

Wringing Wonder From the Arid Landscape of Law

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ABSTRACT

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I. INTRODUCTION

It is easy to celebrate the multi-faceted work of Charles Wilkinson. His public service has given voice to many lives and communities. His teaching has transformed ambitions, including my own.¹ His wide-ranging writing has inspired uncounted thousands. Canvassing Professor Wilkinson's full influence would require an article that would swallow any single issue of this law journal. Therefore, I limit my own tribute to the aspect of his many works I know the best: Wilkinson's profound contribution to public land law scholarship.

Wilkinson made his mark originally with conventional, but thoroughly documented and insightful, scholarship. In particular, his duet of articles on applying a public trust to federal resource management laid a modest but reasonable foundation for creative use of fiduciary concepts in federal law.² Also, the magisterial, double-issue article with Michael Anderson on the National Forest Management Act (NFMA)³ continues to be the standard, authoritative source on U.S. Forest Service organic legislation and implementation.⁴ Along with the first two editions of the Federal Public Land and Resources Law casebook with George Coggins,⁵ these articles remade the field and established Wilkinson as the leading innovator in public land law.

Before this phase of Wilkinson's work, natural resources law emphasized the creation and adjudication of private rights.⁶ Afterward, no serious scholar of public land law could ignore the diffuse public interest as a major influence. Indeed, the focus of the past 35 years of public land law research across the academy generally centers on the best way to deter-

¹ At the University of Michigan School of Law, I took Indian Law and Public Land Law from Professor Wilkinson in the Spring 1986 semester.

² Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. CALIFORNIA-DAVIS LAW REV. 269 (1980); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Sources and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989). Bob Adamcik and I have described the limitations of the trust concept in federal law in *Beyond Trust Species: The Conservation Potential of the National Wildlife Refuge System in the Wake of Climate Change*, 51 NATURAL RESOURCES J. 1 (2011).

³ Pub. L. No. 94-588, 90 Stat. 2949 (1976).

⁴ Charles F. Wilkinson and H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OREGON L. REV. 1 (1985). A single article occupying a double issue (number 1 & 2) of a law journal may well be unprecedented. It remains the only law journal issue I have ever purchased in order to have a personal copy.

⁵ George C. Coggins and Charles F. Wilkinson, *Federal Public Land and Resources Law* (1st ed. 1981 and 2d ed. 1987).

⁶ Michael C. Blumm and David H. Becker, *From Martz to the Twenty-First Century: A Half-Century of Natural Resources Law Casebooks and Pedagogy*, 78 U. COLO. L. REV. 647, 649-650 (2007).

mine and incorporate the public interest, particularly in resource conservation. Charles Wilkinson built the fulcrum and lifted scholarship into a different domain.⁷

For many, this spectacular first act would sustain a comfortable career continuing to publish traditional legal scholarship. However, this is where the story of Wilkinson's major impact on public land law gets interesting. Around the time he arrived at the University of Colorado, he had pivoted toward more challenging research and more literary writing. He already succeeded in reframing scholarship of federal resource management around the principle of pluralistic, public interest. But, how should agencies and elected officials gauge and determine what the public interest is in particular circumstances? Wilkinson launched a decades-long effort to answer that question with publications rich with site-specific detail, compelling narratives, and aspirational themes. This phase of Wilkinson's scholarship defied conventional notions of legal writing and inspired many reformers. My aim is to explore the unique contribution of this line of work to public land law, connect it to broader scholarly themes, and assess its impact.

II. BIOREGIONALISM & HOME

Regionalism links much of Wilkinson's adventurous scholarship of the past three decades.⁸ To understand how this is important in shaping public land law, one must distinguish it from decentralization. Decentralization focuses on moving authority from agencies or governments with relatively broad geographic jurisdiction to ones covering a smaller area.⁹ Decentralization generally spurs federal delegation of more power to states and local jurisdictions empowered by states.¹⁰ Federalism serves as the

⁷ The best description of the transformation in the field remains Wilkinson's own, *The Field of The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 *PUBLIC LAND LAW REV.* 1 (1980) (using traditional, case-oriented scholarship to make the case for a new way to understand public land law). Wilkinson continued to refine his picture of the field through a remarkable series of scholarly dispatches as the *Public Land Law Review* (later called the *Public Land and Resources Law Review*) turned 5, 10, 21, and now 33 years old. I know of no comparable series of contributions to a journal by a professor not on the faculty of the school publishing the journal. The series speaks to Wilkinson's dominant role in public land law.

⁸ Wilkinson, *The Law of the American West: A Critical Bibliography of the Non-Legal Sources*, 85 *MICHIGAN LAW REV.* 953, 955 (1987) (claiming that, just as the South's experience with slavery and segregation created a regional law, so too does the West's aridity and high concentration of federal lands).

⁹ George Cameron Coggins, "Devolution" in *Federal and Land Law: Abdication by Any Other Name...*, 3 *HASTINGS W.-N.W. J. ENVTL. L & POL'Y* 211 (1996).

¹⁰ Decentralization outside of the federalism context commonly refers to state laws that delegate power to local governments. Jerry Frug, *Decentering Decentralization*, 60

most important legal category for implementing decentralization.¹¹ But that conversation is constrained by state and tribal sovereign boundaries.

In contrast, regionalism emerges from more flexible boundaries defined more by culture.¹² This is especially true of the strain of regionalism most closely associated with Wilkinson's scholarship—bioregionalism. Bioregionalism emerges from a deep understanding of a particular place.¹³ Wilkinson considers it a "subtle, intangible, but soul-deep tie" to place and community.¹⁴ It seldom follows state or other jurisdictional boundaries. Wilkinson follows John Wesley Powell and Wallace Stegner in his call for the watershed to be an optimal boundary definer.¹⁵ Bioregionalism places greater weight on the ideas of those who have dwelled there the longest. In this respect it is difficult to disentangle Wilkinson's work on Indian law with his impact on public land law. For it is the aboriginal Americans who can claim moral high ground based on the time they have dwelled in a region. Wilkinson's work in both areas of law recognizes the temporal dimension¹⁶ of regionalism as crucial to defending the special status of the aspirations of the people who live in places where public resource disputes occur.

This is a delicate balance because, for federal lands, there is an enormous public (all United States citizens) to whom lawmakers must answer. Why not just consider national goals and step down quotas to individual land units? That describes a dominant approach to federal land management, promoted by post-war economists, such as the influential Marion Clawson,¹⁷ and embodied in legislation such as the Resources Policy Act

U. CHI. L. REV. 253 (1993); Richard C. Schragger, Decentralization and Development, 96 VA. L. REV. 1837 (2010).

¹¹ Robert L. Fischman, Cooperative Federalism and Natural Resources Law, 14 N.Y.U. ENVTL. L.J. 179 (2005).

¹² Often a dominant city will define a region (e.g. the Portland bi-state region).

¹³ Kirkpatrick Sale, *Dwellers in the Land* 173 (1985) (bioregionalism "is taking the time to learn the possibilities of place"). Wilkinson refers to this as an "ethic of place." *An Ethic of Place* at 405.

¹⁴ *An Ethic of Place* at 406.

¹⁵ Charles F. Wilkinson, *Law and the American West: The Search for an Ethic of Place*, 59 U. COLO. L. REV. 401, 406 (1988) [hereinafter "An Ethic of Place"]. Powell called for state boundaries that match watersheds in his 1878 report "Lands of the Arid Region", which Wallace Stegner revived in *Beyond the Hundredth Meridian: John Wesley Powell and the Second Opening of the West* (1954). Wilkinson himself nods to these two extraordinary works in his own book title "Crossing the Next Meridian". The Powell report (2d ed.) can be found at the web site of the agency he directed from 1881-94: <http://pubs.usgs.gov/unnumbered/70039240/report.pdf>

¹⁶ E.g. Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in A Modern Constitutional Democracy* (1987).

¹⁷ E.g. Marion Clawson, *The Concept of Multiple Use Forestry*, 8 Env'tl. L. 281 (1978). Clawson also served as director of the Bureau of Land Management from 1948-1953, during which time he has been credited with laying a "foundation for future conser-

(RPA).¹⁸ The RPA envisioned Forest Service resource management algorithmically, a set of logical rules that distribute system-wide objectives to ranger district decisions. Yet, Wilkinson has noted that local people have “knowledge, expertise, and a lot at stake” in federal land decision-making.¹⁹ And, “federal agencies are fraught with inefficiencies and bad incentives.”²⁰

On the other hand, granting control over public lands to states or local communities would close off too many options for future generations and narrow the scope of benefits. Wilkinson adamantly opposes this kind of devolution as a loss of “far too much: too much openness, too much freedom, too much protection against the thunder heads that lie thick above our children’s heads, and even darker ones that lie above our grandchildren’s.”²¹

Navigating between these positions, Wilkinson has called for a more nuanced bioregionalism responsive to a wide range of local and national values through deliberative democracy.²² It is a kind of local home building. In fact, this idea has a deep historical taproot. But for a quirk of fate, management decisions about most of the federal lands would actually be administered through a “Home” rather than “Interior” Department. In 1849 a lame-duck President Polk signed the law authorizing three cabinet departments to augment the existing set, State, Treasury, and War, that had been in place since the Washington Administration.²³ I remember Professor Wilkinson quizzing his public land law class in 1986 about which president presided over the largest increase in U.S. land area. As I recall, no

vation management” of the kind required by FLPMA in 1976. James R. Skillen, *The Nation’s Largest Landlord: The Bureau of Land Management in the American West* 33 (2009).

¹⁸ Pub. L. No. 93-378, 99 Stat. 476 (1974).

¹⁹ *The Public Lands and the National Heritage* at 500.

²⁰ *The Public Lands and the National Heritage* at 500.

²¹ *The Public Lands and the National Heritage* at 500. Nonetheless, advocating devolution of federal land management to states remains an electoral boon for politicians, such as Utah Senator Mike Lee. Fischman & Williamson, *The Story of Kleppe v. New Mexico: The Sagebrush Rebellion as Un-Cooperative Federalism*, 83 U. COLO. L. REV. 123 (2011).

²² *An Ethic of Place* is Wilkinson’s seminal contribution to the idea of bioregionalism in the law. Cass Sunstein promoted the rise of deliberative democracy theory in the legal literature with *Interest Groups in American Public Law*, 38 *Stanford L. Rev.* 29 (1985). The political science literature has developed both the theory and practice of deliberative democracy into a rich sub-field. See, e.g., John S. Dryzek, *Deliberative Democracy and Beyond* (2002); *Deliberative Systems* (Parkinson & Mansbridge eds. 2012). See text at *infra* notes x-y on deliberative democracy.

²³ Henry Barrett Learned, *The Establishment of the Secretaryship of the Interior*, 16 *AM. HISTORICAL REV.* 751 (1911). Three days later, fresh from his inauguration, President Taylor nominated the first secretary. Henry Barrett Learned, *The Establishment of the Secretaryship of the Interior*, 16 *AM. HISTORICAL REV.* 751, 770 (1911).

student correctly identified the one-termer James Polk.²⁴ The new federal territories considerably intensified the need for coordinated administration of public land law, which had been divided among the existing three departments, all of which had little interest in the subject. Congress responded with that 1849 statute entitled “An Act to establish the Home Department.”²⁵ Perhaps Wilkinson would urge us to revive that name.²⁶ For his conception of public land law is to view land, the places, as homes. Like all homes, the people who dwell in them can see things easily missed by the visitor, qualities animated by stories and experiences. For instance, Wilkinson understands Ash Meadows National Wildlife Refuge through the stories of Pauline Estevez,²⁷ and Camp Creek through the penetrating observations of Wayne Elmore.²⁸

“Sense of place” is a term commonly used to describe the humanities-infused, literary style of writing that Wilkinson increasingly turned to in the past two decades as he labored to infuse the home concept into public land law. Wilkinson signaled this shift in scholarship as early as 1987 with his “critical bibliography” of literary and historical sources of the roots of “the law of the American West.”²⁹ The sources described by Wilkinson are as important to understanding the old rules of open access as they are to the current armed stand-offs over grazing. In fact, Wilkinson claims that the “regular flashes of contentiousness” help distinguish the West as a distinct place.³⁰

As a Michigan Law Review editor at the time, I remember puzzling over Wilkinson’s bibliography manuscript, which proceeded like nothing else I’d read before in a law journal. We at the law review weren’t sure what it meant, but we sensed it was important. In retrospect, I understand it was a declaration of the legitimacy of a new set of sources to understand public land law. Wilkinson has built upon that foundation ever since. It was also a bold manifesto that there could be a “law of the American

²⁴ This little historical digression is part of my tribute to Wilkinson, who conveyed to me the importance (and delight) of history in understanding public land law.

²⁵ Ch. 108, 9 Stat. 395 (1849). The idea of a Home or Interior department dates to the era of the constitutional convention. Henry Barrett Learned, *The Establishment of the Secretaryship of the Interior*, 16 AM. HISTORICAL REV. 751, 752 (1911). The legislative debates in the 1840s over establishment of a new department framed the issue in terms of the relative roles of states and the federal government. *Id.* at 768 (quoting Senator Calhoun of Georgia, troubled by any expansion of centralized power, exclaiming “there is something ominous in the expression ‘The Secretary of the Interior.’”)

²⁶ Alas, the 2002 Homeland Security Act took the name in a different direction. Pub. L. No. 107–296, 116 Stat. 2135 (2002).

²⁷ *Listening to All the Voices* at 945.

²⁸ *Crossing the Next Meridian* at 294.

²⁹ Wilkinson, *The Law of the American West: A Critical Bibliography of the Non-Legal Sources*, 85 MICHIGAN LAW REV. 953 (1987).

³⁰ *An Ethic of Place* at 401 (actually, the South shares the distinction for violence, which bolsters Wilkinson’s claim in the *Law of the American West* that the South is the only other region with such a distinctive character).

West.” I am still not entirely persuaded that such a law exists,³¹ but the article launched a new approach to resolving the perennially fierce disputes over federal land management.³² Along with the subsequent “Ethic of Place” article,³³ it established the tone for a new scholarship of public land law.

Though “sense of place” is the more common bioregional term, I think “home” better captures the heart of Wilkinson’s work on place and people. For it is “home” where we take “the time to learn the possibilities of place.”³⁴ Deeply understanding a place³⁵ through time is what Wilkinson argues we need to improve public land management. His bioregionalism insists that all facets of the community respect each other despite their heterogeneity.³⁶ This task of making a home in the landscape is a daunting project best described by Wendell Berry as “the forever unfinished lifework of our species.”³⁷ Wilkinson noted in 2006 that he had “come to think of lawsuits over public lands as much in terms of place as law.”³⁸ Kirkpatrick Sale, whom Wilkinson has cited as an influence,³⁹ emphasizes the importance of lore which gives meaning to a landscape.⁴⁰ This deep understanding of place distinguishes Wilkinson’s view from the decentralizers, who generally do not condition devolution of power on some assurance of understanding or demonstrated sustainability over time.

I have always thought that the BLM suffers from not having named units like the other public land agencies. Wilkinson’s attention to the long-neglected environmental, recreational, and (yes) spiritual value of the BLM properties comes from his perception that they are places with their own legacy and stories.⁴¹ While the named national monuments, national conservation areas, and areas of critical environmental concern have started to remedy this shortcoming, there are vast expanses of un-named BLM areas. They are the lost places with fewer national advocates than the national parks, national forests, and national wildlife refuges. A place without a name is a home without an address. That places require specific

³¹ Wilkinson’s body of work also incorporates contradictory notions. E.g. Charles F. Wilkinson, *The Field of Public Land Law—A Ten-Year Retrospective*, 10 *PUBLIC LAND L. REV.* 19, 20 (1989) (“the future of the West is a national, not a regional matter, for our nation has always lodged many of its best dreams in the West”).

³² It also provided students of public land law, myself included, with a hefty summer reading list.

³³ *An Ethic of Place*.

³⁴ Sale at 173.

³⁵ Sale at 42.

³⁶ *An Ethic of Place* at 407.

³⁷ Wendell Berry, *Home Economics* 138 (1987).

³⁸ Wilkinson, *Listening to All the Voices, Old and New*, 83 *DENVER U. L. REV.* 945, 945 (2006).

³⁹ *The Eagle Bird* at 140; *An Ethic of Place* at n.9.

⁴⁰ Sale at 115.

⁴¹ Wilkinson, *Fire on the Plateau*.

names emerges from Wilkinson's appeals to attend to the "particularity" that animates the land.⁴² It is this principle of bioregionalism that leads Wilkinson to applaud Judge Karlton's ridicule of the Forest Service roadless area study that reduced major features of an area to highly generalized descriptions such as "mountain" or "river." One can hypothesize how the Grand Canyon might be rated: "Canyon with river, little vegetation."⁴³

It is not that "canyon with river, little vegetation" is inaccurate. Instead, Wilkinson's key point is that it misses what makes the canyon important: human culture and people's souls. Whether making the Grand Canyon a home or a civic monument of reflection and contemplation,⁴⁴ it is the people who bring meaning to the landscape when they make it home.⁴⁵

Crossing the Next Meridian, Wilkinson's 1992 book, popularized the apt "lords of yesterday"⁴⁶ moniker for the old laws that still influence resource management in the West.⁴⁷ It is probably Wilkinson's most widely adopted idea. My students tell me they remember the phrase above all others long after they take my public land law class. The book is also significant for organizing its discussion of public land law around place-based case studies. But they are case studies centered on *people* as the focus of concern.⁴⁸ Yes, the places are grand, but they are important for inspiring the people who live and work there. The central focus on people who make a place home distinguishes Wilkinson's work from de-centralizers and wilderness warriors who focus on efficiency or pure adventure rather than people.⁴⁹

While Wilkinson ultimately endorses planning as the path to sustainability,⁵⁰ he is careful in his lawyerly manner to distinguish his proposal from technocratic forms of planning (such as the timber harvest "FORPLAN" of the 1970s and '80s)⁵¹ less oriented toward public participation.

⁴² Listening to All the Voices at 950 & 960 (citing as an example of "particularity" Edward Abbey's "vivid descriptions of desert plants, animals, minerals, air, and land formations.")

⁴³ The Field of Public Land Law—A Ten-Year Retrospective at 20 (quoting *California v. Bergland*, 483 F. Supp. 465 n.22 (E.D. Cal. 1982)).

⁴⁴ Joseph L. Sax, *Mountains Without Handrails* (1984).

⁴⁵ Wendell Berry, *Home Economics* 138 (1987).

⁴⁶ His scholarship began focusing on the beautiful expression "lords of yesterday" in 1988 with *An Ethic of Place* at 404. I recall the term from his teaching in 1986.

⁴⁷ Charles F. Wilkinson, *Crossing the Next Meridian* (1992).

⁴⁸ There are flashes of an even broader conception of community in Wilkinson's work, along the lines of including "animals as part of the community within which we live. Even if we stop short of recognizing rights in these animals, we should nevertheless accord them independent respect." *An Ethic of Place* at 409.

⁴⁹ *An Ethic of Place* at 405.

⁵⁰ *Crossing the Next Meridian* at 300.

⁵¹ Randal O'Toole, *Reforming the Forest Service* 54-55 (1988).

When I say planning, I mean it in the broadest sense: the process of a community coming together; identifying problems; setting goals—a vision—for a time period such as twenty or forty years; adopting a program to fulfill those goals; and modifying the program as conditions change. [Sensible yet visionary planning] ... can open our minds to the possibilities for our communities—our neighborhoods, schools, businesses, environment, and culture—so that we can build flexible arrangements⁵²

In other words, places arise from people creating homes out of the landscape.

Wilkinson knows that people need to earn a living, but distinguishes cut-and-run operations as “for business, not living.”⁵³ Planning and decentralization are good only to the extent they facilitate that process. Make no mistake, the process is vague and messy.⁵⁴ That makes it indelibly human: in Wilkinsonian bioregionalism, people figure as important as the physical landscape.⁵⁵ Wilkinson attempts to thread the needle by declaring that the “ethic of place attempts to pull out the best in us but it does not purport to be all things to all people.”⁵⁶ Wilkinson believes that consensus rather than winner-take-all litigation is the preferred approach to bioregional planning.⁵⁷ Above all, he envisions planning as a creative, endogenous exercise that both reflects and reconstitutes the community.

If this all sounds vague and in-the-clouds, then Wilkinson’s application of planning for sustainability in the national forests highlights the practical legal consequences of embracing the humanities view of public land management.⁵⁸ Wilkinson is clear that restrictions on judicial review of plans significantly dampen incentives for public participation.⁵⁹ Despite the twin blows to accessing judicial review in *Ohio Forestry Association*⁶⁰ and *Southern Utah Wilderness Alliance*,⁶¹ he continued to advocate re-

⁵² Crossing the Next Meridian at 300.

⁵³ Listening to All the Voices at 949.

⁵⁴ An Ethic of Place at 409 (“dissenting parties often leave angry, determined to undercut the temporary solution bred of combativeness.”) Environmental historian William Cronon makes the point that “home” is where we make a living. William Cronon, *The Trouble with Wilderness; or, Getting Back to the Wrong Nature*, in *Uncommon Ground: Rethinking the Human Place in Nature* 69, 89 (William Cronon ed. 1996).

⁵⁵ An Ethic of Place at 405.

⁵⁶ An Ethic of Place at 405.

⁵⁷ An Ethic of Place at 409. However, contradictions remain in Wilkinson’s views. His exhortation that “federal action should be the product of agreements that come from the ground up” may not be consistent with establishment of the Grand Staircase Escalante National Monument. An Ethic of Place at 410.

⁵⁸ An Ethic of Place at 405 (“this ethic of place calls for reasonably concrete approaches to specific problems and it has a hard edge”).

⁵⁹ The National Forest Management Act: The Twenty Years Behind, the Twenty Years Ahead, 68 U. COLO. L. REV. 659, 675 (1997).

⁶⁰ *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726 (1988).

⁶¹ *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004).

forming national forest planning. His service on the Committee of Scientists is reflected in the report embracing “intangible qualities, such as beauty, inspiration, and wonder” as among the benefits of national forests.⁶² And, he insisted upon their inclusion in the national forest planning standards for judging sustainability, which now include social factors.⁶³ This is a significant change for an agency that frequently viewed sustainability as sustained yield of outputs. Wilkinson defended the vagueness of these intangibles by insisting that, like “free speech,” the broad formulation can guide conduct through symbolism.⁶⁴ The vague notions gain specific meaning through repeated application to particular places:

Read the Northwest Forest Plan and talk to the many people who are affected by it. They may or may not like the Plan, but I doubt that they will say that sustainability or ecosystem management are vague and abstract in the context [of the place.]⁶⁵

Spoken like a true American law professor, harkening to case-law reasoning, which starts from the particular and builds toward the general in order to give meaning to concepts.⁶⁶ Wilkinson’s scholarship models how the legal method can contribute to the puzzles of public land management.

III. TIME & CULTURE

Indian law also clearly influenced Wilkinson’s emphasis on the cultural dimension to resources law. As I have pointed out elsewhere, one of the distinguishing features of the Coggins & Wilkinson⁶⁷ reformation of public land law is the inclusion of “resources” generally, not limited to *natural* resources.⁶⁸ Wilkinson regards the term “cultural resources” as lacking passion and depth.⁶⁹ I suspect his judgment grows mostly from the

⁶² A Case Study at 312; Charles F. Wilkinson, Land Use, Science, and Spirituality: The Search for a True and Lasting relationship with the Land, 21 PUBLIC LAND & RESOURCES L. REV. 1, 11 (2000) (both citing The Committee of Scientists, Department of Agriculture, Sustaining the People’s Lands: Recommendations for Stewardship of the National Forests and Grasslands Into the Next Century (1999)).

⁶³ 36 C.F.R. § 219.8(b).

⁶⁴ The National Forest Management Act: The Twenty Years Behind, the Twenty Years Ahead, 68 U. COLO. L. REV. 659, 679 (1997).

⁶⁵ *Id.*

⁶⁶ Edward H. Levi, An Introduction to Legal Reasoning 27 (rev. ed. 2013, 1949).

⁶⁷ Federal Public Land and Resources Law (1st ed. 1981).

⁶⁸ Robert L. Fischman, What is Natural Resources Law?, 78 U. COLO. L. REV. 717, 737 (2007).

⁶⁹ Wilkinson, Land of Fire, Land of Conquest: The Colorado Plateau and Some Questions for Its Future, 13 J. OF ENERGY, NAT. RES. & ENVTL. L. 337, 367 (1993) (calling it a “pale term”).

“resource-ist,” utilitarian approach suggested by the term.⁷⁰ Wilkinson criticizes the land-management agencies for failing to grasp the importance of ancient places and cultural landmarks as co-equals with the more traditional values, such as energy development.⁷¹ He advocates a strong commitment to the historic and cultural markers of the past because he sees how they can instruct us today in sustainable use. They help build home from mere place. This temporal dimension resonates with the modern literary trends of western literature.

For instance, Ivan Doig, an author whom Wilkinson commends to scholars,⁷² grapples deeply with the role of time in establishing place. In *Winter Brothers*,⁷³ Doig considers his connection to a nineteenth century diarist and lawyer, James Swan. Like the bioregionalists Wilkinson approvingly describes, Doig declares that he lives in a community of time as well as of people.⁷⁴ Doig is attracted to the West “not because it is the newest region of the country but because it is the oldest, in the sense that the landscape here—the fundament, nature’s shape of things—more resembles the original continent.”⁷⁵ Wilkinson’s writings reflect this same connection to the past through landscape and people’s stories. It is evident in his enchantment with the Colorado Plateau and the petroglyphs left behind by ancient peoples.⁷⁶ Wilkinson’s bona fides as a serious scholar and lawyer offer permission and encouragement for the rest of us to consider the significance of our sense of wonder as we gaze over Monument Valley.⁷⁷ The great puzzle is how to fit it into a relevant category of law. Doig thinks that connections to older times help deepen our roots in a place and understand our heritage. Wilkinson grapples with the ways that “law alters ownerships by responding to . . . voices.”⁷⁸ His ear for those voices and the stories they animate launched a new way to conceive of reforming public land management.

“[W]hen land is at issue, culture can be every bit as real as any timber sale, open-pit mine, or ski area.”⁷⁹ To his everlasting credit Wilkinson—the Native American advocate—listens also to newer voices in shaping a

⁷⁰ Robert L. Fischman, *What is Natural Resources Law?*, 78 U. COLO. L. REV. 717, 737 (2007).

⁷¹ Wilkinson, *Land of Fire, Land of Conquest: The Colorado Plateau and Some Questions for Its Future*, 13 J. OF ENERGY, NAT. RES. & ENVTL. L. 337, 367 (1993).

⁷² Wilkinson, *The Law of the American West: A Critical Bibliography of the Non-Legal Sources*, 85 MICHIGAN LAW REV. 953, 984 (1987).

⁷³ Ivan Doig, *Winter Brothers* (1980). Another one of my mentors at the University of Michigan Law School, Mark Van Putten, introduced me to this book.

⁷⁴ Doig at 4.

⁷⁵ Doig at 120.

⁷⁶ E.g., Wilkinson, *Land of Fire, Land of Conquest: The Colorado Plateau and Some Questions for Its Future*, 13 J. OF ENERGY, NAT. RES. & ENVTL. L. 337, 343 (1993).

⁷⁷ *Id.* at 343.

⁷⁸ *Listening to All the Voices* at 951.

⁷⁹ *Id.*

bioregional culture. This sits somewhat uncomfortably with the “cultural conservatism” of the West that is part of the romantic heritage valued in public land law.⁸⁰ Ultimately, I think Wilkinson reconciles these disparate voices through the reality that new and old, environmentalists and Mormon ranchers, need each other to restore the land.⁸¹ Such a project is difficult, lengthy, and cannot have a pre-determined outcome. But it is the kind of work that Wilkinson endorses and participates in. His research has always reflected is instinct to jump into the game as a facilitator⁸² or advisor.⁸³ It also influenced the Forest Service planning rule defining social and economic sustainability party in cultural terms.⁸⁴ Yet work remains to pilot the role of culture. The Mormon ranchers of Arizona mostly disagree that reintroduction of wolves to that state is “a powerful moral statement” or “a vibrant symbol of what a great and good people can do.”⁸⁵ Like the reformation of the Forest Service, Wilkinson provides us with “signs that point in opposite directions.”⁸⁶ A good scholar leaves behind pitons for the next generation.

Organizing public land management around a “home” department or concept appeals to a deep sense of place. But balance requires undomesticated experiences of foreignness and peril. The geographer Yi-Fu Tuan calls this dialectic “space and place.”⁸⁷ If everywhere is home (“place”) then there is nowhere (“space”) to be a stranger, an outsider, a cowboy. Place may lose its meaning if it is not surrounded by a more perilous space for exploration, testing, and adventure. Wilkinson is no proponent of domestication of our federal lands. His meditations on Utah’s Kaiparowits Plateau make it clear that wildness and remoteness are cherished values in the landscape.⁸⁸ In that respect, time may serve as the space that counterbalances the place of culture.

Limits are important in defining a place. Obviously, geographic limits form place boundaries. But, when Doig despairs that “limits” is not a

⁸⁰ An Ethic of Place at 424.

⁸¹ Listening to All the Voices at 945.

⁸² *E.g.* Listening to All the Voices at 945 (mediating a dispute between the Park Service and the Timbisha Shoshone Tribe).

⁸³ Tony Davis, Bush Camp Backpedals on Toppling Monuments, High Country News (Sept. 25, 2000) (“In 1996, Wilkinson helped Interior Department Solicitor John Lesly draft Clinton’s proclamation creating the Grand Staircase-Escalante National Monument in Utah.”). <http://www.hcn.org/issues/186/6034>.

⁸⁴ A Case Study in the Intersection of Law and Science at 307 (serving on the NFMA Committee of Scientists); 36 C.F.R. § 219.8(b).

⁸⁵ Land Use, Science, and Spirituality at 11-12.

⁸⁶ Charles Wilkinson, Heeding the Clarion Call for Sustainable, Spiritual Western Landscapes: Will the People be Granted a New Forest Service?, 33 PUBLIC LAND & RESOURCES L. REV. 1, 45 (2012).

⁸⁷ Yi-Fu Tuan, Space and Place: The Perspective of Experience (1977).

⁸⁸ The Public Lands and the National Heritage at 504; Land of Fire, Land of Conquest: The Colorado Plateau and Some Questions for Its Future, 13 J. OF ENERGY, NAT. RES. & ENVTL. L. 337, 367 (1993).

word commonly recognized in the West, he is lamenting the lack of sustainability in land use.⁸⁹ Wilkinson's work on the Forest Service planning rule contributes to a growing recognition of limits. Appreciating the heart of Wilkinson's devotion to the Colorado Plateau or the Rogue River Watershed requires understanding that public land law is all about setting limits, which—in turn—define who we are through self-restraint. The wilder spaces on public lands can delimit-by-contrast places of home. Putting aside the carrying capacity of land for economic use, we need places to test ourselves, to come of age, to introspect, and to touch the sublime. Wilkinson's scholarship on public land law recognizes that culture is central to define these limits. He sketches an alternative to the resource-ism that would program decisions through algorithms that sum merely preferences. The role of culture is messy but necessary if public lands are to shape our better natures rather than just satisfy our immediate wants.⁹⁰ As Wendell Berry simply stated, the "only thing we have to preserve nature with is culture."⁹¹ Iris Marion Young has argued that the symbols, meanings, and stories that help construct culture deserve "distinct consideration in discussions of social justice" beyond mere distributional equity.⁹² Wilkinson's work adds strength to her calls for deliberative processes that ensure that voices of marginalized groups are considered in decision-making. Oppression and "de-politicizing the process of public policy formation"⁹³ by allocating decision-making to welfare economists can silence self-expression of minority cultures even where the members have achieved material equality. Wilkinson concedes that cultural differences make deliberative decision-making difficult but no less valuable.⁹⁴ Respect, he argues, will go a long way toward building stronger community plans for sustainability.⁹⁵ Young and other political philosophers would call it justice.

IV. WONDER & JUSTICE

Aristotle related wonder to a moral disposition giving rise to philosophy, what we might call investigation triggered by curiosity.⁹⁶ Wilkinson's scholarship reflects this response to the puzzling patterns displayed by law and its effects. The lived experience of the law—especially the application of natural resources statutes and regulations to particular

⁸⁹ Doig at 141.

⁹⁰ Mark Sagoff, *The Economy of the Earth* (1988) (exploring the difference between endogenous processes in which deliberation shapes the outcomes of political debates, and exogenous environmental policies designed to satisfy wants).

⁹¹ Wendell Berry, *Home Economics* 143 (1987).

⁹² Iris Marion Young, *Justice and the Politics of Difference* 23 (1990).

⁹³ *Id.* at 10.

⁹⁴ *The Eagle Bird* at 137.

⁹⁵ *The Eagle Bird* at 145.

⁹⁶ Aristotle, *Metaphysics*, book 1, §982b

places giving rise to a “law of the land”⁹⁷—is difficult to generalize. It is even difficult to study, requiring painstaking parsing of plans, field visits, and interviews. Therefore, few legal scholars have bothered to investigate the qualitative outcomes (one might say “stories”) that result from application of public land law. Wilkinson, though, breathes life into the “law of the land” by developing narratives that show how rules affect and shape people’s lives.⁹⁸ Wilkinson himself possesses the moral disposition to participate in a pilgrimage along Oregon’s Illinois River, journeying to “a place to shake your head in wonder at the beauty.”⁹⁹ It then leads him to consider just what the law should do about such a treasure. Wilkinson has the clear-mindedness and courage to describe his approach as giving romanticism a role to play in shaping the management of federal lands.¹⁰⁰

A romantic form of wonder has long animated aspects of public land law. Perhaps the most influential American legislation in world conservation is the 1872 act establishing Yellowstone National park, in part to preserve “natural curiosities or wonders.”¹⁰¹ This kind of ineffable wonder challenges the technocratic approach to valuing natural resources. It is beyond our ken to untangle which aspects of this wonder are programmed into human genes as “biophilia” and which are cultural artifacts. But, wonder is widely credited for motivating great scientists¹⁰² as well as and lawmakers.¹⁰³ Once “curiosity is sparked,” people will seek the facts and greater understanding.¹⁰⁴ Wilkinson’s work shows reverence for the understandings delivered by science,¹⁰⁵ even as they may contradict venerable cultural understandings.

As a teacher, though not to the exclusion of covering doctrine, Wilkinson certainly emphasized the importance “of awakening the senses rather than memorizing facts.”¹⁰⁶ Whether an inspirational story about the

⁹⁷ Robert L. Fischman, *Leveraging Federal Land Plans Into Landscape Conservation*, 6 GEO. WASH. J. ENERGY & ENVTL. LAW, no. 3, Winter 2016, 46, 46.

⁹⁸ Daniel J. Philippon makes a similar argument for the role of the humanities in sustainability studies. He claims that literary and cultural narratives provide meaning and perspective. Daniel J. Philippon, *Sustainability and the Humanities: An Extensive Pleasure*, 24 AMERICAN LITERARY HISTORY 163 (2012). Wilkinson is the chief demonstrator of that notion in public land law.

⁹⁹ *Listening to All the Voices* at 957.

¹⁰⁰ *An Ethic of Place* at 424.

¹⁰¹ 17 Stat. 32 (1872).

¹⁰² Richard Dawkins *Unweaving the Rainbow* (1998); E.O. Wilson, *Naturalist* (2006).

¹⁰³ E.g. 17 Stat. 32 (1872).

¹⁰⁴ Lisa H. Sideris, *The Secular and Religious Sources of Rachel Carson’s Sense of Wonder*, in *Rachel Carson Legacy and Challenge* (Lisa H. Sideris and Kathleen Dean Moore eds. 2008) (citing Rachel Carson, *The Sense of Wonder* (1965)).

¹⁰⁵ *Crossing the Next Meridian* at 294.

¹⁰⁶ Lisa H. Sideris, *The Secular and Religious Sources of Rachel Carson’s Sense of Wonder*, at 245. Wilkinson applies this to teaching in *The Eagle Bird* at 15 (“Entering

Siletz people, Theodore Roosevelt, or the primeval forest of the Menominee Reservation, Wilkinson subscribes to the importance of holistic wonder. As a scholar, Wilkinson opened the door for the rest of us to describe the real, felt stakes in dispute. For instance, in recounting landmark litigation over federal reserved water rights at Devil's Hole National Monument,¹⁰⁷ he puts aside the popular understanding of the dispute as ranchers versus fish. Instead, he relates how real people value Devil's Hole, not just for recreation, but also for beauty¹⁰⁸ and "desert magic."¹⁰⁹ And even with "love."¹¹⁰

As a writer, Wilkinson is capable of majestic language, no better manifest than in the title essay of *The Eagle Bird*. In that essay, he grapples with "bloodless" legal writing that fails to capture the wonder of the land and biota it attempts to manage:

The law is the place, above all others, where our nation has chosen to lodge many of our highest ideals, our best dreams, our deepest passions. Still, laws almost always are flat, lifeless.¹¹¹

Other than section 2 of the Wilderness Act, which he discusses as the exception that proves the rule, Wilkinson criticizes law-drafting as too crabbed to identify the wonders that inspire conservation of the public lands. Rising to his own challenge, Wilkinson does much to raise awareness in the legal literature about places (especially BLM lands on the Colorado Plateau) where wonder is more subtle than Yellowstone.¹¹² He is correct that a word like "majesty" is as important—and no less clear—than "due process."¹¹³ Indeed, "how is it possible to be precise about eagles without knowing of majesty?"¹¹⁴ Similarly, Wilkinson defends "beauty, imagination," and even "cultural conservatism" as important concepts on par with "the market" or "the environment."¹¹⁵ All of these notions of our highest aspirations ultimately should lodge in the law, even if existing statutes seldom measure up.¹¹⁶ Wilkinson's scholarship raised the importance of public natural resources law as a vehicle for expressing collective aspirations.

law students begin sentences with 'I feel.' By graduation they respond with 'it depends.'").

¹⁰⁷ *Cappaert v. United States*, 426 U.S. 128 (1976).

¹⁰⁸ *The Law of the American West* at 955; *Listening to All the Voices* at 947; *An Ethic of Place* at 424.

¹⁰⁹ *Listening to All the Voices* at 947.

¹¹⁰ *Id.* at 947 & 957.

¹¹¹ *The Eagle Bird* at 10.

¹¹² *Fire on the Plateau* (1999).

¹¹³ *Eagle Bird* at 14.

¹¹⁴ *Id.*

¹¹⁵ *An Ethic of Place* at 424.

¹¹⁶ *Id.* at 425.

In his influential essay on the limitations of wilderness preservation as an expression of an ethic of place, William Cronon argues that wilderness is a place that invokes wonder as a state of mind.¹¹⁷ By now, it should be clear that Wilkinson anticipated Cronon's separation of wonder from wilderness. Cronon argues that cultivation of wonder for places that fail to meet legal wilderness definitions is essential to understand the role of humans in nature and to develop an appropriate environmental ethic. Unless we experience the wonders of nature even at home, we will be trapped in a dualist world where nature is "out there," away from us.¹¹⁸ Wilkinson recognized this imperative all along, and found "the striking power of place" to force upon us wonder across federal land categories, not just in parks or wilderness areas.

While soaring in his scholarship, Wilkinson keeps his legal-eagle sights also on the role of lawyers as advocates. For instance, he makes the case for the practical as well as the philosophical value of words evoking wonder:

A federal judge can more easily see the force behind the statute when he or she is alerted by bright words. It is not hard to mistake a call to arms Administrators, too, know that law is built on words, and they will squirm at vivid words from Congress; and sometimes they may make different decisions.¹¹⁹

Building on Patricia Limerick's work,¹²⁰ Wilkinson directs scholarly attention toward the way law implicitly distributes power through geographic decisions in accordance with the seemingly bland commands of statutes. He unmaskes the powerful forces of cultural dominance animating public land law.¹²¹ Along the lines of "environmental justice" scholarship, Wilkinson worried about the distributional inequities of pollution and sacrifice areas. His narratives of the "Big Buildup" during and after World War II in the West¹²² highlighted the industrial legacy of federal planning.¹²³ That legacy generated tremendous national benefits.¹²⁴ But, the flooding of sacred tribal areas, the despoliation of surface coal mining, and the contamination from uranium development also hurt people.¹²⁵ The

¹¹⁷ William Cronon, *The Trouble with Wilderness; or, Getting Back to the Wrong Nature*, in *Uncommon Ground: Rethinking the Human Place in Nature* 69, 88 (William Cronon ed. 1996).

¹¹⁸ *Id.*

¹¹⁹ *Eagle Bird* at 15.

¹²⁰ Patricia Limerick, *The Legacy of Conquest* (1987).

¹²¹ *Eagle Bird* at 113.

¹²² Charles Wilkinson, *Fire on the Plateau* 185 (1999); Charles Wilkinson, *Listening to All the Voices, Old and New: The Evolution and Land Ownership in the Modern West*, 83 *DENVER U. L. REV.* 945 (2006).

¹²³ *Fire on the Plateau* at 185 ("The Big Buildup of the Colorado Plateau eclipsed virtually every other industrial effort on earth.")

¹²⁴ *Id.* at 183 & 213-14.

¹²⁵ *Id.*

costs, often on public lands or lands managed by the United States in trust for tribes, continue to be borne locally and inequitably. Fair-minded fellow that he is, Wilkinson is clear that environmental protection can also impose disparate harms:

[we need] to appreciate the inequities. Those jolting changes affect some individuals disproportionately, and many loggers, ranchers, and commercial fishers have been neither amused nor comforted by the fact that their communities have rebounded in the recreation economy, for which they have no interest or training.¹²⁶

Wilkinson gave voice to the people bearing those costs and offered lessons as timely as ever. Today, climate change has already created losers in the global build-up: from residents of Kivalina, Alaska to citizens of Pacific Island nations.¹²⁷ How will the law represent American justice this time around?

V. CONCLUSION

Charles Wilkinson established unimpeachable academic credentials with comprehensive treatments of many of the key developments of public land law from the 1970s. He articulated key themes that seem obvious only in retrospect. That is an accomplishment worth celebrating at any law school. But then he transformed his scholarship into something with greater affinity to the humanities. Legal scholarship had long made room for social science. Wilkinson opened scholarly discourse on public land law to the humanities. Wilkinson found a way to incorporate the values of for bioregionalism, home, time, culture, wonder, and sense of place into legal scholarship. Through books, essays, and articles, he reinterpreted what it means to pursue equity and justice in public land law.

I believe that, in legal scholarship, it is more important to ask the right questions, to frame the normative inquiry, than it is to influence courts or legislatures. I have great respect for the law reformers and their concrete role in positive law. But, Wilkinson's research will endure as great public land law scholarship because it transformed our *inquiries* about how the law can best reflect our national aspirations. The first phase of his work focused attention on a public interest as the overarching concern of public land law, supplementing the formerly dominant private rights analysis. The second phase connected new ideas to the relevant legal questions about how to gauge the public interest. Saying that federal agencies must

¹²⁶ Listening to All the Voices at 948.

¹²⁷ *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (Clean Air Act precludes federal common law nuisance claim by a city damaged by the effects of climate change).

serve the public interest is an empty slogan without methods and standards for determining the public interest. So, Wilkinson undertook a multi-decade project to reimagine the procedural and substantive values of the public interest. He offered an alternative to the neo-liberal, welfare-economic tools favored by federal administrators for cumulating private preferences into a public interest. His deliberative approach to the public interest is as much a home- or place-building tool as it is a method to incorporate local culture and knowledge into public land management. And, it represented a significant break with traditional public land law scholarship.

As a former student, I am grateful for Wilkinson's inspiration. As a public land law scholar, I am grateful for Wilkinson's pioneering work because it elevated the importance of everything I and other public land commentators write. It raised the status and impact of my research because Wilkinson connected public land law to broader themes of interest to everyone who thinks seriously about American law. Public land law scholarship benefits from connections to the legal discourse on deliberative democracy, distributional justice, cultural diversity, law & literature, and sustainability. Otherwise, it becomes an echo chamber preoccupied with ever more recondite issues of little interest beyond the circles of specialists.

Persuading in a literary style, connecting to narratives of nature and spirituality, and gaining recognition for non-utilitarian approaches is more difficult to attain for most of us than cranking out another survey of cases or critique of regulation. That may limit Wilkinson's influence because few law professors have the wit, wisdom, or courage to follow his lead. But, even if we do not spot a successor in the literature, Wilkinson's scholarship will continue to inspire law reformers, and law professors. It demonstrates what a person with real gifts can accomplish when he looks beyond the conventions of legal scholarship. Now that he has revealed to us a vast new legal landscape to explore, it beckons.