as not, favor the latter over the former.

V. PHILOSOPHICAL ANALYSIS OF ENVIRONMENTAL RESISTANCE AS FORCE

A. FORCE AND ENMITY

The most pervasive framing discourse of resistance is force. The starting point of a framework of resistance grounded in force is the classic work, *On War*, by Carl von Clausewitz.¹²⁴ Carl von Clausewitz (1780–1831) was a Prussian general and military theorist. During his service, he witnessed the advent of a new kind of warfare in Revolutionary and Napoleonic France. In *On War*, Clausewitz not only analyzed Napoleonic warfare with the desire of better knowing his enemy, but more significantly, he explored options for the use of resistant force—as energy¹²⁵—against the enemy.

As the first theorist of war and resistance, Clausewitz had the fundamental insight that modern politics and war turn on the *capacity* to resist.¹²⁶ In the initial pages of *On War*, Clausewitz defines war in terms of a straight relation of enmity—a duel or a pair of wrestlers—in which the

¹²⁴ CARL VON CLAUSEWITZ, *ON WAR* (Michael Howard & Peter Paret trans., Oxford World's Classics 2007) (1832).

¹²⁵ Howard Caygill, *Also Sprach Zapata: Philosophy and Resistance*, *RADICAL PHILOSOPHY* 171, Jan.-Feb. 2012, at 19, 21 (“[Clausewitz was] one of the most consistent users of the term before it was overtaken in the mid-nineteenth century by the theory of thermodynamics, where it remains. He understood energy in terms of the Kantian modal category of actuality, as an *Aktus* [that which makes something happen] or event, deviating from the standard idealist focus on the modal category of possibility and its correlate of freedom.”).

¹²⁶ VON CLAUSEWITZ, *supra* note 124, at xxvi.

object of the mutual application of force is to make the other “incapable of further resistance.”¹²⁷ Clausewitz’s definition has a clear implication, which the majority of *On War* acknowledges and explores—that the war of resistance is bivalent: it is dedicated to weakening or destroying the enemy’s capacity to resist as well as to preserving and enhancing one’s own capacity in the face of the enemy’s use of force.¹²⁸

Clausewitz showed that the concept of resistance depended on a discourse of force and opposition to force.¹²⁹ Furthermore, he argued that the opposition of forces directly entailed the exercise of violence.¹³⁰ But as we will explore shortly, force need not always be expressed in the form of physical violence; it can be applied through other means, such as political discourse. This connection to force offers the reader of Clausewitz two basic options. First, one could follow Clausewitz in closely identifying resistance with violence, an identification that leads unequivocally to his main thesis in *On War*, that “war is . . . politic[s by] other means.”¹³¹

The second option is to challenge the close tethering of resistance to violence, while maintaining a strong conception of enmity. Enmity—not violence *per se*—is what allows the paradigmatically weaker party to begin the process of achieving parity and equilibrium, the very condition that must precede any real political change.¹³² Here, Mahatma Gandhi’s South African and Indian anti-colonial struggles and the American Civil Rights Movement under the leadership of Martin Luther King, Jr., are representative of the use of nonviolent resistance as an effective strategic option. This nonviolent resistance is not altogether removed from the Clausewitzian framework because a basic component of these nonviolent resistances is the retention of a clear concept of enmity in conjunction with a developed strategy to preserve and enhance the capacity to resist. Such nonviolent resistances convert Clausewitzian physical force into an

¹²⁷ *Id.* at 13.

¹²⁸ *Id.* at xxvi. Clausewitz illustrates this dynamic as follows: “The occupation [of Bonaparte’s capital in 1814] caused a substantial diminution in Bonaparte’s military strength and his capacity to resist, and a corresponding increase in the superiority of the allies.” *Id.* at 139.

¹²⁹ *Id.* at 44.

¹³⁰ *Id.* at 30.

¹³¹ *Id.* at 252. Such was the position embraced by Lenin, Mao, and Che Guevara, who saw resistance as a preliminary step toward a revolutionary class war whose objective, a classless society, legitimates the violence necessary to achieve it.

¹³² For examples of twentieth-century readings of Clausewitz that fail to convert the Clausewitzian conception of protracted warfare and force into a sustainable practice of equally protracted but affirmative resistance, see ALEXANDRE KOJÉVE, INTRODUCTION TO THE READING OF HEGEL: LECTURES ON THE PHENOMENOLOGY OF SPIRIT (Alan Bloom ed., James H. Nichols, Jr., trans., 1969) (1958); RAYMOND ARON, CLAUSEWITZ, PHILOSOPHER OF WAR (1986); and RENÉ GIRARD, BATTLING TO THE END: CONVERSATIONS WITH BENOÎT CHANTRE (Mary Baker trans., 2009) (2009).

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expression of moral force as a means to preserve its own and deplete its enemy's capacity to resist.

B. SPATIAL REORGANIZATION

Given the nearly total embedding of environmental protection within the capitalist paradigm, the desire to construct meaningful ecological alternatives requires that one develop a new understanding of environmentalism—one that is capable of escaping the gravitational pull of market forces and standing on its own as a viable political imperative. A new understanding of environmental protection would require a reevaluation of the spatial relationship between environmental protection and capitalism. This Article previously described the relationship between environmental protection and capitalism as one of antagonistic oppositional forces.¹³³ This opposition has become invested with spatial and affective properties that create meaning.

The meaning of the space between environmentalism and capitalism has shifted from mere opposition of equal forces to one of hierarchy: dominance and subordination.¹³⁴ We have been conditioned to accept that this opposition of theoretically *equal* forces is, in practice, an opposition of *unequal* forces in a hierarchical field. Our almost “pre-conscious” acceptance of this hierarchy as the “natural order of things” is one of the most difficult and critical obstacles to overcome. For this reason, environmentalism, as expressed as resistance, must direct significant energy at destabilizing these embedded psycho-economic assumptions.

The problem with this spatial organization is that it restricts the dynamics of environmental protection to predominantly reactive measures. These reactive measures create a cycle of inefficiency. The nature of a reactive posture is such that it succeeds in creating a reciprocal movement of reaction-provoking-resistance that in turn intensifies counter-resistance. This means that an environmental protection strategy defined as reaction will only perpetuate environmentalism's current subordination to capitalism, because reactive environmental resistance measures will provoke a disparate (in terms of force) counter-resistance response from capitalism. In short, *reaction* sets in motion a resistance cycle that environmentalism will always lose. In other words, resistance that is drag-

¹³³ See Part IV, *supra*.

¹³⁴ Although a full exploration of the history of capitalist development is outside the scope of this Article, for our purposes we will proceed from the premise that this scenario of hierarchical meaning presupposes the prior opposition of the forces of environmentalism and capitalism during the Industrial Revolution, with the outcome of privileging capitalism. For a treatment of the history of capitalist development, see, for example, JOHN BELLOWS FOSTER, *THE VULNERABLE PLANET* (1999).

ged down into a relation of simple reaction risks being extinguished in a logic of retaliation. This is not idle theory. This happens constantly in the areas of environmental legislation and regulation. When an environmental policy is adopted in response to market-related abuses, the entities threatened by the new policy push back, often with more force than was expected. The result is that the new policy is substantially diluted or gutted altogether and pre-existing environmental regulation becomes a target for roll-back reforms. Additionally, the overlay of this hierarchical spatial relationship obscures the reality of the collision of environmentalism and capitalism as equal forces and compels all analysis of their interaction through the hierarchy-constructed interpretive lens.

Under this hierarchical spatial organization, environmental protection becomes arranged by capitalism's structure and is consequently determined as a function of capitalism's acts. Although this equation of *composed by* and *determined as* may hold for the creation of a meaning, it does not follow that that particular creation is the *only* meaning that can be understood between environmentalism and capitalism. In other words, there is nothing inherent in the subordination of environmental protection to capitalism. Acknowledging that each manifests itself as an equal and opposite force against the other opens up the possibility of new meaningful constructions, i.e., that the given state of things is not fixed. Indeed, the flaw in the conception of the hierarchical spatial organization is that it neglects the reciprocal character of force in general, and environmental force in particular (e.g., the ability of a hurricane like Katrina to wreak commercial devastation, or the potential ability of climate change to force major changes in resource-dependent markets¹³⁵).

One way to rework the spatial relationship between environmentalism and capitalism is to begin thinking about their interaction in a way that does not overlook the quality of each as an opposed force. Here, our thought of force and opposition of forces originates from Newtonian mechanics, viz., Newton's third law of motion: "to any action there is always an opposite and equal reaction."¹³⁶ And while the idea of force

¹³⁵ See generally U.S. DEP'T OF COMMERCE, NAT'L OCEANIC & ATMOSPHERIC ADMIN. & NAT'L MARINE FISHERIES SERV., REPORT TO CONGRESS ON THE IMPACT OF HURRICANES KATRINA, RITA, AND WILMA ON COMMERCIAL AND RECREATIONAL FISHERY HABITAT OF ALABAMA, FLORIDA, LOUISIANA, MISSISSIPPI, AND TEXAS (July 2007), available at http://www.nmfs.noaa.gov/msa2007/docs/HurricaneImpactsHabitat_080707_1200.pdf; see also MARK L. BURTON & MICHAEL J. HICKS, MARSHALL UNIV. CTR. FOR BUS. & ECON. RESEARCH, HURRICANE KATRINA: PRELIMINARY ESTIMATES OF COMMERCIAL AND PUBLIC SECTOR DAMAGES (Sept. 2005), available at <https://cms.bsu.edu/-/media/WWW/DepartmentalContent/MillerCollegeofBusiness/BBR/Publications/disaster-Studies/katrina2005.pdf> (estimating total economic impact to Louisiana and Mississippi exceeding \$150 million).

¹³⁶ ISAAC NEWTON, THE PRINCIPIA: MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY 417 (I. Bernard Cohen, Anne Whitman & Julia Budenz trans., 1999) (1687).

remains indebted to Newtonian mechanics, it is possible to carry over basic characteristics of this idea and graft them onto other discourses.

Placing the decision to resist at the level of recognition of equal opposition of force removes that decision from the confines of the hierarchical capitalist paradigm. From a dynamic point of view, resistance understood in terms of the preservation or the enhancement of the capacity to resist cannot be reduced to a simple binary opposition of accept or challenge. The problem with this simple binary opposition is that it is entirely confined within the already established hierarchy. Thus, any evaluation of ecological strategies or environmental protection laws will be measured according to the barometer set by capitalist values, needs, and goals.

Resistance must be situated instead within a complex and dynamic spatio-temporal field that manifests itself in postures of power and defiance. A spatial adjustment to our current thinking about environmental protection would require that we recalibrate the debate between capitalism and ecology so that the norms and preferences of the former cannot dominate those of the latter. In the most radical sense, this would involve a reorganization of personal and social priorities such that economic advancement is assigned a lower social value than environmental protection and is promoted only to the extent it serves ecological objectives (or at least is neutral as to those objectives).

A temporal adjustment to our current thinking about environmental protection would require that environmentalism and ecological strategies conceive of resistance to capitalist domination in terms of perennial defiance rather than resistance as a singularity. Perennial defiance (unlike mere reaction) is state of being derived from a permanent tension between two energies. As a state of being, or consciousness, perennial defiance stresses the move away from singular reactionary acts of environmentalism to a perpetual state of environmental resistance. An understanding of the temporal relationship between environmentalism and capitalism in terms of perennial defiance is consistent with environmentalism's quest for parity because it releases environmentalism from the limitations of a reactionary posture.

This reorganization would displace romantic, deeply meaningful but doomed gestures such as taking a stand on an individual project (e.g., a timber harvesting plan that displaces spotted owls) and replace them with strategic intentions for reform that are grounded in values, needs, and goals that transcend the capitalist paradigm.¹³⁷

¹³⁷ JAMES K. BOYCE, *ECONOMICS, THE ENVIRONMENT, AND OUR COMMON WEALTH* (2013) (arguing that environmental movements should not only build upon past environmental victories, such as the creation of the Environmental Protection Agency and the Clean Water Act, but also build

C. RESISTANCE

Although resistance is a vital part of navigating between the conflicting values of environmentalism and capitalism, the dominant modes of environmentalism's resistance within the political dynamic are inhibited because they are bounded by capitalism's structure. Therefore, those existing modes of environmental resistance must change; they must be reinvented. Resistance—whether in the form of environmental protection laws or market-based ecological strategies—remains rooted in practice and justifications addressing specific historical contexts or responding to specific market pressures.

The unification of these environmental resistance practices into a cohesive concept of resistance, while tactically necessary in certain contexts, risks emptying resistance of its very capacity to resist. In other words, there is a paradox at work here. To maximize its power, environmentalism in its various forms must unify under the singular heading of “resistance.” However, such unification may allow the opposition force (i.e., capitalist interests) to label, categorize, and thereby marginalize that resistance, relegating it once again to a subordinate position within the existing hegemony. Indeed, defining a norm of “environmental resistance” threatens to subordinate its centripetal activities and initiatives to a centralized political logic.¹³⁸ This type of subordination by definition would disarm environmental resistance by calcifying its meaning into one particular denotation that is easy to dismiss precisely because of its singular focus.

Once the meaning of *an* environmental resistance is calcified, *all* environmental resistances can be categorized along the same parameters of that singular definition. This process delineates the boundaries by which environmental resistance can operate, while at the same time marking out the appropriate responses to said resistance. The most common example of an “appropriate” response is government regulation. An easy-to-imagine situation is environmental resistance to the use of certain pesticides in farming, which may prompt a legislative response. That response, however, may be more symbolic than substantive in that it may

upon the victories of the civil rights movement, the voter rights movement, and others that have helped to empower the people who tend to be on the losing end of environmental problems, the people who tend to be victimized most).

¹³⁸ See, e.g., GEORG LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS* 83–222 (Rodney Livingstone trans., Merlin Press, London, 1971) (exposing the internal limitations and difficulties in using classic Marxist theory to graft the experience of resistance onto the philosophy of class consciousness). Lukács argued that the introduction of resistance into the contexts of national consciousness, and later class consciousness, energized but also diverted the capacity to resist by fixing it on objects like nation and class. *Id.*

be limited to a partial ban of a particular pesticide while allowing others, or domestic restriction on the pesticide while allowing its foreign exportation, or it may simply create an “acceptable use” limitation that allows for a certain amount of the pesticide to continue to be emitted into the environment.

What this classification process creates is an acceptable parameter within which environmental resistance can exist without significantly destabilizing the overall capitalist scheme. This means that when faced with a “problem” highlighted by environmental resistance, there is in place a legislative formula by which to craft a “solution.” These solutions (e.g., governmental regulation) are embedded within the model of capitalist valuation, and as such they provide objective evidence of government’s protection of the environment. This objective protection of the environment, however, will remain incomplete and imperfect, because although it may “fix” a particular “problem,” it does not address the persistent substantive issues of environmental deterioration, which stem from the hierarchy that subordinates environmentalism to capitalism.

This type of calcification renders the current modes of environmental resistance one-dimensional and easily “resolved” by symbolic legislation. Moreover, it prevents the constant reinvention of resistance necessary for a perennial defiance of the capitalist modality. Furthermore, any philosophy of environmental resistance must also combat the pressure of concept-formation, of reducing the practices of resistance to a single concept amenable to legitimation, appropriation, and symbolic resolution by the very modality that it defies. In short, to prevent this collapsing of environmental resistance into a marginalized singularity, environmentalism must begin to express itself as a totalizing system—one that can compete with the totalizing effects of capitalism.

As the idea of calcification suggests, there are risks in attempting to conceptualize with particularity what qualifies as an expression of environmental resistance. Awareness of these risks, however, should not cause us to renounce our responsibility for seeking to understand the *experience* of environmental resistance. Theoretically evaluating the dominant forms of the experience of environmental resistance, both its historical and contemporary manifestations, may lead to a more effective praxis of environmental engagement. Indeed, philosophical reflection of the experience of environmental resistance has the potential to open up new possibilities: for example, new ways of thinking about what environmental resistance to climate change can mean, what form(s) environmental resistance to ocean acidification and fisheries depletion can take, and what objectives environmental resistance to pollution (air, water, and soil) can achieve. Assessment of the experience of each of these separate

incidents of environmental resistance not only forces one to consider whether the resistance was successful, but also challenges one to think about why the resistance was or was not successful. Additionally, it confronts one with the task of contemplating and articulating how success is measured. Only by engaging the experience of environmental resistance on this philosophical level can one possibly discover new points of intervention to address environmental deterioration issues that are unconstrained by and outside of the capitalist paradigm.

Even so, avoiding the conceptual unification of *all* environmental resistances into *an* Environmental Resistance is not simple. It requires an approach to conceptuality that permits recognizing consistency without imposing dogmatic unity. In other words, although it is not productive to single out one component of environmental resistance as emblematic (e.g., protest rallies) because of the limitation it places on the idea of environmental resistance (i.e., environmental resistance *only* or *predominantly* occurs in the form of a protest rally), it is useful to consider what protest rallies, letters to members of Congress, lobbying efforts, voting for green candidates, and boycotts of products or industries have in common in order to form a concept of environmental resistance that tends toward inclusion in its coherence.

Such flexibility in the “concept of environmental resistance” accommodates within it counter-movements to both attempts at conceptual unifications of environmental resistance (i.e., limiting the experience of environmental resistance to one modality) and empirical dispersion of several historically discrete incidents of environmental resistance (i.e., treating prior environmental resistance incidents as historical artifacts with no contemporary relevance). This flexibility is necessary because of the fact that there is nothing inherent in resistance that renders it exclusively progressive or exclusively reactive.¹³⁹ It is precisely because of this multifaceted complexity of resistance that we must first proceed from a point of philosophical reflection rather than determinant judgment.

This approach reorients the goal of understanding environmental resistance away from simply naming it as a thing (a thing that can be overcome and subjugated by the capitalist paradigm) toward an understanding of environmentalism’s affirmative capacity to resist—understood as an ability or energy that links traditional virtues of courage

¹³⁹ HOWARD CAYGILL, ON RESISTANCE: A PHILOSOPHY OF DEFIANCE 5 (2013) (describing the complexity of resistance: “There is never a moment of pure resistance, but always a reciprocal play of resistances that form clusters or sequences of resistance and counter resistance responding to each other in surrendering or seizing initiative.”).

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and fortitude, with a readiness to hold one's ground for however long it takes to achieve substantive justice.

VI. CONCLUSION

Environmental protection laws as currently formulated and market-based environmental strategies as currently advocated will fail to achieve more than marginal ecological goals. Meaningful environmental protection will only come from policies divorced from market pressures. This Article offers some initial thoughts for trying to understand the link between resistance, energy, and environmentalism with the goal of actualizing environmentalism's affirmative capacity to resist. This capacity to resist is actualized through energy, but not the destructive energy released by violence. It is an energy forged outside of the capitalist hegemony grounded in a resistance conceived as an empowering nonviolent interruption of the routine forces of capitalist exploitation. "All resistance is a rupture with what is."¹⁴⁰ Because capitalism in America is everywhere and always the case, it passes unnoticed unless there is a rupture, during which capitalism's laws and principles become open to meaningful resistance and, perhaps, subordination to new structures that assign new social values. The idea of environmentalism's affirmative capacity to resist marks out space to explore the possibility of generating such ruptures.

¹⁴⁰ ALAIN BADIOU, *METAPOLITICS* 7 (Jason Barker trans., Verso) (2005).