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Introduction

The Pragmatic Ecologist: Environmental Protection as a Jurisdynamic Experience

Jim Chen†

Like all other questions, the question of how to promote a flourishing society [should] be answered as much by experience [as by] theory.

– Daniel A. Farber

Among his many contributions to the field of environmental law, Professor Dan Farber is perhaps best known for his development of a systematically “pragmatic approach to environmental problems.” Within the tool kit that Professor Farber has used to breach the “wall between economics and ethics,” one technique merits especially close examination. Professor Farber has often stressed the centrality of “learning strategies” in an environmental enterprise marked not only by a “high degree of uncertainty” but also by “our rapidly evolving understanding” of the science underlying environmental problems and their solutions. “In biological terms,” after all, “stasis is death; only growth and change keep the organism alive.” Environmental law as an organic entity can scarcely escape this law of nature.

According to conventional depictions, the common law system supposedly treats time neither as “a gulf to be bridged” nor as “a yawning abyss,” but rather as a medium “filled with the

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3. Id.
continuity of custom and tradition, in the light of which all that is handed down presents itself to us." Colloquial uses of "law" in other fields, such as Grimm's law, the third law of thermodynamics, or Zipf's law, all treat "laws" as immanent, enduring principles guiding natural phenomena. These descriptions of law—both in its literal sense as a system of governance and in its figurative sense within the language of science—obscure the role of sudden, even catastrophic change in legal evolution. Law can never fully insulate itself from the impact of societal and technological change. Likewise, if law harbors any hope of sustaining "ideas and aspirations that must survive more ages than one," the law must respond to upheaval. Professor Farber's formula is as succinct as it is accurate: "Environmental protection is a marathon, not a sprint." Law may well consist of a series of judicially and politically negotiated equilibria, but any stability is episodic at best and prone to violent interruption. Professor Farber's larger body of work openly embraces a dynamic model of legal change that reflects the "punctuated equilibria" that characterizes biological evolution. Jurisdynamics describes the interplay between legal

6. HANS-GEORG GADAMER, TRUTH AND METHOD 264-65 (Garrett Barden & John Cumming trans., The Seabury Press 2d ed. 1975) (1960); cf. William N. Eskridge, Jr., Gadamer/Statutory Interpretation, 90 COLUM. L. REV. 609, 621 (1990) (explaining how our understanding of any text "is conditioned by the traditions of the world into which we are thrown").

7. See LOUIS HJELMSLEV, LANGUAGE 128-29 (Francis J. Whitfield trans., Univ. of Wisconsin Press 1970) (describing how phonological principles such as Grimm's Law or Verner's Law become so entrenched in a particular language that they become "law[s] of state" rather than "law[s] of change").

8. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 901 (1992); cf U.S. CONST. pml. (describing the Constitution as having been adopted "in Order to.. secure the Blessings of Liberty to ourselves and our Posterity"); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) ("This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.").

9. FARBER, supra note 2, at 13 ("[M]y goal is not to undermine environmental values, but to implement them in a way that we can expect to endure, as opposed to heroic efforts that are likely to fade after a few years.").

10. See generally William N. Eskridge, Jr. & Philip P. Frickey, The Supreme Court, 1993 Term—Foreword: Law as Equilibrium, 108 HARV. L. REV. 26, 30 (1994) (arguing that the Court's decisions are best understood as "a complex amalgam of rule-of-law and substantive values applied selectively").

responses to exogenous change and the law's own endogenous capacity for adaptation.

With any luck, Professor Farber's felicitous term, "eco-pragmatism," "may come to signify an instrument of decision making, the way people conceive of cost-benefit analysis."\textsuperscript{12} Ironically enough for a scholar who has advocated pedestrian "normal science" over flashes of brilliance,\textsuperscript{13} Professor Farber may have invented the paradigm for the next generation of environmental law. One would expect no less from a scholar who issued \textit{Eco-pragmatism} on the heels of a primer on the first amendment\textsuperscript{14} and who has coauthored casebooks on constitutional law as well as environmental law.\textsuperscript{15} His scholarly reach has become "so vast that fully to comprehend it would require an almost universal knowledge ranging from" economics and the natural sciences "to the niceties of the legislative, judicial and administrative processes of government."\textsuperscript{16} The awesome breadth of Professor Farber's scholarly agenda is reminiscent of historian David Christian's argument "that the appropriate time scale for the study of history may be the whole of time."\textsuperscript{17} Professor Farber's very career presents a compelling case for "big law," for the proposition that the substantive scale on which law should be studied, taught, and learned is the entirety of human experience.

This Symposium, \textit{The Pragmatic Ecologist: Environmental Protection as a Jurisdynamic Experience}, represents a first step toward reconceptualizing environmental law as an integral component of a comprehensive, dynamic approach to the biggest questions in law. The contributors to this Symposium are at once deep in the expertise they bring to bear upon this subject and broad in the viewpoints they express. On November 1 and 2,


\textsuperscript{16} Queensboro Farms Prods., Inc. v. Wickard, 137 F.2d 969, 975 (2d Cir. 1943).

\textsuperscript{17} David Christian, \textit{The Case for "Big History."} 2 J. WORLD HIST. 223, 223 (1991).
2002, five of the contributors—J.B. Ruhl, Bradley C. Karkkainen, Christopher H. Schroeder, A. Dan Tarlock, and Amy Wildermuth—presented their papers at the University of Minnesota Law School. Jamie A. Grodsky, Lisa Heinzerling, and Richard A. Duncan provided commentary and moderated audience discussion. Three other contributors—Douglas A. Kysar, Richard J. Lazarus, and James E. Salzman—did not attend the conference but have enriched this Symposium from afar. All of these scholars have done their best to engage Professor Farber’s pragmatic, dynamic vision of environmental protection with “[i]magination, detachment, and humor.” At the same time, the Symposium appeals to the full range of perspectives within environmental law. To borrow Christopher Schroeder’s tripartite division of environmental advocates, “prophets,” “priests,” and “pragmatists” will all find some comfort—and some distress—within the pages of this journal.

Finally, some words of thanks are overdue. The editors and staff of the Minnesota Law Review have been extraordinarily gracious in their handling of this Symposium. Without the financial support of the University of Minnesota Law School and the University’s Consortium on Law and Values in Health, Environment, & the Life Sciences, neither this Symposium nor the conference from which it emerged could have taken place. Two deans of the Law School, E. Thomas Sullivan and Alex M. Johnson, Jr., supported this enterprise during a time of decanal transition. Most indispensable were my tirelessly dedicated assistants—Kelly Wolford, Marcie Cornfield, Melissa Listug Klick, Nicole Narotzky, and Elizabeth Steblay. And of course, I thank Dan Farber for the intellectual stimulation, professional inspiration, and profound friendship he has shown me over the last decade.

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