

‘A Rich Man’s Paradise’: Constitutional Preservation of New York State’s Adirondack Forest, a Centenary Consideration

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INTRODUCTION

This year marks the hundredth anniversary of the creation of the Adirondack Park,¹ and 1994 will be the centenary of the constitutional protection afforded its state-owned forests.² Today, it is one of the wonders of the Empire State, larger than any park in the contiguous states and the largest wild area east of the Rockies.³ Ownership of the Park is now, as it has been since its founding, split roughly sixty-four between private interests on the one hand and the public on the other.⁴ Private ownership is concentrated,⁵ and much is absentee.⁶ Developmental uses

1. An Act to Establish the Adirondack Park, ch. 707, 1892 N.Y. Laws 1459.

2. The New York Constitution states:

The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.

N.Y. CONST. of 1894, art. VII, § 7.

3. It is larger than "Yellowstone, Yosemite, Grand Canyon, Glacier and Olympic national parks combined." RICHARD A. LIROFF & G. GORDON DAVIS, PROTECTING OPEN SPACE: LAND USE CONTROL IN THE ADIRONDACK PARK I (1981).

4. The state now owns 42% of the land within the Park. See COMMITTEE ON THE ADIRONDACKS IN THE TWENTY-FIRST CENTURY, THE ADIRONDACK PARK IN THE TWENTY-FIRST CENTURY 8 (1990) [hereinafter 21ST CENTURY REPORT].

5. In 1954, about a quarter of the Park was owned by 23 individuals or corporations holding parcels of more than 15,000 acres. MILES J. FERREE & J. DAVIS, FOREST ACREAGE AND TIMBER VOLUME IN THE ADIRONDACK AND CATSKILL REGIONS 4 (1954). By 1970, about 30% of all Adirondack Park land, public or private, was in the hands of some 32 individual or corporate owners of parcels over 10,000 acres. 1 TEMPORARY STUDY COMM'N ON THE FUTURE OF THE ADIRONDACKS, THE FUTURE OF THE ADIRONDACK PARK 26 (1971). Although current figures for holdings over 10,000 acres are not available, the authors of the 21st Century Report conclude that "[a]mong the largest landowners, the figures show a clear trend: more acres held by fewer owners." 21ST CENTURY REPORT, *supra* note 4, at 46. As many as 564 large landowners with holdings over 500 acres own more than one-third of the Park. *Id.*

6. As of 1970, 40% of all Adirondack landowners resided outside the area. 2 TEMPORARY STUDY COMM'N ON THE FUTURE OF THE ADIRONDACKS, THE FUTURE OF THE ADIRONDACKS, THE TECHNICAL REPORTS, rep. 1A, at 55 (1971) [hereinafter TECHNICAL REPORTS].

are limited⁷ and public recreation restricted in the interests of wilderness preservation.⁸ It is, says Philip Terrie, a historian and preservationist, "a park like no other."⁹

Unique as it is even today, the Park's creation in the last quarter of the nineteenth century seems even more surprising. The Park's precursor, the Forest Preserve, was created,¹⁰ and the Park came into being, in the Gilded Age, that era in our historical mythology when the market became the defining instrument of the polity.¹¹ An earlier, more communitarian republicanism had passed; the social welfare state was yet to be born.¹² The great fact of the time was vast and unstoppable economic "concentration and oligopoly"¹³ unlike anything ever seen before, fruitlessly opposed only by those it overbore.

The creation of a park out of economically valuable land was thought improbable by J. Willard Hurst, the dean of American legal historians.¹⁴ Hurst argued that in the Gilded Age, law was not used cre-

7. Since 1973, private development has been limited by a regional form of zoning known as the Adirondack Land Use and Development Plan, administered by the Adirondack Park Agency. N.Y. EXEC. LAW §§ 801-810 (McKinney 1982). That form of zoning was upheld against a home rule challenge, *Wambat Realty Corp. v. New York*, 362 N.E.2d 581 (N.Y. 1977), and against an unconstitutional delegation challenge, *Adirondack Park Agency v. Ton-Da-Lay Assocs.*, 61 A.D.2d 107 (N.Y. App. Div.), *appeal dismissed*, 381 N.E.2d 612, (N.Y. 1978). As yet, no takings challenge has reached the Court of Appeals. For further discussion of the regional plan, see Arthur V. Savage & Joseph Sierchio, *The Adirondack Park Agency Act: A Regional Land Use Plan Confronts "The Taking Issue,"* 40 ALB. L. REV. 447 (1976); Charles G. Buschman, Note, *Preserving Scenic Areas: The Adirondack Land Use Program*, 84 YALE L.J. 1705 (1975); Richard S. Booth, *The Adirondack Park Agency Act: A Challenge in Regional Land Use Planning*, 43 GEO. WASH. L. REV. 612 (1975).

8. The state's policy is to limit mass recreational uses to a few areas. "[R]ecreation . . . will be provided on forest preserve land to the extent that such recreation activities do not detract from the land and associated natural resources . . . [T]he Adirondacks, despite their size and variety, cannot respond to all the recreational needs of the people of New York." TECHNICAL REPORTS, *supra* note 6, rep. 1B, at 23.

The state has historically been slow to provide public access to recreational use of the Park. The first two public campsites for overnight stays were not built until 1920, 28 years after the Park's creation, when \$2500 was appropriated to build fireplaces at a site near Lake George where visitors' open campfires were thought to pose a danger of forest fire. TECHNICAL REPORTS, *supra* note 6, rep. 1B, at 6.

9. Philip G. Terrie, "One Grand Unbroken Domain": Ambiguities and Lessons in the Origins of the Adirondack Park, Address Before the Association for the Protection of the Adirondacks (Sept. 17, 1988), in APA SPEC. REP. NO. 14, Dec. 1988, at 1.

10. Act of May 15, 1885, ch. 283, 1885 N.Y. Laws 482.

11. See MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW AND POLITICS 47-53 (1988). The Gilded Age takes its name from the 1873 Mark Twain and Charles Dudley Warner novel, *The Gilded Age*. 5 THE NEW ENCYCLOPAEDIA BRITANNICA 265 (15th ed. 1990).

12. See Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987).

13. ALFRED D. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 489 (1977).

14. Hurst notes:

Had Congress or [a state] legislature enacted substantial restrictions on private lumbering in the late nineteenth century, probably businessmen would have challenged

actively and protectively with respect to the natural world, but served instead to reinforce the prevailing determination to employ an abundant resource, timberland, in order to secure a scarce one, cash. "That there might be a commonwealth interest in preserving the forest as a self-sustaining productive resource of the general economy was an idea outside nineteenth-century policy concepts, bounded as these tended to be by preoccupation with servicing particularized, money-measured transactions."¹⁵ Law was a reflex of the market and no more.

Thus, says Hurst, it would have been impossible to use the legal system to achieve a nonmarket outcome like forest preservation. Law is so entirely the instrument of large-scale social forces, so much an "instrument or reflection of . . . attitudes and values broadly shared,"¹⁶ that small groups cannot manipulate it, no matter how influential or how determined. The failure to protect the forest was not due to any lack of governmental power, but a "want of imagination or will."¹⁷

Hurst identified the roots of this failure as threefold. First was belief in "creative private will . . . and the private transaction market" as the best place to express that will.¹⁸ Increased productivity was accepted as an unalloyed good. This belief expressed itself in the general application of property and contract doctrines. Clearcutting of forests was tolerated because the fee simple title of lumberers permitted them to determine how their land would be used. The particularity of forest resources was lost in the general application of contract doctrines.¹⁹ Second, society held "a profound, commonly shared public distaste for . . . government as a continuing landlord."²⁰ And finally, there were scientific misconceptions as to the inexhaustibility of the forest and the usability of cleared lands for agriculture.

In examining these factors, it is difficult to say that New York differed considerably from Wisconsin in its citizens' esteem for the free market, dedication to economic growth, or understanding of scientific principles. Yet, the outcome in New York was the preservation of its forestlands and in Wisconsin, their utter destruction. New York State

these in court under the new, emerging Fourteenth Amendment doctrine. In the individualistic temper of the times judges probably would have imposed some substantive limits on such regulation, in the name of due process or equal protection standards.

James W. Hurst, *The Institutional Environment of the Logging Era in Wisconsin*, in *THE GREAT LAKES FOREST: AN ENVIRONMENTAL AND SOCIAL HISTORY* 137, 146-47 (Susan L. Flader ed., 1983) [hereinafter *THE GREAT LAKES FOREST*].

15. JAMES W. HURST, *LAW AND MARKETS IN U.S. HISTORY* 58 (1982) [hereinafter *HURST, LAW AND MARKETS*].

16. *THE GREAT LAKES FOREST*, *supra* note 14, at 137.

17. *Id.* at 140.

18. *Id.* at 150.

19. *Id.* at 151.

20. *Id.* at 144.

placed vast timber resources forever out of reach of the lumber industry by stripping the legislature of control of state land and preserving for public use a vast and beautiful region verging on being consumed. The constitutional provision that the state may not sell or use its Adirondack lands won mass electoral support, despite many attempts by foresters and lumberers to abolish or modify it. Thus, other factors were at work in New York which led to a result contemporaneous with, but very much at variance from, that in the Great Lakes.

Preserving a wilderness patrimony for twenty-first century New Yorkers, the Park's creation seems far-sighted and generous,²¹ an anomalous act of a Gilded Age otherwise known for environmental despoliation like that which led to the consumption of Wisconsin's forests. Despite the power of the lumber industry in a state that had led the nation in timber production, the political process created a large benefit to a diffuse public. A primary question is how this period gave birth to a park, made up from timberlands once privately owned and exploited. A second is how land considered a "natural resource" came to be treasured as "wilderness," protected by constitutional mandate, before there was an environmental movement, indeed before there was an active conservation constituency. The answer lies in the efforts of a small but determined group of wealthy recreationists who succeeded in preserving the Adirondack forest, which would otherwise have been consumed by small-scale logging and timbering. This experience belies the inevitability of environmental destruction as a consequence of a burst of creative energy producing economic growth.

Of course, the preservation of the Adirondack forest was not motivated entirely by altruistic or ethical impulses of the kind likely to be recognizable to today's environmentalist. Instead, self-interest was behind the successful organization to save the northern woods. The creation of the Adirondack Park and the constitutional protection of the Forest Preserve enhanced the recreational value of the great Adirondack estates of wealthy downstaters, a cross section of the social and financial elite of New York and of the country. The Forest Preserve provided Adirondack estate owners with an impenetrable barrier of public lands maintained at public expense, and on which the state paid taxes.²² At the same time, many of those same preserve owners were freed from paying

21. See generally FRANK GRAHAM, JR., *THE ADIRONDACK PARK: A POLITICAL HISTORY* (1978).

22. As of 1960, the state was paying about \$2.5 million to the Adirondack counties in the form of taxes on 2.5 million acres of Forest Preserve land. Roger C. Thompson, *The Doctrine of Wilderness: A Study of the Policy and Politics of the Adirondack Preserve Park* 364 (1962) (unpublished Ph.D. dissertation, Syracuse University). By 1990, the total had increased tenfold. Letter from the State Comptroller, New York State, to Louise Halper (Jan. 17, 1992) (on file with author).

taxes themselves.²³ Thus, protection came at public expense and perhaps at the long-term cost of jobs²⁴ and development of the region for the benefit of its year-round inhabitants.²⁵ In fact, to this day local residents resent state involvement and the Park's very existence.²⁶

The first and second parts of this article examine the exploitation of the Adirondack forest, the groups which sought to limit it, and the means they chose. The underpinnings of the concept of wilderness, central to the aim of preservation, are discussed in the third part, and the fourth part of the article reviews the events which led up to constitutionalization. The fifth section discusses the first judicial enforcement of constitutionalization by the state's highest court. The article concludes that it was possible for the legal system of the late nineteenth century to encompass environmental protection despite the social commitment to an expanding economy and a market regime.

A GLOSSARY OF THE ADIRONDACKS

In discussing the Adirondacks, a few issues of terminology based on the peculiar political and legal history of the region should be made clear at the outset. Thirteen counties form the *Adirondack region*. The region is very roughly a right triangle composing the northern third of New York State. From the apex at Troy, a little north of Albany, two legs of the triangle extend north and west. One leg follows the Hudson River north toward Lake George and Lake Champlain. The other extends west along the Mohawk and Black Rivers, and beyond them to Watertown and Sacketts Harbor at the easternmost point of Lake Ontario. The hypotenuse, running northeast to southwest, is the St. Lawrence River.

23. As of 1969, 300,000 Adirondack acres were exempted from property tax and instead subject to forest yield taxes, deferred until cutting. See N.Y. REAL PROP. TAX LAW § 480 (McKinney 1970). Of the acreage so classified, 90% was owned by 10% of those exempted, largely absentee owners. TECHNICAL REPORTS, *supra* note 6, rep. 6, at 11. They include Finch, Pruyn & Co., Whitney Industries, and International Paper Co., among others. *Id.* at 13.

24. In 1920, about 120,000 people were employed in wood industries in New York State. ARTHUR B. RECKNAGEL, *THE FORESTS OF NEW YORK STATE* 93 (1923); by 1970, fewer than 6000 were so employed. TECHNICAL REPORTS, *supra* note 6, rep. 4, at 39-40 (tbl. 10A).

25. "The level of education attained in the region tends to be lower than in the state. The region is characterized by low income, high unemployment and a high welfare case load." TECHNICAL REPORTS, *supra* note 6, rep. 4, at 20. "Unemployment in the Park is usually one or two percentage points above statewide averages; in some counties the gap is much wider Per capita income is below state levels." 21ST CENTURY REPORT, *supra* note 4, at 29.

26. See, e.g., *Adirondack Park Studies Secession*, DAILY ARGUS (Albany), Nov. 21, 1990, at A10 (reporting that a residents' group sought to join Vermont because "we have no representation" in how the park is operated). Planners of the Park centenary report that residents have been lukewarm; some said there "was no reason to celebrate in 1992 since the Park had become a 'rich man's paradise.'" 1992 *Adirondack Park Centennial*, APA ASSOCIATION NEWS Spring 1990, at 9 (Association for the Protection of the Adirondacks, Schenectady, N.Y.). One person compared the blue line to the Berlin Wall. *Id.*

While the entire area is hilly, criss-crossed by rivers²⁷ and dotted by high lakes, the western half is primarily a plateau from two to three thousand feet above sea level and the eastern half more mountainous with a number of peaks over 5000 feet.

The *Adirondack Park* was created by the legislature in 1892; its boundary is known as the *Blue Line*. All the land within the Blue Line, today about 6 million acres,²⁸ public and private, is part of the Park. As noted above, the land within the Blue Line is about sixty percent privately owned.

The *Forest Preserve*, created in 1885 and, since 1894, protected by a state constitutional mandate that it be kept forever wild, is forestland owned by the state within and without the Blue Line. About 2.4 million Forest Preserve acres are inside the Blue Line and so form part of the Adirondack Park.²⁹

Thus, the Forest Preserve and the Adirondack Park are neither co-extensive nor homogeneous. Most of the Forest Preserve lies within the Park but less than half the Park is publicly owned Forest Preserve land. Only public forestland is covered by the forever wild clause; private land within the Park may be lumbered as its owners wish.

A note about sources is also worthwhile. What Hurst pointed out in regard to Wisconsin's treatment of its forest lands applies to New York as well. Its legal history "resides more in legislative and executive materials than in the [court] Reports, rests about equally in 'public' and in 'private' law, and in both 'public' and 'private' law consists more in policy developed out of routinely handled instances than in policy developed in moments of drama."³⁰ Thus, this discussion, like Hurst's, relies on executive and legislative materials far more than judicial ones.

I

EXPLOITATION OF TIMBER RESOURCES IN THE ADIRONDACKS

Before the Civil War, New York was preeminent as a source of cut timber.³¹ New York ceded its leading position to the Great Lakes Re-

27. No area is more than two or three miles from a stream. Evelyn Dinsdale, *Spatial Patterns of Technological Change: The Lumber Industry of Northern New York*, 41 ECON. GEOGRAPHY 252, 253 (1965).

28. One million acres represents the area of a square approximately 40 miles on each side.

29. 21ST CENTURY REPORT, *supra* note 4, at 2. There are also Forest Preserve lands in the Catskills, but this paper refers only to the Adirondack lands.

30. JAMES W. HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1780-1970*, xi (1970) [hereinafter HURST, *LAW AND ECONOMIC GROWTH*].

31. In 1850, New York was first in the nation in lumber cut; in 1860, second; in 1870, third; in 1880, fourth; in 1890, seventh; by the turn of the century, seventeenth. RECKNAGEL, *supra* note 24, at 28.

gion after the Civil War as railroads, machine technology, and a predominantly flat landscape made the harvest of Great Lakes timber more profitable.³² Although large-scale operations moved westward, technological advances ensured that timber cutting continued and even increased in New York State.³³ New York's wood products industry continued to be important to the state's economy, especially the processing of white pine cut in the Great Lakes, rather than the state's north woods.³⁴

A. *The Conditions of Lumbering in the Adirondacks*

New York State's sale of public lands began in 1784, after the Revolution. Most was sold by 1820.³⁵ The last major sale of public land took place in 1851.³⁶ A generation later, the process of buying it back would begin.

32. Dinsdale, *supra* note 27, at 264-65, 270-72. Many New York State lumberers moved westward and assumed leading roles in the lumber industry there. Sixty percent of the leaders of the Michigan lumber industry in the last quarter of the nineteenth century were from New York. THOMAS COX ET AL., *THIS WELL-WOODED LAND: AMERICANS AND THEIR FORESTS FROM COLONIAL TIMES TO THE PRESENT* 157 (1985) (citing George Engberg, *Who Were the Lumberjacks?*, 32 MICH. HIST. 239 (1948)). The same pattern occurred later as the center of lumbering again moved west and also south. Industry leaders like Frederick Weyerhaeuser took the experience and technological advances gained in exploiting the Great Lakes forest to sites in the Pacific Northwest. By 1910, Wisconsin and Michigan, which had been first and second in the value of timber product in 1900, were replaced by Washington and Louisiana. Charles E. Twining, *The Timber Frontier*, in *THE GREAT LAKES FOREST*, *supra* note 14, at 131.

33. The peak year for Adirondack lumbering was 1905 when about 3.5 million trees were cut and 700 million board feet of lumber produced. JANE E. KELLER, *ADIRONDACK WILDERNESS: A STORY OF MAN AND NATURE* 94 (1980).

34. See COX ET AL., *supra* note 32, at 157.

35. Three major tracts made up what would later become the Adirondack Park. First, the bulk of what turned out to be 1.2 million acres was purchased from the Mohawk nation for a little over 1000 pounds. This was approximately twice as much as was paid to the English king for his permission to close the deal (the land was originally assessed by the purchaser's surveyors, as 800,000 acres). 1 ALFRED E. DONALDSON, *THE HISTORY OF THE ADIRONDACKS* 55 (1921). The Totten and Crossfield Purchase, as it was known, left its mark in the division of the area into fifty 25,000-acre townships, whose numbered designations have been used, though without legal significance, for the past 200 years. This tract escheated to the state after the owners fled to Canada and fought for the Crown in the Revolution. *Id.* at 53-58.

Another 650,000 acres owned by the state in the northern Adirondacks was offered to veterans of the Revolutionary War at low prices, but the vets, attracted by flatter, more fertile land further west, uniformly ignored the offers to buy at a shilling an acre in what became known as the Old Military Tract. Ultimately, all of it was sold to speculators, rather than veterans. D.W. Meinig, *Geography of Expansion, 1785-1885*, in *THE GEOGRAPHY OF NEW YORK STATE* 140, 141 (John H. Thompson ed., 1966).

Finally, the largest single land sale in New York history was the 3.6 million acres known as Macomb's Purchase, after the fur trader who took it on in 1791 at eight pence an acre, and quickly sold out to other speculators, who themselves sold off the townships within it. Macomb got a bargain on his land since adjoining tracts had recently sold for two and three shillings an acre. 1 DONALDSON, *supra*, at 62, 72-73.

36. The state sold an entire township to the Brandreth family. 1 DONALDSON, *supra* note 35, at 60.

Most Adirondack land, with its hilly conditions, was not suitable for farming; many failed speculations testified to that fact. Purchasers of large tracts who hoped to convince immigrants from New England to clear the land and work it did not recoup their investments, because the migrants chose the better farmlands in Ohio and beyond.³⁷ Thus, the forest clearance that attended the spread of agriculture in other parts of the United States never occurred in the Adirondacks, which remained timbered long after forests had disappeared elsewhere in the East.³⁸

The same hilly conditions that defeated farmers also made vast areas of the Adirondacks less than useful as a woodlot. Unless roads or navigable rivers were accessible, hauling timber to sawmills and then lumber to market was difficult and prohibitively expensive. A forest historian has estimated that, in the early part of the nineteenth century, transport amounted to between one-half and three-quarters of total production costs.³⁹ "The cost of the timber . . . was not great compared with transport."⁴⁰ Some sawmills were built in the Adirondacks immediately after the Revolution, but sale for the market beyond the Adirondacks was limited.⁴¹ Local mills served only to cut into lumber that timber felled close enough to be hauled to the mill by oxen. Since the mills were small, it would take some time to clear an area of timber; then the logger would move the mill to another tract and begin logging there.⁴²

But the availability of wood elsewhere in the state, and an English export market for New York lumber and Canadian timber milled in New York, meant that large-scale sawmills did exist and could handle great quantities of nonlocal wood.⁴³ The Albany-Glens Falls region emerged soon after Independence as a major milling center.⁴⁴ The completion of the Hudson-Champlain canal in 1822 and the Erie Canal in 1825 increased the preeminence of the two cities in the lumber trade.⁴⁵

37. Meinig, *supra* note 35, at 149-53.

38. Hurst points out that the assumption that forest clearance was a necessary precondition to the commencement of land use for agricultural purposes was one of the factors that doomed the Wisconsin pinewoods. "The country lost the Great Lakes forest as a continuing source of lumber because public lands disposition went ahead without examining the assumption that the natural destiny of pineland was to be cleared for cereal crops." HURST, *LAW AND MARKETS*, *supra* note 15, at 127. Finally, says another commentator, "public policy and individual heartache . . . came to admit that what the land grew best was, after all, trees." Charles E. Twining, *The Lumbering Frontier*, in *THE GREAT LAKES FOREST*, *supra* note 14, at 121, 129.

39. MICHAEL WILLIAMS, *AMERICANS AND THEIR FORESTS: A HISTORICAL GEOGRAPHY* 170 (1989).

40. *Id.*

41. William F. Fox, *History of the Lumber Industry in the State of New York*, *FOREST, FISH AND GAME COMM'N OF THE STATE OF N.Y.*, SIXTH ANNUAL REPORT 237, 245-46 (1901).

42. *Id.* at 248.

43. *Id.* at 245-46.

44. WILLIAMS, *supra* note 39, at 104.

45. *Id.* at 178. Forest products continued to move by canal at an increasing rate through

If a means could be found to get timber out of the hills, there was an infrastructure of sawmills ready to support large-scale logging in the Adirondacks.⁴⁶ In 1813, the Fox brothers, Warren County lumbermen, began for the first time to float their logs down the Hudson and Schroon Rivers to Glens Falls.⁴⁷ Log-driving, as this method was known, made it possible to bring all the wood cut in the winter to sawmills in the spring when the rain and snowmelt raised river and stream levels.⁴⁸ Log driving, in which thousands of individual logs were floated downstream, was suited to the industrial forms of timber production which the country's great appetite for forest products demanded.⁴⁹

B. State Aid to the Lumber Industry

In the pre-Civil War republic, government intervention for the enhancement of the economy was welcome, particularly with respect to the transportation infrastructure of state economies. "In the first three decades of the century, virtually every state and locality in the nation sought to aid the economy by building roads and encouraging the construction of privately owned turnpikes."⁵⁰ New York State also provided infrastructural aid to its industries,⁵¹ including lumbering. The legislature eased the problems of transporting timber by providing public funds for dam construction on, and rearrangement of the legal status of, important watercourses. Its first such act was to declare the Salmon River (in Columbia County in the Catskills) a public highway, barring riparian

the mid-1880's, while the canals themselves "stimulated lumber production in areas previously inaccessible by navigable rivers." *Id.* at 179.

46. Dinsdale, *supra* note 27, at 257-58.

47. Fox, *supra* note 41, at 248. The author, Col. William Fox, was then Superintendent of Forests and came from a family of pioneer New York lumbermen. The Fox brothers were his grandfather and great-uncle. George N. Ostrander, *The History of the New York Forest Preserve*, 40 J. FORESTRY 301, 302 (1942).

48. Until then, logs had been brought out by poled rafts made up of many logs lashed together. These logs were often the collective product of a winter's logging by a number of families and individuals. But rafting, even more than log driving, was dependent on high water levels. Without high water, it was not at all uncommon for rafts to sit in the mud from one spring flood to the next, with logs warping in the sun, waiting for more water. WILLIAMS, *supra* note 39, at 97-100.

49. "With log driving, . . . hundreds of individual loggers pitched tens of thousands of logs into the river and drove them downstream, then sorted them out at the boom of the sawmill, which demanded a complex cooperative arrangement, particularly over payments . . ." WILLIAMS, *supra* note 39, at 99. Logs were identified, and loggers paid, based on the marks they scratched into the end of the log. Marks were then registered with the town clerks. Col. Fox illustrates several pages of his history with the marks used in the Adirondacks. Fox, *supra* note 41.

50. WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900*, at 13 (1982).

dam owners from lowering water levels in such a way that log rafts could not pass.⁵²

Without more such aid, lumberers would be limited to the margins of the Adirondacks, for no navigable waterways existed in the interior.⁵³ Between 1806 and 1867, the legislature, in derogation of the common law,⁵⁴ declared at least eighteen nontidal, nonnavigable rivers public highways.⁵⁵ As the timber near large rivers was exhausted, loggers moved further inland to rivers that were less affluent; thus, the legislature funded dam construction to create artificial flooding and allow logs to be floated out.⁵⁶ Later, public funds were appropriated for "splash" or "flood" dams to increase stream flow during the crucial spring log drives, thus opening most Adirondack rivers to lumbering.⁵⁷

The legislature also attempted to assist the construction of railroads in the area. In 1848, the legislature incorporated the Sacketts Harbor & Saratoga Railroad and provided financing through use of state lands, allowing the company to buy 250,000 acres of land at a nickel an acre and mortgage the land to raise further funds.⁵⁸ In 1857, it exempted the line from taxation.⁵⁹ There had been earlier attempts to build railroads

52. Act of April 4, 1806, ch. 139, 1806 N.Y. Laws 444.

53. Dinsdale, *supra* note 27, at 253.

54. See, e.g., *Morgan v. King*, 35 N.Y. 454 (1866); *Munson v. Hungerford*, 6 Barb. 265 (N.Y. App. Div. 1848); see also JOSEPH K. ANGELL, *TREATISE ON THE LAW OF WATER-COURSES* 717-28 (6th ed. 1869).

55. These included, in addition to the Salmon, the Raquette and St. Regis rivers. Act of Apr. 5, 1810, ch. 180, 1810 N.Y. Laws 186; see also Act of Apr. 13, 1854, ch. 222, 1854 N.Y. Laws 499 (declaring west branch of the St. Regis River a public highway); Act of Apr. 14, 1860, ch. 394, 1860 N.Y. Laws 672 (declaring east branch of the St. Regis River a public highway); Act of Apr. 15, 1816, ch. 155, 1816 N.Y. Laws 168 (Oswegatchie River); Act of Feb. 5, 1819, ch. 15, 1819 N.Y. Laws 10 (Schroon River); Act of Mar. 16, 1821, ch. 107, 1821 N.Y. Laws 97 (Black River); Act of Apr. 12, 1824, ch. 257, 1824 N.Y. Laws 316 (Grass River); Act of May 13, 1846, ch. 273, 1846 N.Y. Laws 368 (Saranac River); Act of Apr. 17, 1851, ch. 207, 1851 N.Y. Laws 421 (Moose River); Act of June 30, 1851, ch. 327, 1851 N.Y. Laws 628 (Chateaugay River); Act of July 21, 1853, ch. 643, 1853 N.Y. Laws 1225 (Beaverkill River); Act of Apr. 12, 1854, ch. 200, 1854 N.Y. Laws 466 (West Canada Creek); Act of May 9, 1867, ch. 836, 1867 N.Y. Laws 2096 (Deer River).

Norman Van Valkenburgh reads the river improvement laws, in particular the one pertaining to the Raquette as "an attempt to protect the waters" and part of the recognition of the "importance of forests in the matter of water supply." NORMAN J. VAN VALKENBURGH, *THE ADIRONDACK FOREST PRESERVE: A NARRATIVE OF THE EVOLUTION OF THE ADIRONDACK FOREST PRESERVE OF NEW YORK STATE* 18 (1979). However, it seems unlikely that protection of the water supply was a motivation at this early date. A more likely motivation was simply support of the industry need for infrastructure.

56. Fox, *supra* note 41, at 258.

57. See e.g., Act of Apr. 9, 1850, ch. 249, 1850 N.Y. Laws 484; Act of Mar. 11, 1852, ch. 58, 1852 N.Y. Laws 56; Act of Apr. 17, 1854, ch. 395, 1854 N.Y. Laws 998.

58. Act of Apr. 10, 1848, ch. 207, 1848 N.Y. Laws 321; VAN VALKENBURGH, *supra* note 55, at 17-18. The line received Townships 6, 37, 42, and 43. 1 DONALDSON, *supra* note 35, at

through the Adirondacks, for purposes of lumbering as well as transporting ore mined from rich but inaccessible iron deposits. The legislature had incorporated these companies and provided some with the privilege of purchasing state lands once built, but none had succeeded.⁶⁰ The Sacketts Harbor Railroad also failed in its first incarnation but in the 1860's was taken over, with its hundreds of thousands of acres, by Thomas C. Durant, of Union Pacific fame, who renamed it the Adirondack Railway. In 1871, he brought the line as far as North Creek, about a third of the route originally planned.⁶¹ Durant's line not only served the lumber industry, but also helped to open the area to widespread tourism, at least by the well-to-do.⁶²

C. *The Economics of Postwar Lumbering in the Adirondacks*

Originally, only softwood was taken out of the Adirondacks. White pine, highly prized by builders and shipwrights, had been logged since colonial days when "New York was not only a forest state, but . . . essentially a white pine State."⁶³ A "universal prejudice in favor of eastern white pine"⁶⁴ meant that it was the only wood taken by lumbermen until about 1850.⁶⁵ Hemlock was logged when pine became scarce; until then hemlock had simply been stripped of its bark, which was used in tanning and the dead trunks were left to decay in the woods. Spruce was not cut, and the hardwoods, maple, beech, and birch, could not be logged on a

ler to reimburse Essex and Warren counties for losses due to the exemption from taxes of the railroad lands).

60. See, e.g., Act of Mar. 30, 1832, ch. 69, 1832 N.Y. Laws 123; Act of Apr. 28, 1834, ch. 195, 1834 N.Y. Laws 271; Act of May 14, 1840, ch. 346, 1840 N.Y. Laws 292; Act of May 14, 1845, ch. 324, 1845 N.Y. Laws 351.

61. The road originally was to go from Saratoga Springs beyond North Creek to Long Lake, and then to Canton and Ogdensburg, bisecting the Adirondacks on a southeast-northwest axis. But the road went bust in 1881, and reorganized in 1882, with the successor road, the Adirondack Railway, owning not only the railroad, but also about 400,000 acres of its predecessor's land originally granted for the longer route. Those lands were a valuable asset. 1 DONALDSON, *supra* note 35, at 334.

62. In 1889, the line sold out to the Delaware and Hudson, but sold its acreage to a lumber syndicate including Titus B. Meigs, George E. Dodge, Henry Patton, Thomas H. McGraw, R. K. Hawley, and Conrad N. Jordan for \$500,000 to \$2 million. (Meigs of the Santa Clara Lumber Co. was a founder of the St. Regis Paper Co.) Since the land was originally obtained from the state pursuant to the railroad's charter which called for the road to go to Sacketts Harbor (three times farther than North Creek), the Forest Commission tried to retrieve the land, but did not succeed. HAROLD K. HOCHSCHILD, *DR. DURANT AND HIS IRON HORSE* 13 (1961).

The Durant family owned a portion of the state-granted lands as late as 1897, when they sold 24,000 acres back to the state at a price higher than had ever been paid before. However, how they acquired title is not clear. According to Hochschild, "Dr. Durant was not troubled by moral considerations in his dealings with the public." *Id.* at 14.

63. Fox, *supra* note 41, at 239. Pine Street in the Wall Street area took its name from the

large scale because they did not float and could not be taken out by water. But after the Civil War, the limitations on logging began to ease.

Two factors changed lumbering in the Adirondacks late in the nineteenth century. First, in 1867, a process was developed for using wood, together with relatively scarce cloth rags, as paper pulp. Over the next twenty years, the process was further refined until paper could be made entirely of wood pulp; by the mid-1880's, wood pulp had supplanted rag pulp in the manufacture of newsprint.⁶⁶ Spruce, until then regarded by lumberers as a junk species, could be cut off, as could trees of any age, type, or size, even the smallest. New York, along with Maine and New Hampshire, became pulpwood rather than lumber states.⁶⁷

Pulpcutting reduced the cost of labor because "[v]ery small trees as well as the large ones are cut, and when down are sawed into short lengths only four feet long, making the work of skidding, hauling and river driving much easier."⁶⁸ Thus, though at first only small trees were cut for pulp and others were reserved for sawmills, pulpcutting soon came to dominate Adirondack lumbering.⁶⁹ "While the lumbermen formerly took nothing less than two-log trees [at least thirteen-inch diameter for at least twenty-six feet], leaving nearly all that were twelve inches or less in diameter on the stump, the woodpulp men cut all the trees, . . . large and small."⁷⁰ It was pulpcutting which produced the scenes of ragged desolation that mobilized an organized movement to stop the destruction of the woodlands.

Second, the extension of railroads through the Adirondacks promised to make the extraction of hardwoods commercially viable, since they could now be transported in bulk out of the area in which they had been cut. Furthermore, to the extent that railroads could be built in new areas, they would free loggers from the rough rule that timber could not be taken more than six miles from a waterway.⁷¹ Together, these factors meant that much of the central Adirondack forest, as yet untouched,⁷² could be clearcut.

66. The Voelter grinding process was developed in Germany and first used in the United States in 1867. ELEANOR AMIGO & MARK NEUFFER, *BEYOND THE ADIRONDACKS: THE STORY OF THE ST. REGIS PAPER COMPANY* 8-9 (1980). See also RECKNAGEL, *supra* note 24 at 33-35 (discussing how the discovery of way to make paper from pulp encouraged clearcutting in New York State).

67. COX ET AL., *supra* note 32, at 165-66.

68. Fox, *supra* note 41, at 278.

69. *Id.* According to Fox, the largest spruce tree ever cut in the Adirondacks was cut for pulp. It was 41 inches in diameter and 88 feet high; it was "sawed into 22 short logs, each four feet long." *Id.*

70. *Id.* at 277. In the first decades of the twentieth century, New York was the country's leading producer of pulp and paper, but half its raw material came from out of state. As to other forest products, the quality of the remaining available forest resources was inferior to

But the extension of railroads into areas to be clearcut heightened the danger of fire. The pressure to lower costs meant that loggers could not afford to take any steps which did not add to their immediate profit, like clearing off debris after logging. This "would cost so much as to put [the logger] out of competition with his neighbor. Moreover, if he were to adopt such policy, the danger is not much lessened, for he is surrounded by other operators who may be less careful than himself."⁷³ The debris (scrub, twigs, bark and brush) dried quickly and, particularly in the fall, after the leaves fell but before the snows came, the danger of fire was quite severe. Railroads with their inevitable sparks from coal-fired burners magnified the danger of fire. It was pulpcutting and railroads at which the "forever wild" constitutional amendment was aimed.⁷⁴

Once clearcutting was possible, the economics of the lumber industry made it inevitable. The seasonal nature of the work (fall logging, winter hauling, spring driving, summer milling) meant that lumberers carried their expenses through a yearly cycle which paid off only once. Once it was possible to increase production and gross profits by using new woods and new means to transport timber, more capital was invested in mills and equipment. This in turn increased the amount of logging done in order to produce more for the market so that increased capital investment costs could be amortized.

The necessity to cut in order to meet capital costs contributed to "a periodically saturated market,"⁷⁵ one which could not be rationalized by concentration because the very availability of forests meant that small operators could always break into the market. "During its major period of growth, between the end of the Civil War and the first decade of the twentieth century, the industry suffered from dislocation, chronic overproduction, cutthroat competition, and a generally unstable market."⁷⁶ Thus, the lumber industry, though profitable, remained "fragmented, highly competitive, and chronically overbuilt."⁷⁷

D. Lumbering, State Tax Policy, and Land Acquisition

The very intensity of this exploitation of Adirondack woodlands brought that land back to the state. In 1855, the state retained owner-

73. James E. Desebaugh, *The Relation of Forestry to Lumbering and the Wood-Working Industries*, 10 PROC. AM. FORESTRY ASS'N 150, 154 (1893).

74. The amendment served its purpose in that respect; pulpcutting peaked in 1905, 10 years after the effective date of the amendment. HARVEY H. KAISER, *GREAT CAMPS OF THE ADIRONDACKS* 18 (1982).

75. WILLIAM G. ROBBINS, *LUMBERJACKS AND LEGISLATORS: POLITICAL ECONOMY OF THE UNITED STATES LUMBER INDUSTRY 1890-1941* 242 (1982).

76. *Id.* at 5.

77. Thomas R. Cox, *The Stewardship of Private Forests: The Evolution of a Concept in the United States, 1864-1950*, 25 J. FOREST HIST. 188, 193 (1981).

ship of not much more than 50,000 acres of public land.⁷⁸ Thirty years later, when the Adirondack Forest Preserve was officially created, the state held tax certificates, equivalent to title, to twenty-five times that, three-quarters of a million acres of cutover lands.⁷⁹ How did this happen?

Timber is a crop, but not of a year; Adirondack species took at least a quarter-century to regenerate. But during the period when timber was standing, woodlot continued to be taxed *ad valorem* as though used for seasonal agriculture.⁸⁰ Taxes were assessed annually, while profit from young trees would be realized in the future. Indeed, it might never come if fire took the growing timber. One way to reduce costs was to cut before forests were fully mature; another was to abandon land that had been cutover rather than continuing to pay taxes once the land was unproductive. "During the nineteenth century it cost a lumberman less to buy and cut new timberland than to hold his old land for a second crop."⁸¹

Rather than invest twenty-five years in raising a new crop, it was cheaper, particularly for the small-scale operators so characteristic of New York logging, simply to buy wooded land, cut it off, realize the profit on the timber, and abandon the cutover land in default of tax payments. "Cut out and get out," the loggers called it. Often no taxes were ever paid after purchase, since the time between default and tax sale was long enough to allow for complete harvest of the timber crop.⁸² In New York, probably to protect farmers from ticks in the business cycle, title took seven to twelve years to transfer without possibility of redemption after tax default.⁸³ This policy simply encouraged loggers to cut and run.

78. DONALDSON, *supra* note 35, at 52-53, 57-60.

79. SENATE OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE ON STATE LANDS IN THE ADIRONDACK REGION, N.Y. S. DOC. NO. 23, at 13 (1884). In one day alone, November 23, 1883, the last date on which land which had been sold for taxes in 1881 could be redeemed, the state became owner of over 175,000 acres. Annual Message of Gov. Cleveland, 1884, in 7 MESSAGES FROM THE GOVERNORS 984-85 (Charles Z. Lincoln ed., 1909) [hereinafter Lincoln].

80. *Ad valorem* taxes are assessed on the value of trees currently standing. Gary Gutches, Note, *Reassessing New York's Forest Tax: The Case for Site Productivity Assessment*, 46 ALB. L. REV. 1447, 1449 (1982).

81. Cox, *supra* note 77, at 192.

82. See, e.g., *People v. Turner*, 22 N.E. 1022 (N.Y. 1889), *aff'd*, 168 U.S. 190 (1897). The defendant pled not guilty to a charge that he cut state trees, claiming there were defects in an 1877 tax sale of lands in default for taxes dating back to 1864. The matter was not decided by the Court of Appeals until 25 years after the first default.

83. Act of Apr. 13, 1855, ch. 427, 1855 N.Y. Laws 780; 7 Lincoln, *supra* note 79, at 984. The method by which land came to be taken by the State for nonpayment of taxes was that the counties would report to the state comptroller the nonresident property taxes which were unpaid. The Comptroller's office would pay the taxes to the county treasury. At some point, the land would be advertised for sale for nonpayment of taxes, and would be auctioned off to the buyer willing to reimburse the state for the taxes it had paid, plus 10% interest per annum, in return for the smallest number of acres. Thus, the price to be paid was fixed; the amount of

Said a critic of state tax policy, "[T]he passing of the forest [occurred] . . . not entirely by the hand of the lumberman, but largely through the operation of [tax] laws."⁸⁴

Local lumberers agreed; as one told the New York State forestry commissioners in 1884, taxes are the reason "why the State holds so much land. It has acquired it within the last twenty or thirty years; all this vast amount of land they have acquired, not because the people wanted to let it go, but because they could not afford to hold it."⁸⁵ By the time those lands had reverted to the state, they were "unquestionably, waste lands and almost all had progressed through the same pattern of ownership—from state ownership after the Revolution—to ownership by a land speculator through a land grant—to a logging interest which removed the timber and seriously damaged the soil and ground cover—and back to the State, far depleted in value."⁸⁶

The state, by taxing land used in a quarter-century crop cycle in the same fashion as that used in an annual crop cycle, gave lumberers a reason to default on their tax payments. Moreover, by allowing years to pass before title shifted in consequence of default, state law encouraged lumberers to cutoff land without replanting it. In effect, the state issued lumbering licenses on woodlot.⁸⁷

Thus, when tax defaults increased after the Civil War, the state once again came into possession of large chunks of Adirondack land that it had earlier sold off. The choice it faced was to resell to loggers as the crop regrew or to keep the land and have logging take place in a more conservationist fashion. *Neither* choice would end the use of these lands as woodlot. Only if the state chose to make a park of its lands would

land for which the price would be paid was the subject of the auction and buyers bid down, rather than up. If no buyers appeared, the state took title by virtue of having paid the taxes. See *Proceedings Before the Forestry Commission of N. Y. State* at 55-56 (July 23, 1884) [hereinafter *Sargent Hearings*] (testimony of Mr. Finch). Note there is no Mr. Finch listed among the Sargent Hearing attendees for this date. George W. Ostrander is listed and the speaker called Mr. Finch identifies himself as "represent[ing] the Finch Pine [sic: probably Prunyn] Company," so this may be Ostrander, a land buyer for Finch, Prunyn, who is not otherwise identified as speaking. *Id.* at 44.

84. Alfred A. Gaskill, *How Shall Forests be Taxed?*, PROC. SOC. AM. FORESTERS, Apr. 1906, at 115. Not everyone agreed with Gaskill; a report prepared for the United States Forest Service in 1932 attributed forest clearance to overcapitalization, but said that tax laws kept lumberers from reforestation. FRED R. FAIRCHILD, *FOREST TAXATION IN THE UNITED STATES* 193 (1935).

85. See *Sargent Hearings*, *supra* note 83, at 32 (testimony of Lemon Thomson).

86. VAN VALKENBURGH, *supra* note 55, at 21.

87. Hurst notes:

What [lumberers] wanted was the lumber. In practice what they bought was an unconditional license to cut, since after they had cut they either let the land default to government for unpaid taxes, or sold it cheaply. They did not sell it as timber-productive land—which, indeed, it scarcely was, in the condition in which it was

logging cease. Hence, lumberers objected only to a park proposal,⁸⁸ while even the proponents of state retention disclaimed that end: "We do not favor the creation of an expensive and exclusive park for mere purposes of recreation, but, condemning such suggestions, recommend the simple preservation of the timber."⁸⁹ How, then, did the preservation debate result in the creation of the Adirondack park?

It was not because the forest products industry suffered any great economic catastrophe; indeed, Americans' per capita consumption of wood products almost quadrupled between 1880 and 1905⁹⁰ and, during that time, the average price of timber never declined.⁹¹ Nor is it the case that the state could not have protected its forests otherwise. Had the state wished, it could have continued to sell its land, at the same time exempting timberlands from local property taxes and taxing the cut timber instead, or requiring that land with standing timber be assessed at a different rate than cutover land, thus giving lumberers the incentive to hold onto cutover land for another crop.

Tax revision was the solution the lumbermen and some foresters urged.⁹² Its advantage, they said, was "that in consideration of the lumbermen carrying that land, . . . they are going to have an interest in it. It is property, and they are going to look out for it."⁹³ It would have meant, at worst, that the state reimbursed counties for their lost tax revenues, as it did when property taxes were unpaid and would do in the future when it bought land to add to the Forest Preserve.

The limitation of forest use in New York is simply contrary to that predicted. According to the customary wisdom:

Even if state legislatures had wanted to prevent depletion, there were a number of processes at work that would have made it difficult to stop—for example, population growth, the inflow of capital, . . . the problem of dealing with the dispersed decision-making powers that flowed in the private property market, and the new financial techniques used to enlarge the scale of operations. An energetic minority existed with a clear vision of the short-run profit to be gained by rapid clear-cutting, a vision that could be translated into action without a restraining influence or regulatory agency to make that minority account for its actions.⁹⁴

88. See Lemon Thomson, *Adirondack Wilderness*, Address at the Albany Institute (Mar. 18, 1884).

89. COMM'RS OF STATE PARKS OF N.Y., *FIRST ANNUAL REPORT OF THE COMMISSIONERS OF STATE PARKS OF NEW YORK*, N.Y. S. DOC. NO. 102, at 1 (1873).

90. WILLIAMS, *supra* note 39, at 331.

91. *Id.* at 218.

92. See *Sargent Hearings*, *supra* note 83, at 38-44 (testimony of Finch, McEchron, and Thomson).

But in New York, political forces succeeded in putting an end to the exploitation of the forest, rather than regulating or limiting the use of forest resources based on conservationist practices. Instead, the forest was "locked up" and made unusable. It was no longer a "natural resource," but rather, "wilderness."

By using both New York's mechanisms for constitutional change and the downstate media, preservationists put an end to years of legislative indecision over whether to exploit or preserve the north woods by mobilizing an electoral majority for constitutional change. Rather than continue to struggle, measure by measure, with a legislature in which logging interests were influential, the preservationists organized one single referendum which, with its success, marginalized the legislative struggle of the lumber industry ever after.

II

CONSERVATIONISTS AND PRESERVATIONISTS

Those opposed to the continued exploitation of New York's timberlands comprised three distinct groups, each of which had a limited membership and a distinct agenda. The first was a group of men with scientific or technical backgrounds who, after the Civil War, began to question whether the natural world could forever tolerate uncontrolled industrial expansion. They were protoconservationists who believed that a rational use of natural resources could be ascertained which would provide for sustained use.⁹⁵ The second group were downstate merchants dependent on water transport who feared deforestation would mean rivers and canals would dry up. Their interest in the woodlands was merely instrumental. The third group were extremely wealthy individuals who had made the Adirondacks their retreat from the quotidian and were determined to preserve for themselves the aesthetic and emotional value of wilderness against the lumber industry's plans for clearcutting. Conservation had no appeal for them; their aims were preservationist.

Despite the fact that the Legislature *never* supported forest preservation, going no further at any time than to endorse conservationist methods of logging on state owned lands, merchants and preservationists, with the aid of the media and the initial support of scientific conservationists, mobilized mass electoral sentiment in referendum form to support constitutional measures to keep state-owned woodlands unused. The public supported this measure despite its cost, for it came to perceive the preservation of wilderness as a social goal.

95. Foresters were among the earliest of the "progressive conservationists" who later extended their claims for the primacy of science in policymaking to rivers, range, and public lands. For a full discussion, see generally SAMUEL HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920* (1975).

A. *Science Comes to the Woods*

The first people to express the idea that the state should take an interest in preserving its forests were scientists who were beginning to describe themselves as "foresters." They claimed that the forest held a key to economic life in terms of its influence on climate, particularly rainfall. This affected the water supply and, thus, transportation as well. The new "foresters" were the first to look at the woods in an economic context larger than their utility as an immediately exploitable resource.

1. *The Science of Forest Preservation*

In the 1860's, an upstate physician toured the Adirondacks and was shocked at the extent of deforestation. Franklin B. Hough cultivated an interest in forestry⁹⁶ and believed that forests were the essential regulator of temperature, climate, rainfall, and water supply for the rest of the biosphere.⁹⁷ For him, deforestation amounted to a recipe for making a desert out of a fertile land.

Hough was only one of a number of midcentury intellectuals concerned with the effects, only now becoming visible, of large-scale industrial and agricultural activities on the natural landscape.⁹⁸ Perhaps the first was George Perkins Marsh, a native Vermonter whose early interest in forests and nature as an ecosystem was reinforced when, as American Ambassador to Italy, he viewed at first hand the long-term effects of deforestation.⁹⁹ In 1864, he published the classic *Man and Nature*, warning that human activity "on a large scale, [could] interfere with the spontaneous arrangements of the organic or the inorganic world."¹⁰⁰ Marsh stressed, as none had before him, that the natural world was a system of interlocked phenomena and warned that any disturbance of natural processes would have consequences throughout the system. Thus, deforestation could affect rainfall, rainfall could affect vegetation, and vegetation soil quality, with the consequence that fertile land could be turned

96. Throughout this paper "forestry" is defined, as Bernhard Fernow, one of the first and most influential of the scientific foresters, defined it, "the application of scientific methods in the production and reproduction of wood crops." Bernhard Fernow, Address at the Canadian Forestry Association (Feb. 13, 1913), in ANDREW RODGERS, BERNHARD FERNOW, A STORY OF NORTH AMERICAN FORESTRY 53 (1951).

97. Hough, something of a polymath, was an amateur of both life and earth sciences, as well as statistics. Before becoming the first agent of the federal Division of Forestry in the Department of Agriculture, a post later held by Bernhard Fernow and Gifford Pinchot, he was Superintendent of the United States Census of 1870. WILLIAMS, *supra* note 39, at 375.

98. For accounts of this concern, see David M. Emmons, *Theories of Increased Rainfall and the Timber Culture Act of 1873*, 15 J. FOREST HIST. 3 (1971); Charles R. Kutzleb, *Can Forests Bring Rain to the Plains?*, 15 J. FOREST HIST. 15 (1971).

99. David Lowenthal draws attention to the extent to which forestry proponents like Hough and Pinchot were inspired by Marsh's work. David Lowenthal, *Introduction to GEORGE PERKINS MARSH, MAN AND NATURE* at xxii (1965).

100. *Id.* at 3.

into deserts. Said Marsh: "It is certain that a desolation like that which has overwhelmed many once beautiful and fertile regions of Europe, awaits an important part of the territory of the United States, unless prompt measures are taken to check the action of destructive causes already in operation."¹⁰¹ One of Marsh's readers, the Rev. Frederick Starr, extended his work to a prediction that American forests could disappear, with devastating economic consequences, if attention were not paid to managing forests scientifically. Starr recommended that the government make forest conservation a priority.¹⁰²

That concern was reiterated very specifically, even prophetically, by Increase Lapham of Wisconsin. Lapham, a Cassandra who was the first scientist to do field research on forest depletion in the United States, warned the Wisconsin legislature of the serious danger that lumbering would destroy what appeared to be an inexhaustible forest if some encouragement were not given to reforestation.¹⁰³ But there, as forester Bernhard Fernow sardonically said, "the matter was allowed to mature for the next thirty years,"¹⁰⁴ until the fate of the Wisconsin forests became a byword for the rapacity and destructiveness of economic development in the Gilded Age.

As a result of the efforts of these scientists, the link between vegetation and rainfall was widely discussed in the late 1860's and early 1870's, when New York State was acquiring cutover forest land in default of taxes and had to decide whether to hold or resell the land. Conservationists argued that the state should protect its Adirondack forests in order to preserve its water supply.¹⁰⁵

One proponent of this view was Verplanck Colvin, a well-to-do young man who was exploring the Adirondacks on his own and reporting the results of his explorations to the State Board of Regents. In 1870, Colvin sounded the alarm: "The Adirondack wilderness contains the springs which are the sources of our principal rivers, and the feeders of

101. *Id.* at 233.

102. NORMAN WENGERT & A.A. DYER, THE "PURPOSES" OF THE NATIONAL FORESTS—A HISTORICAL REINTERPRETATION OF POLICY DEVELOPMENT 6 (1979).

103. INCREASE LAPHAM, REPORT ON THE DISASTROUS EFFECTS OF DESTRUCTION OF FOREST TREES NOW GOING ON SO RAPIDLY IN THE STATE OF WISCONSIN 33 (1867).

104. BERNARD E. FERNOW, HISTORY OF FORESTRY 489 (1913).

105. At the time, there was very little scientific justification for the theory. In 1886, Fernow, a proponent, told a researcher that it was "questionable whether anywhere such measurements have been made, which can form a reliable basis for deductions." RODGERS, *supra* note 96, at 110. Twenty years later, Fernow found the situation not much better: "To tell the truth, while we know much of the general philosophy of the influence of forest cover on water flow, we are not so fully informed as to details of this influence as we might wish." *Id.* at 128. Overall, Fernow's biographer has said, "forest influences as propaganda were badly misused." *Id.* at 127.

the canals. Each summer the water supply for these rivers and canals is lessened, and commerce has suffered."¹⁰⁶

At Colvin's recommendation and in an atmosphere of concern about the effect of lumbering on the headwaters of the Hudson, the Legislature created the Commission on State Parks in 1872. Colvin and Hough were included on the Commission, whose task was to review the state's forest holdings and determine whether they should be protected.¹⁰⁷

2. The Hough Report

When the Commission made its report in 1873, it concluded that "the protection of a great portion of that forest [Adirondack counties] is absolutely and immediately required." It also made quite clear that its recommendation was not based on any light purposes. "We do not favor the creation of an expensive and exclusive park for mere purposes of recreation The conclusion that the permanent preservation of a large portion of this forest is necessary, is based upon numerous considerations intimately connected with the great business interests of the State."¹⁰⁸ The Commission's concern was

the maintenance of that quantity of water in the navigable rivers, in the streams that supply the canals and afford power to mills and manufactories, which from time immemorial has flowed in undiminished volume in their channels, and which only in these later days begins to slowly fail and disappear.¹⁰⁹

The consequences of diminished streamflow would be shattering:

[O]ur canals would be dry, and . . . farmers would be in the power of the great railroad monopolies. The merchants at Albany would also suffer; their summer trade would be ruined, and the hundred propellers which now make the Hudson foam before the fleets they tow, might be idly tied to the wharves and left there to decay.¹¹⁰

Overcutting might also bring disastrous floods: "More than a quarter of a massive cubic mile of water hurled furiously into the narrow valley of the Hudson, it would sweep before it fields of ice, to crush and sink the strongest vessels, and ruin the warehouses on our wharves."¹¹¹

If this were not enough to set New York businessmen against lumbering in the Adirondacks, the Commission also put deforestation in a legal context which made it out to be a violation of the nineteenth cen-

106. VAN VALKENBURGH, *supra* note 55, at 24 (quoting Verplanck Colvin).

107. The N.Y. Legislature created a commission to investigate the feasibility of a state park on forest lands in Lewis, Essex, Clinton, Franklin, St. Lawrence, Herkimer, and Hamilton Counties. Act of May 23, 1872, ch. 848, 1872 N.Y. Laws 848.

108. COMMISSIONERS OF STATE PARKS OF N.Y., FIRST ANNUAL REPORT OF THE COMMISSIONERS OF STATE PARKS OF NEW YORK, N.Y. S. DOC. NO. 102, at 1 (May 15, 1873).

109. *Id.* at 9.

110. *Id.* at 10.

111. *Id.* at 11.

tury's fundamental principle of use of private property, *sic utero tuo ut alienum non laedas* [so use your own property as not to injure another's]. By cutting the forests and thus reducing rainfall and water retention in the soil, lumberers were diverting water from others who also had a right to make economic use of it:

[T]he forests preserve and protect the springs and streams among them. No man has, therefore, more right to cut away those forests absolutely, and thus divert, by expropriation, the water they protect, than he has to conduct it away, for his own selfish purposes, by canal or tube. Those below him upon the stream, the mill owner and operator, and the farmer and his cattle, are as much entitled to the water as the lumberman is to the timber.¹¹²

Like others who violated riparian rights, lumberers could be stopped. State action in such circumstances was no more than the protection of the rights of private property, and carried no hint of the confiscatory policies so threatening to the business interests which had to be won to support the proposal for a timber reservation:

When we find individuals managing their property in a reckless and selfish manner, without regard to the vested rights of others, it becomes the duty of the State to interfere and provide a remedy. Here, by ruthless destruction of the forest, thoughtless men are depriving the country of a water supply which has belonged to it from time immemorial, and the public interest demands legislative protection.¹¹³

The fact that logging had not previously been considered an action violating the rights of others was not dispositive:

It is of no consequence that, through ignorance of the natural laws governing rain and rivers, men have hitherto permitted, without protest, the injustice which they felt, but the cause of which they did not understand. The State must apply the remedy, and to protect their interests, preserve the forest.¹¹⁴

The laws of the State of New York, it seemed, should be made consonant with the laws of nature, as science was making them known.¹¹⁵

Despite the strong sentiments and dire predictions of its report, the Commission only recommended that the state retain woodlot to which it currently had title; it did not even suggest that the state acquire title to other lands abandoned for nonpayment of taxes. It recommended that a park should be created, but land to create it should not be bought. For-

112. *Id.* at 13.

113. *Id.* at 13-14.

114. *Id.* at 14.

115. There were other "scientific" reasons for the creation of the park. For example, the fetid quarters of the urban poor threatened not only physical health, but the mental health of the young as well. For their sake, it was important to retain the forests in order to "replace the vicious, enervating, debasing pleasures of the cities . . . To foster and promote these natural

estry should be encouraged, and destructive logging ended, but no means were suggested. While logging should be regulated, the report contained no recommendations for legislation. In fact, the Commission could offer no specific model either for the conservation of the forest, or its pristine preservation. Given this, the report did not lead to much action on the part of the Legislature.

In 1874, the Legislature did appropriate money for a survey of the headwaters of the Hudson and the drafting of plans for a series of dams and reservoirs to ensure its constant flow as well as the continued availability of the Champlain Canal. That survey, conducted by engineer and mathematician Benedict Farrand, proposed a reservoir system which could guarantee the affluence of the Hudson throughout the year.¹¹⁶ That proposal was also rejected by the Legislature.

State lands continued to be sold to speculators and lumberers and, in 1877, four years after the Hough Report, Governor Robinson vetoed an additional \$7500 for Colvin's ongoing forest survey to define the boundaries of state-owned land: "This survey . . . is of no necessity and of no real practical benefit," he said.¹¹⁷ Nonetheless, Colvin continued to make his reports, arguing for forest preservation and the creation of a park,¹¹⁸ and, as Hough predicted, the state continued to accumulate land by tax default.

But no further action was taken by the state on scientific recommendations to preserve forestland. Perhaps, said the new magazine, *Forest & Stream*, "these measures, [namely] the preservation of a certain extended area of lands, which should ever remain the property of the State, were somewhat foreign to our American ideas."¹¹⁹

B. Merchants and Railroads

The problem of what to do with the Adirondacks could not be ignored. The idea of a relationship between deforestation, loss of streamflow, and climatic changes which the Hough report had endorsed was becoming widespread. Terrible forest fires that accompanied the intense exploitation of the Great Lakes forests also had an impact in convincing

116. N.Y. ASSEMBLY DOC. NO. 6 (1875). The Farrand report became the basis for later arguments by lumberers that an alternative existed to the lockup of forest resources; reservoirs, they argued, could provide for both lumbering and streamflow. See *infra* notes 251-57 and accompanying text.

117. Brenda Parnes, *Trespass: A History of Land Use Policy in the Adirondack Forest Region of Northern New York State, 1789-1905*, at 212 (1989) (unpublished Ph.D. thesis, New York University).

118. For an exhaustive discussion of the literary merits of Colvin's reports see PHILIP TERRIE, *FOREVER WILD: ENVIRONMENTAL AESTHETICS AND THE ADIRONDACK FOREST PRESERVE* 77-91 (1985).

the public that logging could lead to environmental catastrophe,¹²⁰ as did a drought that hit New York State in 1882-83. These events seemed to suggest that the warnings of the 1873 report were justified.¹²¹ The threat to the water supply became the focus of the activities of the New York City Board of Trade and Transportation,¹²² which joined with the New York City Chamber of Commerce and other civic organizations in placing the issue of the preservation of the state's water commerce on the public agenda.

1. *The Threat to the Erie Canal*

The success of forest preservation and the movement for an Adirondack park also had roots in a coalition comprised of New York City merchants, producers who relied on water transportation to get their products to market, and the water transporters themselves. The groups were "shakily held together" by their opposition to railroads or their rate setting policies.¹²³ They believed that the competition supplied by the threatened canal and river system was the only effective brake on the extortionate policies of the railroads.

Only the availability of the Canal as an alternative form of transportation kept railroad freight rates down, merchants said; they gave as an example the increase in railroad rates each winter upon closing of canal navigation.¹²⁴ There was little alternative to using the railroads in the winter when the Canal's locks would freeze, but it would be catastrophic if summer water levels dropped, for what threatened was no less than the availability of the Canal for six out of the seven months a year when water transportation was otherwise reliable.

Rail transportation was "the leading problem confronting the New York mercantile community."¹²⁵ Initially, small feeder rail lines had simply connected with the Erie Canal and enhanced trade in and out of New York City.¹²⁶ Then, expansion of grain production in the midwest meant that a variety of forms of transportation, including both rail and water, were competitive because of the limited means of transport from west to east. But with the consolidation of the New York Central Railroad over a route parallel to the Canal and the open competition for

shipping among the New York Central, the Erie, the Pennsylvania, the Grand Trunk and the Baltimore & Ohio,¹²⁷ a course of rate cutting began which led western suppliers to choose rail rather than canal and to ship their grain to a variety of ports, not just New York.¹²⁸

Railroads also offered eastern producers lower freight rates if they undertook not to ship out of New York. Goods were "being shipped from Boston to Chicago and other points West, via New York, at [lower] rates than the same goods [could] be shipped from New York," according to one group of merchants investigating rates in 1875.¹²⁹ According to the Cheap Transportation Association, "From some Western points to Baltimore the rate on grain was 12 to 14 cents less than to New York, and there was also allowed a rebate of 3 cents on grain exported from Baltimore."¹³⁰

The New York City Chamber of Commerce, representing the city's mercantile interests, expressed its constituents' fears that these discriminatory rates challenged the advantage which the Erie Canal had given New York City as the entrepot for trade between the east and midwest. Another such group was the antirailroad Cheap Transportation Association, formed in 1873, and later known as the New York City Board of Trade and Transportation (BOTT), today the New York City Board of Trade. BOTT became "the most important organization to deal with the problems of railroads and regulations in New York and . . . the nation at large."¹³¹

These antirailroad forces, though businessmen and property owners, were firmly committed to the policy of state control and regulation of the railroads in the name of continuing prosperity. Their policy was reflected in actual railroad regulation developed by the New York State Assembly's Special Committee on Railroads (also known as the Hepburn

127. *Id.* at 106. There are "five great railroads to New York, with only business enough for two." BENSON, *supra* note 122, at 36 (quoting Commodore Vanderbilt).

128. New York's share of grain receipts dropped nearly 15% between 1865 and 1880. BENSON, *supra* note 122, at 34.

129. N.Y. Cheap Transp. Ass'n, Minutes of February 9, 1875, in PAPERS OF NEW YORK BOARD OF TRADE AND TRANSPORTATION [hereinafter BOTT] (available from the New York Historical Society).

130. *Id.*, Minutes of March 14, 1876.

131. BENSON, *supra* note 122, at 57.

120. WILLIAMS, *supra* note 39, at 232, 449.

121. See, e.g., ASSEMBLYMAN RODGERS, 1883 REPORT TO THE COMMITTEE ON AGRICULTURE, N.Y. ASSEMBLY DOC. NO. 130 (1883) (speaking of climatic changes in rivers and rainfall due to deforestation).

122. The Board was founded in 1878 as a successor to the New York City Association for Cheap Transport. LEE BENSON, MERCHANTS, FARMERS, AND RAILROADS: RAILROAD REGULATION AND NEW YORK POLITICS, 1850-1887, at 78, 119 (1955).

123. *Id.* at 117.

124. THE GEOGRAPHY OF NEW YORK STATE, *supra* note 35, at 177.

125. BENSON, *supra* note 122, at 35.

126. HARRY H. PIERCE, RAILROADS OF NEW YORK 105 (1953).

Commission).¹³² These same merchants also urged creation of the Interstate Commerce Commission.¹³³

One historian has referred to the Chamber of Commerce and the Board of Trade and Transportation as a group of "New York merchants . . . attempt[ing] to restrain free enterprise."¹³⁴ This characterization may take some academic liberties, but it contains a grain of truth. These merchants *were* willing to back drastic action to preserve New York City's locational advantage in commercial competition.

In fact, although state ownership and control of forest resources seems a radical stance for the leading organizations of New York businessmen, it was no great leap from support for railroad regulation to the call for state ownership of wild forestlands; both would protect mercantile interests.¹³⁵ Important elements of New York City's mercantile community had already taken positions in favor of state regulation of railroads by the early 1880's when plans for three separate rail lines, intended to bisect the Adirondacks, threatened fire and deforestation.¹³⁶

Thus, it was no surprise that BOTT, together with the Chamber of Commerce, spearheaded the campaign for state action to preserve the Adirondacks. The Board had earlier "infiltrated"¹³⁷ the New York Chamber of Commerce to win that organization's support for its an-

132. The Hepburn Commission, created to investigate disparities in railroad rates charged in New York versus those in other cities, delegated prosecution of its inquiry to Simon Sterne of the Board of Trade and Transportation. In doing so, it in effect gave the New York merchants control over the Committee's investigation into the abuses of the railroads of which they had themselves complained. *Id.* at 133-34. Sterne, a founder of the BOTT, was a well-known attorney who became the intellectual godfather of the movement for railroad regulation not only in New York but the entire nation. He supported government action to regulate railroads. He believed this was an appropriate response to an industry whose peculiar nature was such as to would repeal the laws of laissez-faire. *Id.* at 122.

133. *Id.* at 212.

134. *Id.* at 28. The Chamber's support for the formation of such a commission led William Vanderbilt of the New York Central to accuse the Chamber of Commerce of displaying "communistic characteristics." *Id.* at 131.

135. The Board of Trade backed government ownership of monopolies like the telegraph. Its committee on telegraph communications reported:

The day is not distant, if it is not already arrived, when it will be the duty of statesmen to inquire whether there is less danger in having the property and industrial interests of the people wholly at the mercy of a few men . . . then in adding somewhat to the power and patronage of a government directly responsible to the people . . . In the opinion of your committee the evils are far less on the side of government ownership.

Comm. on Telegraph Communications, Committee Report, Feb. 1881, in BOTT, *supra* note 129.

136. Marvin W. Kranz, *Pioneering in Conservation: A History of the Conservation Movement in N.Y. State 1865-1903*, 145-46 (1961) [hereinafter Kranz] (unpublished Ph.D. dissertation, Syracuse University).

137. Leaders of the Cheap Transportation Association made a conscious decision to work in the Chamber of Commerce in order to use the influence of that body to achieve the ends they desired with respect to the railroads. BENSON, *supra* note 122, at 73.

tirailroad stance;¹³⁸ now the links between the Board and the Chamber assured that both organizations would strongly support the preservation of the Adirondacks. Their campaign was spearheaded by a figure active in the public life of New York City.

2. Organizing to Save the Water Supply

Morris K. Jesup, whose family had initiated the Totten and Crossfield Purchase,¹³⁹ and who was at one time a New York City banker,¹⁴⁰ was instrumental in persuading the Chamber of Commerce to take an active role in the struggle for forest preservation in the eighties.¹⁴¹ In December 1883, Jesup secured the Chamber's backing for a proposal that the state purchase four million Adirondack acres in order to preserve the waters of the Hudson River.¹⁴² The Chamber recognized that the proposal might appear to be a self-seeking measure for the benefit of Adirondack landowners. Said Charles S. Smith, a member of the Chamber's forestry committee, "To meet this objection, we must arouse a degree of public interest in the matter that will make it apparent that the proposition comes from the people and not from the property owners."¹⁴³

Perhaps in response to this concern, the Chamber's report urging that its proposal be adopted was focused on economic concerns. "The commercial supremacy of the State is endangered by the threatened destruction of the forests that control and regulate the water supply of the

138. In 1870, the Chamber had first investigated the natural damage done by railroad-building at Sandy Hook. They feared for the continued viability of New York harbor, so the strategy of attacking railroads for the collateral harm done to other forms of transportation was already known to the group. Kranz, *supra* note 136, at 152.

139. The named parties in the Totten and Crossfield Purchase were only dummies. The real principals were Edward and Ebenezer Jessup, the latter being Morris Jesup's grandfather. The land escheated to the state after the Jessups fled to Canada in the Revolution. After their escape, Crossfield, who had supported the winning side, petitioned for a portion of the land and received Township 1. DONALDSON, *supra* note 35, at 58.

140. Jesup retired from banking in 1884 and devoted all his energies to eleemosynary activities. He served as president of the Chamber of Commerce from 1899 to 1907. Among his other charitable concerns were the Watch and Ward Society of Anthony Comstock and the Young Mens' Christian Association; he was on the board of both organizations. 10 *DICTIONARY OF AMERICAN BIOGRAPHY* 62 (Allen Johnson ed., 1928).

141. "It was to his efforts that was due the energetic action taken by the Chamber in the matter of the preservation of the Adirondack forests." WILLIAM A. BROWN, MORRIS KETCHUM JESUP: A CHARACTER SKETCH 115 (1911). According to Brown, Jesup became interested in forest preservation by way of another of his pet charities, the American Museum of Natural History, of which he was a major supporter. He sponsored the Museum's Jesup Collection of American Woods, which familiarized him with forest issues. *Id.* at 61-62.

142. Kranz, *supra* note 136, at 154.

143. *The Adirondack Forests: Discussing Measures for Their Better Preservation*, N.Y. TIMES, Dec. 13, 1883, at 8. It was Smith who, at another special meeting of the Chamber five years earlier, had proposed the resolution which led to the creation of the Hepburn Committee. BENSON, *supra* note 122, at 119.

Hudson River, the Mohawk River and the Erie Canal," it said.¹⁴⁴ In April 1884, Jesup convinced the Board to sponsor a public meeting on the issue, which he addressed together with forester Bernhard Fernow and Carl Schurz, the conservation-minded former Secretary of the Interior.¹⁴⁵

Jesup and the forestry committee won the Chamber's permission to approach other organizations to gain their support.¹⁴⁶ The Brooklyn Constitution Club and the Canal Boat Owners and Commercial Association joined in, attacking the Adirondack Railway's charters.¹⁴⁷ In February 1884, the Board of Trade and Transportation also decided to support Adirondack preservation. The Board did not support the Chamber's proposal as such, but rather resolved to urge the legislature "to adopt such measures as will effectively protect the Adirondacks."¹⁴⁸ The Board formed its own forestry committee in the autumn of 1884,¹⁴⁹ and both groups continued to agitate for forest protection.¹⁵⁰

The key element mercantile groups brought to the struggle to preserve the Adirondacks was their conviction that state intervention was a legitimate means to achieve the aim of forest protection. The scientist authors of the Hough report, written ten years earlier, had been unable to organize effective support for the proposition that state intervention to preserve the forests was possible. The New York merchants, on the other hand, had taken far more radical positions in order to guarantee their continued prosperity; they did not shrink from doing so now. Unlike the foresters, merchants were not committed to conservationist notions of sustained use. They had no particular interest, one way or the other, in how the state used or did not use its forests; their interest was merely in maintaining streamflow which, they were convinced, was linked to forest preservation. The 1873 proposals for state control, which *Forest & Stream* had thought "foreign," were eagerly adopted by busi-

nessmen in 1883 who now had behind them the experience of struggling for state control and regulation of railroads.

C. *The Lovers of Wilderness*

In addition to the merchants and scientists, there was another group that had distinct ideas on forest preservation; their notion was that the state should make *no* use of its lands. That group—the preservationists—was key in the struggle to preserve the Adirondacks. They had a clear goal in mind: restricting the use of Adirondack lands to recreation.

1. *The Beginnings of Adirondack Tourism*

By the middle of the nineteenth century, the Adirondacks had become a retreat for the well-to-do from the metropolis. Said the *Times* in 1871:

Here alone in the Eastern States, the whirl of the factory or the hum of commerce is not heard. Around this enchanted island, the waves of business and the currents of traffic, and all the storms of the busy American world seem to beat in vain, leaving its sylvan solitudes and still lakes and ancient forests as peaceful and lonely as they were when the Pilgrims first landed."¹⁵¹

The construction of hotels and lodges for vacationing urbanites began in the decade before the Civil War.¹⁵² Between 1865 and 1900, the capacity of hotels and lodgings in the Adirondacks went from roughly 2000 to about 17,000,¹⁵³ and the number of summer tourists from 3000 to 250,000.¹⁵⁴ "[T]he desert ha[d] blossomed with parasols and the waste places . . . filled with picnic parties," said the 1873 *Times* of the erstwhile "sylvan solitudes."¹⁵⁵ By the late 1870's, the recreation boom in the park was in full swing. For example, in 1879, Blue Mountain Lake, which could only be reached by water,¹⁵⁶ boasted a six-story hotel, Frederick Durant's Prospect House, the first in the world to have electricity in every bedroom. Its technological level was unique, but luxury hotels deep in the Adirondack forest were by no means unusual.¹⁵⁷

As the New York Times articles suggest, the media played a key role in promoting the Adirondacks as an urban retreat and eventually

144. CHAMBER OF COMMERCE, PRESERVATION OF THE ADIRONDACK FORESTS (1884) (available at the N.Y. Public Library Annex).

145. Kranz, *supra* note 136, at 172-73.

146. *Id.* at 154; 3 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 408 (1906).

147. Kranz, *supra* note 136, at 159. Other groups that flocked to the banner of state purchase of the forest and watershed protection included: the Mercantile, Maritime, Produce, Stock, and Wine, Spirits, and Distillers Exchanges, as well as the Anti-Monopoly League. BROWN, *supra* note 141, at 26.

148. N.Y. Cheap Transp. Ass'n, Minutes of Feb. 13, 1884, in BOTT, *supra* note 129.

149. BD. OF TRADE AND TRANSP., FORESTRY COMMITTEE REPORT 22 (1894).

150. For accounts of public meetings on Adirondack protection sponsored by the Board, the Chamber and their allies, see, for example, *The Adirondack Forests: Discussing Measures for their Better Preservation*, N.Y. TIMES, Dec. 13, 1883, at 8; *The Adirondack Forests: Action by the Legislature to be Solicited for their Preservation*, N.Y. TIMES, Feb. 2, 1884, at 2; *Need of Saving the Forests: A Well-Attended Meeting at Delmonicos to Consider the Subject*, N.Y. TIMES, Feb. 20, 1884, at 2; *To Protect the Forests: The Adirondack Mass-Meeting in Chickering Hall*, N.Y. TIMES, Apr. 10, 1884, at 2.

151. *A People's Hunting-Ground*, N.Y. TIMES, June 10, 1871, at 4.

152. 1 DONALDSON, *supra* note 35, at 298, 323.

153. Charles Zinser, *Economic and Industrial Development in the Adirondack Area*, 1971 PROC. SEVENTH ANN. ADIRONDACK CONF. 2.

154. David Strauss, *Toward a Consumer Culture: "Adirondack Murray" and the Wilderness Vacation*, 39 AM. Q. 270, 281 (1987).

155. HARVEY KAISER, GREAT CAMPS OF THE ADIRONDACKS 31 (1982).

156. Thomas Durant opened the land around Raquette and Blue Mountain Lakes to tourism by establishing a stage coach and then a boat line (rowboats and then steamboats) which took tourists some 40 miles from his North Creek railhead to Raquette Lake. 2 DONALDSON, *supra* note 35, at 93-94.

157. *Id.* at 103.

sponsoring the preservation of the north woods. *Forest & Stream*, a magazine founded in 1873 for hunters, fishers, and other outdoor enthusiasts, immediately backed the idea of an Adirondack park. "Have [the legislature] look at the preservation of the Adirondacks as a question of self-interest," it suggested.¹⁵⁸ *The American Sportsman* saw "this wild region" as providing city dwellers "the relaxation so congenial and necessary to their exhausted natures."¹⁵⁹ *Harper's Monthly* approved the idea of a park and suggested that the state lease "villas or hunting lodges" to defray the cost of its maintenance.¹⁶⁰

Outlook, the magazine of the socially conscious Rev. Lyman Abbott, recommended to its readers that they buy land, join a private preserve, or form a club, as ways to protect the woodlands. This was no self-indulgence; to the contrary, "[o]n such a hobby one could expend an amount of money that would seem quite unjustifiable if spent in wholly selfish pleasure involving no good to the community at large."¹⁶¹

2. The Creation of Estates and Private Preserves

a. The Estates

The 1880's and 1890's were the heyday of the great Adirondack "camps," estates of many thousands of acres, set in the wilderness. A turn-of-the-century magazine told its readers: "An Adirondack camp does not mean a canvas tent or a bark wigwam . . . [but] a permanent home, where the fortunate owners assemble for several weeks each year and live in perfect comfort and even luxury, though in the heart of the forest."¹⁶² Theodore Dreiser allowed Clyde Griffiths, the lower-middle class protagonist of *An American Tragedy*, a taste of summer romance at an Adirondack camp, as a symbol of what American life could hold for those who succeeded.

These great camps were built and furnished in a distinctive style combining the sinuous curves of a rusticated art nouveau with high Victorian clutter.¹⁶³ The primary motif of both structure and ornament was wood. Furniture, walls, even wallpaper and dishes, were executed in wood—with and without bark, slab and log, timber and lumber, hard-

158. *The Adirondack Park*, FOREST & STREAM, Sept. 11, 1873, at 73.

159. *A Grand Sporting Park*, AM. SPORTSMAN, Aug. 1873, at 169.

160. *The Adirondack State Park*, HARPER'S MONTHLY, Nov. 1873, at 937.

161. Ernest Carter, *Reclaiming the Adirondacks*, OUTLOOK, Sept. 25, 1887, at 230-31.

162. William Frederick Dix, *Summer Life in Luxurious Adirondack Camps*, 40 INDEPENDENT 1556, 1556-57 (1903). It was a stay at such a camp that led Freud to exclaim, "Of all the things that I have experienced in America, this is by far the most amazing." GRAHAM, *supra* note 21, at 43.

163. Art nouveau itself began as an attempt to reproduce nature in the *haut bourgeois* urban precincts of Paris; its rustication thus provides an ironic but unwitting emulation of

wood and soft. The result was the "Adirondack Style," a fantasy of life in the forest; about as faithful to camping in the north woods as the Petit Trianon was to dairy farming in France. That style was also the basis of the "wilderness architecture" adopted by the National Forest Service for its sites in Yellowstone and Glacier National Parks, among others.¹⁶⁴

The creator of the Adirondack Style was William West Durant, who built four great camps along the Raquette River chain of lakes, and sold them to J. P. Morgan (Camp Uncas), Collis P. Huntington (Camp Pine Knot), Alfred G. Vanderbilt (Sagamore Lodge), and Lieutenant Governor Timothy Woodruff (Kamp Kill Kare).¹⁶⁵ Among the other notable American architects and firms employed in building these rustic retreats were Robert H. Robertson, McKim, Mead & White, Coulter & Westhoff, and John Russell Pope.¹⁶⁶

Others owning Adirondack camps included banker-philanthropist Anson Phelps Stokes and Whitelaw Reid, owner and editor of the *New York Tribune*, both of whom had camps on the Upper St. Regis. Frederick Vanderbilt built a Japanese pagoda there and Edward Hubbard Litchfield, a perfectly reproduced French chateau on Tupper Lake. Financiers Julius Bache, Otto Kahn, Adolph Lewisohn, and Isaac Seligman, barred by their religion from other resorts and clubs, all built camps on Upper Saranac Lake. Secretary of the Navy William C. Whitney and his son, banker and horsebreeder Harry Payne Whitney, a Vanderbilt son-in-law, owned a camp on Forked Lake. Gen. E.A. McAlpin, tobacco magnate, owned Trophy Lodge on Brandreth Lake which his wife's family had purchased from the state in 1851. Robert C. Pruyn, with family connections to the New York Central Railroad as well as the lumber industry in Albany, owned Camp Santanoni. Phineas Lounsbury, the one-time governor of Connecticut and president of the Merchant's Exchange Bank, owned a camp on Raquette Lake, as did Allen Apgar, his colleague at the bank. Others included Chauncey Depew, United States senator and chairman of the board of the New York Central Railroad, Samuel Callaway, president of the same line, Governor John A. Dix, former Vice-President Levi P. Morton, publisher R.J. Collier, E.H. Harri-man, and many more.¹⁶⁷ Overall, these men represented the very highest reaches of American wealth and prestige in the Gilded Age.

164. KAISER, *supra* note 155, at 4.

165. 2 DONALDSON, *supra* note 35, at 93.

166. Kaiser, *supra* note 155, at 69.

167. For Webb, Vanderbilt, Whitney, Dix, Callaway, Depew, and Rockefeller, see Roger C. Thompson, *Politics in the Wilderness: N.Y.'s Adirondack Forest Preserve*, 6 FOREST HIST. 14, 17 (1963); for Huntington, Collier, Morgan, Woodruff, Stokes, and Lewisohn, see Parnes, *supra* note 117, at 141-48; for Bache, Kahn, Lewisohn, and Seligman, see Kaiser, *supra* note 155, at 144-58; for Apgar and Reid, see 2 DONALDSON, *supra* note 35, at 22, 94; for McAlpin

b. The Clubs

By 1871, the legislature recognized the increasing presence in the Adirondacks of landowners not living off the land as farmers or lumberers, allowing them to post property against hunting and fishing by neighbors by declaring their acreage a game preserve.¹⁶⁸ In 1876, it afforded the same privilege to corporations and associations, and so encouraged the creation of clubs made up of private individuals who jointly owned Adirondack land.¹⁶⁹ The Adirondack Iron & Steel Co., which had failed to extract iron ores from deposits in the Adirondacks because of the presence of titanium (regarded as an impurity), first leased, then sold, over 100,000 acres to the Adirondack Club.¹⁷⁰ That was the first of the many hunting and fishing clubs in the Adirondacks. The group, which later changed its name to the Tahawus Club, sold all but 10,000 acres to Finch, Pruyn Lumber Co. and leased back the hunting and fishing rights.¹⁷¹ Finch, Pruyn in its turn leased some of the land to other clubs as well; their rent paid property taxes, and their caretakers guarded against fire.¹⁷²

In 1887, William A. Neilson and Charles Alderson purchased 28,000 acres near the Upper Ausable Lake to avert the sale of its "glorious virgin forests" for lumbering. The club called its land the Adirondack Mountain Reserve. This was the genesis of the Ausable Club, a private hunting, fishing, and mountaineering club.¹⁷³ Three years later, the Adirondack League Club was formed. For about \$500,000, it bought 104,000 acres in Hamilton and Herkimer counties, later bought 12,000 more, and leased another 75,000 acres.¹⁷⁴ Member-

ISTS 53 (1985); for Harriman, see HAROLD T. PINKETT, GIFFORD PINCHOT: PRIVATE AND PUBLIC FORESTER 49 (1970); for Lounsbury, see CRAIG A. GILBORN, ADIRONDACK FURNITURE AND THE RUSTIC TRADITION 164 (1987); for Morton, see KAISER, *supra* note 155, at 136-37.

The last of the great camps, Eagle Nest at Blue Mountain Lake, was built in 1937 by Walter Hochschild of American Metals Climax (today AMAX), the giant international mining and extraction company. His son, Harold Hochschild, also head of AMAX, an amateur historian of the Adirondacks and the Chairperson of the 1971 Temporary Study Commission on the Future of the Adirondacks, gave the camp to serve as a museum and library of the Adirondacks. There can be few research libraries in a more beautiful setting.

168. Act of Apr. 28, 1871, ch. 831, 1871 N.Y. Laws 1912-13.

169. 1876 N.Y. Laws ch. 632.

170. ARTHUR H. MASTEN, THE STORY OF ADIRONDACK 175 (1923).

171. *Id.* at 189.

172. *Sargent Hearings*, *supra* note 83, at 66-67. This pattern has continued. In 1970, every timber products company responding to a state survey leased Adirondack land to private clubs. TECHNICAL REPORTS, *supra* note 6, rep. 5, at 41.

173. At one time, the club owned the summits of Haystack, Basin, Saddleback, Sawteeth, Bothics, Armstrong, Upper and Lower Wolf Jams, Blake, Colvin, Dial, Bear Den, and Noonmark mountains, all of which it sold to the state in 1977. BROWN, *supra* note 141, at 31. It currently owns one of the few old-growth forests remaining in the Adirondacks at Nipple Top.

ship was limited to 500 people, each of whom initially paid \$1000 for membership and in exchange received the use of the club's facilities as well as a five-acre plot with water frontage.¹⁷⁵ The club numbered among its members many of those who would later be founding members of the Association for the Protection of the Adirondacks (the APA).¹⁷⁶ By 1893, about 1 million of the 3 million acres within the Park were held as private preserves,¹⁷⁷ at least three clubs owned over 100,000 Adirondack acres apiece.¹⁷⁸

3. The Goals of the Preservationists

As wealthy and upper-middle class New Yorkers flocked to Adirondack preserves and estates, the constituency for preservation grew. As Roger Thompson puts it,

Exploitation of the Adirondack forests was little different from the forest exploitation anywhere else in the nation during the free-booting *laissez-faire* era. . . . But peculiar to the Adirondack area, perhaps, was the fact that during the waning years of the Victorian period the more affluent members of New York society began to assemble rather large holdings of forest land to use as summer estates.¹⁷⁹

These landholders, so different from the loggers, trappers, and dirt farmers scratching subsistence from the wild land, were resented both in the Adirondacks and elsewhere.¹⁸⁰ Thus, any movement to protect the Adirondacks from deforestation, and from its partner, economic development, had to avoid the charge that what was being protected was the leisure of the wealthy. This may, in part, account for the insistent reiter-

175. *Id.* at 161.

176. Among the Club's trustees were Abraham G. Mills, Warren Higley, Warner Miller, and Henry E. Howland. *Id.* at 159.

177. FOREST COMM'N OF N.Y. STATE, ANNUAL REPORT OF THE FOREST COMMISSION 154 (1894). As of 1902, 60 private preserves accounted for 800,000 acres in the Park. The difference in figures may be attributable to the leasing of land to private preserves by lumber companies. That land is not owned as a preserve, but is used as such. BROWN, *supra* note 141, at 52.

178. William F. Fox, *Forestry Matters in New York*, PROC. AM. FORESTRY ASS'N 62, 67 (1893).

But the Association for the Protection of the Adirondacks listed no clubs of over 100,000 acres in 1901. It gave the following as the major preserves in the Adirondacks at the turn of the century, in order of size: Adirondack League Club, 80,000 acres; Tahawus Club, 75,000 acres; Hamilton Park (Wm. Whitney), 75,000 acres; Rockefeller Preserve, 62,000 acres; Boreas Ponds (Finch, Pruyn & Co.) 46,000 acres; Nehasane Park (Wm. Webb), 34,000 acres; Sumner Park (Wm. Durant), 32,000 acres; Wilderness Park (Wm. DeCamp), 30,000 acres; Adirondack Mountain Reserve (Ausable Club), 29,000 acres; Horseshoe Forestry Co., 28,000 acres; Brandreth Preserve (Edwin Brandreth), 26,000 acres; Ampersand Preserve (Santa Clara Lumber Co.), 21,000 acres; Vilas Preserve (Edward Carpenter), 19,000 acres; Paul Smiths Co., 19,000 acres; Santanoni Park (Robert Pruyn), 10,000 acres; Caugh-Na-Wau-Ga Club (Wm. Clark) 10,000 acres. APA, SPECIAL REP. NO. 11, at 2-3 (1977).

ation by the proponents of forest protection that their cause was the protection of transportation and water supply.

Ultimately, it was the state's *passive* ownership that would protect the retreats of the estate owners and the clubs. The state was the perfect abutter: it laid no roads, blocked no views, erected no buildings, and committed resources to fire prevention and firefighting. Hence, the very wealthy, who might be thought ideologically opposed to state involvement, had, in this instance, the opposite interest; in fact, they had a reason to support the state's ousting an ongoing use. The self-interest of a significant slice of the social and financial elite of New York and the nation in the north woods meant that the fate of that forest was not left to merely economic exploitation.

The most attractive option for a legislature faced with the question of what to do with lands that came willy-nilly into state ownership would probably have been conservation, that is, retention of state lands and their managed exploitation. Such a course would both preserve the forest as a resource *and* produce revenue for the state. It would have popular appeal on both a sentimental and a financial basis. Thus, conservation would appear to have been the "default" solution. The fact that it was not adopted, despite the potential and actual constituency for conservation—merchants, foresters, lumberers and taxpayers—indicates a quite extraordinary effort on the part of the preservationists for whom an alternate, more expensive solution was attractive.

For wealthy vacationers, state lumbering was only marginally less disruptive than private lumbering. State lumbering would still create unattractive scenes of cutover lands, lead to the construction of more railroads, and increase the danger of fire. Thus, the consistent aim of preservationists was to persuade the state to keep its land, but *not* to use it. Whereas scientific foresters favored active state management of New York's forests and New York City merchants supported state purchase of the entire region, the outcome most favorable to preservationists was the course actually adopted to save the Adirondacks—passive state ownership of land which would otherwise be used for lumbering, and private ownership of land used recreationally.¹⁸¹ Obviously, it was not easy to

achieve a goal which required higher state taxes, lower state revenues and special benefits to a circumscribed group. The story of the forest's creation, reflected in the records of the Legislature and private organizations, is one of repeated attempts by the legislature to utilize the gigantic bounty of state-owned lands as a setoff to the cost of maintaining them. Those efforts were ultimately defeated by preservationists who used the strategy of constitutionalization to protect the nonuse of property from legislative interference. The irony of this outcome is that this strategy had been developed to protect active uses of private property from legislative interference, uses like those of the industrialists who supported the effort to restrain development in the Adirondacks.

Railroad barons, bankers, and stock speculators depicted their main opposition, the lumber industry, as greedy and rapacious despoilers of a public trust. Logging, however conservationist, and lumberers, previously regarded as colorful vital entrepreneurs, came to be viewed as "ruthless, arrogant, greedy destroyer[s] of the bounty of nature."¹⁸² Indeed, the proponents of wilderness lumped scientific foresters together with lumberers and condemned both as destroyers of wilderness. To read newspapers like the *Democratic Times* and the *Republican Tribune* for the last quarter of the nineteenth century is to hear an unremitting drumbeat against railroads, lumberers, and even forestry—anything that threatened to cut the woods.¹⁸³ "[T]he public perception of lumbering changed from that of an essentially harmless activity not inconsistent with wilderness recreation to one that threatened to destroy [it]."¹⁸⁴

The success of the constitutionalization campaign depended upon preservationists forging an electoral majority, expressed in a unidistrict¹⁸⁵ constitutional referendum, for the state's passive retention of its

to draw up a forestry plan for D. Willis James of the Sargent Commission and the Chamber of Commerce. See PINKETT, *supra* note 167, at 34. Others who sought Pinchot's help in managing their forest estates were Abram S. Hewitt, E.M. Harriman, and Wm. G. Rockefeller. *Id.* at 49. The forest management plans Pinchot drew up in the Adirondacks continued to be profitable at least into the 1940's. Hardy L. Shirley, *Large Private Holdings in the North*, 1949 Y.B. AGRIC. 257-58.

Under the direction of Bernhard Fernow, the Adirondack League Club was one of the first to adopt a policy of scientific forestry. Ironically, its members later opposed any forestry management plan on state lands, and some are reputed to have been behind the dismal failure of Fernow's management of the Cornell forestry school. 2 DONALDSON, *supra* note 35, at 159; GILBORN, *supra* note 167, at 70. Fernow's plan may not have been implemented since the club's purchase was subject to the right of the seller (probably Finch or Pruyn) to log spruce above 12 inches for the next 15 years. RODGERS, *supra* note 96, at 166.

182. TERRIE, *supra* note 118, at 98.

183. The Tribune consistently urged that action be taken to protect the woods. Kranz, *supra* note 136, at 144-45. John Agar, a major stockholder in the New York Times, was one of the founders and first presidents of the Association for the Protection of the Adirondacks. Ostrander, *supra* note 47, at 302.

184. TERRIE, *supra* note 118, at 99.

185. In a unidistrict election, the entire state votes as a single district. This is important where, as here, legislative districts are apportioned unequally.

181. Despite the opposition of preservationists to forestry on state lands, they were not at all adverse to its aims. Owners of private preserves and estates were undertaking forestry on their own lands. Indeed, they were responsible for some of the most innovative projects directed toward sustained yield forestry. See George B. James, *Cooperative Forestry*, 11 PROC. AM. FORESTRY ASS'N, at 169-70 (1896).

Gifford Pinchot, whose first employment as a forester was at George Vanderbilt's Biltmore in North Carolina, was subsequently recommended by Vanderbilt to his brother-in-law, William Seward Webb. Webb owned a 40,000 acre camp, Ne-ha-sa-ne Park, and he hired Pinchot as well. This was Pinchot's first introduction to Adirondacks forestry. GIFFORD PINCHOT, *THE ADIRONDACK SPRUCE: A STUDY OF THE FOREST IN NE-HA-SA-NE PARK* at iv-v (1898). Later, Pinchot also drew up a forestry plan for an adjoining tract owned by William H. Whitney and logged by the Santa Clara Lumber Co. *Id.* at v. Pinchot was also asked

Adirondack land. And for that purpose, it was the idea of wilderness, land too sacred to disturb, that served to persuade the public to oppose the state's otherwise profitable and tax-reducing use of its land. No longer was timbered land a natural resource subject to harvest; now it was wilderness, and wilderness assumed a spiritual value in a country fast becoming developed and urbanized.

III

IDEOLOGIES OF THE FOREST: WILDERNESS AND WOODLOT

A. Wilderness

Any account of wilderness in the midst of industrialization may be less about preservation than construction. For in the modern world, wilderness requires the "conscious presence of man . . . [to keep] nature natural."¹⁸⁶ Intense levels of control are necessary to preserve that wilderness whose inherent attractive quality resides in being uncontrolled, wild, nonhuman. The mechanisms for the controls which allow us to believe that nature exists are those we impose by law on economic development and on land use.

At one time, wilderness interested very few. To Americans in 1795, "the sight of a wheat field or a cabbage garden would convey pleasure far greater than that of the most romantic woodland views," said Isaac Weld, an English traveller.¹⁸⁷ The tasks of clearing and cultivation defined the relationship with the natural world. But the post-Enlightenment view of the relationship to nature was one of unity in a sense that went beyond getting a living from the land; there is "one life," said Wordsworth, "within us and abroad." That unity was the gravamen of Romantic thought about the natural world. What, then, did the clearing of the forest for the cultivation of wheat field and garden mean?

In the United States in particular, transcendentalism, the home-grown brand of romanticism, made that question central to its project. For the transcendentalists, nature and humanity were not only one; nature was itself "the symbol of spirit"¹⁸⁸ and "mountains, waves and skies . . . emblems of our thoughts,"¹⁸⁹ said Emerson. So what were we losing as we changed the face of the world? Thoreau answered, "[A]ll good things are wild, and free."¹⁹⁰ We were losing the Good and had to take

thought to preserve it. That notion became the dominant way of thinking about wilderness in the United States.

Thus, a popular and still current story of the forest is the heroic-romantic tale about the wilderness as a necessary adjunct to the fulfillment of the human soul. The history of the regulation of American forests is in large part the story of a growing appreciation of land "untrammelled by man," in the words of the federal Wilderness Protection Act of 1964,¹⁹¹ and a concurrent disapproval of valuation in terms of use.

In the middle of the nineteenth century, the early proponents of this unitary view also spoke of the power of the wilderness to heal the mind and body wounded by separation from nature. They saw the thrilling beauty of the Adirondack landscape and called it a cure, both physically and mentally, for the ravages wreaked by the stress of urban life. After his 1858 visit to Follansbee Pond, the so-called "Philosophers' Camp" in the Adirondacks, Emerson wrote of himself and his colleagues:

They fancied the light air
That circled freshly in their forest dress
Made them to boys again. Happier that they
Slipped off their pack of duties, leagues behind,
At the first mounting of the giant stairs.
No placard on these rocks warned to the polls,
No door-bell heralded a visitor,
No courier waits, no letter came or went,
Nothing was ploughed, or reaped, or bought, or sold; . . .¹⁹²

Returning to the wilderness restored men to their youth and freed them from the duties of a merely political, merely social, merely economic life.

Although the transcendentalists themselves succeeded in convincing very few, their inheritors, particularly John Muir, woke the public to an appreciation of wilderness for its own sake, rather than as a natural resource. Muir, and his long, bitter, and ultimately unavailing struggle to preserve Yosemite's twin, Hetch Hetchy Valley, from being dammed to supply water to San Francisco, waged through the first decade of the twentieth century, enshrined wilderness preservation in the public mind. Only wilderness, untouched by man, was sufficient. "The clearest way into the Universe," said Muir, "is through a forest wilderness."¹⁹³ After

186. KELLER, *supra* note 33, at 170.

187. 1 ISAAC WELD, TRAVELS THROUGH THE STATES OF NORTH AMERICA AND THE PROVINCES OF UPPER AND LOWER CANADA DURING THE YEARS 1745, 1796, AND 1797, at 41 (2d ed. 1799), cited in CAROLYN MERCHANT, ECOLOGICAL REVOLUTIONS: NATURE, GENDER AND SCIENCE IN NEW ENGLAND 162 (1989).

188. Ralph Waldo Emerson, Nature, in THE SELECTED WRITINGS OF RALPH WALDO EMERSON 197 (William M. Gilman ed., 1965).

189. *Id.* at 200.

190. Henry David Thoreau, Address Before the Concord Lyceum (Apr. 23, 1851), in RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 88 (1973).

191. Wilderness Act of 1964, 16 U.S.C. § 1131. The first federal wilderness area was administratively designated in 1924 in New Mexico through the efforts of Aldo Leopold of the United States Forest Service. In 1929, the Secretary of Agriculture promulgated regulations permitting the designation by the Forest Service of other such areas. WILLIAM DORON, LEGISLATING FOR THE WILDERNESS 19-20 (1986).

192. Ralph Waldo Emerson, The Adirondacks, in POEMS 159, 161 (1885).

193. Linda Wolfe, *John of the Mountains: Unpublished Journals* 313, in WILLIAMS, *supra* note 39, at 405. Muir's adversaries put it differently: "With him, it is me and God and the rock where God put it, and that is the end of the story." Letter from Congressman William Kent, to Sidney Anderson (July 2, 1913) in NASH, *supra* note 190, at 174.

Muir's defeat, Aldo Leopold¹⁹⁴ and Robert Marshall¹⁹⁵ won his victories, persuading the federal government to preserve wilderness by regulation and statute. Today we have wilderness and it is life-oriented. Thoreau, this story says, was right: "In wildness, is the preservation of the world."¹⁹⁶

The antithetical view, the natural world as a resource to be worked by human enterprise, was also a construction of the nineteenth century, in this case a conceptual product of the market revolution.¹⁹⁷ It was possible to hold both views at the same time. Indeed, proponents of the wilderness aesthetic were among the most avid exploiters of natural resources in their business dealings.¹⁹⁸

From this dual perspective, this story can be told as a feminist tale of the wilderness as the antagonist of the city. In this story, the social construction of wilderness is deeply related to the heightened duality of gender roles in an industrial culture. Carolyn Merchant, an ecofeminist historian, has written that in nineteenth century America:

The public sphere of marketplace and politics was dominated by men, the private sphere of home and family by women. Nature was also severed: science and technology became the instrument for economic development, spirit and emotion a counterpoint to competition. From the first

194. Leopold is remembered as the man who persuaded the National Forest Service to modify its goals of land and resource management by creating the first wilderness designation for untouched lands at the Gila Wilderness and Peco Wilderness in New Mexico in 1924 and 1933, respectively. COX ET AL., *supra* note 32, at 227. Today, Leopold's notion of the land ethic and wilderness aesthetic as an interactive recognition of what the natural world requires and of what the human species requires within that world has become a philosophical foundation of ecological ethics. See ALDO LEOPOLD, A SAND COUNTY ALMANAC (1949); MAX OELSCHLAGER, THE IDEA OF WILDERNESS 204-42 (1991).

195. Marshall, a wealthy New Yorker who went to Washington with the New Deal, founded the Wilderness Society in 1935 to lobby the government to preserve more wild country. As the head of the National Forest Service Division of Recreation and Lands, he drafted the first regulations on protection of wilderness areas in 1939. His interest in wilderness preservation stemmed from a childhood and adolescence spent hiking in the Adirondacks; he was one of the first to climb the forty-odd peaks there over 4000 feet. COX ET AL., *supra* note 32, at 229.

196. JOHN BARTLETT, FAMILIAR QUOTATIONS 560 (Emily Morison Beck ed., 15th ed. 1980). Today this is the motto of the Wilderness Society, founded by Robert Marshall.

197. MERCHANT, *supra* note 187, at 23.

198. The first officers and board of the Association for the Protection of the Adirondacks in 1902, the year of its founding, included Henry Howland, President; Judge Warren Higley, First Vice-President; William Barbour, James MacNaughton, William G. Rockefeller, William C. Whitney, Vice-Presidents; Edward Marston, Treasurer; Henry S. Harper, Secretary.; and Trustees John G. Agar, William G. DeWitt, Archer M. Huntington, Gen. E.A. McAlpin, Col. Abraham G. Mills, J. Pierpont Morgan, Henry Phipps, Rev. Henry C. Potter, Robert C. Pruyn, William A. Read, Hon. Whitelaw Reid, F. Augustus Schermerhorn, Hon. Titus Sheard, Charles A. Tatum, Dr. Edward L. Trudeau, Alfred G. Vanderbilt, William G. Verplanck, Thomas S. Walker, Dr. Samuel B. Ward, Dr. William Seward Webb, Alfred L. White, Hon. Timothy L. Woodruff. WOODS & WATERS, Aug. 1902. This is a pretty fair sampling of the top layer of American merchants, industrialists, bankers, and transport magnates.

perspective, land was a 'virgin' to be conquered and controlled; nature, first second, a mother who embodied moral law.¹⁹⁹

If we apply Merchant's explanation of the duality of man's sphere and woman's sphere, the construction of the ideas of "virgin" wilderness which must be "conquered" and of "Mother Nature" who is a wilder parallels Dorothy Dinnerstein's account of individual male socialization. Dinnerstein holds that the creation of male gender in a nuclear family requires not only the standard Oedipal conflict with the male parent, but also separation from the mother followed by overcoming, then denying, her power and, finally, regretting the separation.²⁰⁰

Much nineteenth century language about wilderness imposes this gender identity on the natural world. The imagery shows that men viewed their relationship with nature as gender-linked. The gender link represents the interaction of men with the Other, which is female. Moreover, to a large extent, the nineteenth-century language illustrates Dinnerstein's observations that male identity is necessarily forged by insistence on separation from the female, accompanied by regret.

The gender imagery imposed on wilderness by nineteenth-century male writers is compelling.²⁰¹ Here is how George Perkins Marsh, the first and greatest of American ecologists, put it:

The fact that, of all organic beings, man alone is to be regarded as essentially a destructive power . . . tends to prove that, though living in physical nature, he is not of her, that he is of more exalted parentage, and belongs to a higher order of existences than those born of her womb and submissive to her dictates.²⁰²

This triumph of the male over engendered female nature is common among wilderness buffs like Teddy Roosevelt: "The man in the woods matches himself against the forces of nature . . . [It] is a test, a measuring of strength, a proving of his essential pluck and resourcefulness and manhood, an assurance of man's highest potency, the ability to endure and to take care of himself."²⁰³

Superior to all creation and willing to use the earth—Whitman's "great silent savage all-acceptive Mother"²⁰⁴—as they wish, men still require some place which is unused, as the idea of the whore requires the idea of the virgin. Thus, part of the natural world must be kept sacro-

199. MERCHANT, *supra* note 187, at 231.

200. See, DOROTHY DINNERSTEIN, THE MERMAID AND THE MINOTAUR 188-97 (1976).

201. "Our over-personification of nature . . . is inseparable from our under-personification of woman." *Id.* at 108.

202. Lowenthal, *supra* note 99, at 36-37.

203. NASH, *supra* note 190, at 154. Consider a Canadian's discussion of late nineteenth century lumbering: "[N]o medieval ravisher could have been more fierce and unscrupulous than the lumberman. His lust of power and wealth have changed the face of the country." Arthur R.M. Lower, *The North American Assault on the Canadian Forest* (1938), in THE GREAT LAKES FOREST, *supra* note 14, at 134-35.

204. *Id.* at 151.

sanct, pure, and unexploited, "virgin wilderness." Such places, said Thoreau, must be kept wild, "for modesty and reverence's sake, or if only to suggest that earth has higher uses than we put her to."²⁰⁵

The separation from nature that is the concomitant of a market society allows its exploitation. Nonetheless, the exploitation of wilderness becomes taboo, not because men are reestablishing their unity with nature, but rather because, despite overcoming "Mother Nature" and mastering her in their economic lives, they retain their longing for her; "nature" becomes an icon attainable only to the most successful.

The possessor of wilderness possesses not only a rarity, but a symbol of the possession of all nature. Said the first white man to climb the Adirondack's highest peak, "It makes a man feel what it is to have all creation placed beneath his feet."²⁰⁶ Nature beneath one's feet is a rhetorical trope appropriate to the relationship of an industrialized society to the natural world. Although the natural world is desired, the desire is for possession, not joining. Wilderness is no longer a commons available for exploitation but is instead the most precious commodity an individual can possess.

Hence, when wealthy vacationers appealed directly to the public on behalf of wilderness, their message was understandable. What man did not wish to imagine himself on some majestic summit with nature at his feet? A whole genre of literature was based on such imaginings. Though at the time representing only the wealthy elites of New York City, preservationists succeeded in winning this battle for public opinion by convincing the public that pristine wilderness served both the economic and spiritual ends even of those who would never lay eyes on it.

As a consequence of its sacralization, an increasingly urbanized population came to value wilderness in the same terms as those who possessed it. This electorate, as the friends of the park came to discern, would not be satisfied with conservationist use, for wilderness and utility were represented as dialogic opposites. The quotidian demanded the wilderness, a sphere of purity and perfect nonutility.

B. Woodlot

Opposed to the preservationists' romantic and popular conception was conservationism, a drier and altogether less compelling ideology. "Conservation," says historian Samuel Hays, "above all, was a scientific movement, and its role in history arises from the implications of science and technology in modern society . . . Its essence was rational planning to promote efficient development and use of all natural resources."²⁰⁷

205. *Id.* at 103.

206. KELLER, *supra* note 33, at 115.

207. HAYS, *supra* note 95, at 2.

The utilization of scientific methods to determine the maximum appropriate use of natural resources was a dominant paradigm of the regulatory economics of the first half of the twentieth century, approved of by both the Progressives and the New Deal, and institutionalized and bureaucratized by wartime mobilizations of the economy.²⁰⁸

Conservation was the ideology of technocrats now convinced that questions about distribution of wealth were a misunderstanding of the real issue of how to increase production, thereby increasing the wealth of all. They claimed that questions previously thought of as political were in fact technical, answerable by new, expert approaches to science. Forester Bernhard Fernow said:

[T]he forest . . . bears such a close relation to other cultural and to water conditions that the unrestricted exercise of property rights is apt to lead to conditions detrimental to the interests of the community and of coming generations. How and how far restriction may be applied, or how private forest owners may be made to consider the interests of the community in the use of their property, or whether and where the community had best take possession of the forest property, that is the general forestry problem.²⁰⁹

Even if private ownership of forests were to remain the rule, parallel government ownership would be necessary to demonstrate the long-range profitability of forests. In 1882, Fernow said that, while "impetus to action will come mainly through private interest, we believe that in this one question, the national government, as owner of large tracts of woodlands, is called to proceed with good example in the management of the same."²¹⁰ But by 1888, Fernow discounted *any* role for private forestry in the north woods, telling the New York Chamber of Commerce that "[s]tate ownership is the only hope of saving or restoring the favorable forest conditions [in the Adirondacks]. . . . What is wanted is a fully equipped rational forest management."²¹¹

Fernow was not alone in thinking that expert state management of forest resources was required. Charles Sargent shared that view,²¹² as did William Fox, the Superintendent of New York State's forests,²¹³ and

208. Despite overwhelming acceptance, maximum appropriate use, or sustained yield, methods were often less than successful. In some cases, they led to catastrophe, as Arthur McEvoy has documented in respect to the destruction of California's sardine fisheries. ARTHUR MCEVOY, *THE FISHERMAN'S PROBLEM: ECOLOGY AND LAW IN THE CALIFORNIA FISHERIES, 1850-1980*, at 123-55 (1986).

209. BERNHARD FERNOW, *FOREST CONDITIONS* 33 (1913).

210. *Id.* at 58.

211. *Id.* at 129 (speech to New York City Chamber of Commerce, Mar. 9, 1888).

212. *Sargent Hearings*, *supra* note 83, at 16.

213. Fox stated that view:

[T]he preservation and future existence of that [Adirondack] forest in its entirety is dependent on communal instead of private interests A communal interest is based on perpetuity of title and on a management looking to the future rather than the present. A private interest means successive changes in the title, and a manage-

John Muir.²¹⁴ The synergistic effects of the forest upon the ecosphere and the consequent need for its social control seem to have been a recurrent theme of those who wished to use the forests scientifically.

Scientific forestry was the prototype of conservationism.²¹⁵ Its cause became one of the first public acts of the American Association for the Advancement of Science (the AAAS), founded in 1872. The Hough report to the New York State Legislature was, in fact, an exegesis of a speech Hough made to the Association in 1873, calling upon the federal government to protect forest resources generally for the benefit of the public.²¹⁶ The AAAS then created a Committee on Legislation Necessary for the Protection of Our Forests, which, under Hough's leadership, petitioned Congress for a national policy of timber protection and stressed the role forests played in climate and water supply.²¹⁷

The drying up of rivulets, which feed our mill streams and navigable rivers and supply our canals, the failure of the sources which supply our cities with pure water, and the growing tendency to floods and drought resulting from the unequal distribution of the rainfalls since the cutting off of our forests are subjects of common observation.²¹⁸

The following year the AAAS committee successfully lobbied for Hough's appointment in 1876 to collect statistics and distribute information on forestry within the Department of Agriculture. This embryonic form of the Forestry Division of the USDA was headed first by Bernhard Fernow and then by Gifford Pinchot.²¹⁹

Likewise, the American Economic Association (the AEA), another technocratic group which believed in expert solutions to political questions, took up the forestry question at its fourth annual meeting in 1890.

ment based on present needs . . . State ownership will secure forest preservation.
Fox, *supra* note 178, at 67-68.

214. See, e.g., WILLIAMS, *supra* note 39, at 405.

215. Loomis Havermyer described it this way:

The great question of conservation has been forwarded more by the rapid reduction of our forests than by any other cause. The forests are the natural resource whose rapid destruction made scientists realize as early as the [eighteen]-seventies that, if existing practice were continued, the end was in the not far distant future.

LOOMIS HAVERMEYER, CONSERVATION OF OUR NATURAL RESOURCES 5 (1930), cited in HENRY CLEPPER, PROFESSIONAL FORESTRY IN THE UNITED STATES 15 (1971).

216. Franklin Hough, *On the Duty of Governments in the Preservation of Forests*, 1873 PROC. AM. ASS'N FOR ADVANCEMENT SCI. 1 (1874), cited in WENGERT & DYER, *supra* note 102, at 6-7.

217. Memorial of a Committee of the American Association for the Advancement of Science on Behalf of Forest Preservation, Leading to the Establishment of the Division of Forestry (Aug. 22, 1873) in BERNHARD FERNOW, REPORT UPON THE FORESTRY INVESTIGATIONS OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, 1877-1898, at 37 (899).

218. *Id.* Other climatological reasons advanced for the preservation of forests included the requirement of "the higher civilization of the Caucasian race . . . [that] shade must be provided . . . to avoid the action of the midday sun on the brain and nervous system." C. Abbe, *The*

The meeting was addressed by Pinchot and Fernow, the first professionally educated foresters in the country. The AEA recommended establishing public reserves of timber to be logged scientifically.²²⁰ In 1895, the National Academy of Sciences recognized the need for a federal policy on scientific forestry and established a committee chaired by Charles Singer Sargent who had completed similar work for New York State ten years earlier.²²¹

Scientific foresters like Fernow and Schurz wanted to rescue woodlands from short-sighted, short-term-profit-oriented lumbering practices and replace those practices with the scientific management of the forests. They claimed that a balance between cutting and planting could be found that would guarantee a "sustained yield" of timber forever. Though offered to urbanites as an alternative to the uncontrolled consumption of woodlot, the idea held not even the excitement of the logging drive. It was a bureaucratic solution to the problem of resource depletion and, as such, did not win mass support.

At the national level, preservation and forestry did not seem contradictory. Shortly before they became the avatars of the opposing poles of preservation and conservation in the struggle over Hetch Hetchy, both John Muir and Gifford Pinchot agreed that the United States needed a policy of forest reservation and scientific management of forest resources to guarantee, in Muir's words, "a sure harvest of timber."²²²

In 1891, Congress gave the President the power to create forest reserves.²²³ Foresters and preservationists alike saluted Congress for setting aside, in the words of John Noble, Interior Secretary under President Cleveland, "seventeen million acres of the public domain, to remain unconverted into private fortunes."²²⁴ This was acreage independent of the national parks and their dedication to recreation and scenery; the land was to serve the purposes of forestry and irrigation. No one could "appropriate to personal advantage what God and the Government have ordained should be for all."²²⁵

220. *Id.* at 21-22.

221. *Id.* at 26.

222. John Muir, *A Plan to Save the Forests*, 49 CENTURY MAG. 631 (1895).

223. Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103, repealed by Act of Oct. 21, 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792. Those reserves resembled the Adirondack forest reserve and park, rather than the national parks, in that the drawing of the border of the reserve had no effect on private titles within that border. In the national parks, all private titles within the park boundary were extinguished. See, e.g., 17 Stat. 32 (1872) (creating Yellowstone National Park). The national reserves provided for timber use. See WENGERT & DYER, *supra* note 102, at 4-5 *passim*. The Adirondack Park did not, at least in respect to state-owned land. N.Y. CONST. of 1894, art. VII, § 7.

224. John W. Noble, *Our National Parks and Timber Reservations: Their Importance and Proper Administration*, 10 PROC. AM. FORESTRY ASS'N 36, 37 (1893). While millions of acres went into reservation, Congress did not devise a management plan for these reserved areas

The congressional action, together with New York's ban on the sale of state lands in 1885, were taken by forestry advocates as a signal of the start of a new era in which conservation would take the place of the lavish consumption of forest resources which had, until then, characterized the United States.²²⁶ "[F]orestry matters in New York are moving, and in the right direction," said Fox.²²⁷ But, in fact, the creation of New York's forest preserve did not signal the beginning of scientific management of state-owned forests. The creation of the forest preserve was not accompanied by any provision for forestry in the park, despite the fact that more and more owners of private preserves and estates were undertaking forestry on their own lands.

Foresters saw as their audience forestland owners, while in New York, recreationists appealed directly to the public. Bernhard Fernow spoke of the need to make "[forestry] propaganda . . . among those who own forest property," and called for the creation of forestry associations.²²⁸ While, as Craig Allin has noted, preservationist organizations at the national level "did not constitute a significant political force until after the formation of the Sierra Club in 1892,"²²⁹ preservationist forces in New York mobilized far earlier, capturing the high ground of public purpose.

On the other hand, forestry advocates spoke of matters quite foreign to most citizens. State ownership of productive resources seemed anathema, and the plea to owners of forest resources to use conservationist methods was not an appeal to the millions. Bernhard Fernow made clear that forestry was not for those who wanted to preserve the forest or for those who expected immediate profit: "[F]orestry does not consist in leaving trees, but, on the contrary, in cutting every one . . . [T]he harvest is perhaps not profitable, but the loss must be charged to the improvement and greater value in which we find our property after the operation."²³⁰ With views such as these, it is not surprising that forestry advocates failed to persuade either the public or lumberers that conservationist methods were worth adopting.

226. See, e.g., Bernard Fernow, *Forest Conditions and Forestry Problems in the United States*, in 10 PROC. AM. FORESTRY ASS'N 29, 31 (1893). In 1885, California, Colorado, New Hampshire, and Ohio also created forest commissions as did Kansas and Michigan in 1887, the Dakotas in 1890, Maine in 1891, and Pennsylvania in 1893. G. Parsons, *Forest Administration—Federal or State?*, in 10 PROC. AM. FORESTRY ASS'N 123, 125 (1893).

227. Fox, *supra* note 178, at 71.

228. Fernow, *supra* note 226, at 35-36.

229. CRAIG ALLIN, *THE POLITICS OF WILDERNESS PRESERVATION* 29 (1982).

230. Bernhard E. Fernow, *Timber as a Crop*, in 10 PROC. AM. FORESTRY ASS'N 142, 145 (1893).

IV

CONSTITUTIONALIZING THE FOREST

The 1880's and 1890's were years of constant struggle over the future of the Adirondacks. The preservationists helped create a Forest Preserve and a state park, yet they were unable to prevent either state or private action that destroyed the forest. Only when public support was enlisted for a constitutional amendment was protection guaranteed. The tools of environmental and land use controls did not yet exist, so wilderness proponents had to preserve land in ways other than the now-familiar techniques of zoning and land use planning. True to the age, they chose constitutionalization, the same means by which other forms of property were protected. In the Adirondacks, constitutionalization, a concept developed in the course of the struggle for judicial protection of the dynamic use of private property, kept public property unused.

Possibly because of their power within a number of legislative districts, lumberers were able to achieve certain legislative outcomes. Preservationists, on the other hand, although able to attract mass electoral support, were unable to utilize the legislature with its particularistic and localized concerns. They came to favor constitutionalization as a means of neutralizing the political clout of lumberers. The political resources of each group dictated their strategies.

Legislative representation favored the lumber industry because it was well-represented in nonurban legislative districts that carried substantial weight because of malapportionment.²³¹ Conversely, the relative concentration of recreationists in New York City limited their ability to influence the legislature. The recreationists' strategy of constitutionalization, which required a one-time unidistrict referendum, capitalized on the electoral appeal of preservation downstate where the legislative votes of millions were devalued. The constitutional referendum reinvested those voters with weight equal to that of their rural counterparts.

A. *The Creation of the Forest Preserve*

At the start of the 1882 legislative session, Governor Alonzo Cornell, in his message to the new legislature, asked for the first time

231. The Constitution of 1846 provided each county with at least one senator, and New York County with four. N.Y. CONST. of 1846, art. III, §§ 3-4. In consequence, by 1879, the redistricting date closest to the decision to retain ownership of state owned woodlands, the difference between the number of inhabitants represented by a single senator in the largest and smallest counties was almost 60%. Ruth Silva, *Apportionment of the New York Assembly (pt. I)*, 30 FORDHAM L. REV. 581, 601 (1962).

The Assembly had 128 members from 59 counties, and each county had at least one assemblyperson regardless of size. N.Y. CONST. of 1846, art. III, § 5. A reapportionment act of 1879, actually increased the disproportion between the 22 smaller and 37 larger counties.

whether the state should not end its sale of lands. He described the existing policy of sale as "questionable."

[I]t has been the practice of the State . . . to sell its wild lands, at nominal prices, to private parties, who have gone on . . . and cut off the marketable timber where accessible and then abandoned to the State the clearings, worthless generally for agricultural purpose; thereby escaping the payment of taxes.²³²

The area, he noted, had "become one of the most inviting resorts to invalids and tourists."²³³ More than that, however, the "region is the natural and principal watershed of important navigable waters, and, if it be divested of its timber, imminent danger will threaten."²³⁴

The *New York Times* agreed: "On purely economic grounds, it does not pay to allow the forests to be ruthlessly cleared, for it is demonstrable that the water supply of the upper Hudson has suffered in continuity if not in volume from the indiscriminate felling of trees in the Adirondacks."²³⁵ The *Herald* and the *Tribune* agreed as well.²³⁶ In February 1883, the Legislature took its first steps toward creating a forest preserve, by prohibiting the further sale of state land in ten Adirondack counties.²³⁷ The Legislature further directed the Comptroller to acquire complete title to tax sale lands by buying out joint owners and appropriated \$10,000 for that purpose.²³⁸

This creation of the forest preserve was not opposed by the wood products industry;²³⁹ in fact, it was sponsored by Senator Lansing of Albany, the great milling center. So long as lumbering could continue on state lands, lumberers would be in no different position than they had been when they owned, but did not pay taxes on, the land they cut. State retention of woodland seemed to mean only that an unofficial system of timber licensing would become official. The lumberer would now be a licensee rather than a temporary freeholder. The real threat lumberers perceived was that a park would be created with lands not only owned by the state but also barred from use for market purposes. Should the land be wilderness or woodlot? The legislature could not readily answer that question.²⁴⁰ Thus, while it barred the sale of state lands, the legislature

232. Alonzo B. Cornell, Annual Message From the Governor (1882), in 7 Lincoln, *supra* note 79, at 676, 721.

233. *Id.*

234. *Id.* at 711.

235. N.Y. TIMES, Jan. 18, 1883.

236. N.Y. HERALD, Jan. 11, 1883; N.Y. TRIBUNE, Jan. 24, 1883.

237. Act of Feb. 6, 1883, ch. 13, 1883 N.Y. Laws 10. The counties were Clinton, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, and Warren. *Id.*

238. Act of May 25, 1883, ch. 470, 1883 N.Y. Laws 645.

239. The bill passed the Senate 24-5 and the Assembly 81-4, and five of the nine negative votes cast came from Adirondack county legislators, of whom there were at least 22. N.Y. SENATE J. 75 (Jan. 23, 1883); N.Y. ASSEMBLY J. 207 (Feb. 2, 1883).

240. Indeed, it did not even know where its lands were and thus appointed Colvin to

appointed a Special Committee on State Lands in the Adirondack Region to solicit the views of concerned citizens and make recommendations for further action. Virtually all the Adirondackers interviewed by the committee opposed the reservation, because the land was mostly cut over and valueless, and the state was unable to protect the forests it did own from timber thieves. The committee rejected these views as "mere special pleading for personal ends"²⁴¹ and found them

not only bad in policy but wrong in principle. If the State is not now able to defend its rights to property placed in its possession for the public good, it is because the laws are imperfect or the officials lacking in power or negligent in the use of the power delegated to them to maintain the rights of the State.²⁴²

The only state lands which should be available for sale were those cleared for farming, within a settled area, or "mingled with valuable private property."²⁴³

The committee afforded more deference to the views of "wealthy citizens who have in many cases purchased whole townships."²⁴⁴ It noted that "[t]hose who have purchased these lands . . . as preserves for game have often, not only no desire to have the timber cut, but consider the destruction of trees by lumbermen as in every way deplorable."²⁴⁵ Not surprisingly,

[t]his class through many of its leading members . . . expressed a willingness to join their lands to those of the State, and to enter into an agreement not to cut any timber for lumbering purposes, or to allow any lumbering to be carried on upon them, and to place their whole territory in the hands of the State for control as a water-shed; provided, the State on the other hand, will grant them the exclusive privilege to hunt, fish, and camp thereon, relieved from all taxation.²⁴⁶

The committee did not entirely disapprove the proposition ("Hundreds of thousands of acres could be secured for the protection of the watershed upon such terms," it noted) but was politically astute enough to recognize that tax exemptions for wealthy vacationers "would not be popular with the other tax payers of the State."²⁴⁷ However, the proposal does reveal the support of campowners and club members for forest preservation which would remove state lands from the reach of lumbermen.

undertake a survey to discover the boundaries of state owned lands. Act of June 2, ch. 499, 1883 N.Y. Laws 693.

241. REPORT OF THE SPECIAL COMMITTEE ON STATE LANDS IN THE ADIRONDACK REGION, N.Y. S. DOC. NO. 23, at 4 (1884).

242. *Id.*

243. *Id.* at 5.

244. *Id.*

245. *Id.*

246. *Id.* at 5-6.

247. *Id.* at 6.

The tax proposal was a sweetener, but not central to the preservationist agenda. Wealthy sportsmen were not likely to clearcut their land in the future if they had not already done so; their interest was that state land not be lumbered. With or without tax breaks, they would not destroy their own recreational areas.

Finally, the committee endorsed the Hough report and concluded that the preservation and protection of the Adirondack forests were required to maintain the state's canals and rainfall, and to stockpile timber reserves to avoid importing wood from Canada. The land was not suited for agriculture but was "naturally the great forest reserve of the state."²⁴⁸ It drew a boundary for the proposed park that included the principal lands owned by the State and the chief of its watersheds but noted that "[i]t is not proposed to take by eminent domain, or purchase, the lands of private citizens."²⁴⁹ Nor did the committee recommend an end to lumbering on state lands. Instead, it suggested that by a "new method of management" of those lands, "we may . . . gather millions into the public coffers."²⁵⁰

The lumberers' perspective was expressed by Lemon Thomson, an active lumberer, in an address to the Albany Institute on the subject in March 1884. Those who wanted to create an Adirondack park, he said, were "office-seekers, aesthetics and dudes."²⁵¹ Thomson proposed an alternative to the park:

If the Legislature and the people of our State would give up the idea of a large public park and a sporting ground—if they would pass laws to prevent unjust taxation upon the lands in the Adirondack region; and also pass stringent laws against [making] fires . . . and enter upon an intelligent system of reservoirs, the blessing which would result would be immensely greater than the expense.²⁵²

The focus on reservoirs served two purposes: it answered the Chamber of Commerce and BOTT concern for maintaining navigability on rivers and canals and also provided for deep water logdriving.²⁵³

Thomson made the lumbermen's case against the park. First of all, "civilization in its onward march has penetrated" the Adirondacks, once a wilderness, and that is all to the good.²⁵⁴ Sportsmen and office seekers who would benefit from a new park bureaucracy hide their real motiva-

248. *Id.* at 10.

249. *Id.* at 11.

250. *Id.* at 13-14.

251. Lemon Thomson, An Address Before the Albany Institute on the Adirondack Wilderness, 11 (Mar. 18, 1884) (transcript available in Adirondack Museum Library).

252. *Id.* at 21-22.

253. The state's official Engineer and Surveyor, Silas Seymour, also supported the proposals for dam and reservoir construction. The watershed would not be depleted by scientific forestry and could be protected forever by expanding natural reservoirs. Kranz, *supra* note 136, at 165.

254. Thomson, *supra* note 251, at 5.

tions behind the claim that New York City's watershed is endangered. In fact, says Thomson, two-thirds of the Adirondacks are the watershed for the St. Lawrence. "What good does that do to the canals or the Hudson river?"²⁵⁵ If the real desire were to increase streamflow, the proponents of a park would back the lumber industry's proposals to construct dams and reservoirs. Instead, they attack the lumber industry, but that industry does not destroy the forests; it preserves them in its own interest. "There are no other class of men half so much interested in the preservation of the Adirondack forests as the lumbermen, for they own most of them, and when you destroy the timber, you destroy all that is most valuable."²⁵⁶ Lumberers take out only the mature trees, which would die and rot on the ground if not cut. "It is a most ridiculous folly for any one to pretend that our water supply from the Adirondacks will be better preserved by preventing the mature trees from being cut."²⁵⁷

Second, the lumber industry invests \$13 million annually in its sawmills and meets a payroll of \$2 million; it is important to the state, but it is continually threatened by "the manipulations of the tax department in the comptroller's office [which] . . . has compelled citizens who have owned lands in this region, and upon which they have paid thousands of dollars in taxes, to surrender, without compensation, their title to the State."²⁵⁸ The counties are to blame as well for they assess the lands of nonresidents at a far higher rate than those of local people. "The seven hundred and fifty thousand acres of which the friends of the great park now so frequently boast as belonging to the State, is made up entirely of lands seized by the state officers, and wrenched by oppression and unjust laws from the citizens of the State without paying the real owners one dollar for their lands."²⁵⁹ It was the tax laws which were destroying the forests, not the lumber industry.

In addition to the proposal to declare the area a park, Thomson says, there is another put forward by the New York City Chamber of Commerce. That proposal would have the State take four million Adirondack acres by eminent domain and appropriate funds to reimburse the owners.²⁶⁰ To Thomson, the two plans were simply "different ways of being robbed,"²⁶¹ but the Chamber's plan was preferable since at least it would provide reimbursement for purchased land. Thomson did not explain why the Chamber's eminent domain plan was better than the state's plan to hold onto its lands and create a park that would take no

255. *Id.* at 8-9. For confirmation of Thomson's point, see Dinsdale, *supra* note 27, at 253.

256. Thomson, *supra* note 251, at 11.

257. *Id.* at 12.

258. *Id.* at 14.

259. *Id.* at 18.

260. This proposal by Morris Jesup was made to the Chamber, which adopted it at the end of 1883. Parnes, *supra* note 117, at 199.

261. Thomson, *supra* note 251, at 20.

lumber company's land. Perhaps it appeared to the industry less likely to be adopted.

The eminent domain proposal was opposed by the new governor, Grover Cleveland, and defeated.²⁶² In his 1884 message to the legislature, Cleveland said that while the state

should not neglect to provide against any danger which threatens the supply of water in our important streams and rivers, . . . we must vigilantly guard . . . [against] schemes which are likely, in the present state of the public mind, to be proposed, having for their object the purchase by the State of immense tracts of these lands, upon the representation that this is the only means of protecting the interests involved.²⁶³

The Governor's preference was that land already "owned by the State should be plainly located and declared . . . to be Park lands."²⁶⁴ At the same time, he suggested that the time between abandonment and sale be shortened to discourage cut-and-run logging. Whether state lands were to be park or woodlot remained unresolved.

B. The Sargent Commission

In response to Cleveland, the legislature appointed a commission²⁶⁵ to "investigate and report a system of forest preservation."²⁶⁶ The commissioners included an upstate judge, William A. Poucher; a downstate lawyer, Edward M. Shepard;²⁶⁷ a New York City banker, D. Willis James, who was a member of the Chamber of Commerce forestry committee and a close friend of Jesup;²⁶⁸ and, as chair, Charles S. Sargent, a

forestry expert who had just completed a survey of the forests of North America for the federal census.²⁶⁹

The Sargent Commission's report was long and thorough. First, the Commission flatly declared the land unsuitable for agriculture.²⁷⁰ "[T]he Adirondack plateau is incapable of supporting an agricultural population;" clearing the forest would "reduce this whole region to an unproductive and dangerous desert."²⁷¹ Secondly, the Commission threw its weight behind the theory linking forests and water supply. "As reservoirs of moisture, these forests are essential to the continued prosperity of the State; . . . their destruction must be followed by widespread commercial disaster."²⁷² The question was no longer open, according to the Commission. "Science long ago pronounced upon the subject, which now, moreover, seems to be fully understood in all its bearings by the people of this State."²⁷³ However, the Commission opposed the Thomson proposal to preserve the watershed by constructing reservoirs. "The proper reservoirs for the Adirondack region are the natural woods, and the State might wisely devote its energies to their protection rather than in expending large sums of money in creating reservoirs destructive of property and dangerous to human life as long as they last."²⁷⁴ And the Commission did not attack the lumber industry generally. "The lumbermen . . . have inflicted little direct damage upon Adirondack forests . . . [S]erious injury is not directly inflicted by lumbering."²⁷⁵

Although watershed protection was the most important function of the forests, their appeal as a resort was also well known and would continue to grow. The tourist business, "now the principal and permanent element of prosperity in the Adirondack region," depended on preserving the forest.²⁷⁶ And, of course, the lumber industry could not exist without forests. All three uses, watershed, resort, and woodlot, were compatible.

The Adirondack region . . . could be made to maintain and increase . . . the annual out-put of lumber without serious injury to the forests as reservoirs of moisture or as health resorts for the people; and it is clearly in the interest of the owners of forest property as well as for the people of the State to encourage the adoption of any system of management which will insure such results.²⁷⁷

262. Assembly Speaker James W. Husted, the "Bald Eagle of Westchester," was the Chamber's sponsor for the eminent domain bill. Parnes, *supra* note 117, at 230. One of the few supporters of the bill was Assemblyman Theodore Roosevelt. Kranz, *supra* note 136, at 173-74.

263. Gov. Grover Cleveland, Annual Message (1884), in 7 Lincoln, *supra* note 79, at 985.

264. *Id.*

265. Act of June 14, 1884, ch. 541, 1884 N.Y. Laws 678.

266. Act of June 14, 1884, ch. 551, 1884 N.Y. Laws 723. At the same time, the legislature also named a commission to investigate "the practicability of storing the headwaters of the Hudson river," apparently in response to the urging of Thomson and the lumber industry. Act of June 14, 1884, ch. 541, 1884 N.Y. Laws 678. Its members were William A. Beach, A.B. Cox, and Jeremiah Finch. The Beach-Cox-Finch Commission proposed a series of dams and reservoirs for the Hudson, Indian, Schroon, and Raquette river basins, which would raise the level of the depleted Champlain Canal and swell the volume of the Hudson during low water. But the commission noted that its plan would require paying damages to riparian owners on the various lakes, at a cost that it could not calculate. REPORT OF COMMISSIONERS ON STORING THE HEADWATERS OF THE HUDSON RIVER, N.Y. S. DOC. NO. 22 (1885).

267. Shepard was a Democrat who would become a leader of an independent reform faction in Brooklyn. RICHARD L. MCCORMICK, FROM REALIGNMENT TO REFORM: POLITICAL CHANGE IN NEW YORK STATE, 1893-1910, at 55 (1981).

268. COMMUNICATION FROM THE COMPTROLLER SUBMITTING REPORT OF THE FORESTRY COMMISSION, N.Y. ASSEMBLY DOC. NO. 36 (1885) [hereinafter SARGENT REPORT]; Parnes, *supra* note 117, at 236; BROWN, *supra* note 141, at 208.

269. WILLIAMS, *supra* note 39, at 376-77. Sargent was also the founder of Harvard's Arnold Arboretum.

270. SARGENT REPORT, *supra* note 268, at 6.

271. *Id.*

272. *Id.*

273. *Id.* at 7.

274. *Id.* at 10.

275. *Id.* at 11.

276. *Id.* at 8-9.

277. *Id.* at 9.

However, one real threat, the Commission warned, was from fire which was less a consequence of lumbering than of railroads and their sparks. Furthermore, the demand for hardwoods was increasing and railroads were necessary to carry hardwoods out.²⁷⁸ "[T]he general introduction of such roads must be followed by [the forests'] general extermination."²⁷⁹ Like the downstate merchants, the Sargent Commission concluded that railroads, not lumberers, were the villains in the drama of the Adirondacks.

The Commission would not go as far as the Chamber of Commerce' proposal that the state purchase the Adirondacks, though it would have favored such a policy. "Experience has shown that private ownership means—sooner or later—forest destruction."²⁸⁰ The Commission was unable to formulate a scheme for regulation of private use which might be an alternative to public ownership. "Private owners of forest property must be left to regulate the supply of timber by the demand, and devise and put into execution the methods necessary for the development of their property."²⁸¹ There was no alternative to the current system of private ownership for production. "The spirit of American laws and the sentiment of the American people are opposed to any State interference with the enjoyment of individuals of the right to do as they please with their own."²⁸² The Commission noted that that sentiment might change if the State demonstrated an ability to manage its forests. Then, "the question of the purchase of other lands of the same character can be seriously considered."²⁸³

Overall, the Commission recommended a scientific system of management of state owned land with the primary aim of watershed protection and the secondary aim of lumber production. The Commission did make one unorthodox recommendation: the state should pay taxes to the localities where its land was located. In this way the state would lift from residents the burden of paying additional taxes to compensate for land taken from the rolls after the state took title.²⁸⁴ That proposal would guarantee the support of Adirondack residents for continuing state ownership and was an important addition to the debate.

The Sargent Commission's report both aided and hindered the preservationist interest. The proposal for state payment of county taxes was helpful since it removed any sectional opposition to state forest preservation by socializing its cost broadly. On the other hand, the proposal

278. Hardwoods do not float and thus could only be taken out in quantity by rail. GEORGE D. DAVIS, *MAN AND THE ADIRONDACK ENVIRONMENT* 35 (1977).

279. SARGENT REPORT, *supra* note 268, at 15.

280. *Id.* at 16.

281. *Id.* at 18.

282. *Id.* at 16.

283. *Id.* at 17.

284. 3 LINCOLN, *supra* note 146, at 416-17.

to defray those payments through active use of state land for lumbering was contrary to preservationist goals.²⁸⁵

C. Responses to the Sargent Commission

After some negotiations and a series of meetings in Albany and New York, the forces of preservation concluded that the Sargent Commission's recommendations were the best they were likely to achieve. The downstate groups united to prepare a bill reflecting those conclusions, meeting in the Wall Street office of Morris Jesup in late April of 1885.²⁸⁶ Edmund Martin had undertaken the task of working out a bill based on the Sargent report which all the downstate organizations could support. This unity would be important because the lumber interests were also presenting a bill adopting some of the Sargent Commission recommendations, including state sale of lumber from its lands and payment of local taxes on state-owned land.²⁸⁷ Martin's draft bill was approved by a group of influential preservationists including lawmakers, BOTT members, and members of the Commission.²⁸⁸ All agreed on a single piece of legislation reflecting the recommendations of the Sargent Commission. "The result of the conference was highly satisfactory. Every one present approved of the new measure, and the two members of the Legislature agreed to introduce and push it. This they did, and on May 15th it became Chapter 283 of the Laws of 1885."²⁸⁹

285. In fact, BOTT continued to push for land purchase even after the Sargent report recommended against that course. 2 DONALDSON, *supra* note 35, at 175-76. In April 1885, BOTT put out a pamphlet calling for state control of the Adirondacks and state ownership through eminent domain. N.Y. Bd. OF TRADE AND TRANSP., *THE PRESERVATION OF THE ADIRONDACK FORESTS AND THEIR RELATION TO THE COMMERCE OF THE STATE* (1885), in BOTT, *supra* note 129 (box 2, Apr. 1885 file).

Fire, floods, and malaria were among the evils the Board predicted if the Adirondacks were not preserved. *Id.* at 2-3. "The influence of this wilderness is, therefore, not merely local . . . [I]ts utility is experienced by every industry." *Id.* at 5. The report was circulated to members of the legislature. EDMUND P. MARTIN, REPORT TO THE NEW YORK BOARD OF TRADE AND TRANSPORTATION (undated), in BOTT, *supra* note 129 (box 2, May 1885 file). The report was apparently the joint work of Edmund Martin and Peter Schofield, members of the forestry committees of the Board and the Brooklyn Constitution Club, respectively. Schofield was the author of a letter, "Forests and Rainfall," published in *Popular Science Monthly* in November 1875. Schofield argued that forested land preserved moisture and increased rainfall. Peter Schofield, *Forests and Rainfall*, 8 POP. SCI. 111, 112 (1875) (letter to the editor).

286. 2 DONALDSON, *supra* note 35, at 176-77.

287. Parnes, *supra* note 117, at 239-40.

288. At the meeting in Morris Jesup's office, Martin presented his draft to, among others, Schofield; Frank Gardner, secretary of both BOTT and the Anti-Monopoly League; State Senator Henry R. Low of Orange County; Assembly Speaker Husted; Jesup, chair of the forestry committee of the Chamber of Commerce; Edward Shepard of the Sargent Commission; and Professor Sargent himself. Martin's account in his Report of the meeting's participants does not include Gardner, while Donaldson's does not include Sterne. 2 DONALDSON, *supra* note 35, at 177-78.

289. *Id.* at 177.

The act created a state Forest Preserve composed of all lands owned by the state in fourteen counties, including eleven Adirondack counties,²⁹⁰ administered by a Forest Commission.²⁹¹ This law first used the language which would become the famous rallying cry of Adirondack preservationists: "The lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands."²⁹² Another bill, passed at the same time, shortened the time between tax default and sale of land owned by nonresidents.²⁹³ The following year the legislature adopted the commission's recommendation that the state accede to taxation of its lands.²⁹⁴

Although the creation of the forest preserve is often treated as a watershed, it did not in fact resolve much. Railroads, with their inevitable companion, fire, continued to be built in the Adirondacks.²⁹⁵ At the same time, the clearcutting which accompanied timbering for paper pulp was reaching its peak.²⁹⁶ "[W]ith the unrestricted cutting of spruce saplings and young trees for pulp-wood, now prevalent on most all the private timber lands outside the preserves owned by the clubs, a most serious condition confronts every one interested in the forests of New York."²⁹⁷ The forest holdings of the state remained scattered and undefined.

Thus, state land purchase continued to be a theme among recreationists. The issue of whether the state could lease timber rights on its land remained open; no steps had been taken toward developing demonstration projects of scientific forestry, as recommended by the Sargent Commission and lumberers still wanted the state to undertake major construction on Adirondack rivers. In fact, all that had been decided (and it was not a small thing) was that the state would no longer sell lands at a low price to those who would strip it of its resources and then abandon it.

290. Act effective May 15, 1885, ch. 283, § 7, 1885 N.Y. Laws 482. The forest preserve created by the 1885 legislation included land in the three Catskill counties of Greene, Sullivan, and Ulster, and other areas in the Adirondacks.

291. The Forest Commission is the predecessor of today's Department of Environmental Conservation (DEC). In the interim, it has also been known as the Forestry Commission; the Forest, Fish and Game Commission; and the Conservation Commission. It is DEC which today exercises "care, custody and control" of the Forest Preserve. N.Y. ENVTL. CONSERV. LAW § 9-0105 (McKinney 1984).

292. Act effective May 15, 1885, ch. 283, § 8, 1885 N.Y. Laws 482.

293. Act effective June 9, 1885, ch. 448, 1885 N.Y. Laws 758.

294. Act effective May 5, 1886, ch. 280, 1886 N.Y. Laws 459. The legislation passed both houses unanimously. N.Y. SENATE J. 672 (Mar. 2, 1886); N.Y. ASSEMBLY J. 322 (Feb. 19, 1886).

295. See 2 DONALDSON, *supra* note 35, at 136-41, 216.

296. See HAROLD K. HOCHSCHILD, LUMBERJACKS AND RIVERMEN IN THE CENTRAL ADIRONDACKS 1850-1950, at 8 (1962).

297. Fox, *supra* note 178, at 64.

D. From Forest Preserve to Forest Park

Tax sales for default had virtually ceased once the forest reserve was created, for the withdrawal of the state lands from the market had enhanced the value of woodlands.²⁹⁸ The opportunity now existed for the state to demonstrate by its own example the means by which the forests could be both saved and used. As Bernhard Fernow said,

It is not the control of the Government over private property, it is not the exercise of eminent domain, it is not police regulation or restrictions that have produced desirable effects upon private forestry abroad, but simply the example of a systematic and successful management of its own forests, and the opportunity offered by the government to the private owner of availing himself of the advice and guidance of well-qualified forestry officials.²⁹⁹

While the Sargent Commission and the conservationists recommended a policy of managed timbering on state lands, the preservationists opposed any interference with the state lands as a passive buffer. Thus, they focused their attacks on the state's fledgling attempts to utilize its timberlands.

From the beginning, the Forest Commission, created by the 1885 preserve legislation, held the position that state timber should be harvested for profit; it recommended timber leasing in its first report to the legislature in 1886.³⁰⁰ Leasing timber rights, it argued, would put private loggers in the position which the state did not have the infrastructure to occupy, namely, guardian of its forest wealth. As a strategy to secure support for its proposal to lease state timber, the Commission stressed the extent to which the state was incapable of protecting against trespass.³⁰¹ This strategy failed. The Commission's proposals were seen as a self-serving attempt by individual commissioners to gain at the public's expense. The commissioners themselves (Townsend Cox, Sherman Knevals, and Theodore Basselin) came under attack for lining their own pockets.³⁰²

A law of 1887 explicitly provided that the Forest Commission could, through the State Comptroller, sell off timber and sell or exchange small parcels of noncontiguous preserve land, in order to increase its con-

298. See *id.* at 68; Parnes, *supra* note 117, at 251-52.

299. GRAHAM, *supra* note 21, at 119 (quoting Bernhard Fernow).

300. 3 LINCOLN, *supra* note 146, at 420.

301. See Kranz, *supra* note 136, at 300-01.

302. Cox and Knevals were both "downstaters," the former an attorney and the latter a stockbroker, while Basselin was a Lewis County lumberman, originally opposed to the forest preserve. According to Donaldson, a commission was also offered to Edmund Martin, who had accomplished the task of bringing all the downstate organizations together in support of the Sargent Commission report, but Martin "felt that his disinterestedness might be brought into question if he accepted the appointment." 2 DONALDSON, *supra* note 35, at 178.

tiguous holdings.³⁰³ The Commission's decision to sell off 3500 contiguous acres under the statute was severely criticized.³⁰⁴ Basselin was accused of profiting from some exchange decisions made by the Commission, and the commission as a whole was charged with ignoring timber trespass on state lands.³⁰⁵ The Commission's response was that timber trespassers could be prosecuted, but that convictions were difficult in localities where incidents occurred.³⁰⁶

Attacks on the Commission's position were unceasing. The friends of the park campaigned against the Forest Commission throughout the last half of the 1880's, accusing it of corruption, incompetence, politicization, and wastefulness.³⁰⁷ The accusations that members of the Commission were benefitting from their own forest policies and were political cronies of the leaders of Tammany Hall and the state Democratic machine came from both Republicans and reform Democrats.

The "downstaters" were unhappy with any active use of land neighboring their own, whether state sponsored or not. In 1888, the Chamber of Commerce endorsed a bill to bar railroads on state land.³⁰⁸ When the legislature failed to act on it, preservationists began campaigning for a park with definite boundaries. By defining where the state's interests lay, the park solution would permit the sale of state owned land outside that border and would focus plans for acquisition by exchange on lands within. Creation of a park would make boundaries clear to residents, who complained that they did not know when they were trespassing on state lands.

In a message to the legislature in January 1890, Governor Hill suggested that the state take a more affirmative position with regard to its Adirondack holdings.³⁰⁹ He noted that the forest preserve now included "all the lands that come to the state from tax sales . . . without reference to quality, quantity or locality," and suggested that the state should instead concentrate on protecting "the wilder portion of the region," and the headwaters of rivers. Hill also suggested leasing small parcels to vacationers, so that "the wilderness would thus afford a summer home to

303. Act of May 26, 1887, ch. 475, 1887 N.Y. Laws 600. The state lands, because they had been obtained through tax sales, were scattered throughout the Adirondack counties in checkerboard fashion. A continual theme of both park and forest preserve has been to unify state holdings whenever possible. See 2 DONALDSON, *supra* note 35, at 174, 180, 183.

304. Parnes, *supra* note 117, at 259-60.

305. *Id.* at 260-62.

306. N.Y. FOREST COMM'N, SHALL A PARK BE ESTABLISHED IN THE ADIRONDACK WILDERNESS?, N.Y. S. DOC. NO. 19, at 9 (1891).

307. For example, in August, September, and October of 1889, the *Times* ran a series of reports from the Adirondacks featuring floods, drought, timber theft, fire, and clearcutting, all attributed to the Forest Commission's failures. See, e.g., *Destroying the Forests*, N.Y. TIMES, Sept. 16, 1889, at 1; *In Peril From Floods*, N.Y. TIMES, Sept. 17, 1889, at 1-2.

308. Kranz, *supra* note 136, at 313-14.

309. Gov. David B. Hill, Annual Message (1892), in 8 Lincoln, *supra* note 79, at 936-37.

persons of moderate means as well as to the wealthy," while the revenue would help the park pay for itself.³¹⁰ The governor recommended a special commission to investigate these suggestions.

The legislature turned the investigation over to the Forest Commission. The decision was opposed by the friends of the park, led by the *New York Times*. According to a front-page story, "Not a member of [the Forest Commission] is competent to perform the duties required of him."³¹¹

Two separate downstate groups, the Adirondack Park Association (the APA) and the New York State Forestry Association (the NYSFA), sought to bring their influence to bear on the outcome of the Commission's deliberations. The APA was founded in the spring of 1890 by a group of wealthy businessmen with Republican and railroad connections, including J.P. Morgan, Whitelaw Reid, John D. Rockefeller, William Whitney, Chauncey Depew, and Thomas C. "Boss" Platt of the New York Republican Party.³¹² The group was headed by Alfred Loomis, a New York physician and proponent of the idea that the Adirondack air had particular and specific healing properties for those suffering from tuberculosis.

Loomis proposed the application of "the German forestry system to the Adirondack region."³¹³ In practice, this meant the group supported state purchase of land, funded by the sale of timber from those lands under a state program of scientific forest management, a position which could be supported by lumberers and foresters as well.³¹⁴

But the APA had also supported an end to rail construction in the area,³¹⁵ a position which embarrassed it in the next year when some of its members became interested in the construction of William Webb's Mohawk & Malone Railroad, which could give the New York Central a connection to Montreal.³¹⁶ The group's switch to support the new road vitiated its credibility.³¹⁷

This left the field open to Morris Jesup's NYSFA,³¹⁸ a group that included many "good government" types such as George William Curtis,

310. *Id.* at 936.

311. David B. Hill, *A Park in the Adirondacks*, N.Y. TIMES, Jan. 21, 1890, at 1.

312. *Save the Adirondacks*, N.Y. TIMES, May 20, 1890, at 2.

313. *For a State Forest Park*, N.Y. TIMES, May 24, 1890, at 9.

314. *Id.*; *Save the Adirondacks*, *supra* note 312, at 2; *Band of Foresters*, N.Y. TIMES, June 26, 1890, at 4.

315. See *Save the Adirondacks*, *supra* note 312, at 2.

316. *A Soft Spot for Webb*, N.Y. TIMES, May 27, 1891, at 5; *Adirondack Invasion*, N.Y. TIMES, May 28, 1891, at 4; *Keep Out of the Forests*, N.Y. TIMES, May 28, 1891, at 5. Webb, who was William Vanderbilt's son-in-law, ran his road from Herkimer in the southwest, near the Erie Canal, to Lake Placid in the northeast.

317. The *Times* suggested the APA change its name to the "Adirondack Railroad Construction and Wood-Pulp Production Concern." *Adirondack Invasion*, *supra* note 316, at 4.

318. This group had come into existence in 1885 but had been inactive for several years

independent Republicans Seth Low and Warner Miller, and independent Democrats such as Edward M. Shepard.³¹⁹ The NYSFA organized an appeal by the owners of the *Times*, the *World*, the *Daily News*, and the *Journal of Commerce* to oppose allowing the Mohawk & Malone to cross state lands.³²⁰

Interestingly, given Jesup's 1885 position in favor of state takeover when he worked with the Chamber of Commerce,³²¹ his group now opposed state purchase. Jesup stated, "We must insist on the State protecting the forest land that it has before we ask it to buy more."³²² Until they could be convinced that state ownership would not mean permanent logging, these recreationists preferred not to encourage further land purchases which would consolidate state holdings and thus make managed forests more feasible.

The NYSFA's position was that the state should maintain its current holdings, refrain from active land purchase and bar further construction of dams and railroads.³²³ Of course, if dam and railroad construction ceased, lumbering could not move further into the Adirondacks, and there would be no particular reason for the state to purchase more land. Indeed, others might find land quite cheap if timber could never be transported out of the area by rail or water. The state could also exchange land with private owners to rationalize the borders of the park and thus "the region under preservation would be so much larger."³²⁴ The Forest Commission, charged with reviewing Governor Hill's suggestions, suggested establishing "one grand, unbroken domain,"³²⁵ of state land, through a plan of exchange and purchase, but it did not see the park proposal as qualitatively new. "It does not appear that the name park is any better than that of preserve for accomplishing the objects required, but the name appeals to a popular sentiment . . ."³²⁶ Indeed, the commission noted that in the year since the legislature had asked it to

when Jesup revived it as an instrument of the struggle for the park. Kranz, *supra* note 136, at 261-64.

319. *Future of the State's Forests*, N.Y. TIMES, Jan. 18, 1891, at 3.

320. Kranz, *supra* note 136, at 354. Among other opponents of the Mohawk & Malone were the New York Central's competitors, the Delaware and Hudson, and the Chateaugay.

321. See *supra* note 280 and accompanying text.

322. *Will Make Haste Slowly*, N.Y. TIMES, Feb. 2, 1891, at 5. According to Gifford Pinchot, Jesup, the moving spirit behind the NYSFA, was "strong for what he called forestry, but equally strong against cutting any trees." GIFFORD PINCHOT, *BREAKING NEW GROUND* 33 (1947).

323. *Future of the State's Forests*, N.Y. TIMES, Jan. 18, 1891, at 3.

324. The state should cooperate with the private clubs and landowners "whose desire to preserve the natural beauty of the region is as strong as ours is," said former President Cleveland, at a grand meeting of the NYSFA at the Museum of Natural History attended by 1500 people. *To Save the Woodlands*, N.Y. TIMES, Jan. 25, 1891, at 5.

325. LANYS, *supra* note 59, at 26.

326. N.Y. FOREST COMM'N, *supra* note 306, at 14.

investigate, the park proposal had been warmly received in the Adirondack region among the public.

[T]he establishment of an Adirondack Park is urged, from all sections of the State, with a force which cannot be ignored . . . [T]here has not been, so far as the commission has seen, one dissenting voice, nor one objection raised against the scheme . . . The people now well understand that we must save our forests if we would save our timber, our water, our farms and our factories, as well as the health of our fast increasing population.³²⁷

The Commission invited representatives from groups with an interest in the Adirondacks to participate in informal discussions regarding their position on the creation of a public park. The groups whose positions were specifically noted in the Commission report were lumberers, scientific foresters, and the owners of large estates. The latter's ranks had increased recently because "[t]he seekers after pleasure in the woods, fearing that the State would, by acquiring title to all the Adirondack lands, exclude them from private ownership, have taken the opportunity, while there was yet time, to purchase many desirable localities throughout the forest and to establish private reserves . . ."³²⁸ The public protested its exclusion from those reserves; although the owners were within their rights, the Commission saw a problem. "To establish a State Park that should be dotted with private reserves exercising the right to forbid the public to enter . . . was simply out of the question."³²⁹ But the private reserves could not be bought. "The owners, naturally, did not wish to be disturbed in their possession."³³⁰ The Commission noted what Dr. Samuel Ward³³¹ had said, that there was no reason to disturb the private reserves whose interests matched those of the state, preserving fish and game and cutting lumber only to preserve the forests. Moreover, if the Park were established, "present regulations forbidding trespassing would be abolished."³³²

The lumber interests, represented by William McEchron, F.A. Johnson and A.G. Thurston, suggested state purchase of land with the buyer retaining a ten-year right to take timber of a certain diameter. "If that was done the State would acquire the lands at a comparatively low price."³³³ Estate owners were willing to go along with the idea of giving

327. *Id.* at 14-15.

328. *Id.* at 17.

329. *Id.*

330. *Id.*

331. Those at the meeting included both William West Durant and Frederick Durant, Morris Jesup, and representatives of the Upper Saranac Lake Association, the Adirondack Preserves Association, the Knollwood Club, and several other private camp owners. *That Adirondack Park*, N.Y. TIMES, Nov. 6, 1890, at 9.

332. N.Y. FOREST COMM'N, *supra* note 306, at 18.

333. *Id.* It is apparent that this was no more than a continuation of the practical outlines of the tax default-tax sale scheme extant before 1885. The state has the land, but does nothing

the lumberers about \$1.50 an acre for their land, with a ten-year right to remove all soft lumber of ten or twelve inches minimum diameter, though they would have preferred outright taking. "The club representatives, who had no sympathy for the devastating lumber concerns, rather leaned toward the idea of taking their land by force of law, but agreed that that method would be exceedingly expensive."³³⁴ The expense would include purchasing the improvements, in the form of mills, dams, and booms, which the lumbermen had constructed.

Although the Commission had met early in the year with Jesup and D. Willis James of the Chamber of Commerce, the report contained no account of the position of the downstate business interests which had recently assumed a leading role in developing state policy concerning the preservation of the watershed and water transport in the Adirondacks. Jesup agreed to support the report, but James would not.³³⁵ The unnamed representative of scientific forestry supported bringing all of the Adirondacks under one forestry plan, either by purchasing all the land or by requiring or convincing the private preserves and lumbermen to participate in such a plan.

The Commission concluded that the state's holdings, some three-quarters of a million acres, needed to be consolidated.

This area is by no means a compact tract, but lies in widely separated parcels, varying in extent from one-quarter of an acre to 70,000 acres, interspersed among tracts held by individuals and corporations (mostly lumbermen and paper manufacturers), an unknown number of clubs, or other associations and persons who have established private preserves and parks in the woods for purposes of pleasure and recreation, and of hotel sites. It goes without saying, that a Park could not be erected from such scattered sites.³³⁶

The consolidation could be achieved through purchase or eminent domain takings, although the latter would arouse the ire of both the private preserves and the lumbermen. The preserve owners could be relied upon to manage their lands well and to give the state the right of first refusal, should they ever wish to sell. Moreover, the commission believed that through negotiation they could be persuaded not to exclude the public as trespassers.

But the lumberers, as the Commission perceived them, were different. "The interest that this class has in the Adirondack lands is not of a sentimental, pleasure-seeking, nor sanitary character. It is merely a matter of business and money." They would not "give up, voluntarily, their

private benefits for the public good."³³⁷ As to their lands, "it is essential that much of that area should be eventually owned by the State," but the accomplishment of that aim could be "progressive and the acquisition of lands gradual."³³⁸ The plan proposed by lumbering interests met with the Commission's approval. The limited lumbering it proposed was not necessarily a drawback. "No scheme of forestry is complete that does not contemplate the preservation and cultivation of timber for the sake of wood to be used for merchantable purposes . . . mature trees for timber purposes can be cut to the pecuniary advantage of the owner, and still leave the forests intact . . ."³³⁹ The Commission envisioned such a plan. "The lands acquired for the park can be, doubtless, brought under a system of good forestry management, and permanent forests maintained thereon."³⁴⁰

The final recommendation of the Commission was abandonment of the forest preserve as it was constituted and creation of a defined park area of more than a million acres. State lands outside the area would be sold and areas within managed so as to preserve the forests. The Commission estimated the cost would be about \$3 million, but the state would "not only be reimbursed for its expenditure, but [would] receive a considerable revenue from its woodlands."³⁴¹ The Commission attached to its report a map showing the boundary of the proposed park in blue.³⁴² The wilderness area which surrounded the proposed park included some 3.2 million acres of which about 650,000 were then owned by the state, 700,000 by residents, and 350,000 by private reserves, leaving about 1.5 million under nonresident, nonpreserve ownership.³⁴³ The Commission intended that the state acquire that 1.5 million acres. The Commission apparently accepted the notion that private preserves were unlikely ever to come into the state's hands. In fact, the state appeared less likely to acquire private preserves than to acquire land owned by the lumber companies. Thus, the Commission's report seems to mark the origin of a wholly new concept in American land use—the public-private park.

A year after the Commission's report, the legislature voted to establish an Adirondack Park "forever reserved, maintained, and cared for as a ground open to the free use of all the people for their health or pleasure, and as forest lands necessary to the preservation of the chief rivers

337. *Id.* at 20.

338. *Id.* at 22-23.

339. *Id.* at 24.

340. *Id.* at 25.

341. *Id.* at 33.

342. *Id.* at 38, 40.

343. *Id.* at 39. The actual amount of land available for sale to the state, assuming as the Commission did that the private preserves would not sell, was about 700,000 acres. In fact, at the time there were 45 private preserves in Adirondacks totalling almost one million acres. N.Y. S. Doc. No. 85 (Jan. 16, 1894).

with it, while the former owner logs it, then the state perfects its title. *Id.* at 22-24.

334. *That Adirondack Park*, *supra* note 331, at 9.

335. N.Y. TIMES, Feb. 26, 1890.

336. N.Y. FOREST COMM'N, *supra* note 306, at 16.

of the state and a future timber supply."³⁴⁴ It also retained the Forest Preserve, thus creating "a park within a park, and authorized purchase and sale of land within the preserve."³⁴⁵ The state could purchase land subject to the seller's right to remove timber of a certain height and diameter for a period of ten years, but no appropriations for that purpose were made.³⁴⁶ Preservationists had their park, but it was not yet free of lumbering.

According to Governor Roswell Flower, who signed the act, the legislation consolidated "the State's holdings and enable[d] the State to pursue some rational and practical system of forestry."³⁴⁷ Yet he saw the policy of selective state purchase of Adirondack lands as fraught with risk. "[I]t puts the government in the market as a buyer and seller, and opens the way to all kinds of impositions and frauds."³⁴⁸

Indeed, the state's presence in the marketplace as a seller had already led to some peculiar consequences. In 1891, the legislature had amended the tax law to make redemption of lands sold at tax sale easier.³⁴⁹ According to Flower, the amendment brought a "flood of applications for cancellation to the Comptroller's office, and . . . now threatens the State with a loss of nearly every acre of forest land acquired by tax sale. The amendment was . . . in the interest of land and timber speculators."³⁵⁰ The state had already lost almost 100,000 acres to these speculators.³⁵¹

Flower thought only two courses were possible to counteract this problem. The entire Adirondacks could be purchased or taken by eminent domain, or, alternatively, if "the people are indifferent as to whether

the ownership of the bulk of the great forest is in private persons or in the State, so long as the forest is preserved,"³⁵² the State could grant private owners tax exemptions in return for their promise not to remove timber except as approved by the state.³⁵³ The legislature adopted the latter course, providing tax exemptions for private owners who agreed not to cut timber less than twelve inches.³⁵⁴ It also gave the Forest Commission power to sell from state lands softwood more than twelve inches in diameter with the proceeds used to fund land purchases.³⁵⁵ All major groups, including preservationists, lumberers, and foresters, gained by this legislation. Now the owners of the great preserves and camps were entirely untaxed as long as they did not clearcut their land, which of course was unlikely. Lumberers too were not taxed as long as they did not cut "any of the timber . . . [on their land] except spruce, tamarack or poplar timber twelve inches in diameter at a height of three feet above the ground."³⁵⁶ Foresters saw the state finally attempting to impose a system of scientific management of state forests.

E. From the Park to the Constitution

At this point, the future of the preservationist cause was not promising. Legislation which should have satisfied important elements within each group comprising the Adirondack coalition had passed; thus, a campaign to preserve the Adirondacks from any use, even the careful management of state forests, would have been hard to sustain. However, the preservationists found surprising allies in the advocates of scientific forest management.

1. Foresters Defeat Forestry

The state entered the timber licensing business with great success. Over 17,000 acres of state land were lumbered in 1893 and the state earned approximately \$50,000 from the sale of its wood.³⁵⁷ Encouraged by its venture, the Forest Commission entered into contracts for spruce logging in the following year on some 80,000 state owned acres.³⁵⁸ But opposition to the attempt by the state to utilize its timber resources now came from an unexpected quarter, the foresters who were the only constituency who actively supported the idea of state lumbering. Hopes for

344. Act of May 20, 1892, ch. 707, 1892 N.Y. Laws 1459. The legislation passed each house unanimously. N.Y. SENATE J. 1424 (Apr. 20, 1892); N.Y. ASSEMBLY J. 1424-25 (Mar. 31, 1892).

345. 3 LINCOLN, *supra* note 146, at 427.

346. *Id.*

347. Roswell P. Flower, Memorandum Filed with Assembly Bill No. 1422, to Establish the Adirondack Park (May 20, 1892), in 9 LINCOLN, *supra* note 79, at 146. Flower told the American Forestry Association in 1894 that the park resolution insured that the forest would be "forever guarded against denudation," while "the State could acquire considerable revenue" by allowing cutting of the largest trees. Gov. Roswell P. Flower, Annual Message (1894), in LINCOLN, *supra* note 79, at 298.

348. Gov. Roswell P. Flower, Annual Message (1893), in 9 LINCOLN, *supra* note 79, at 184.

349. Act effective Apr. 20, 1891, ch. 217, 1891 N.Y. Laws 411.

350. Gov. Roswell P. Flower, Message Relating to Preservation of Forests on State Lands (Apr. 10, 1893), in 9 LINCOLN, *supra* note 79, at 220. See e.g., People ex rel. Hamilton Park Co. v. Wemple, 34 N.E. 883 (N.Y. 1893) (Adirondack Railway seeks to redeem lands lost in tax sale).

351. Flower, *supra* note 348, at 187. According to the Association for the Protection of the Adirondacks, by 1893, the state had actually lost about 160,000 acres by cancellation. PAPER OF THE ASSOCIATION FOR THE PROTECTION OF THE ADIRONDACKS 101 (1904) (Adirondack Museum and Library, reel 1); see also People v. Turner, 22 N.E. 1022 (N.Y. 1889), *aff'd*, 168 U.S. 90 (1897) (describing how speculators were taking advantage of the most minute deficiencies in tax-sale procedures to redeem Adirondack lands).

352. Flower, *supra* note 348, at 185.

353. *Id.*

354. Act effective April 7, 1893, ch. 332, §§ 103, 121 (2), 1893 N.Y. Laws 635, 643-44. At Flower's recommendation, the legislature also abolished the three-person Forest Commission which had come under attack, see *supra* text accompanying note 311, and created a five-person Forestry Commission. *Id.* § 101, 1893 N.Y. Laws at 634.

355. *Id.* § 101, 1893 N.Y. Laws at 634.

356. *Id.* § 121(3), 1893 N.Y. Laws at 644.

357. Flower, Annual Message, *supra* note 347, at 299.

358. *Lumbering on State Lands*, 7 GARDEN & FOREST 151 (1894).

state-managed forestry were dashed when foresters themselves publicly opposed the state's standards for logging. "The efforts of professional foresters to alert the public to the need for the implementation of their nascent science were themselves largely responsible for the fashion in which the public turned against the timber harvest altogether."³⁵⁹

Their opposition became public at a meeting of the Congress of the American Forestry Association in Albany. William Fox, the Superintendent of State Forests, along with the American Forestry Association, the New York Forestry Association, the Genessee Valley Forestry Association and the Adirondack Park Association, called a meeting to discuss state forest policy.³⁶⁰ At the meeting, the Forestry Commission introduced a resolution in support of its cutting policy, but its resolution failed because some foresters chose this opportunity to attack the Commission's twelve-inch rule and offered a substitute resolution that opposed diameter limits and mandated development of a comprehensive forestry management plan before cutting began.³⁶¹ Neither resolution passed, but the conflict between the Commission and foresters became widely known³⁶² when State Engineer Campbell Adams announced that he also opposed cutting contracts that used the twelve-inch rule and urged the Legislature to reject them.³⁶³

As a result of this conflict, the preservationists' position once again became viable; they utilized the foresters' specific objections to diameter rules as a potent weapon in their campaign against *any* lumbering of state lands. Ironically, the very standards to which they objected were those which defined the tax exemption for preserve owners.

2. The Board Chooses Constitutionalization

The New York Board of Trade and Transportation quickly moved to capitalize on the foresters' unexpected objections to the sale of timber from state owned lands in the park. BOTT advised legislators not to "jeopardize both life and property" by allowing continued cutting in the face of the Adams report.³⁶⁴ The group then lobbied the Governor to withhold his approval of the cutting contracts.³⁶⁵ But when the Governor rejected their appeal, secretary Frank Gardner told the Board, "I am convinced that the forests will never be made safe until they are put into the State Constitution."³⁶⁶ This telling remark reflected the late nine-

teenth-century experience of granting private property protection from legislation by constitutionalizing it.

The belief of the era was that property was secure from redistributive attack only to the extent that control could be placed outside the realm of legislative action and within the limited confines of judicial interpretation.³⁶⁷ Thus, the ideal solution to the problem of preserving the Adirondack forests, to the extent that solution was within the grasp of the preservationists, was constitutionalization. Writing in 1906, the historian of New York's constitution, Charles Z. Lincoln, said constitutionalization of Adirondack protection was a model example of the effort to move issues out of the legislative arena and thus out of the scope of a battle of particularized interests:

[It] illustrates the tendency . . . to include in the Constitution subjects which are primarily of legislative cognizance, and which ordinarily might be left to the discretion of the legislature By including these subjects in the Constitution they are withdrawn from legislative control, and this withdrawal is in most cases the chief reason for constitutional interference.³⁶⁸

3. The Constitutional Convention

In fact, the Board of Trade and Transportation had chosen an ideal time to lobby for constitutionalization. First of all, the hard times of 1893 had weakened the lumber industry nationwide and depressed demand for its products.³⁶⁹ Already concerned with competition,³⁷⁰ lumberers were hardly eager for New York State to sell more land on which timber was standing. Moreover, the tax break provided in the 1893 legislation³⁷¹ had a conservationist outcome that alleviated the lumberers' need to cut and run in order to avoid high taxes.

Secondly, the upcoming constitutional convention³⁷² would be dominated by Republicans, independents, and good government types³⁷³ who

367. See, for example, Donaldson's characterization of the decade before constitutionalization as follows:

[There was] unhampered legislative control . . . that played for the most part into the greedy hands of the lumber interests. The net result was to convince all true friends of the forests, and a majority of the voters, that the guarding of the woods could not safely be left to a free-handed Legislature. Its hands were consequently tied by a drastic constitutional amendment

Id. at 167-68.

368. 3 LINCOLN, *supra* note 146, at 433-34.

369. COX ET AL., *supra* note 32, at 162.

370. *Id.* at 163.

371. See *supra* note 354 and accompanying text.

372. The New York Constitution of 1846 had provided that voters should decide every twenty years whether to call a constitutional convention. N.Y. CONST. OF 1846, art. XIII, § 2. The vote had been positive in 1886, but the Democrats, then in control of state government but factionalized, had squabbled over delegates delaying the convention until 1893 when the Republicans won a surprising statewide victory. MCCORMICK, *supra* note 267, at 52.

373. One commentator described the Republican approach:

359. TERRIE, *supra* note 118, at 108.

360. PINKETT, *supra* note 167, at 33.

361. *Meetings of Societies, Forest Congress at Albany*, 7 GARDEN & FOREST 109-10 (1894).

362. *The Adirondack Reservation*, 7 GARDEN & FOREST 91 (1984).

363. N.Y. Bd. of Trade and Transp., Resolution (April 12, 1894), in BOTT, *supra* note 129 (box 3, 1894 file).

364. *Id.*

365. 2 DONALDSON, *supra* note 35, at 188.

366. *Id.*

were a natural constituency for the recreationists. A lumber industry spokesperson, looking back at the convention, recalled that the political climate provided "fertile soil for the cultivation of hostility to any policy which had the indorsement of the political party which the elections of 1893 had retired from the control of the State government [the Democrats]."³⁷⁴ He believed the sale of state timber had been such a policy.³⁷⁵

Third, the product of the upcoming convention was to be submitted to popular vote.³⁷⁶ Hence, widespread downstate sentiment could be expressed on a unidistrict basis without the fear that upstate lumber interests could influence the outcome far beyond their numbers.

Finally, natural events favored preservation. A drought in 1893-94 again raised the issue of deforestation and streamflow. The Hinckley forest fire raged in Minnesota in the summer of 1894, killing over four hundred people.³⁷⁷ The New York papers followed the Hinckley conflagration, and discussed it as an example of the consequences of the greed of the lumber industry, in columns next to those reporting the activities at the constitutional convention.³⁷⁸ The situation was ideal for the preservationists who had shown themselves far more adept at mobilizing popular opinion downstate than they had at winning the legislature to their cause.³⁷⁹

The proposal presented to the convention was the product of several participants in the 1885 struggle for the forest preserve,³⁸⁰ as well as a number of other well-known figures.³⁸¹ It used language similar to the 1885³⁸² law that state-owned lands in the Adirondack counties "shall be

Not expecting to win the 1893 elections, Republican leaders had dressed up their slate of fifteen delegates-at-large by nominating men distinguished for their professional activities rather than for close association with the party organization. Two of them, Joseph H. Choate, the convention's president, and Elihu Root, chairman of the judiciary committee and Republican floor leader, became the convention's most influential members . . . [T]he members of the convention "represented the best public opinion, rather than the mere party opinion, of the State."

MCCORMICK, *supra* note 267, at 52-53.

374. George N. Ostrander, *A Discussion of Article VII, Section 7, of the State Constitution*, 1 N.Y. FORESTRY 11, 12 (1914).

375. *See Id.*

376. N.Y. CONST. of 1846, art. XIII, § 1.

377. WILLIAMS, *supra* note 39, at 449.

378. Kranz, *supra* note 136, at 394-95.

379. According to Donaldson, BOTT believed "the lawmakers at Albany had shown themselves to be under influences frankly hostile to conservative [preservationist] measures . . ." 2 DONALDSON, *supra* note 35, at 189.

380. The 1885 participants included William B. Boorum, Peter F. Schofield, and Edmund P. Martin. EDMUND P. MARTIN, REPORT TO THE NEW YORK BOARD OF TRADE AND TRANSPORTATION (May 1885), in BOTT, *supra* note 129 (box 2, May 1885 file).

381. They included, among others, Joseph J. O'Donohue, City Chamberlain; Edwin S. Marston, a banker who later became active in the Association for the Protection of the Adirondacks; and Simon Sterne. Forestry Comm., N.Y. Bd. of Trade and Transp., Minutes of Nov. 18, 1884, in BOTT, *supra* note 129 (box 2, Nov. 18, 1884 file).

382. Act of May 15, 1885, ch. 283, § 8, 1885 N.Y. Laws 482.

forever kept as wild forest lands," and added that such lands "shall not be sold, neither shall they be exchanged for other lands, nor taken by any person or corporation, public or private; nor shall their woods be cut or sold, nor their downed or burnt timber removed; nor shall they be leased."³⁸³

The target of the proposed amendment was not private lumbering, but state action. "The people of the Commonwealth cannot restrain individuals or corporations from lumbering their own lands. They can, however, stop at once the further denuding of their [state-owned] woodlands," said BOTT.³⁸⁴ The Forest Commission's sale of timber from state lands posed an immediate threat and the fact that legislation authorized it showed a constitutional amendment was needed to eliminate it forever. "Granted the Forest Commission acquires the unrestricted authority to sell the [timber] . . . of the present legal size, what is there to prevent its acquiring the authority for selling other woods . . . below their present lawful girth should they become marketable?"³⁸⁵ After all, the State Engineer had already said that the contracts for sale which the Commission entered into were "the beginning of the diminution of the supply."³⁸⁶

The Board of Trade's proposal demands attention precisely for what it does not discuss, namely, any interest other than that of the watershed. There is no mention of tourism, of recreation, of health, or *any* values other than transportation, although those values were by then uniformly acknowledged by every political group, including legislators, commissioners, and elected officials. The probable intent of BOTT was to convey to the convention that its proposal was a wholly utilitarian one.³⁸⁷ But, by this time, the canals of New York State were carrying almost half the tonnage of their peak years in the 1870's and early 1880's; railroads had become the premier form of goods transport.³⁸⁸ Nonetheless, the utilitarian argument regarding streamflow and water transportation that had first drawn New York merchants continued to be made in the cause of aesthetic preservation of the wilderness.

383. N.Y. BD. OF TRADE AND TRANSP., PROPOSED AMENDMENT TO THE CONSTITUTION OF THE STATE OF NEW YORK TO PRESERVE ITS FORESTS, WITH REASONS WHY 3 (1894).

384. *Id.* at 25.

385. *Id.* at 26.

386. *Id.* at 27.

387. This undoubtedly enhanced its appeal, freeing the proposal from the charge of serving only the interests of the well-to-do vacationers. It was also useful because the convention had compromised on proposals for enlarging the Erie Canal, much sought after by western agricultural and commercial interests: MCCORMICK, *supra* note 267, at 59. Support for the Adirondack amendment could be described as a pro-Canal move.

388. 2 JAMES E. DEFEBAGH, HISTORY OF THE LUMBER INDUSTRY OF AMERICA 419-20 (1906).

After meeting with Root and Choate, who comprised the Republican leadership of the convention, BOETT entrusted its proposal to David McClure, a Tammany Hall attorney, to demonstrate bipartisan support for Adirondack protection. Choate told them that their proposal for Adirondack protection was "the only question that warrants the existence of this convention."³⁸⁹ Ultimately, it was the only proposal which the convention passed unanimously.³⁹⁰ Although opposition from the northern counties had been expected,³⁹¹ Adirondackers apparently believed that the state, in paying property taxes on Adirondack land, was as welcome a landowner as the lumberers.

Submitted to the voters in November 1894, the article in which Adirondack protection was embedded passed 411,000 to 327,000.³⁹² Taking effect in 1895 as article VII, section 7, of the New York Constitution, it read:

The lands of the State, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.³⁹³

Immediately, foes of the amendment made plans to change its provisions. Bills to allow lumbering on state lands were introduced in the legislature and passed in 1895 and 1896; their passage was the precondition for putting a modification of the "forever wild" amendment on the state ballot.³⁹⁴ In November 1896, New Yorkers had an opportunity to vote on the amendment unaccompanied by other issues. The attempt to weaken the amendment was defeated overwhelmingly, about 710,000 to 320,000, and did not carry in any county, although two successive legislatures dominated by upstate and rural interests had passed it.³⁹⁵ The electorate was far more supportive of Adirondack preservation than legislators were.

Why did the preservationists finally give up on the legislature and turn to constitutionalization in their attempt to preserve the Adirondacks? Although there is no explicit statement of their reasons, the legis-

lature no doubt favored the lumber industry because it was represented in virtually every nonurban legislative district of the state. Such districts had substantial weight due to malapportionment.³⁹⁶ Rural voters employed by the lumber industry or interested in such local employment were an important interest group. Thus, the legislature, despite overwhelming popular support for the Park, supported forestry, dam construction, and timber leasing and opposed the strict interpretation of the "forever wild" amendment championed by preservationists.

On the other hand, the relative concentration of recreationists in New York City limited their ability to influence the legislature. The recreationists' strategy of constitutionalization, which required a one-time undistrict referendum, capitalized on the electoral appeal of preservation downstate where the legislative votes of millions were devalued. The constitutional referendum reinvested those voters with weight equal to that of their rural counterparts and allowed preservationists to mobilize popular support in what was, for all intents and purposes, a referendum on lumbering versus wilderness. It is hardly surprising that the latter prevailed in the minds of an electorate that was, by then, largely urban.³⁹⁷

Despite the accessibility of both the legislature and the forest agency to other interest groups, as demonstrated by the policies adopted by each in the preconstitutional period, the friends of the park ultimately succeeded because of their greater ability to win over the public. They tapped into and coalesced an emerging sentiment that valued all things "natural" and used the media to present themselves as nature's champions. Despite the opposition of scientists and technical experts, not to mention lumberers and railroaders, the friends of the Park won the support of voters statewide, thus bypassing a legislature and an agency they did not control.³⁹⁸

396. See *supra* note 231 (discussing malapportionment).

397. Up to the mid-1880's, a larger percentage of New Yorkers lived in rural areas than in large cities, but the two percentages met in 1883 with 40% living in each. Within about 25 years, over 60% lived in big cities, and only about one-fifth lived in rural areas. See MCCORMICK, *supra* note 267, at 27.

398. After constitutionalization, the friends of the Park also took care to ensure that the agency was theirs. Eventually, the legislature became discouraged and the interest group became the body to which the agency felt it must respond and whose direction it must follow. The following letter from Conservation Commission files provides an example. The writer is the Commission's Director of Lands and Forests; the recipient is the Fire Control Supervisor: Commissioner Osborne [head of the Conservation Commission] and I attended a meeting of the trustees for the Association for the Protection of the Adirondacks yesterday. The Association approved our building of the truck trail from Wakeley Headquarters to Moose River Valley. You may, therefore, include this in your plans for construction.

Letter from W.G. Howard, Director of Lands and Forests, to K.F. Williams, Fire Control Supervisor (May 8, 1940), cited in Thompson, *supra* note 22, at 405.

The agency and preservationist groups became intertwined; one head of the agency was the president of the Association for the Protection of the Adirondacks and one was the Associ-

389. 2 DONALDSON, *supra* note 35, at 190.

390. *Id.* at 192.

391. Kranz, *supra* note 136, at 407.

392. 2 DONALDSON, *supra* note 35, at 196.

393. The amendment also contained a unique provision permitting citizen suits to restrain violations of its provisions by executive or legislature. "A violation of any of the provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general, at the suit of any citizen." N.Y. CONST. OF 1894, art. VII, § 7. The same provision exists in the current constitution. N.Y. CONST. OF 1938, art. XIV, § 1.

394. 3 LINCOLN, *supra* note 146, at 435. The amendment resolution passed each house overwhelmingly: in the Senate, the vote was 23-1. N.Y. SENATE J. 642 (Mar. 24, 1895).

395. Kranz, *supra* note 136, at 480.

V

"FOREVER WILD" IN THE COURT OF APPEALS

The first judicial test of the amendment revealed that the judiciary was supportive of its purposes. In 1899, after the overwhelming defeat of the first attempt to modify the amendment electorally, the New York Court of Appeals held in *People v. Adirondack Railway*³⁹⁹ that the important public purpose intended by the amendment overcame a grant of eminent domain to the Adirondack Railway,⁴⁰⁰ when that grant conflicted with the Forest Commission's eminent domain power.⁴⁰¹

Thomas Durant, vice-president of the Union Pacific, had planned a line from Saratoga Springs beyond North Creek to Long Lake, and then Canton and Ogdensburg, bisecting the Adirondacks on a southeast-northwest axis.⁴⁰² However, his Adirondack Railway was only built as far as North Creek. The road became insolvent in 1881, and a successor group, still controlled by the Durants, took it over.⁴⁰³ In 1889, the successor group sold out to the Delaware & Hudson Railroad (the D&H) with Thomas Durant's son, W. W. Durant, winning a seat on the board of that road.⁴⁰⁴ After the purchase, the D&H, under the chairmanship of James Roosevelt, decided to connect the Adirondack Railway's North Creek terminus to Long Lake and thence, by connection with another D&H line, to the St. Lawrence River and Montreal.⁴⁰⁵

In September 1897, pursuant to the eminent domain powers granted its predecessor, the Sacketts Harbor & Saratoga, the Adirondack Railway filed a map of lands it proposed to take in Hamilton, Warren, and Essex counties. But the state had already made plans to purchase land in Township 15, including a six-rod strip the railroad sought. The railroad recorded its map before the state closed with the sellers and obtained an injunction halting the transfer of deed to the state. The state responded by condemning the land pursuant to a statute implementing the constitu-

tion's secretary; one secretary of the agency was president of the Association, and the counsel for the agency was at one time counsel for the Association. Thompson, *supra* note 22, at 394.

399. *People v. Adirondack Ry.*, 54 N.E. 689 (N.Y. 1899), *aff'd* 176 U.S. 335 (1900).

400. For a discussion of the original grant to the railroad's predecessor, see *supra* note 61 and accompanying text.

401. Act effective April 8, 1897, ch. 220, 1897 N.Y. Laws 94.

402. See *supra* notes 61-62 and accompanying text.

403. HAROLD K. HOCHSCHILD, *ADIRONDACK RAILROADS, REAL AND PHANTOM* 12 (1962).

404. *Id.*

405. *Id.* at 13. The railroad had sought a right-of-way on state lands from the Forest Commission in 1894, just before the new constitution was to go into effect which would bar such a use. Two days after Christmas, in a hastily called meeting to which at least one commissioner was brought by special train, the commission voted to give the railroad the rights it sought only five days before the new constitution would take effect. The move was blocked when recreationists won an injunction against the commission.

tional amendment.⁴⁰⁶ The state sued to halt the railroad's condemnation proceedings, and the Appellate Division reversed the injunction against the state's deed transfer.⁴⁰⁷ The matter went to trial and the state prevailed. However, on appeal, the trial court's judgment was reversed on the grounds that the railroad's map filing had created a prior lien on the lands it sought to take.⁴⁰⁸ The court held that the state's condemnation action was thus a taking of the railroad's property.

The Court of Appeals considered the first question of whether the state's exercise of eminent domain amounted to an uncompensated taking of the railroad's property in favor of the state and held that it did not.⁴⁰⁹ Judge Irving Vann, himself the owner of an Adirondack camp, wrote for a unanimous court.⁴¹⁰ The power of eminent domain is extraconstitutional and exists "because the state exists."⁴¹¹ Was it exercised properly in this case? Due process was not violated, the court said, even though the railroad was given no hearing prior to the condemnation; a compensation hearing was all that was required.⁴¹² Furthermore, the procedures used by the commissioners were the same as those used when the state built the Erie Canal. The court explained that neither provided for notice to lienholders, as the railroad claimed to be.⁴¹³

Interestingly, the Erie Canal comparison is wholly gratuitous, because the court found that "the defendant . . . acquired no lien and no property right as against the state,"⁴¹⁴ and rejected the railroad's claim to be a lienholder. Thus, reference to the building of the Erie Canal, may be read as a sign that the court was alert to public sentiment in favor of the Forest Preserve.

Although the railroad may have had rights, the constitutional command of the amendment provided the state with rights which overcame those of the railroad. Even if the railroad had a lien because the statute creating it gave it the power of eminent domain, the state still retained control of that power and could decide how to exercise it. The state in this case wanted the land for a park, a use which the people had embedded in the constitution as "a part of the permanent policy of the state."⁴¹⁵ Although railroading might also serve a public purpose, "the two uses . . . are inconsistent."⁴¹⁶ The object of the park was threefold: "promot-

406. Act effective April 8, 1897, ch. 220, 1897 N.Y. Laws 93.

407. *People v. Adirondack Ry.*, 39 A.D. 34 (N.Y. App. Div. 1899).

408. *People v. Adirondack Ry.*, 56 N.Y.S. 869 (App. Div. 1899).

409. *People v. Adirondack Ry.*, 54 N.E. 689, 696 (N.Y. 1899).

410. *Id.*

411. *Id.* at 692.

412. *Id.*

413. See *id.*

414. *Id.* at 694.

415. *Id.* at 696.

416. *Id.*

ing the health and pleasure of the people, protecting the water supply as an aid to commerce and preserving timber for use in the future."⁴¹⁷ If railroading and the park were inconsistent, then the park must win. "The command of the Constitution that the lands of the forest preserve cannot be 'taken by any corporation, public or private,' shows an unmistakable intention to keep railroads out of the Adirondack Park."⁴¹⁸ The railroad's statutory power to take land did not create a vested right as to a particular piece of land, and was modified by the passage of the statute implementing the constitution.⁴¹⁹

CONCLUSION

In the State of New York, forest resources were withdrawn from the market by popular mandate and thereby saved. By 1910, when the Great Lakes forest had disappeared, the State of New York had already been for twenty-five years the owner of a Forest Preserve that encompassed millions of acres. A great campaign to preserve the Adirondacks had culminated in the constitutionalization of forest preservation, a mandate which remains in force a century later, and legislative appropriations provided for the purchase of even more acreage to be added to those which the constitution required "be forever kept as wild forest lands." This constitutional amendment was the product of the actions of a group unable to capture a legislative majority, but nevertheless able to win an electoral one.

Why did New York differ from Wisconsin? According to Hurst, while there were warnings of deforestation in Wisconsin and even an attempt to make a park of lands taken by the state for tax default, the attempt was unavailing against "the massive weight of surrounding circumstance."⁴²⁰ By the time the national conservation movement was well underway, Wisconsin's pine woods were no more⁴²¹ because "[p]ublic policy in the nineteenth-century United States favored nothing more highly than putting economic resources in use."⁴²² Economic growth, within the context of a free market and a contract regime, was underway; rights of property were respected and guarded; the power of

417. *Id.*

418. *Id.*

419. *Id.* at 695. Although the railroad did not press the vested/nonvested property right distinction on appeal, the Supreme Court decided the case on that issue: "[T]he capacity to acquire land by condemnation for the construction of a railroad . . . when unexecuted cannot be held to be in itself a vested right . . ." *People v. Adirondack Ry.*, 176 U.S. 335, 345 (1900).

420. HURST, LAW AND ECONOMIC GROWTH, *supra* note 30, at xv.

421. Production of white pine lumber in the Great Lakes states increased from 4 billion board feet in 1880 to over 9 billion in 1892 and dropped to less than 1.5 billion in 1910. WILLIAM G. RECTOR, LOG TRANSPORTATION IN THE LAKE STATES LUMBER INDUSTRY, 1840-1918, at 42 (1953).

422. See HURST, LAW AND ECONOMIC GROWTH, *supra* note 30, at 301; WILLIAMS, *supra* note 39, at 393-424.

the state was not used to overbear the individual decisions of market participants; and none would intervene when an exploited resource was about to vanish forever. According to Hurst, "not until the eighties was there any considerable interest shown by the nation's press in conservation issues, and conservationists found themselves swimming against a tide of mass indifference or hostility until Theodore Roosevelt dramatized and popularized the conservation movement at the turn of the century."⁴²³

But, in New York, the forces in favor of preserving the forests succeeded just when Hurst says they were powerless both in Wisconsin and across the nation. Indeed, a forest historian views the "success in the Adirondacks" as crucial to having "firmly fixed in the political, public, and individual mind that wild forest land had its own value, which was a totally nonutilitarian argument of great portent . . . for future action in the preservation of the forests."⁴²⁴

Lumberers, foresters, and wealthy vacationers who had a personal and aesthetic interest in the forest were all interested in the fate of the Adirondacks. Lumberers as exploiters and foresters as conservationists were also present in Wisconsin; missing were those with both an interest in forest preservation and the ability to make that interest politically powerful. As Hurst points out, the focus of concern for those who managed public affairs in Wisconsin was swift economic growth. "Generous present use of the public timber was warranted where this would give impetus to general economic growth. Labor and money would yield more richly. This would put in motion a cumulative process of development which, once started, would create steadily compounded increments of productive capacity."⁴²⁵ There was little tolerance for the notion of withdrawing a resource from the market. "The bias was against withholding of public resources and in favor of quicker realization through the familiar market processes. . . . The pressure inherent in money reckoning weighed heavier because of the chronic scarcity of fluid capital."⁴²⁶

Conversely, in New York, the financial capital of the country, timberland was not required as a capital resource because the formation of capital had already advanced to a substantial degree. Capital requirements in terms of lumber use were merely local; overall, the state did not have to rely for its economic development on the exploitation of that unique resource as Wisconsin did. Thus, it was quite possible to lock up a resource for purely aesthetic reasons. In New York, influential elites thought of the forests as something other than a capital resource, perhaps because their own capital resources freed them from the need to do so.

423. See HURST, LAW AND ECONOMIC GROWTH, *supra* note 30, at 683 n.56.

424. WILLIAMS, *supra* note 39, at 407.

425. HURST, LAW AND ECONOMIC GROWTH, *supra* note 30, at 116.

426. *Id.* at 124.

For wealthy vacationers, preservation of the forests as an object of desire, whether for psychological reasons or for those of prestige, was possible without endangering economic growth. Financiers and railroaders who might otherwise oppose state control were themselves personally interested in maintaining the pristine quality of the Adirondacks as a retreat from their own stressful lives. Their sentimental attachment to the idea of wilderness made them unlikely, but powerful, proponents of locking up the Adirondacks.

Moreover, for the downstate elite, there was precedent for state intervention to support markets. The Erie Canal, with roaring success, had enhanced New York City's status as the trading capital of the country. Merchants had fought for increased state control of railroads, again in order to keep commercial transportation cheap and available for products shipped to and from the city. For them, state intervention was *not* an alien notion.

It was the foresters who could not succeed, either in Wisconsin or New York. Foresters opposed exploitative lumbering practices and favored conservation, both in New York and in Wisconsin. In Wisconsin, like New York, foresters had succeeded in persuading the state legislature to retain lands the state had acquired by tax sale and devote them to conservation uses.⁴²⁷ The "official explanation offered for this measure was that it aimed to protect forest cover at headwaters of Wisconsin rivers, to check the flood hazard."⁴²⁸ Hurst himself disapproved of this attempt and applauded its defeat in the state's highest court which, he said, "properly ruled that this sterile lock-up program violated the constitutional trust for educational funds" to which the proceeds from sale of state lands were to be devoted.⁴²⁹

Yet in both states, the end result of the foresters' efforts was defeat for any chance at scientific forestry on state owned lands. Both in Wisconsin and New York, the constituency for state imposition of use controls was extremely limited.⁴³⁰ As Hurst says:

[I]n the early eighties and nineties the early conservationists often presented their case ineptly, appearing to have no program except to lock up the public timberlands. Opponents condemned their efforts to "hoard" public assets, appealing in righteous outrage to the country's

427. No "privilege, license or authority [shall] be given to any person or persons whomsoever, to cut down or destroy any timber growing on such [state-owned] lands." Act effective Apr. 6, 1878, ch. 324, 1878 Wis. Laws 667.

428. HURST, LAW AND ECONOMIC GROWTH, *supra* note 30, at 101.

429. *Id.* at 76.

430. I do not propose to discuss here *whether* state-managed forestry or any similar regulatory scheme would have been successful in maintaining the forest. See, e.g., MCEVOY, *supra* note 208, at 156-84.

traditional faith in the social benefits of rapidly rising productive capacity.⁴³¹

In nineteenth century America, approaches to the natural world were at two poles. One end was the maximum exploitation of natural resources in response to the shortage of capital. This was the position of the lumberers in New York and Wisconsin. At the other was preservation of nature for those who could afford to possess it. This was the position of wealthy vacationers and sportsmen. The interest of the latter was to find a replacement for the natural world otherwise destroyed, the interest of the former was in the continued consumption and replacement with capital. Between these two extremes, there might have been, as Gifford Pinchot said, a middle course: "The State Preserve, by its locking up of needed timber resources, stands at one extreme. The private owner (again with notable exceptions) stands at the other. Between them lies the mean of proper exploitation with adequate reproduction."⁴³² No mean existed in the debate over the Adirondacks because there was no support for a middle course. Political and economic power lay with those who had capital or those who had the means of acquiring it. Both had specific interests in the wooded wilderness, but none of those interests included long-term utilization to supply forest products. With no politically powerful constituency supporting regulation of use, forest destruction could be countered only by preservationism.

431. HURST, LAW AND ECONOMIC GROWTH, *supra* note 30, at 114.

432. RECKNAGEL, *supra* note 24, at 61.