Some Pragmatic Observations About Radical Critique In Environmental Law

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I. INTRODUCTION ................................................................. 226
II. THE COMPETING PARADIGMS OF ENVIRONMENTAL PROTECTION ......................................................... 228
   A. The Traditional Property Paradigm: Locke’s Anthropocentric Theory of Property .................. 233
   B. The Radical Critiques: Calling for a Paradigm Shift ................................................................. 235
      1. Aldo Leopold’s “Land Ethic” ......................... 236
      2. Ecofeminism ......................................................... 237
      3. Deep Ecology ....................................................... 239
III. RICHARD DELGADO AND RADICAL ENVIRONMENTAL CRITIQUE ......................................................... 240
   A. The Public Trust Doctrine as a Dominant Paradigm of Environmental Protection ................. 241
   B. Delgado’s Internal Critique: the Limitations of Human Nature ............................................. 242
   C. Delgado’s External Critique: Radical Alternative Paradigms .............................................. 244
IV. NEGOTIATING THE GAPS: PRAGMATIC REINTERPRETATION OF PARADIGM DEBATE ........................................ 247
   A. Pragmatism ............................................................. 247
   B. Negotiating in the Gaps ........................................... 253
   C. Paradigm Shifts in Environmental Law ............... 259
      1. Paradigm Shifts and the Law ............................. 259

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I. **INTRODUCTION**

In effect, we are being given the following recipe for deciding environmental policy issues: "Step 1: Settle the question originally raised by Plato by providing an indisputable definition of the nature of the good." Step 2: Apply the results of step 1 to the particular problem of environmental quality." It's easy to see that we're unlikely to get past step 1 anytime soon.¹

Contemporary critics often charge that environmental law is defective for its failure to incorporate environmental ethics. This "defect" in environmental law has been attributed, variously, to a disinterested and inefficient bureaucratic regime,² interest group politics and public choice theory,³ and to the law's anthropocentric foundations from which environmentally destructive actions are excused as *damnun absque injuria.*⁴ Theories based on the third challenge, referred to in this article as "radical environmental critiques," propose perspectives and norms for our treatment of the environment that diverge from existing environmental law. The proponents of such theories find themselves frustrated and often simply ignored in the legal arena.

Although not intending to champion or condemn the reigning legal scheme of environmental protection, this article employs environmental pragmatism to question the effectiveness of radical critique as a strategy for initiating progress in, and integrating

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² See, e.g., Richard O. Brooks, *A New Agenda for Environmental Law*, 8 J. Envtl. L. & Litt. 1, 2 (1991) ("[T]he moral and intellectual insights of the new discipline of ecology are barely visible in the corpus of environmental law ... The fault lies at the feet of bureaucrats, lawyers and scholars who have tarnished the dream with unimaginative legal responses.").
³ Jerry L. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law*, 23 (1997) (demonstrating his pessimism of public choice theory when he writes, "Appalachian soft coal interests joined with Western environmentalists to produce air quality regulation that dries the air unnecessarily at enormous economic cost").
environmental ethics into, environmental law. The premise of this article is that while proponents of radical environmental theories are deeply committed to implementing environmentally protective policies, their argument that their theories represent the "world-as-it-really-is" better than current law is naïve. The radical arguments can be criticized for two related reasons: first, because the conceptual scheme underlying radical alternative theories undercuts their normative force; and, second, because deeply held beliefs alone are ill-equipped to achieve progress in environmental law. This article offers environmental pragmatism as a means to avoid the problems, while maintaining the goals, of radical environmental critique. In particular, this article argues that the challenge of integrating environmental ethics and law requires the pragmatic distrust of claims of ultimate truth and the replacement of that concept with a recognition of the importance of persuasion. Like Daniel Farber, 5 Carol Rose, 6 Joseph Sax, 7 and other pragmatists, 8 this article argues that the pragmatism's emphasis on persuasion makes it a superior strategy to radical critique.

In support of this thesis, this article generalizes what might be called the traditional adversaries in environmental matters—property rights and non-use environmental values—as environmental paradigms. After identifying property rights as representative of a more dominant paradigm in law, this article describes radical environmental critiques as proposals for revolutionary paradigm shifts in environmental law, 9 or in other words, fundamental transformations in the way the environment is represented and treated under the law. When portrayed in the terms of paradigm analysis, two characteristics of radical critique emerge, both of which call into question the strategy of the revolutionary approach to progress. First, framing radical critique in paradigm terms tends to illustrate how critique of a dominant paradigm may be self-defeating. Second, radical environmental critiques are based on revolutionary hopes of uprooting the "dominant paradigm" of environmental law and replacing that scheme with a new, incommensurable the-

5. Farber, supra note 1, at 9-11.
9. See generally THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962); infra notes 18 to 25 and accompanying text (discussion concerning Kuhn's vision of intellectual progress through "paradigm shifts").
ory of environmental protection. In legal paradigm competition, this critique may ask for more than the law can give.

This article begins by conceptualizing the debate on environmental values in terms of paradigm shifts and discusses a few of the ethical theories proposed as radical alternatives to past practices of overconsumption and pollution. Part III examines an exemplary critical article authored by Richard Delgado regarding the current state of environmental protection in terms typical of paradigm analysis. Part IV introduces pragmatism as an alternative to the critical method of reasoning and then applies the lessons of pragmatism to polemic disputes between conflicting paradigms. Finally, Part V returns to Delgado’s critique and offers a pragmatic alternative to his critical perspective.

II. THE COMPETING PARADIGMS OF ENVIRONMENTAL PROTECTION

This article characterizes the environmental debate in paradigm terms for three reasons. First, because of the frequency with which critics expose the limitations in the current system of environmental law from alternative, external perspectives and offer those perspectives to resolve the apparent problems.\(^{(10)}\)

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\(^{(10)}\) Kuhn’s book has been called the “arguably most frequently cited work in the humanities and social sciences in the past twenty-five years.” Stanley Fish, Rhetoric, in Doing What Comes Naturally 471, 486 (1989). Oddly enough, few legal commentators have delivered a sustained analysis of paradigm reasoning to legal theory. The actual value of such an analysis may be unclear. Indeed, when Kuhn discusses scientific progress as “an intrinsically revolutionary process,” he clearly thinks that he is discussing a characteristic unique to science. As Kuhn states, it is questionable whether non-scientific disciplines in fact progress at all, since “there are always competing schools, each of which constantly questions the very foundations of the others.” Kuhn, supra note 9, at 162-63. In other words, the issues raised and defended in works of Plato, Nietzsche and Kant will be debated for years to come, suggesting that the humanities and social sciences do not actually progress by revolution. An education in science demonstrates a stark contrast: “Why, after all, should the student of physics . . . read the works of Newton, Faraday, Einstein, or Schrodinger, when everything he needs to know about these works is recapitulated in a few brief, more precise, and more systematic form in a number of up-to-date textbooks?” Id. at 165.

In one article developing the Kuhnian thesis in legal theory, the author maintains that paradigm analysis should lead legal theory “if the law is to remain a separate discipline, rather than being based as broadly as possible so as to bring out the interrelation between law and the other disciplines, principally philosophy, sociology and ethics.” Peter Ziegler, A General Theory of Law as a Paradigm for Legal Research, 51 Mod. L. Rev. 569, 570-71 (1988). I am uncertain of the wisdom of this goal, since achievement of its primary purpose would seem to auger against the discussion of both current and alternative paradigms, which often arise from or owe allegiance to interdisciplinary research. I am inclined to believe that, as an academic matter, if alternative paradigms are foreclosed to any extent, then the reasons for adopting the paradigm perspective would be lost.

At least one legal commentator has recognized that Kuhn himself did not think that
ics of environmental law repeatedly propose alternative paradigms that, by design, resolve the limitations of the dominant paradigm. It is these external viewpoints, alternatively referred to as "radical critique" or "alternative paradigms," that help identify the "other" excluded, voiceless perspectives that are unrepresented or underrepresented in the dominant paradigm.  

Second, the paradigm perspective is attractive to critical scholars who seek to make a sweeping change in the practices of a given discipline. By recognizing the existence of alternative theoretical frameworks, the paradigm perspective commits to a specific understanding of doctrinal change that abandons the "evolutionary" view of progress and leaves behind a genealogy of eclectic, incommensurable theories. Critical scholars often adopt this framework because it justifies the existence of alternative proposals and exposes the solipsist justifications for dominant modes of thought. As one theorist comments: "Changes in the law can be instigated by those willing to think the other of the legal system, those who practice what Thomas Kuhn has called 'revolutionary science' by swimming against the tide of 'normal science.'"  


11. Theories of adjudication that do not account for alternative viewpoints have been said to "deal with the deprived and disadvantaged in society by simply pretending they do not exist." Allan Hutchinson, The Last Emperor?, in READING DWORKIN CRITICALLY 21 (Alan Hunt ed., 1992). For purposes of paradigm analysis, the "deprived and disadvantaged," also called the "other," refer to alternative theories of environmental protection that have not found their way into the legal scheme of environmental protection.

12. See generally KUHN, supra note 9.


Finally, this article also assumes that when a debate can be described as discourse between alternative paradigms, the description is probably helpful in understanding the nature of the debate. Environmental law is faced with a variety of perspectives on how to understand the environment, as well as the normative consequences of that understanding. Admittedly, the nature of law and legal discourse may resist an accurate application of paradigm analysis due to the existence of multiple competing paradigms at any given time. In particular, this circumstance calls into question whether any paradigm is dominant and consistent throughout environmental law. However, due to the nature of competition among the various perspectives in the environmental debate, as well as the manner in which proponents maintain loyalties to their various perspectives, paradigms likely reflect "the way environmentalists often see the issues themselves, and the way they find themselves shifting grounds drastically according to the different parties they are talking with or against." Moreover, regardless of whether we can talk intelligently about the existence of alternative paradigms or actual incommensurability, we can use the conceptual scheme of paradigms and paradigm shifts in an intelligible fashion to (1) describe the type of conflict encountered in the environmental debate, and (2) identify the commitments that make a paradigm characterization compelling. Therefore, this article applies the paradigm perspective to the environmental debate to understand why that debate ensues, without questioning too deeply the ultimate accuracy of that analysis.

This article loosely defines "paradigm" as a worldview, perspective, or comprehensive conceptual scheme. Paradigms are com-

15. This circumstance generally tolls against an accurate application of paradigm analysis as developed by Thomas Kuhn, since, in his view, alternative paradigms are only seriously considered when the dominant paradigm has failed in some way and failed to retain the confidence of persons subject to it. See supra note 10.

16. Richard Routley, Roles and Limits of Paradigms in Environmental Thought and Action, in Environmental Philosophy 260, 261 (Robert Elliot & Arran Gare eds., 1983). Routley describes this appearance: "Often, for instance, they regard themselves as pitted against (filthy) capitalists who stand to make (immense) profits out of offensive environmental despoliation or, more recently, against bureaucracies committed to narrow economic and environmentally destructive developments." Id.

17. Some commentators dismiss the very idea of talking intelligently about alternative conceptual schemes. For instance, Donald Davidson has argued that even the attempt to consider an alternative paradigm will be translated into the terms and structures of the existing paradigm (i.e., the onlooker's perspective), "so there is no chance that someone can take up a vantage point for comparing conceptual schemes by temporarily shedding his own." Donald Davidson, On the Very Idea of a Conceptual Scheme, in Post-Analytic Philos-
posed of the complex sets of shared beliefs, assumptions and premises on which we rely to understand the world. A paradigm gives form to substance, in that it categorizes and classifies the world in a way that makes its experience understandable and, it is hoped, coherent. In this sense, paradigms define the limits of what can be taken seriously as reality and truth by organizing how experiences are perceived. For instance, because it is generally assumed today that the earth is round, people do not typically entertain stories about monsters waiting for hapless sailors to venture over the edge of the world. People do assume, however, that something dropped will fall towards the earth until obstructed. These assumptions, which are embedded in the current scientific paradigm, are among the many that govern whether a given proposition can be taken seriously.

As employed in this article, a "paradigm" specifically represents those assumptions that are accepted and employed by practitioners in a particular discipline. Because a paradigm acts as a filter that causes experiences and observations to be interpreted in a particular way, it provides a common language for all practitioners in a field. Acceptance of the dominant paradigm signifies indoctrination into a field of practice, especially where divergence from that paradigm results in reprimand rather than praise for innovation and creativity. Any observations that arise under other circumstances, particularly when they do not conform to the paradigm, are simply not considered normal practice in the discipline. As a result, such "external" views are excluded as unfounded, speculative, or simply wrong. In this way, paradigms define the limits of


18. One of the most pressing problems with paradigm research concerns defining, with precision, the term "paradigm." One commentator states that the term "paradigm" might predominate simply for lack of a better term:

Terms that would do, more or less, for the sweeping cases of cultural paradigms, such as 'world view' and 'ideology' will not do for narrower applications, for example, within special sciences such as political science. None of the other likely candidates, 'theory,' 'system,' 'position,' 'viewpoint,' 'perspective,' 'archetype,' 'myth' can really substitute or even fill all the places where 'paradigm' now makes sense.

Routley, supra note 16, at 263.

19. KUHN, supra note 9, at 180 (postscript) ("A paradigm governs, in the first instance, not a subject matter but rather a group of practitioners.").

20. id. at 24.
“normal” disciplinary discourse, and the constraining effect of shared basic principles on a given discipline tolls against paradigm shifts. Practitioners are justified in ostracizing arguments and ideas that do not fall squarely into normal practice; arguments external to accepted practices defy, in a broad manner, the very fundamental principles that make the practice a professional discipline.

Alternative paradigms—theories that contest the fundamental principles of the dominant paradigm in favor of other principles that explain the world in a radically divergent way—always exist, and sometimes these theories persuade practitioners in a discipline. Standoff ensues between paradigms where the shortcomings of the dominant paradigm persuade enough practitioners that resolution of the dispute is necessary for the propagation of the discipline. Occasionally, the dominant paradigm is questioned because of its inability to explain or justify some anomalous observation. In such an instance, referred to by Kuhn as a time of crisis, alternative paradigms are offered to explain the anomaly. To be taken seriously within the discipline, these alternative perspectives must present as comprehensive a scheme for understanding the world as the dominant paradigm and explain why the dominant paradigm has failed. Alternative paradigms, of course, come with their own sets of assumptions and limitations.

This article generally treats the “property paradigm” as the dominant paradigm with the caveat, noted above, that this description of environmental law may not be entirely accurate. There are several reasons for this characterization. Most importantly, property rights theories often exempt the land from those subjects

21. "Philosophers of science have repeatedly demonstrated that more than one theoretical construction can always be placed upon a given collection of data. History of science indicates that, particularly in the early developmental stages of a new paradigm, it is not even very difficult to invent such alternates." Id. at 76.

22. There is also an important sense in which dominant paradigms can be said to cause their own anomalies due to the particular paradigm’s limitations. See, for example, Anna Peterson’s discussion of the ethical dangers in the varieties of the social construction of nature in Environmental Ethics and the Social Construction of Nature, 21 ENVTL. ETHICS 339, 346-47 (1999). This sentiment is typical in what is here termed “radical environmental critique.”

23. KUHN, supra note 9, at 76 (“As in manufacture so in science—retooling is an extravagance to be reserved for the occasion that demands it. The significance of crises is the indication they provide that an occasion for retooling has arrived.”).

24. Id. at 153 (“Probably the single most prevalent claim advanced by the proponents of a new paradigm is that they can solve the problems that have led the old one to a crisis.”).

25. See supra note 15 and accompanying text.
to which a duty is owed. As a result, most contemporary theories of environmental protection, which include ethical duties to nonhuman entities, appear fundamentally at odds with the notion of property rights. In addition, it is probably not contestable to assert that, at least at one time, property rights dominated the legal arena and determined which or whose values to apply when assessing the worth of land. Finally, the property paradigm surfaces in response to environmental laws that have made the most noticeable change in land use (e.g., wetlands regulations and the Endangered Species Act). The opposition to these laws has consistently cited the protections of property rights deeply established in constitutional, statutory and common law. In other words, although the property right is likely not a fundamental principle supporting environmental law, environmental law nonetheless operates in the context of, and subject to, the pervasiveness of the property paradigm.

A. The Traditional Property Paradigm: Locke’s Anthropocentric Theory of Property

Locke’s universally cited property theory provides an insightful backdrop against which alternative environmental theories compete. According to Locke, property rights are natural rights, and thus arose prior even to civil society. The simple notion underlying Locke’s theory of property is that one could acquire an ownership interest in land and other natural resources by making use of that land. Locke’s theory was attractive because it provided for a fair system of property allocation that rejected social distinctions relating to ownership. Although unstated in Locke’s defense of property, we can add the common law notion that the law does not


distinguish among different individuals' values for the resources.\footnote{31} This description of property elevates a private sphere of choice and value in the environment.

At the heart of Locke’s theory is the notion that unused land has little or no value.\footnote{32} Locke goes further, stating that “land that is left only to nature, that hath no improvement of pasturage, tillage, or planting, is called, as indeed it is, waste; and we shall find the benefit of it amount to little more than nothing.”\footnote{33} Consistent with this view, under the Lockean paradigm the term “environment” describes an array of “things” that can be bought and sold, used in production, built upon, or otherwise traded on the market. This description, and the resulting property right, was not limited by particular types or amounts of land and resources since they extended to “as much as [man] could use.”\footnote{34}

Locke’s property notions were easily applied to early America and the pioneering ventures in the undeveloped West. Whether urged by the prospect of gold and minerals, fur, or land itself, laborious improvement of natural resources resulted in a legal right by the “inherent justice of [the] principle.”\footnote{35} This simple rule provided a basis for the orderly allocation of property throughout the western United States. The individual longing to have property and property rights, coupled with the firm expectation of acquiring such a right, presented liberty in the form of labor\footnote{36} and rights in consumption.

Locke’s conception of property rights understandably drove governmental support for the alteration of as much land as could be used. Such incentive was demonstrated in land grant statutes, such as the Homestead Act of 1862,\footnote{37} the Mining Act of 1872,\footnote{38} as


\footnote{32} Of the products of the earth useful to the life of man,” Locke says, “nine-tenths are the effects of labor.” Locke, supra note 30, at 22. On recalculation, Locke asserts that only one percent of all things useful are “purely” attributable to nature. Id.

\footnote{33} Id. at 22-23 (emphasis added). Locke’s sentiment is apparent when he writes that “bread is worth more than acorns, wine than water, and cloth or silk, than leaves, skins or moss.” Id. (emphasis in original).

\footnote{34} Id. at 25.

\footnote{35} Jones v. Adams, 6 P. 442, 446 (1885).

\footnote{36} Turner noted that “the West gave, not only to the American, but to the unhappy and oppressed of all lands, a vision of hope, and assurance that the world held a place where were to be found high faith in man and the will and power to furnish him the opportunity to grow to the full measure of his own capacity.” Frederick Jackson Turner, The Problem of the West, Atlantic Monthly, Sept. 1896, at 268.

well as the prior appropriation doctrine of western water law.\textsuperscript{39} Land holdings served as a source of revenue for the federal government and were disposed by auction to support the national treasury.\textsuperscript{40} Likewise, in mining projects and water appropriation in the West, courts recognized that "he who first connected his labor with the property . . . in \textit{natural justice} acquired a better right to its use and enjoyment than others who had not given such labor."\textsuperscript{41} Courts found enforceable property rights in the labor exerted to deliver the killing blow on a fox\textsuperscript{42} and to gather manure\textsuperscript{43} where the plaintiff "had changed its original condition and greatly enhanced its value by his labor."\textsuperscript{44} In addition, theories such as adverse possession and prescription awarded the party who actually made use of property against the party who owned title to the parcel.\textsuperscript{45} Thus, while Locke's theory of property and the legal doctrine inspired by it may not have incorporated an absolutist conception of property rights,\textsuperscript{46} it was animated by the fundamental principle that socially beneficial goods were produced by \textit{altering} the land. In this fashion, property rights in natural resources have historically maintained both the Lockean protection of the individual right and the understanding of "environment" that supported such a right.

\textbf{B. The Radical Critiques: Calling for a Paradigm Shift}

Conflict with the Lockean notion of property was inevitable. Against the assumption that the only value of a natural resource was its potential to support a property right, alternative environmental theories have recognized that anthropocentric values, and the Lockean property right, are based on an unjustified notion of free will\textsuperscript{47} and freedom to use natural resources. Alternative theo-


\textsuperscript{40} Benjamin Horace Hubbard, \textit{A History of Public Land Policies} 1-6 (1965).

\textsuperscript{41} Jones v. Adams, \textit{supra} note 35, at 446 (emphasis added).

\textsuperscript{42} Pierson v. Post, 3 Cal. R. 175 (N.Y. Sup. Ct. 1805).

\textsuperscript{43} Haslem v. Lockwood, 37 Conn. 500 (1871).

\textsuperscript{44} \textit{Id.} at 506.


\textsuperscript{47} The attempt to expose the \textit{non sequitur} between intrinsic value of the property right and free will is not an original project. Holmes indicated that possession is unjustly
ries of nature, such as Leopold's land ethic, ecofeminism and deep ecology, challenge that notion of free will. In particular, they are (typically) marked by the attempt to de-emphasize the dualism between humans and nature created by the Lockean celebration of man's alteration of natural resources. In place of this dualism, alternative environmental theories espouse conceptions of the environment that include humans and ethical systems that exclude human-centered values. Such views are often called "ecocentric" as opposed to anthropocentric—whatever value nature has arises independent of human labor or human interest.

1. Aldo Leopold's "land ethic."

The naturalist Aldo Leopold, in the most renowned call for a reconsideration of ethics to date, *A Sand County Almanac*, hailed the coming of an environmental ethic and destruction of the property paradigm by criticizing the hero Odysseus for his treatment of slave-girls as disposable property in a manner that is now considered immoral and illegal.48 Leopold observed that the use of land and natural resources in a consumptive fashion was indicative of the same attempt to control nature, since "[l]and, like Odysseus'..."
slave-girls, is still property.” Leopold proposed a holistic change in human consciousness and attitude toward the environment that would account for the environmental subject and reflect a moral ground for instituting environmentally protective values. Leopold’s answer, the culmination of his studies in normative ecology, was that “[a] thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.” Each natural thing, and the part each thing plays in the greater ecological community, had value and worth whether marketable or not.

The ostensible intent of Leopold’s land ethic was to decentralize the importance of property and the concept of ownership. It was intended to focus attention on understanding the biotic community and the human place in it, as opposed to Locke’s emphasis on the human value of resources as useful goods. Leopold challenged Locke’s premise of the importance of property as it related to the individual, asserting that the individual is only a part of a community. Moreover, recognizing that the Lockean community included only individuals that could possess property, Leopold proposed an ethic that “enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.”

2. Ecofeminism.

Ecofeminism, also known as ecological feminism, calls for a revolution in natural resource management that challenges the biases inherent in social gender constructions. This view criticizes the mechanistic view of nature, and combines critical feminist descriptions of social inequality with concerns for environmental mistreatment. From this perspective, the “masculine” crimes of spousal abuse and rape are equated with forest clearcutting and

49. Id. at 263.
50. Id. at 294-295.
51. Id. at 293.
52. Id. at 204 ("In short, a land ethics changes the role of Homo sapiens from conquerors of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such.").
53. Admittedly, this description does not do justice to the philosophy of ecofeminism, which is the "most complex" of the radical environmental philosophies. Michael E. Zimmerman, CONTESTING EARTH’S FUTURE: RADICAL ECOLOGY AND POSTMODERNITY 233 (1994).
dissipation of wetlands. The correlation is descriptively simple: the
disparate treatment of men and women, coupled with the dispa-
rate protection afforded to property rights and environmental
sanctity, illuminate the institutional subordination of both women
and the environment to patriarchal values. Ecofeminists contrast
the loving, supportive character of women and the environment
with the patriarchal insistence on neutrality and property rights
that institutionalize harsh, oppressive treatment. The differences
between men and the environment, like those between men and
women, and the disparate social hierarchy, result in an abusive en-
vironmental ethic.

The ecofeminists' most compelling argument is that what has
been termed the "logic of dominance" is not logical at all. The
logic of dominance assumes the premises that humans are morally
superior to nonhuman entities and that superiority justifies subor-
dination. Because patriarchal values have culturally evolved as
human, superior characteristics, while emotion, femininity and re-
production have been identified with nature, the logic of domi-
nance justifies the subordination of women. Under the critique
of the logic of dominance, ecofeminists point out that there is no
necessary connection between having the ability to dominate and
wielding that ability as a right.

The problem, however, does not end at dismantling dominance
itself. The ecofeminists also challenge the manner in which nature
is dominated, arguing that even an alleged right does not justify
dominating in an oppressive way. Warren states that "the problem
is not simply that value-hierarchical thinking and value dualism are
used, but the way in which each has been used in oppressive concep-
tual frameworks to establish inferiority and to justify subordi-
nation." Only by reconsidering the patriarchal biases in our
treatment of the environment, and rejecting the logic of domi-
nance over nature, will we relieve the environment from our mis-
treatment. Like Leopold's land ethic, then, the ecofeminists' point

55. Ecofeminists occasionally adopt an essentialist viewpoint, arguing that these dif-

56. See generally Karen Warren, The Power and the Promise of Ecological Feminism, in Envi-

57. Id. at 328.

58. Id.

59. Id. at 327.
against viewing natural objects as property presents a compelling critique of the Lockean justification for ownership.

3. **Deep ecology.**

Proponents of deep ecology also dispute the fundamental premise of the Lockean property scheme. Like the land ethic and ecofeminist approaches to value in the natural environment, deep ecologists dispute an anthropocentric notion of worth based on human dominance of the natural environment:

Ecological consciousness and deep ecology are in sharp contrast with the dominant worldview of technocratic-industrial societies which regard humans as isolated and fundamentally separate from the rest of Nature, as superior to, and in charge of, the rest of creation. But the view of humans as separate and superior to the rest of Nature is only part of larger cultural patterns. For thousands of years, Western culture has become increasingly obsessed with the idea of dominance: with dominance of humans over nonhuman nature, masculine over the feminine, wealthy and powerful over the poor, with the dominance of the West over non-Western cultures. Deep ecological consciousness allows us to see through the erroneous and dangerous illusions.60

Deep ecology, like the philosophies discussed above, calls for a significant, revolutionary change in the way the environment is perceived. According to Arne Naess, who coined the term "deep ecology,"61 the aim of the deep ecology movement "is not a slight reform of our present society, but a *substantial reorientation of our whole civilization.*"62 One of the primary targets of deep ecology is, of course, the property paradigm. The first principle of deep ecology, that the life and well being of all entities are intrinsically valuable, firmly rejects the Lockean notion of property ownership as reward.63 Under this view, no natural object is improved by changing its form or purpose; such alteration merely (and immorally) deprives the thing of its value.

These alternative philosophies demonstrate a genuine distrust of the grounding principles of the property right. Proponents of

63. **Gus DiZerega, Unexpected Harmonies: Self-Organization in Liberal Modernity and Ecology,** 10 *The Trumpeter* 25, 31-32 (1993) (stating that property rights "should reflect not just efficiency in meeting human desires, but should also take account of our place in communities other than the purely human").
radical environmental theories replace the property right with a variety of moral principles, rejecting the Lockean basis of ownership. Unfortunately, in attacking the accepted tenets of ownership, proponents of radical environmental critiques may argue themselves off of the negotiating table and render their insights ineffective. The next Part examines an example of such an attack.

III. RICHARD DELGADO AND RADICAL ENVIRONMENTAL CRITIQUE

Richard Delgado provides a paradigmatic example of the clash between competing environmental paradigms in his article, “Our Better Natures: A Revisionist View of Joseph Sax’s Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Reform.” The pessimism in the title foretells his nihilistic conclusions. Delgado identifies the public trust doctrine, inflated to include other aspects of the current environmental regime, as the dominant paradigm of environmental protection. His central claim is that the public trust doctrine, the notion that natural resources be held in trust for the public’s benefit, is a “wrong—or at least seriously flawed—solution to our environmental crisis” because it provides only for an incremental change in the way we interact with the environment. He argues that the public trust theory is essentially a façade; an innovative means to maintain the status quo, while giving the appearance of advancing environmental protection. As a result, Delgado argues, it has “forestalled more searching reconsideration of environmental predicament and postponed, perhaps indefinitely, the moment when our society would come to terms with environmental problems in a serious and far-reaching way.”

64. Delgado, supra note 13; see also Richard Delgado, Rodrigo’s Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence, 58 S. Cal. L. Rev. 545, 556 (1995).

65. Although this article does not take a position on whether the public trust doctrine actually serves as the dominant paradigm for environmental law, I doubt a convincing case could be made for the proposition that the public trust pervades all of contemporary environmental law. Delgado does not attempt to make this case. Therefore, Delgado can be seen as attacking a straw man in identifying the public trust doctrine as the dominant environmental paradigm. See infra note 218 Nonetheless, the relationship between the operation of the public trust doctrine as a property right doctrine and the radical critiques of the property paradigm discussed above make the discussion of the public trust doctrine relevant to the thesis of this article.

66. Delgado, supra note 13, at 1211.

67. Id. at 1225-26.

68. Id. at 1211.
A. The Public Trust Doctrine as a Dominant Paradigm of Environmental Protection

Under the public trust doctrine, the public possesses “rights” to natural resources for certain traditional purposes, such as commerce, navigation and fishing. The well-known 1892 case of Illinois Central Railroad v. Illinois articulated the doctrine as traditionally applied. Illinois Central involved a conveyance of submerged lands from the state to a railroad company. The state subsequently reconsidered this conveyance and revoked the land grant. The court upheld the state’s revocation and invalidated the original transfer. Rather than finding that Illinois had authority to rescind the land grant, the court held that the state lacked the authority to divest itself of its trust responsibilities toward that land in the first place.

The most significant advancement in environmental protection made by the public trust doctrine was a reservation of property to the public use that might otherwise be subject to the choices and whims of private parties. The prohibition against governmental transfer of certain property preserved a public good in particular uses of property protected by the trust. Nonetheless, the public trust doctrine, which operates to ensure that the public is able to use natural resources, does not eschew the anthropocentric description of the environment found in property law. When expanded to account for environmental law in general, the doctrine effectively operates on a case-by-case basis in which the principle of sic utere tuo ut alienum non laedas acts as a balancing force upon the private sphere of the property paradigm. Pollution resulting in injury is actionable, but requires a determination of who among property right holders is permitted to injure the other party without compensation.

Delgado therefore levels a number of criticisms against the public trust doctrine that suggest this paradigm has failed to curb environmentally damaging practices. First, Delgado points to flaws in the public trust doctrine itself, arguing that human nature prevents the doctrine from achieving any actual progress in our consump-

70. Id.
71. Id.
72. Id. at 455.
73. "One should not use property in a manner that injures another."
74. Oliver Wendell Holmes, Privilege, Malice, and Intent, 8 Harv. L. Rev. 1, 3 (1894).
tive attitude toward the environment—his “internal critique.” Second, Delgado offers several alternative environmentally protective paradigms—those alternative environmental paradigms discussed above (and hereinafter, his “external critique”)—that are intended to obviate this defect.

B. Delgado’s Internal Critique: The Limitations of Human Nature

Delgado opens his attack by examining traditional trust relationships to determine the basic precepts of the public trust doctrine. He finds that the

impulse for setting up a trust is lack of confidence; we fear that we may act irresponsibly with respect to the valued good (say, a sum of money), so we place it in the hands of another whom we instruct to act in accord with our better natures—in the way we would act if we were trustworthy.  

His inquiry reveals that the public trust doctrine rests on a metaphysical claim—one that delves into human nature itself—that “all of us . . . know that we have impulses to hunt, mine, dam, or cut things down” in contravention of our collective need for resource conservation. On this view, we abrogate the opportunity to commit such harms against ourselves by placing management authority in some other entity (a trustee), who is presumably fit to consider the best interests of the beneficiary of the trust. In theory, then, the government in its capacity as trustee of natural resources can curtail those human instincts and impulses that would otherwise obstruct the public’s access to public trust resources.

Delgado contends that this theory is faulty. Apart from the possibility of gender-specific bias inhering in the doctrine, the public

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75. Delgado, supra note 13, at 1215.
76. Id. Carol Rose comes to a different conclusion. She states that “what we have learned about self-interest and the commons is not that people necessarily act selfishly in using common resources. Instead we have learned, among other things, that self-interest is a signaling or attention-getting device of power.” Rose, supra note 6, at 1026.
77. Delgado, supra note 13, at 1214-15.
78. Id. at 1216-17.
79. Delgado does intimate that the paternalistic bias inherent in the very notion of the trust may be a drawback. He states that the doctrine is a “particulism male approach,” which combines with the problem that the impulse to destroy is “especially” felt by men. Id. at 1215. While Delgado did not develop this line of thought, there is a possible argument against the paternalistic aspect of the public trust doctrine that accounts for a great deal of the moralistic rhetoric accompanying environmental disputes. This argument might be that legal moralism (the attempt to legislate the moral value of individual thoughts and choices, even without any detectable injury to others) is decidedly off limits where it appears as a chauvinistic instance of control. Legal paternalism (legislation aimed at keeping...
trust doctrine also fails to recognize that the resource trustee will share the same human impulses to hunt, mine, dam, or cut things down that determine the basis for a trust relationship. Delgado’s internal argument against the public trust doctrine emphasizes the problem of perspective: no human trustee, burdened with the types of natural impulses that drive humans to overconsumption, will be capable of transcending this nature to manage natural resources in a responsible fashion. The government’s announcements of a public interest criterion in managing lands do not necessarily translate into new management methods or perspectives. Rather, “the trustee will construe our trust instructions against a background of the same cultural assumptions, values, and meanings that we hold.” Therefore, Delgado suggests that we cannot realistically believe that because we empower a particular entity with the authority to manage natural resources, the administrator will acquire special insight to assess the needs of nature. Indeed, all humans share the same perspective, and that perspective is the problem. Successful implementation of public trust protection, in Delgado’s estimation, may require a great deal of luck.

Admittedly, the public trust theory lacks several features crucial to a comprehensive theory of environmental protection. Although scholars have called for an expansion of the scope of the trust, the public trust doctrine does not extend to all resources or types of property. The limit of the trust has traditionally been the high water mark of navigable waters, or at the outer limit, tributaries of navigable waters that affect the navigable water body. A statutory defense of the public trust concept—that statutes enacted pursuant to the public trust obligation extend to all “major federal actions,” or all “navigable waters”—is unpersuasive because the conception of the environment underlying these statutes does not alter the property right or the treatment of the environment. Thus,

people from harming themselves) the argument goes, is only a slight variation from moralism because it denies people of the freedom to choose what constitutes an injury to the individual. The difference between determining what is good for the public versus what is harmful is no difference at all; they are tokens of the same type.

80. Id. at 1215.
81. Id.
82. Id. at 1216.
83. Id. at 1215.
84. See infra note 218.
86. 42 U.S.C. § 4331.
Delgado argues that the public trust theory fails to account for any real change in the perception of property rights. Delgado’s position may be tested by examining the actual effects of the public trust doctrine on the management of natural resources. As noted above, the public trust doctrine operates to expand the public benefit in natural resources, while contracting the private choice on how those resources are best used. However, if enforcement of public trust responsibilities does not change embedded notions of the environment as an array of goods best utilized through consumption, then the doctrine merely redistributes property rights. Indeed, judicial review of the trust management emphasizes the trustee’s discretion in managing trust resources. It has proven to be beyond the courts to decide “how that trust shall be administered. That is for Congress to determine.”88 The choice of how to administer the trust is among “the rights incident to proprietorship,”89 and when trust property is allocated, there “always remains with the State” the right of revocation to exercise proprietary rights in a manner “more conformable with its wishes.”90 In light of the legal operation of the public trust doctrine—that the doctrine only applies where a property right exists in the land—Delgado’s criticisms appear well founded and leave little hope that the public trust doctrine will achieve far-reaching environmental protection.

C. Delgado’s External Critique: Radical Alternative Paradigms

Delgado’s second criticism refers to the notion of paradigm shifts and normative analysis in legal theory.91 He notes that when dramatic paradigm shifts occur, a great deal of energy is directed against the old paradigm.92 Once a new dominant paradigm is in place, other alternatives, in addition to the old dominant para-

89. Id.
92. Delgado, supra note 13, at 1225. Kuhn states: “When, in the development of a natural science, an individual or group first produces a synthesis able to attract most of the next generation’s practitioners, the older schools gradually disappear. In part their disappearance is caused by their member’s conversion to the new paradigm. But there are always some men who cling to one or another of the older views, and they are simply read out of the profession, which thereafter ignores their work. The new paradigm implies a new and more rigid definition of the field.” KUHN, supra note 9, at 18-19.
digam, are condemned and rejected. Delgado's critique adopts the external perspective: the law should have rejected the public trust doctrine in favor of a new paradigm that favored common interests in property, such as a Marxist-type legal consciousness that eschewed the concept of private property ownership altogether. At least, the law should have adopted an understanding of natural resources that did not institutionalize anthropocentric aims. Based on this critique, Delgado offers alternative conceptions of the environment—such as those discussed above—as alternatives deserving the attention of the legal community.

However, the alternatives Delgado identifies were not chosen as the foundations for environmental protection to the detriment of the environmental debate. And, in a somewhat defeated tone, Delgado points to the public trust theory as a lesson in futility: the legal community refuses to condemn and abandon old perspectives and paradigms until "we are certain that the new one is not more discomforting than necessary." At the same time, the legal community seeks to "condemn the more ambitious reform programs as extreme and dangerous." To be clear, Delgado does not argue that no change has taken place. Rather, argues Delgado, when incommensurable paradigms compete, the exchange results in the acceptance of a compromised and disconcerted effort, a façade designed to quell opposition and lead opponents to mistakenly believe they have won the day. The public trust doctrine is, according to Delgado, the product of such a compromise. The only winner in such a case is the conservative proponent.

Delgado further argues that the principal effect of paradigm resolution is a death knell for radical environmental perspectives since the resolution, a compromise from all but conservative points of view, diverts the intellectual community’s attention away from anything that could sincerely be called a solution. By the time a movement regains composure and momentum, any solution of-

93. Delgado, supra note 13, at 1225.
94. Id. at 1218-22.
95. Id.
96. Id. at 1225.
97. Id.
98. Delgado's application of paradigm terminology arguably defies Kuhn's explanation of paradigm conflict and resolution and raises a serious question regarding the applicability of paradigm terminology to legal change. At least in Kuhn's view, a revolution ends in a new paradigm, or in a complete rejection of the proposed paradigm replacement, but not by rephrasing the rules to satiate challengers. See supra note 10.
For example, for many African Americans, changes such as abolition, desegregation and equal rights came too late to be enjoyed. Likewise, for many women, modernization of status, job opportunity and rape laws arrived too late. And most relevant to this discussion, for many forests, fish, and other voiceless members of the ecological community, environmental protection has come too late.

In summary, Delgado’s skepticism questions not just the wisdom of the public trust doctrine, but also the possibility that anthropocentric environmental protection could effectively protect the environment. Delgado asserts that the public trust doctrine suffers from an internal competition between what should be done and what can be done. To Delgado, the inability of the public trust doctrine to affirmatively resolve the dispute in favor of environmentally protective values is fatal. In the end, the doctrine’s reliance on a human trustee betrays our hopes of instituting authentic environmental values. His external perspective posits that the public trust doctrine is comparatively benign. To the extent that change has taken place in the management of the natural resources, the public trust doctrine only reinforces the anthropocentric perspective of the environment established by the property right. That is, the contingent application of the public trust doctrine to natural resources, where the character and use of property determines whether trust responsibilities apply, does not relieve environmental protection from the albatross of the property paradigm. The basic notion of property is as central to the public trust doctrine as the collapse of property categories is to radical environmentalism. As a result, Delgado concludes that the public trust doctrine (and environmental law in general) sends the message that environmental protection is not protection of what radical environmentalists understand to be the environment.

Is Delgado right? Is the human perspective inhering in the public trust doctrine self-defeating? Should the law have diverged from the property paradigm and adopted an ecocentric approach to environmental protection? Perhaps. Perhaps, however, the human perspective is the only viewpoint we are able to conceive. Perhaps the law is not equipped to make doctrinal changes is the way Delgado believes. The remainder of this article proposes a pragmatic reinterpretation of Delgado’s critique, and the subject matter of

99. Delgado, supra note 13, at 1227.
that critique, to determine whether his decretism is justified. From the perspective of pragmatism, from which we view paradigms and paradigm conflict in a manner that is slightly skewed but more realistic, Delgado has gone about environmental law in the wrong way.

IV. NEGOTIATING THE GAPS: PRAGMATIC REINTERPRETATION OF PARADIGM DEBATE

Pragmatism effects an important divergence from purely critical philosophy into instrumental and practical reason. Where critical scholars often question the validity of a discipline or its justification by exposing deep internal inconsistencies and contradictions in that theory, pragmatic thinkers assume the possibility of contradiction, but contextualize that finding so that the supposedly inadequate theory may yet offer answers to pressing problems. That is, as lawyers, philosophers, or whichever our discipline, when we practice with a hammer, we are critically inclined to use it as a tool of destruction or deconstruction; pragmatists remind us that a hammer is more useful for building houses, not tearing them down. As this Part explains, the debate on environmental law and ethics could benefit from a little pragmatism.

A. Pragmatism

In championing an idea, theory, or method of reasoning, one must begin with an explanation of that idea, theory or method. When the subject is pragmatism, however, this task is difficult. The pragmatist is less familiar with what she is than with what she is not, given that she “turns away from abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins.” The pragmatist quickly grows weary of philosophical debates on meta-theories and purportedly universal “first principles,” leaving himself armed only with a common sense, justified by the premise that “contemplative thinking originates in the practical need to solve

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100. See infra notes 221-32 and accompanying text.
102. WILLIAM JAMES, WHAT PRAGMATISM MEANS, in ESSAYS IN PRAGMATISM 341, 144 (1948).
103. RICHARD A. POSNER, OVERCOMING LAW 5 (1995); see also James, supra note 102, at 144; Richard Rorty, The Banality of Pragmatism and the Poetry of Justice, 63 S. CAL. L. REV.
real problems.” However, pragmatic common sense is not itself common, even if due only to the types of challenges to which pragmatic common sense is put. The pragmatist canonizes instrumentalism in problem solving, and, although unbounded by theory, the pragmatist is open to the employment of visionary ideas.

Kant was the first to formulate the need for practical reason under the auspices of “pragmatic” thought. His project in *The Critique of Pure Reason* was to establish the metaphorical tribunal of pure reason, in which all claims to knowledge could be conclusively adjudicated. By subjecting all propositions to the review of pure reason, and adjudicating these claims *a priori*, the tribunal of pure reason would separate justified claims from groundless ones. However, Kant discovered that the reach of pure reason was not infinite, and the precise limitations of pure reason called into question the wisdom of his project. Kant realized that human reason provoked inquiry into very important questions, the answers for which lay beyond the limits of reason. Hence, the problem was that

> [Human reason has this peculiar fate that in one species of its knowledge [pure reason] it is burdened by questions which, as prescribed by the very nature of reason itself, it is not able to ignore, but which, as transcending all its powers, it is also not able to answer.]

Pragmatic reason does not find itself confronted with the antinomy faced by pure reason. “Pragmatic” beliefs, for Kant, are “contingent” and provide “a ground for the actual employment of means to certain actions.” At the limits of pure reason, Kant focused human thought on the “actual employment” of practical reason to assess solutions to actual problems. By freeing us from having to submit every claim of belief to the tribunal of pure reason, Kant sought to avoid subjecting us to the frustrating antinomy of our human condition. So, for practical needs for which purely analytic reasoning is of no help (such as grounding religious belief), even Kant made the subtle but important departure, and

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106. *Id. at* 58-59.
107. *Id. at* 7.
108. *Id. at* 661.
turned to practical reason. In Kant's departure from pure reason, "[t]hought was no longer to be conceived as something distinct from practice, but rather it simply was practice, or activity, in its deliberative or reflective aspect."10

In contemporary theory, pragmatism was established with the rise of consequentialist thinkers in liberal political and philosophical theory.11 As philosophers questioned our ability to discover our true natures and basic metaphysical principles, the pragmatists questioned whether we needed to be philosophizing in such grand meta-philosophical ways at all. Taking Kant's lead, the pragmatists offered an alternative to foundationalism—"the age-old philosopher's dream that knowledge might be grounded in a set of fundamental and indubitable beliefs."12 The pragmatist dismissed the search for absolute foundations as antiquated, positing that "[n]o rational God guarantees in advance that important areas of practical activity will be governed by elegant theories."13 Foundationalism hinders useful discussion by disputing the justifiability of conclusions not firmly grounded in theory, while being unable to prove, conclusively, the soundness of a particular theoretical ground.

For the pragmatist, debates involving competition between "foundationalist" types of theories demonstrate a failure to find common context in which to converse. As a result, such debates are often unproductive. Accordingly, the pragmatist has abandoned both the dream of discovering the "world as it really is" and circular justifications of such meta-theories. The pragmatist's resulting loyalty is to the practical goals of resolving conflicts, engaging in an inclusive dialogue and determining a course of action. In James' words:

Is the world one or many?—fated or free?—material or spiri-

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109. I do not intend to cast Kant as a pragmatist, as much as to note that the practical limitations of his project are the same as the ones that can be applied to the environmental debate. Nonetheless, Kant "found it necessary to deny knowledge, in order to make room for faith" and the moral principles that faith allows. Id. at 29 (emphasis in original).

110. Grey, supra note 104, at 802.

111. The consequentialist strain of thought in pragmatism is evident in James' conception of "truth," to which he references the "usefulness" of a proposition. See James, Pragmatism's Conception of Truth, in Essays in Pragmatism, supra note 102, at 159, 162.

112. Grey, supra note 104, at 799.

113. Id. at 814-815. See also Richard Rorty, Philosophy and the Mirror of Nature 6 (1979) ("[T]he notion of knowledge as accurate representation, made possible by special mental processes, and intelligible through a general theory of representation, needs to be abandoned.").
tual?—here are notions either of which may or may not hold good of the world; and disputes over such notions are unending. The pragmatic method in such cases is to try to interpret each notion by tracing its respective consequences. What difference would it practically make to any one if this notion rather than that notion were true? If no practical difference whatever can be traced, then the alternatives mean practically the same thing, and the dispute is idle. Whenever a dispute is serious, we ought to be able to show some practical difference that must follow from one side or the other's being right.\textsuperscript{114}

By rejecting commitments to theory and the notion that such commitments will direct us to optimal solutions, the focus of pragmatic inquiry turns to an empirical, practical mode of inquiry that takes context as the basis for knowledge and consequences as a basis for judgment.\textsuperscript{115} Pragmatism, the "future-oriented instrumentalism that tries to deploy thought as a weapon to enable effective action,"\textsuperscript{116} embodies the notion that practical reason produces more successful action than dwelling on the theoretical, abstract "nature of things." In this manner, the pragmatist avoids Holmes' feared "Can't Helps."\textsuperscript{117}

By rejecting commitments to theory, pragmatists are denied the benefit of having a justifying principle (such as free will, equality, utility, ecocentrism, etc.) under which they can rally support. However, what pragmatists lose by rejecting meta-theory they replace by widening the field of potential solutions. Avoiding commitment to a substantive meta-theory frees the environmental thinker from worry about whether the solutions proposed for a given problem are consistent with an ultimate theoretical grounding; that is, the pragmatist is not bound by deductive reasoning within the confines of any particular analytic scheme. Visionary reasoning becomes an eclectic array of possibilities, limited only by those contextual needs that make the inquiry important in the first place.

The turn to pragmatism thus symbolizes a rejection of the al-

\textsuperscript{114} James, supra note 102, at 142.

\textsuperscript{115} For, supra note 104, at 801. See also Richard Rorty, Pragmatism, Relativism, Irrationalism, in Consequences of Pragmatism 160, 174 (1982). ("The pragmatist cannot answer the question 'What is so special about Europe?' save by saying 'Do you have anything non-European to suggest which meets our European purposes better?'").


\textsuperscript{117} "If... the truth may be defined as the system of my (intellectual) limitation, what gives it objectivity is the fact that I find my fellow man to a greater or less extent (never wholly) subject to the same Can't Helps." Oliver Wendell Holmes, Natural Law, reprinted in The Dissenting Opinions of Mr. Justice Holmes xiii (1929).
leged relationship between theory and answers to practical questions. To the pragmatist, this rejection comes for very good reason. Competing conclusions can often be derived from the same incomplete set of premises, and divergent theories can often produce the same conclusions. Pragmatists redirect human inquiry to avoid the indeterminacy of theory, since the "knowledge of obstacles is not itself an obstacle unless it leads to defeatism; for pragmatists it serves as a spur to seek a way to overcome those obstacles."  

In the final analysis, although theories are important, the pragmatist warns against theory commitments, because theories provide "no more than commentary on practice, based on premises drawn from that practice itself."

Accordingly, the pragmatic position against theory is not a broad, sweeping dismissal of every idea derived from a theoretical framework. Rather, the pragmatist is free to consider a variety of ideas, approaches and solutions without committing to particular theoretical foundations. The method and strength of problem solving, if not the purpose, is to ensure conversation participants


The corpus of the dispute was a squirrel—a live squirrel supposed to be clinging to one side of a tree-trunk; while against the tree's opposite side a human being was imagined to stand. This human witness tries to get sight of the squirrel by moving rapidly round the tree, but no matter how fast he goes, the squirrel moves as fast in the opposite direction, and always keeps the tree between himself and the man, so that never a glimpse of him is caught. The resultant metaphysical problem now is this: Does the man go round the squirrel or not?

James, supra note 102, at 141. To James, this dispute was easily reconcilable by the pragmatic method. "Make the distinction, and there is no occasion for further dispute. [Both are] right and both wrong according as you conceive the verb 'to go round' in one practical fashion or the other." Id. at 141-142.


120. Farmer, supra note 2, at 9 ("Intelligent analysis requires the use of theories, but as tools, not as ends in themselves.").

121. It is not a coincidence that most pragmatists define pragmatism by describing its instrumental import to deadlocked theoretical disputes. The pragmatist needs some type of polarized debate to resolve. Pragmatism does not answer simple questions. Dewey recognized that the quest for truth will inevitably mask the uncertainty of inquiry. "The attempt to include all that is doubtful within the fixed grasp of that which is theoretically certain is committed to incoherence and evasion, and in consequence will have the stigma of internal contradiction." Dewey, supra note 118, at 244. The notion to which Dewey likely refers is the Law of the Excluded Middle (LEM). LEM maintains an exclusive disjunction. According to this law of logic, a proposition is either true or not true, but not both nor neither. The philosophical quest, a consciousness that needs certainty, is divided by the polemic of right or wrong. Pragmatism rejects this model because it only perpetuates great
that their theories are duly considered. The resulting formation of policy is “inclusive, treating current theories as perspectives, each of which can add to the understanding of law.”

Pragmatism, then, is a helpful tool (especially to environmental debate) because of its freedom from any particular method of inquiry and any particular metaphysical “good” of society. For the pragmatist, theories “are not Euclidean axioms or Kantian categorical imperatives, but graffiti, practical guidelines to be noticed by the alertly street-wise when context makes them applicable.” When unbounded by consistency with or loyalty to any particular theory, all relevant ideas become useful to the resolution of a dilemma. The lesson from pragmatism is that to see the law as something more than a refined, yet interminably eclectic conglomerate of ideas, taken from all forms of social and cultural practices, would be to give too much credit to our insight into the nature of justice.

The resulting amalgam—the plurality of perspectives arranged for inclusive discourse—is not mandated by pragmatism. Nonetheless, since pragmatism is in its most useful capacity when put to the task of dispute resolution, pragmatism inevitably finds itself confronted with opposing and incompatible perspectives. A pragmatic conclusion is one in which those opposing and incompatible perspectives are represented. To this end, some pragmatists have tried to surmount the foundationalists’ problem of theory-hope (that the right theory will supply the right solutions) by proposing pluralist perspectives to bridge the gaps between competing paradigms. Pluralism serves as a helpful model for pragmatism’s

uncertainties. LEM does not allow the possibility that both ideas to a dispute can be right, or both wrong, as it appeals to the context in which the question may be relevant.

122. Dewey asked:
For what is the faith in democracy in the role of consultation, of conference, of persuasion, of discussion, in formation of public opinion, which in the long run is self-corrective, except faith in the capacity of the intelligence of the common man to respond with common sense to the free play of facts and ideas which are secured by effective guarantees of free inquiry, free assembly, and free communication?


124. Grey, supra note 119, at 1593.

125. Pragmatism does not have necessary principles or substantive vision to arrive at such a theoretical commitment. Pragmatism “has no dogmas, and no doctrines save its method.” James, supra note 102, at 146.
application.\textsuperscript{126}

In summary, pragmatic inquiry illustrates three main themes. First, pragmatism embodies "anti-foundationalism" in that it is not loyal to any particular substantive theory. Second, pragmatism allows negotiation between purportedly uncompromising positions for the purpose of solving real problems, due in large part to its lack of dependency on any "truths" claimed in these positions. Finally, pragmatism disputes whether the adoption of any particular theory determines the right answers to difficult questions. The pragmatist uses these tools to transcend barriers between alternative perceptions by critically examining such perspectives to determine how each of them can be applied in a helpful, non-exclusive manner. These tools can be applied to debates over environmental protection, which were above portrayed as deadlocked dialogues between deeply held beliefs. Below, the problems of frustrated belief are contrasted to examples of pragmatic environmentalism, verifying the potential benefits of legal pragmatism for advocates and judges engaged in environmental disputes.

B. \textit{Negotiating in the Gaps}

Pragmatism may prove a useful tool in environmental debates simply because such debates can be characterized as competing, irreconcilable perspectives that suggest conflicts between paradigms. The environmentalist, for instance, may find it "incomprehensible that an applicant may be permitted to construct a shopping mall, a non-water dependent activity, on wetlands."\textsuperscript{127} Yet, the property rights activist believes that "[I]loss of freedom goes

\begin{footnotesize}
\begin{enumerate}
\item As an extremely simplified model of the type of visionary thinking, we might consider the cubist school of aesthetic representation. The cubist's freedom in considering and demonstrating the multitude of perspectives, a type of plural perspectivism, is an embodiment of the pragmatic visionary project. In this way, pragmatism would be poorly described as a Jackson Pollock in contrast to the "one right answer" type of Euclidean; rather, the pragmatist is like the cubist, who understands the simple Euclidean notion of space to be bound too tightly to a single perspective of perception, and as such, is incomplete as a perspective from which to present images. Pragmatism acknowledges advice from all disciplines and dialects within those disciplines, much like the cubist may take all Cartesian vantage points into perspective to create something that is not per se Cartesian in appearance. See, e.g., Catherine Wells, \textit{Situated Decisionmaking}, 63 S.Cal. L. Rev. 1727, 1746 (1990) (providing an insightful reminder that the tiger hunt must be understood from the hunter's point of view, as well as the tiger's).
\item Bhavani Prasad V. Nerikar, \textit{Comment: This Wetland is Your Land, This Wetland is My Land: Section 404 of the Clean Water Act and Its Impact on the Private Development of Wetlands}, 4 Admin. L.J. 197, 225 (1990).
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hand-in-hand with loss of property rights.” As a result of such deadlocks (or at least what appear to be deadlocks), many commentators find themselves pessimistic and unable to move beyond the polemic. Delgado’s nostalgic recounting of the environmental debate prior to adoption of the public trust doctrine is essentially a “what if” story about someone else’s victory. Similar frustration exists in Justice Douglas’ dissent in Sierra Club v. Morton, as he tried to convince the court to extend standing to natural resource interests before the wilderness disappeared, in the helplessness pervading Rachel Carson’s Silent Spring and in the nihilism felt by students of William Cronon’s environmental history courses. The pragmatic lesson to be learned from these losses is to recognize the conflict between the environmentalists’ goals and the most appropriate methods of effecting those goals. The challenge is to find a way the law can be understood to include conceptions of the oppressed as they are coming to be, even if the weight of legal institutions coherently excludes them.

A pragmatic approach to environmental decision making re-


Schlag, in discussing the value of normative legal thought in the postmodern era, opens his discussion with the same pessimism:

There is nothing quite like the exhilarating experience that comes from reading a provocative new piece of legal thought. Of course, at some point this exhilaration will give way to ennui as the new piece of legal thought unravels — ultimately to be classified as yet another possibly clever, perhaps thoughtful, but nonetheless utterly failed contribution. One characteristic feature of our own postmodern condition is the breakneck speed with which the second experience succeeds the first. From exhilaration to failure, the distance has been reduced to a couple of sentences.

Schlag, Normative and Nowhere to Go, supra note 91, at 167.

130. Delgado, supra note 13, at 1225.


133. William Cronon, The Uses of Environmental History, 1995 ENVTL. HIST. REV. 1 (Fall).

quires environmental advocates to recognize the nature of the debate. When competing theories are understood in light of paradigm analysis, no single theory can lay claim to moral superiority or universal appeal. Rather, “[w]hen paradigms enter, as they must,” such as when a new paradigm is asserted to trump a dominant mode of thinking, “their role is necessarily circular. Each group uses its own paradigm to argue in that paradigm’s defense.”136 In this context, pragmatists remind that the force of an argument “is only that of persuasion.”137 Of course, to acknowledge these aspects of paradigm analysis—that alternative paradigms are ultimately indefensible—undercuts the normative force of any proposed perspective. However, pragmatism points out that the dominant paradigm will suffer this same foundational deficiency. Paradigm discourse replaces truth with rhetoric, realizing that “since no paradigm ever solves all the problems it defines, and since no two paradigms leave all the same problems unsolved, paradigm debates always involve the question: which problems is it more significant to have solved?”138 Paradigm proponents must argue convincingly for the reach of their theories, as “[p]aradigms gain their status,” not because they are correct, but “because they are more successful than their competitors in solving a few problems that the group of practitioners has come to recognize as acute.”139 Pragmatism’s lesson for the proponent of the alternative paradigm is that a little flexibility toward what might be termed “truth” will help in recognizing the powers and opportunities of persuasion.140 Persuasion, not stubborn dogmatism, is the key to progress.

The environmentalist must choose between two strategies. She can persist in the hope that courts will determine that the current environmental regime is inherently faulty, which will lead to the destruction of environmental law and property rights as we know them. Or, alternatively, she can recognize that the perceived barriers to integrating environmental ethics and environmental law are themselves a result of the rhetoric and persuasion from those opposing radical change. Such a recognition could favor the environmentalist’s position as it has her opponents. Inevitably, the choice

135. KUSH, supra note 9, at 94.
136. Id. at 93.
137. Id. at 99.
138. Id. at 23.
wavers between two types of thinking: the dogmatic and the pragmatic. The dogmatic "thinks of truth as a vertical relationship between representations and what is represented," whereas the pragmatist "thinks of truth horizontally—as the culminating reinterpretation of our predecessor's reinterpretation of their predecessor's reinterpretation." The difference between the two perspectives, in essence, is "the difference between regarding truth, goodness, and beauty as eternal objects which we try to locate and reveal, and regarding them as artifacts whose fundamental design we often have to alter." This, of course, is just another way of saying that adapting Kuhn's thesis to legal analysis is itself a paradigm, one that is principally pragmatic in nature. But by attempting to advance radical theories of nature that lack a viable means of policy implementation, environmentalists find themselves in an extremely unpersuasive, dogmatic camp.

Recent philosophical scholarship on environmental ethics has begun to recognize the limits of theorizing on intrinsic value in nature. While noble in cause, debates about intrinsic value may not provide useful answers. Instead, "many writers have begun to outline a pragmatic agenda for environmental ethics by proffering approaches that attempt to shift the field's mode of inquiry to a more practical dialogue about the multiplicity of values at play in specific matters of environmental policy." Environmental ethics, it seems, is experiencing a "swelling wave" of support for the "pragmatic turn" in environmental theory.

Pragmatism's success in the environmental debate is owed to its

140. Rotty, supra note 115, at 92.
141. Id.
142. Id. Another way of describing the ethicist's choice is an attempt between either pragmatism or essentialism—that is, in application and problem solving or by exploration and philosophical architecture. J. Baird Callicott, Non-Anthropocentric Value Theory and Environmental Ethics, 21 AM. PHIL. Q. 299 (1984). Many have considered the two divergent methods of reasoning and determined that architecture is the preferred method of dealing with environmental ethics. Environmental ethics has thus been overrun with monistic theories that, to both their strength and detriment, appear to portray a dogmatic aspect of environmental ethics "almost of necessity religious in nature." Hahn, supra note 13, at 1774.
144. Some anti-foundationists argue that theory is useless because it does not determine practice. Farber, supra note 1, at 40. See also Against Theory: Literary Studies and the New Pragmatism (W.J.T. Mitchell ed., 1982).
146. Id. at 192.
understanding of the operation of context as a constraint on persuasion and discourse. Persuasion between foundational theories may result from the attempt to reconcile differing approaches. Pragmatists rely on a reconciliation-based description of how paradigms and belief systems transform in the face of competing paradigmatic structures,\textsuperscript{147} in which new problems, predictions and solutions can be translated into an existing structure of beliefs by displacing the fewest other beliefs. Effective dialogue on solutions espoused from otherwise incommensurable positions simply requires a touch of flexibility toward traditional philosophical questions.\textsuperscript{148} In applying this maxim to legal change, the lesson to be learned from the pragmatist’s understanding of paradigm shifts is that revolutionary ideals can be presented in light of dominant beliefs, rather than in spite of them.

William James described the process by which an individual “settles into new opinions”\textsuperscript{149} in a manner resounding in a more pragmatic perspective on paradigm competition:

The individual has a stock of old opinions already, but he meets a new experience that puts them to a strain . . . The result is an inward trouble to which his mind till then had been a stranger, and from which he seeks to escape by modifying his previous mass of opinions. He saves as much of it as he can, for in this manner of belief we are all extreme conservatives. So he tries first to change this opinion, and then that. (for they resist change very

\textsuperscript{147} See, e.g., W.V. Quine, \textit{Pursuit of Truth} 14 (1991). One description Quine gives is as follows:

We have before us some set $S$ of purported truths that was found jointly to imply the false categorical . . . Now some one or more of the sentences in $S$ are going to have to be rescinded . . . [W]e rescind one that seems most suspect, or least crucial to our overall theory. We heed a maxim of minimal mutilation. If the remaining members of $S$ still conspire to imply the false categorical, we try rescinding another and restoring the first. If the false categorical is still implied, we try rescinding both. We continue thus until the implication is defused.

But this is only the beginning. We must also track down sets of sentences elsewhere, in our overall theory, that imply these newly rescinded beliefs; for those must be defused too. We continue thus until consistency seems to be restored. Such is the mutilation that the maxim of minimal mutilation is meant to minimize.

In particular the maxim constrains us, in our choice of what sentences of $S$ to rescind, to safeguard any purely mathematical truth; for mathematics infiltrates all branches of our system of the world, and its disruption would reverberate intolerably.

It is well . . . not to rock the boat more than need be.

\textit{Id.} at 14:5.

\textsuperscript{148} See Rorty, \textit{supra} note 139, at 193.

\textsuperscript{149} \textit{James, supra} note 102, at 148.
variously), until at last some new idea comes up which he can
graft upon the ancient stock with a minimum of disturbance of
the latter, some idea that mediates between the stock and the
new experience and runs them into one another most felicitously
and expeditiously. 150

James’ observations recognize that the basic problem with new
ideas is that they are contrary to accepted beliefs. Although there is
often a natural resistance to revolutionary ideas, integrating new
ideas into prior assumptions is a powerful form of persuasion.
While persuading someone to give up firmly held beliefs may be
exceedingly difficult (if not hopeless), she may welcome being told
that her prior beliefs are basically correct, with slight modifications.
A successful result of paradigm exchange, in the environ-
mental context as well as any other, may hinge on this simple
lesson. Pragmatic proponents of environmental protection have
adopted such an approach, arguing that “a more democratic and
pluralistic approach to the countenance of ethical orientations
regarding the natural world must be accepted” to foster informed
environmental policy. 151 Some adopt a more direct strategy aimed
at softening the property right that assumes “environmental pro-
tection is not at odds with property; it is part and parcel of the
same relationship between society and the individual that gives
property its meaning.” 152 Even Leopold, who was acutely aware of
the barriers obstructing his project, came to the pragmatic conclu-
sion that “non-anthropocentrism raises issues too intractable to
make it useful in management decisions.” 153

It should now be obvious that the ways of thinking about argu-
ment and the methods of recharacterization offered by pragma-
tism have application in the environmental debate. Certainly,
understanding deadlocked disputes in paradigm terms helps ex-
plain the basis for heartfelt disagreement. In this context, pragmat-
ism offers a means by which paradigm opponents can find
common ground and potentially agree on environmental policies

150. Id.

151. Minteer & Manning, supra note 145, at 21. Minteer and Manning repeatedly
remind monistic theorists that, “[p]hilosophically speaking, the search for analytically con-
structed moral ‘truths’—whether about human nature or environmental obligation—from
a detached, external perspective is not the only way to go about the work of ethical in-
quiry.” Id. at 200.

152. James M. McElfish, Jr., Property Rights, Property Roots: Rediscovering the Basis for Le-

153. Brian G. Norton, The Constancy of Leopold’s Land Ethics, in ENVIRONMENTAL PRAG-
MATISM, supra note 8, at 99.
and laws. In short, the pragmatic view of environmental law serves as a promising negotiating strategy for those who have grown weary of ongoing disputes over meta-theoretical, incommensurable principles between rights to environmental quality and rights to property.154

C. Paradigm Shifts in Environmental Law

While previous Parts describe the debate on environmental protection as a broad and eclectic theater of competing ideas and ideals, recognition of the nature of the competition between competing paradigms is only part of the project. We must also consider the appropriate form of argument for the environmental debate. The pragmatic perspective recharacterizes the debate and places emphasis on the arbiter herself: from this viewpoint, alternative theories are not accepted or rejected in the law based on their ability to accurately describe the world or uncover the values inhering in nature. Rather, success in legal paradigm competitions comes from persuading the lawmakers and administrators. From this perspective, a theory is not better because it appears to centralize the protection of nature (or property rights); rather, a theory is better when it is successful, and a theory is only successful when it finds its way into the law.

1. Paradigm shifts and the law.

Recent environmental literature has been flooded with positivistic and hopeful identifications of new, environmentally protective paradigms. Drawing on the ethical principles espoused by Rachel Carson,155 Aldo Leopold156 and in the public trust doctrine, pragmatic scholars have identified emerging themes in environmental law that suggest new environmentally protective legal principles are gaining dominant status in the law. These optimistic scholars are succeeding where proponents of radical paradigms have failed: the environmental optimists recognize that disciplinary restraints influence doctrinal changes in the law. Respecting these restraints

154. See, for example, Marc R. Poirier, Property, Environment, Community, 12 ENVTL. L. & L'IRRIE 43, 44-45 (1997), who has cried "enough!", arguing that "Many articulations of property and environmental theory might seem to terminate at the point of identifying two conflicting tendencies within property. This is not enough." Id.


enables them to identify theories and arguments that can persuade the legal community.

In legal practice, we could imagine that a dominant paradigm determines the confines of acceptable legal argument by placing limitations on the "normal" practice of law. For the purposes of this article, it is assumed that a dominant legal paradigm exists where research identifies a small set of fundamental principles that interact to create a framework within which the practice of law is maintained. Such principles are taught in law schools, tested on bar exams, and relied upon in the courts. Ronald Dworkin's metaphoric "chain novel," in which continuity drives legal practice toward "right" answers to difficult judicial questions, provides insight into legal paradigm practices.\textsuperscript{157} The metaphor suggests why "massive doctrinal shifts are rare. When they do occur, they are usually a long time building, and, if they touch sensitive moral nerves, are at least as long a time commanding the general acceptance needed to make them effective."\textsuperscript{158} Perhaps more importantly, the metaphor provides a context in which radical environmental critique can find a persuasive strategy.

Dworkin's chain novel metaphor portrays adjudication as inherently resistant to paradigmatic shifts. For Dworkin, the idea of the chain novel is strikingly similar to the way in which new issues, or "hard cases," are decided in law. A chain novel is a novel sectioned into parts with a different author responsible for writing and developing each chapter. Each chapter is written in turn: the first is written first, then the second, and so on. The succeeding chapters build on, or at least do not violate or contradict, the themes constructed by preceding authors. The chain continues until the novel is completed in a final chapter, unifying and completing the novel. Posing the chain novel as a model of adjudication, Dworkin argues that just as each author must respond to the dual needs of creating a new work and adhering to previously developed themes, "[e]ach judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history."\textsuperscript{159} Just as each author must realize that she contributes to an


\textsuperscript{159} Dworkin, \textit{Law as Interpretation}, supra note 157, at 263.
organized whole, and tries to make that whole the best and most consistent it can be, so too the judge participates in an historical chain, with her part serving simply as another link.

The chain novel explains that law imposes constraints that keep personal convictions and idealistic legal preferences from influencing adjudication. A judge falling prey to such influences might reinterpret the past, despite the existing historical chain of precedent, and effectively create a new history, without regard for his place in the chain. Dworkin, though, assures us that a judge who faces a new case has at his disposal history of preceding chapters, with several main characters and some unfolding of the plot from which to draw; judges use them, says Dworkin, to "continue the past and not invent a better past." To act consistently with precedent, the author or judge does not "strike out in some new direction of his own" and knowingly deviate from the chain. The judge, as a prerequisite for the job, allows the law to come before his personal convictions and utopian visions. Of course, judges obviously have moral convictions; without some sensibilities, the legal process (especially in light of its positivistic nature) would be devoid of the balancing function of equitable considerations. Moreover, a particular judge's background likely has a noticeable effect on his understanding of legal rights and how those rights are applied. However, argues Dworkin, "the brute facts of legal history will nevertheless limit the role these convictions play in those decisions."

According to Dworkin's chain novel model, the judiciary's proper goal is not to take the law into new (and perhaps better) directions, but "to resolve the issue by constitutional measurement, free of emotions and of predilection." In Dworkin's metaphor,

160. Dworkin, Natural Law Revisited, supra note 157, at 169.
161. Dworkin, Law as Interpretation, supra note 157, at 283-84.
162. Dworkin, Natural Law Revisited, supra note 157, at 169.
163. Roe v. Wade, 410 U.S. 113, 116 (1973). Dworkin's answer here may be considered to be generally, though not universally, accepted. I am accepting the chain novel metaphor as persuasive so long as it is a likely consciousness adopted by judges. However, the opposition makes a noteworthy point: a "hard case," to which no law directly applies, may not be bound by any particular history, and thus judges should always be considered to be making new law in hard cases. The humorous extreme position is illuminated in the following excerpt:

Then there is the doctrine of precedent, one of my favorite doctrines. I have managed to apply it at least once a year since I've been on the Bench. The doctrine is that whenever you are faced with a decision, you always follow what the last person who was faced with the same decision did. It is a doctrine eminently suitable for a nation overwhelmingly populated by sheep. As the distinguished
judges generally do not diverge from precedent. Of course, as is aptly argued from many corners, the actual amount of constraint precedents places on judges may be illusory, since each preceding case, as well as every piece of history, must itself be interpreted. But we are not concerned with whether these are interpretive constraints in actuality. Judges believe they are applying legal principles and rules, rather than their own interpretations, political ideologies and, perhaps, apologies.

Granted, this understanding of constraint diverges from the pragmatic position on adjudication. As Judge Posner defines it, "pragmatist judges always try to do the best they can for the present and the future, unchecked by any felt duty to secure consistency in principle with what other officials have done in the past." Nonetheless, the divergence defended here is not fatal; recognizing interpretive constraints in the courts serves a greater purpose than merely paying lip service to the more conservative

chemistry, Corford, said, 'The doctrine is based on the theory that nothing should ever be done for the first time.'


164. Shapiro has argued that "all judges—perhaps most particularly those who have managed to push the law in bold new directions—have been aware of and responsive to these constraints." Shapiro, supra note 158, at 554.

165. See, eg., STANLEY FISHER, Working on the Chain Gang, in FISHER, supra note 10, at 87.

166. Among other things, the mere notion of legal interpretation as a constraint raises critical questions concerning objectivity and "right answer" types of responses to the claim of indeterminacy in interpretation. However, it may not be necessary to make the argument that judges actually ignore personal politics and preferences. "Despite all the palaver that this is what judges really do, the truth is that they really do not. The institutional constraints... are checks that deter the imposition of judges' personal values and that confine the courts to 'molecular motions.'" Shapiro, supra note 158, at 556. It is enough to assume that constraints can be asserted—and that issue is whether judges will be amenable to alternative paradigms. It is enough to assume, as Catherine Wells has said, that "all judges bring their own situated perspective to the case and do the best they can under all the circumstances to reach a fair and just disposition." Catherine Wells, Situated Decisionmaking, in PRAGMATISM IN LAW AND SOCIETY 275 (Michael Ern: & William Weaver eds., 1991). If they believe they are upholding precedent and constrained by history, alternative paradigms will seem offensive to that duty.

167. Richard A. Posner, The Problems of Moral and Legal Theory 241 (1999). This definition, derived from a debate with Ronald Dworkin, is for Posner only a "working definition." It does, however, serve as a solid foundation against which to view the importance of history in adjudication from the pragmatic viewpoint: "So the pragmatist judge regards precedent, statute, and constitutional text both as sources of potentially valuable information about the likely best result in the present case and as signposts that he must be careful not to obliterate or obscure gratuitously, because people may be relying upon them." Id. at 242.
methods of judicial interpretation. Environmental law is still in its infancy. Canons of interpretation in environmental law remain to be determined. As such, the notions of precedent and constraint serve purposes that extend beyond the academy. When courts seek interpretive guidance in precedent, they may find guidance in cases relating to public goods, perhaps nuisance and trespass, but inevitably they will find conflict with established notions of property rights and a comparative absence of, say, a deep ecologist, ecofeminist or other radical environmental interpretive constraint. Overcoming the confinement, through reinterpretation of existing precedent, reveals a means to finding the most persuasive sources of “green” interpretation in the law.

2. Environmental ethics through the law’s eyes.

With the disciplinary constraints of legal practice in mind, environmental law can now be viewed as a successful legal paradigm shift. As noted in Part I.A, the common law governing property rights has overwhelmingly defined natural resources as “things” that can be possessed and protected as property. This Lockean property right in land, “that sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the right of any other individual in the universe,” became a cornerstone of organized community and governance. The common law developed to protect these expectations of “things” in a manner that ensured individuals’ ability to effectively utilize the market.

During the 1960s and 70s, discussions turned to environmental ethics, and philosophy and science experienced an explosion of intellectual curiosity in academic journals such as Environmental Ethics and The Ecologist. This call to arms against the “environmental crisis” produced an abundance of pointed literary and ethical scholarship designed to offer an alternative to unbridled human consumption of natural resources. Concerned intellectuals from all disciplines authored reflective warnings about humanity’s impacts

168. 2 William Blackstone, Commentaries *2-3 (1778). Citing Blackstone for this idea is not meant to attribute that idea to him, as it has been argued that he may not have defended this principle as an absolute. See Robert C. Ellickson, Property in Land, 102 Yale L.J. 1315, 1362 n.237 (1993).

169. As Judge Posner states, “legal protection of property rights creates incentives to use resources efficiently.” Richard A. Posner, Economic Analysis of Law 30 (3d ed. 1986). Under this scheme, individuals must be able to find security in their commitments and investments, and realize a reasonable return on their labor.
on nature. The general public responded in fear to reports of industrial accidents and rivers catching on fire, and poked and prodded until Congress enacted a wide array of laws to protect human beings from themselves. Meanwhile, the Lockean-based notion of the property right has undergone a slow redefinition, impelled by developments in property notions and shifts in our understanding of the value of natural resources.

Essential to the analysis of environmental law’s progress is the fact that these changes have occurred within the existing legal system and, further, that they have relied upon other areas of law. The relationship between environmental philosophy, environmental law and the legal system as a whole is an important one, since, as a general rule, “we cannot simply change our entire philosophy of law to accommodate a need felt within one area of law.” Success in environmental law can be credited to its adherence to this rule. To illustrate, hazardous waste regulation appears to make radical changes to liability law, but is justified on common law grounds.

170. In 1983 Joseph Sax discussed a version of this conclusion: “A case could be made for the proposition that property rights have been in a state of more-or-less continuous decline for many decades, and that there is nothing to report on that front but more of the same. I do not agree.” Joseph L. Sax, Some Thoughts on the Decline of Private Property, 58 Wash. L. Rev. 491, 491 (1983). Significantly, Sax distinguished “decline” from “redefinition” in his interpretation of the trend:

I believe that we have moved in recent years from a situation (characterized by conventional urban zoning) in which we generally encourage development rights, though recognizing they must from time to time be restrained, to one in which development activity has itself become suspect. As a result, we are in the midst of a major transformation in which property rights are being fundamentally redefined to the disadvantage of property owners.

171. A significant caveat in this presentation of environmental paradigm discourse is that I have ignored the question of whether shifts in the law are primarily attributable to social influence or persuasive legal arguments. On this point, Robert Goldstein aptly applies Cardozo’s dictum, “One of the marks by which we recognize a social interest worthy of protection is the spontaneity and persistency with which groups are established to conserve it.” Robert J. Goldstein, Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law, 25 B.C. Envtl. L. Rev. 947, 992-93 (1998), quoting Benjamin N. Cardozo, The Paradoxes of Legal Science 143 (1928). Goldstein’s analysis, which relies on social momentum to support his identification of the “green wood” in the bundle of sticks metaphor, therefore properly answers the question of “whether the social interest is environmental ethics is weighty enough to justify a shift in the law of real property.” Id at 993. Such questions are beyond the reach of this article because the analysis employed here does not aim to justify social movements but only to classify legal ones.

172. Brooks, supra note 2, at 15. However, for Brooks the hope is that “[a]l starting point for a complete reexamination of current environmental law might be the articulation of a naturally-based philosophy of law not only as a preface to environmental law, but as a preface to the understanding of all law.” Id.
The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 173 imposes strict, joint and several liability on landowners and those parties responsible for hazardous substance contamination of real estate. CERCLA has been challenged as unconstitutionally retroactive and for imposing liability without regard to fault. In the midst of this litigation, it has been the common law foundations—the adaptability of hazardous waste law to existing legal concepts 174—that made possible the defense of a regulatory regime altering the manner in which hazardous wastes are treated. 175 Furthermore (and this point cannot be overemphasized), although CERCLA may not appease radical environmentalists as to waste production, overconsumption or hazardous substance disposal, a change has almost certainly taken place in the minds and practices of those who deal with hazardous waste.

Pragmatic scholars note success through working within the established legal framework and use existing legal vocabulary to present their arguments. Zygmunt Plater, for instance, argues that the changes in environmental law are a reflection of Rachel Carson’s influence on public awareness of toxins and moral pluralism in understanding environmental issues. 176 In *Silent Spring*, Rachel Carson exposed the lack of scientific foresight accompanying pesticide use in the United States. Carson reminded that our actions have inevitable consequences: pesticides can kill more than bugs, and they continue to do so long after their job is done. Plater siphons a utilitarian principle from Carson’s observations, finding that “[u]nless you are pretty sure that the background foundational equilibria will not be disrupted, or that the negative consequences will be foreseeable . . . you had better be sure that what you proposed to do is worth the costs.” 177

Plater’s method, unlike many environmental advocates, is not to champion the normative force of a Carsonsque ethic. Rather,
Plater uses Carson's insights to explain a reigning public policy of awareness of environmental impacts and the laws that institute that policy. Plater thus describes a movement in the judicial, political and social spheres that has changed the decision making process when the environment is implicated. 178 His description of the environmental paradigm shift accounts for many of the victories environmentalists have secured, and licenses courts to remand agency decisions where minimum procedural requirements might otherwise allow complacent environmental enforcement.

In Robert Goldstein's view, the attention given to environmental quality and property right concessions made in environmental regulation represent "the clear acceptance of some level of environmental ethic, as a social interest worthy of protection." 179 He characterizes progress in environmental protection as a promising addition to our plethora of rights metaphorically depicted as a "bundle of sticks." To the bundle of sticks, Goldstein adds "green wood." 180 In a pragmatic fashion, Goldstein argues that environmental rights, such as those represented by green wood, are grounded in the legal system and people's expectations under the law:

The inclusion of this green wood into the bundle is evolutionary, not revolutionary. It will promote an understanding that existing rules and sources, which though implicit, are part of our value system and therefore the essence of our real property law, mandate environmental protection. It will not effect a moratorium on development, but perhaps stimulate a more substantive environmental impact assessment process, and greater adherence to a land use scheme that also must be prepared in accordance with that procedure. 181

Goldstein's characterization of environmental rights in an existing legal vocabulary emphasizes the potential gains from using a constrained imagination to express the goals of an alternative view. As such, his portrayal of environmental quality, in which environmental rights retain the same character as other rights in the "bundle,"

178. Plater argues that the broad scope of issues covered in environmental law "can be attributed to the universality of the Carson Paradigm." id. at 908. However, Peter Manus has argued that the Carson Paradigm is not as "universal" as Plater argues. Peter M. Manus, Natural Resource Damages From Rachel Carson's Perspective: A Rite of Spring in American Environmentalism, 37 WM. & MARY L. REV. 381, 453 (1996).
179. Goldstein, supra note 171, at 395.
180. Id at 392.
181. Id at 411.
is an inventive but well-grounded means of communicating the need for environmental protection.

Finally, in his recent book, *Ecopragmatism*, Daniel Farber justifies institutionalizing a precautionary principle in environmental matters. Farber focuses his analysis on the Reserve Mining decision to explain the range of considerations that make environmental law difficult. In *Reserve Mining Co. v. United States*,[182] the Environmental Protection Agency (EPA) attempted to abate the significant discharges of t cometite tailings and asbestos into the waters of Lake Superior. The question raised by the district court was how to achieve a balance between the risks (known and unknown) to human health and the financial feasibility of abating those risks.[183]

Like the pragmatic analysis provided by the scholars discussed above, Farber provides both a normative and a descriptive account of environmental law. Assuming that economic analysis will underlie environmental analysis,[184] Farber argues that “[i]n considering opportunity costs, we must consider only other opportunities that might actually be implemented. We should choose among the most desirable of the feasible alternatives.”[185] Farber’s analysis, like Leopold’s and others’, does recognize that the lack of “green” sources of legal precedent raises significant barriers to effective environmental protection.[186] Farber offers the “environmental baseline,” a means of integrating the precautionary principle within a cost-benefit analysis.[187] Farber describes his baseline by factoring significant risks out of the equation, stating that “[w]hen a reasonably ascertainable risk reaches a significant level, take all feasible steps to abate it except when costs would clearly overwhelm any potential benefits.”[188] And, where uncertainty plagues the wisdom of an action, Farber’s baseline remains overtly precautionary.[189] The goal of Farber’s environmental baseline, which is a hybrid of cost-benefit and feasibility analyses, is to keep a close eye on the difference between the victim and the wrongdoer.[190]

182. 514 F.2d 492 (8th Cir. 1975).
183. Farnes, supra note 1, at 22-23.
184. Farber does not seem to question whether the District Court’s decision to close down the plant was the correct decision. Id. at 81-82.
185. Id. at 159 (emphasis in original).
186. Id. at 124.
187. Id. at 93-132.
188. Id. at 201.
189. Id.
190. Id.
Each of these scholars has offered a descriptive interpretation of the present paradigm in environmental protection. Each may be influenced, even if only slightly, by the author’s hope for a more protective doctrine. However, it is not necessarily the descriptive accuracy of these efforts that makes them persuasive or draws our attention. Rather, it is the characteristically pragmatic element used in presenting these insights—the internalization of a flexible “rule of law” strategy of persuasion—that compels consideration and makes the reader wonder whether the suggested new paradigms are new at all. These environmental scholars have taken hold of pragmatic lessons: they do not assert the incompatibility of property ownership with the true nature of things, though such notions may inspire their positions. Each may, in Tarlock’s words, be “thinking Unger but pleading Hart.”

Each seeks to alter the shape and operation of environmental law by making legal arguments that already-existing law compels the proposed changes.

V. Return to Delgado

As discussed above in Part IV, the thrust of applying pragmatism to environmental critique is that a practical eye on progress separates the effective strategies from the futile ones. If progressive thinkers would yield to the tools of persuasion and withdraw hopes of revolutionary restructuring of property ownership, then the environmental law and policy debate might produce solutions that can be incorporated into the law. Applying this lesson to Delgado’s critique reveals the wisdom of the pragmatic method.

This Part addresses Delgado’s criticisms of the public trust doctrine, with an underlying assumption that this doctrine pervades contemporary environmental law. First, this Part questions whether an intelligible case can be made for an alternative perspective that opposes Delgado’s criticism of anthropocentric environmental regulation. What Delgado identifies as the crucial but fatalistic element in the public trust theory—the problem of the human land manager—illustrates the problems of dogma in paradigm discourse and inhibits legal progress. Second, applying the pragmatic perspective of legal progress, this Part also argues that Delgado’s external criticisms of the character of doctrinal change are self-defeating and commit radical critics to an untenable posi-

192. See supra note 62.
tion with regard to legal process. On this basis, Delgado’s conclusion as to the character of legal progress should be seriously questioned: “We turn to strong solutions,” says Delgado, “only when it is either too late, or when our thinking has advanced so far that the solutions seem commonplace and tame.” From a pragmatic perspective, Delgado’s static view of legal progress is unlikely to effect any significant change in the substance of the dominant legal paradigms and demonstrates the pessimism resulting from the failure to persuade.

A. Limitations on Perspective

Regardless of whether legal pragmatism can stand free of philosophical pragmatism, the obstructions pragmatists avoid in the philosophical context provide guidance in legal discourse. In particular, pragmatists address what Delgado discusses as the problem of the human land manager as a question of perspective: which among the various potential perspectives—ecocentric, biocentric, homocentric, anthropocentric, etc.—preserves the “best” understanding of and protection for the environment?

Delgado’s first criticism of the public trust doctrine can be restated as follows: there is a fear that, in attempting to understand nature through human-centered value structures, nature becomes interpreted out of the inquiry. Likewise, if interpretation of a narrative disregards the author’s perspective, the interpretation may fail to capture the narrator’s intended meaning in the story. Of course, Delgado also makes more specific reference to the vicious circle of securing a human land manager to combat the human perspective. The two notions point, for the most part, to the same criticism: the human perspective is itself too selective and self-oriented to incorporate, much less implement, the types of values that exist independent of human utility in natural resources.

Describing failure in environmental protection as a problem of the human land manager has intuitive appeal. Other social and political movements have brought success in removing paternalistic and chauvinistic perspectives from the law. Delgado’s criticism of the public trust, for example, reverberates in kind with the basic position of women’s suffrage. In determining the best lifestyle for

193. Delgado, supra note 13, at 1212.
194. See generally Grey, supra note 193.
195. Id., supra note 17.
196. Id., supra note 15, at 1216.
American women, courts were once called upon to make a severe, yet paternalistic, choice. Consistent with paternalistic responsibilities, courts took their duties seriously. The Supreme Court, for example, wrote in 1872 that "[m]an is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life . . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother." Courts could not allow such an entity into a situation beyond its means. Women were thus excluded from admission to the bar (with the Supreme Court's acquiescence). Such a decision appears as simple-minded today as it appeared reasonable then. Management of women's life choices is doomed to failure if the values protected are inconsistent with the values of the object of protection. In theory, the same argument applies to the anthropocentric values placed on natural resources. It would therefore seem that the perspective critique could succeed by analogy to other instances in legal history where the values from one perspective have been inflated to govern the values of all others.

However, Delgado's critique is not aimed at the way in which environmental stewards approach their duties; his attack raises a philosophical objection to the very possibility of stewardship. Yet, Delgado's position is undermined by his insistence that the primordial human impulse compels us to dominate. That is, if Delgado is correct, and humans cannot transcend their natural impulses when adopting the position of a trust administrator, then no other theory of environmental protection should fare any better. In this sense, his critique of the public trust theory leaves the distinct feeling that no legal tool or theory could counteract such destructive impulses. Moreover, the problem with applying the flaws of paternalistic decisionmaking to the environment is an epistemological problem. Paternalistic impulses drive the desire to protect others, usually upon the judgment that the "others" are unable to rationally discern harmful from harmless activity. The problem of paternalism is typically raised as the inevitability of value assumptions, made by the actor on behalf of the "other." The rejection of environmental paternalism necessitates an assertion of a truer understanding of nonhuman values; or, in other words, a (likely un-
justified) claim to an epistemological privilege. This does not imply that any comprehensible form of right ascribed to an animal is senseless because of the inability of an animal to assert such a right. But the rejection of the human perspective ignores a means to implement environmental rights, especially when an accurate understanding of nonhuman interests is a contested subject. As an epistemological matter, access to such notions is laden with obscurity and leads us into the Kantian antinomy of the human condition—that we too often focus on questions that we are unable to answer. Delgado asks us to throw out the baby with the bath water.

What must be observed here, from the pragmatic perspective, is that “environmentalists need to be able to enter the public arena armed with genuine and defensible moral principles so that they can assert the priority of their goals over the mere preferences of the consumer society.” The pragmatist rejects the notion that the human perspective on environmental law inevitably leaves us feeling “somewhat disingenuous,” and results in “two distortions: First, an inchoate sense of obligation toward natural objects is flattened into an aspect of self-interest; second, value discontinuities tend to be foreshortened.” These two “distortions,” like Delgado’s criticisms, are diversions that obscure any real solutions to environmental problems. The pragmatic response to the problem of the human land manager is that the human perspective is not as constricting as Delgado proposes. Quite simply, the law has not yet found the limits of the human perspective.

Recent decades have witnessed a resurgence of experiments in testing these limits of anthropocentrism. The pragmatists, in particular, have set out to defend a human perspective that is not limited by anthropocentric interests. They have found that human insights create a context in which environmentally protective doctrines come to light in common terms and concepts. Besides avoiding some of the more agitating epistemological debates, the

201. See supra note 195 and accompanying text.
202. See ENVIRONMENTAL PRAGMATISM, supra note 8, at 122.
204. Id. at 1332.
205. See generally Eric Katz, Against the Inevitability of Anthropocentrism, in BENEATH THE SURFACE: CRITICAL ESSAYS IN THE PHILOSOPHY OF DEEP ECOLOGY 17-42 (Eric Katz et al. eds., 2000) (arguing that anthropocentrism is inescapable, even for the philosophy of deep ecology).
human perspective limits dialogue only to the extent of our ability
to empathize and theorize. It is because humans are able to seek
both economic and non-use values, while reconciling the compet-
ing ends, that the human perspective is demands attention. Our
philosophical underpinnings may in fact be confined by our distinc-
tively human perspective, but they are concurrently liberated by our
sense of selves, “characterized not so much by [our] ability to pro-
duce a culture but by [our] ability to transcend old cultural
forms.”

Delgado’s internal critique of the public trust doctrine, which
assumes that humans have unavoidable destructive instincts, fails to
consider whether the human perspective is so limited. Instead, Del-
gado adopts a position on human nature that, from any perspec-
tive, is self-defeating and so deeply immersed in contestable
principles that it fails to actually address real environmental
problems. While this may be a common failing of radical environ-
mental critique, it is not the more pressing problem addressed
herein. Next, we turn to Delgado’s very unpragmatic application of
the Kuhnian thesis to changes in the law.

B. Theory Foreclosure and Cross-Paradigm Communication

Delgado’s second critique is that when the public trust doctrine
was adopted, the more authentic, but radical, environmental per-
spectives were foreclosed from environmental law. As Kuhn ex-
plained, once a particular paradigm sweeps the discipline and is
identified as “dominant,” practitioners work within that frame of
referece to solve problems raised by the paradigm. The dominant
paradigm maintains its purported efficacy by default; the fact that
paradigm competition occurred in the discipline during paradigm
crisis is generally forgotten.\(^{207}\) Delgado identifies this scenario in

\(^{206}\) Arran E. Gare, Postmodernism and the Environmental Crisis 137 (1995). In
this sense, I also agree with Buell’s assertion that “we are more likely to make progress if we
imagine texts as emanating in the first instance from responsible agents communicating
with other responsible agents than if we imagine texts without agency inhabiting discursive
force fields.” Lawrence Buell, The Environmental Imagination: Thoreau, Nature Writ-

\(^{207}\) Kuhn states that the “invention of alternates is just what scientists seldom undertake
even during the pre-paradigm stage of their science’s development and at very special
occasions during its subsequent evolution. So long as the tools the paradigm supplies
continue to prove capable of solving the problems it defines, science moves fastest and
penetrates most deeply through confident employment of those tools.” Kuhn, supra note 9,
at 76.
environmental law. Like Delgado's internal criticism, his external critique can be improved upon by inserting a pragmatic perspective.

There is support for Delgado's contention. Since the wave of environmental laws was passed just over thirty years ago, there have been few, if any Congressional acts that have surprised the legal community. Congress seems to have settled into the project of determining how to implement the policies promulgated in the 1970s, rather than inventing new ones. The exciting judicial decisions in the past decade have essentially been limited to interpretation of isolated provisions in statutory and regulatory mandates. In short, the amount of attention paid to environmental protection that has been redirected from what environmental protection ought to be to what the statutes say it is provides support for Delgado's pessimistic view of the future of environmental protection.

At the same time, however, there have been significant accomplishments in environmental protection. States are including "rights" to environmental quality in their Constitutions. Congress has armed the public with knowledge of environmental harms by crafting statutes that provide for public awareness of toxics in the community. The courts have similarly contributed to development of a new environmental paradigm. For instance, NEPA, which some thought represented a benign commitment to environmental protection because of its lack of enforceable substantive norms provides procedural safeguards to ensure compliance with other, substantive environmental laws such as the

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208. Delgado, supra note 13, at 1218.
209. Id. at 1217.
Clean Water Act.\textsuperscript{214} And citizen enforcement of the Clean Water Act, previously thought obstructed by the Supreme Court’s decision in \textit{Gwaltney},\textsuperscript{215} is being closely scrutinized in the federal district courts.\textsuperscript{216}

Are these developments benign? Perhaps. It is difficult to know without the benefit of hindsight and an objective perspective from which such changes can be assessed. Insofar as the characterizations of Goldstein, Plater, and Farber are descriptive, the existence of some significant change has occurred. Their descriptions, which identify the various bases and the reach of the current regulatory scheme, would in all likelihood have been received differently as little as 30 years ago. Indeed, those descriptions may have been rejected outright. Nonetheless, the degree to which one might consider their characterizations accurate induces the same degree of confidence in finding that a shift must have occurred.\textsuperscript{217}

The consequence of this analysis is that current schemes of environmental protection, such as the public trust doctrine, may have indeed been the correct choice at the time they were adopted. Tribe’s point—still an illustrative one—presents a cold reminder of our situation:

Like Schiller’s mechanics who dare not let the wheels run down while they repair ‘the living clockwork of the State,’ or Neurath’s sailors who must rebuild their ship on the open sea without discerning its ideal design, we are condemned to toll in the dimmest

\textsuperscript{214} See Idaho Sporting Congress v. Thomas, 137 F.3d 1146 (9th Cir. 1998); Neighbors of Cuddy Mountain v. USFS, 137 F.3d 1372 (9th Cir. 1998).

\textsuperscript{215} 484 U.S. 49 (1987).


\textsuperscript{217} It might be easy to contest Delgado’s conclusions on the basis that the public trust doctrine has never been universally accepted as the most binding principle of environmental protection. See supra note 65. See also James L. Huffman, \textit{A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy}, 19 ENVTL. L. REV. 527 (1986); Richard J. Lazarus, \textit{Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine}, 71 IOWA L. REV. 631 (1986). The status of the doctrine in the courts is less clear. Some state courts have enthusiastically accepted the public trust as a standard for environmental protection. See Just v. Marinette County, 291 N.W.2d 761, 768-69 (Wis. 1979). On the other hand, some courts have been less sure of its application. See R.D. Merrill Co. v. State Pollution Control Hearings Bd., 969 P.2d 438, 467 (Wash. 1999). In this vein, the onslaught of environmental statutes and property limitations indicates an atmosphere of continuing paradigm exchange, where the diversity of characterizations suggests there has been no clear victor among the various paradigms. Once again, this circumstance calls into question paradigm analysis in the legal context.
light as we feel our way toward the evolution of our conceptions and ideal of the natural order.\textsuperscript{218}

Like it or not, the sailors on Neurath's ship had only the resource of the ship itself to make repairs. Likewise, as in Dworkin's chain novel analysis, judges typically draw from a limited and restraining body of precedent when making difficult decisions. Delgado's critique of the public trust doctrine ignores this aspect of progress by assuming the possibility of autonomous changes in the law, free of precedent and existing doctrines in other areas of law.

In the context of paradigm tension, the development of the public trust doctrine is quite impressive because the doctrine, which essentially operates to redistribute property rights from private to public control, traditionally applied only to disputes over rights of access to and use of waterways. That is, the doctrine did not originate as a tool of environmental protection.\textsuperscript{219} Nonetheless, contrary to its green alternatives,\textsuperscript{220} the public trust doctrine grew out of a legal doctrine. The public trust doctrine has evolved to American law from the Roman and English concepts of \textit{res communes}, the idea that some resources are so central to common needs that they cannot be allocated to exclusive individual use:

Things common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea . . . . The use of the seashore . . . is also [governed] by the law of nations . . . and all persons are at equal liberty to land their vessels, unload them, and to fasten ropes to the trees upon the banks as to navigate upon the river itself . . . for the shores are not understood to be property in any man, but are compared to the sea itself, and to the sand or ground which is under the sea.\textsuperscript{221}

As described above in Part III and suggested by Delgado, the public trust doctrine is wholly anthropocentric. It has evolved to incorporate "non-use" values of environmental resources,\textsuperscript{222} and it has become arguable that environmental law "threatens to wrest unilateral control of land from the land owner to such an extent that the appellation 'private property' no longer naturally

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\textsuperscript{218} Tribe, supra note 203, at 1340-41, citing Friedrigh Schiller, On The Aesthetic Education of Man 99 (Snell trans. 1954) & Otto Neurath, Protokolltexte, in 3 Erkenntnis 204, 206 (1932).

\textsuperscript{219} See supra notes 69-74 and accompanying text.

\textsuperscript{220} Such as those cited by Delgado, supra note 13, at 1218-22.

\textsuperscript{221} J. Inst. 2:1.1-2:1.5, at 67-68 (T. Cooper trans., 1852) (emphasis added).

applies."\footnote{223}

In 1983, the California Supreme Court provided formal recognition of trust responsibilities as an environmentally protective measure in natural resources law. In National Audubon Society v. Superior Court,\footnote{224} popularly known as the "Mono Lake case," the California Supreme Court held that rested appropriative water rights were subject to the state’s ongoing duty to protect its waters in trust for the public. The effects of this decision have been profound and will resonate for years to come. As Joseph Sax puts it, "the message of the case was that environmental demands could now be made on existing uses of water rights, and that those uses might have to be adjusted in order to maintain or restore natural ecosystem values."\footnote{225} The dispute over the waters of Mono Lake—between human consumptive use and ecological use—demonstrates how the public trust doctrine extends beyond the pitfalls of paradigmatic debate and across the lines of incommensurability. The most striking aspect of the public trust doctrine is its openness to explanation in property terms—meaning that it is grounded in precedential doctrines. Moreover, it makes little sense, from an environmental pragmatist’s perspective, to oppose a property doctrine that requires us to "maintain or restore ecosystem values."\footnote{226} Indeed, despite its anchor in the property paradigm, the public trust doctrine has made a very noticeable a change in land management.\footnote{227}

Under this reinterpretation of the public trust doctrine and its evolution, pragmatism’s perspective of legal progress modifies the notion of revolutionary paradigm shifts. Delgado’s pessimism can be avoided by acknowledging that, without contesting the possibility of paradigm dispute, we can question the unavoidability of incommensurability between paradigms. Under the pragmatic view of legal progress, the law shifts in incremental steps. Consequently, the pragmatist is free to recognize incremental changes as achieve-

\footnote{223}{Gary E. Varner, The Eclipse of Land as Private Property, in Ethics and Environmental Policy 142, 155 (Frederick Ferre & Peter Hartel eds., 1994).}
\footnote{224}{658 P.2d 709 (1983).}
\footnote{225}{Sax, supra note 222, at 149.}
\footnote{226}{Id.}
\footnote{227}{Zygmunt Plater describes Sax’s presentation of trust responsibilities to a "group of old-line Michigan resource officials," to whom environmental protection "could have come across as a foreign language." See Zygmunt J.B. Plater, The Three Economies: An Essay in Honor of Joseph Sax, 25 Ecology L.Q. 411, 415 (1998). As described by Plater, the presentation was successful in that many of the conference participants "left the conference talking about themselves as guardians of a public trust." Id. at 415-16.}
ments and innovations, rather than having to take a position between “wrong—or at least seriously flawed”—paradigm shifts, or alternatively, no change in the law at all. Furthermore, the pragmatist can recognize appropriate arguments through which the interpretive community can modify an interpretation or practice. As Holmes stated:

A very common phenomenon and one very familiar to the student of history, is this. The customs, beliefs, or needs of primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenuous minds set themselves to inquire how it is to be accounted for. Some ground or policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives new content, and in time even the form modifies itself to fit the meaning which it has received.  

Changes in each instance create entirely new contexts in which more (or less) progressive arguments find a hold. Every time a change occurs, even if it is incremental or ostensibly seems benign, the change creates a new context within which an entirely new set of possibilities will arise. The pragmatist therefore evaluates progress by the distance a new idea causes practices to move away from past practices and paradigms.

The difference between the pragmatic version of progress and the Kuhnian version is one only of degree. In the end, the results of both versions of progress are the same—we look back at the change and realize that earlier ideas do not make sense anymore. The effectiveness of the pragmatic approach lies in the simple realization that, in adopting an innovative approach to a legal question, courts will find comfort in adopting what appears to be an incremental change, rather than a radical paradigmatic shift. In

228. Delgado, supra note 13, at 1211.
230. Each change creates a new set of "others" who are left outside of the dominant vision. This conclusion, which I find no persuasive theoretical reasons to reject, is that external alternative theories and paradigms are themselves determined (at least in part) by the design of the dominant paradigm as reactions to, yet remaining in the context of, the shortcomings of current practice and theories that support such practice. See Luke, supra note 17, at 196.
contrast to radical theorists that deny the existence of progress because of a failure to immediately reach the radical goals of alternative paradigms, the pragmatist recognizes that a series of incremental changes eventually add up. Environmental pragmatism enables environmentalists to seek achievable gains by focusing on minor improvements in the law that incrementally close the gap between the values that pre-existed current environmental law and the alternative paradigms of environmental protection.

Hence, the pragmatic view contests the main thrust of Delgado’s argument—that the adoption of the public trust doctrine effectively stunted hopes for progress in environmental law. An idea might be completely foreclosed from the legal arena due only to the character of the idea itself; an idea that cannot be integrated into an existing body of law will not be well received. Accordingly, Delgado’s invitation to critical environmental theory can emphatically be rejected. Innovative legal theories of environmental protection, such as the public trust doctrine, have altered our conception of the environment and hence made law more amenable to the radical theories of environmental protection.

In a sense, these discussions seem a bit disingenuous, since Delgado’s point is to show that incremental, pragmatic goals are themselves the problem. In particular, Delgado argues, incremental

231. Focusing on pragmatism’s anti-foundationalism, critics often note that pragmatism offers no substantive guidance to dispute resolutions. Since pragmatism uses context as a loose guide, but offers no substantive answers, it has no constraints. It offers only the motto: practice, resolve, act. This aspect of pragmatism inclines some theorists to think that pragmatism is banal. See generally Richard Rorty, The Banality of Pragmatism and the Poetry of Justice, 83 S. Cal. L. Rev. 1811 (1990); Thomas Morris, Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory and judging, 141 U. Pa. L. Rev. 371, 452-54 (1992). The critics are certainly on to something.

The philosophical answer pragmatists give to this question, summarized by Rorty when he describes the pragmatic clearing of the philosophical underbrush, is consistent with pragmatism but wholly unsatisfactory to the needs of jurisprudence. The pragmatist’s answer is that anti-foundationalism and instrumentalism provide the means by which prophetic and visionary thinkers can expand the scope of possible solutions to practical problems—without theory-hope, pragmatists are free to face pressing problems by taking “leaps in the dark.” See Richard Rorty, Pragmatism and Feminism, in TRUTH AND PROGRESS 202 (1998). Obviously, the question remains of how to determine whether any particular judicial decision is the “right” result. Pragmatists are seldom, if ever, bold enough to take a stand.

The reasons pragmatists fail on this point are not failings of pragmatism, and raise a more interesting question than whether pragmatism itself offers a “right answer” jurisprudence. Against an illustrative history of debate on objective decision making criteria, pragmatism fails to provide substantive guidance on jurisprudential questions because, to the pragmatist, jurisprudence is simply stuck on the wrong questions. Jurisprudential questions need not be evaluated at some hopeless level of abstraction that cannot possibly be applied
changes, such as to the public trust theory of environmental protection, legitimize the remnants of past practices that have since been formally rejected. As a result, those same problems remain, despite their rejection as a matter of law, in the same manner that race and gender discrimination remain. The concept of "neutrality," and the incremental gains that hail the neutral state are the common methods of such legitimation. Environmental law may be susceptible to such a characterization. For instance, courts may find in the land use context that "[t]he fact that lands may be in a state below that of their original pristine condition is content neutral for policy purposes," and that consumptive uses, which are protected under land use statutes, by definition signify a "retreat" from an "ecological climax state." Likewise, in the NEPA context, Justice Stevens has stated that "if the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs . . . notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of..."

to the facts at hand. That is, we must be careful when discussing legal questions in academia lest we lose sight of the point. Abstraction of judicial decision making or environmental values may simply abstract the facts out of the question.

But because it is the facts themselves (i.e., the context and circumstances) that need deciding, it is the facts that should constitute the decisionmaking criteria. Anthony Weston provides an example of such thinking when he grapples with the value of preserving wilderness. Weston reasons as follows:

Why should we protect the new Alaskan national parks, for example? Now the answers are much easier: because the new parks are both exceptionally wild and exceptionally fragile; because the non-preservationist pressures in at least this case are exceptionally unworthy, tied largely to exploitation of energy resources to which there are any number of more intelligent alternatives; perhaps also because their protection is still possible. These arguments do indeed seem to dodge the original question. They do not say why wilderness as such should be protected. On the other hand, one certainly does not have to be an anthropologist to doubt whether it should be protected "as such." This is why the exceptional nature of the Alaskan wilderness makes that particular case so powerful.

Anthony Weston, Beyond Intrinsic Value: Pragmatism in Environmental Ethics, in Environmental Pragmatism, supra note 8, at 302. Weston's answer is a good one, despite its inability to incorporate a main theme of substance and despite its questionable application to less "exceptional" situations: Weston's answer, like those of the older pragmatists, is only one of a variety of possible solutions.

232. As Kairys notes, "The dominant system of values has been declared value-free; it then follows that all others suffer from bias and can be thoughtlessly dismissed." David Kairys, Introduction, in THE POLITICS OF LAW 4 (Kairys ed., 1982). See also FARRER, supra note 1, at 115-14 ("If we believe at all in the idea of public values, adopted as a result of vigorous democratic deliberation, this is a public consensus policy makers must respect.").


234. Id.
Despite their heavy use in bringing about change in environmental law, content neutrality and procedural compliance seem to legalize the same consumptive practices that first raised environmental awareness and led to environmental protection.

Delgado emphasizes the effects of content neutrality to support his assertion that incremental gains indefinitely foreclose the "far-reaching strategies" of environmental protection. However, if legal progress is accurately viewed as a continual process, Delgado is probably wrong. In short, he requests more than the law can provide. There are a great many alternative paradigms (even "serious" ones) that are offered to the legal interpretive community: Fascist ideologies, for instance, that threaten racial and cultural diversity, as well as ideologies that relate to public participation in the political process, destruction or institutionalization of gender roles, unionization, and equal opportunity, among others. Some of these ideologies are adopted, some are contested, and still others are rejected outright for their incompatibility with values that are already deeply embedded in the law. The most radical environmentalist paradigms are only a slight variation; to many, the environmentalist threatens freedom and identity—or whatever the popular libertarian rhetoric—in the form of deprived property rights.

It comes down to this: between those paradigms that society currently deems "just" and "right" and those that have been rejected, either retrospectively or prospectively, the law must still determine which paradigms represent more effectively the views of antidiscrimination, gender voices, or environmental protection. Under Delgado's critique of legal progress, his foreclosed "far-reaching strategies"—which could only have been achieved by revolutionary paradigm shifts—are clearly his preferred views. But from the pragmatic view, such a preference dresses dogma in misguided rhetoric. Different and alternative perspectives do not necessarily deserve to be considered because they are better, or because they offer a special insight (the mere notion of adjudicatory consistency seems to trump adoption of a more "far-reaching strategy"). The substantive incompatibility of alternative paradigms only offers

236. See Scott Brewer, Pragmatism, Oppression, and the Flight to Substance, 63 S. Cal. L. Rev. 1753, 1762 (1990). Once again, this position diverges from the Kuhnian notion of paradigm competition, in which "it makes a great deal of sense to ask which of two actual and competing theories fits the facts better." Kuhn, supra note 9, at 146. This divergence, I believe, is justified for those reasons set forth in supra note 10.
proof of the existence of other perspectives—bringing the “other” to the fore requires a more persuasive argument.

VI. Conclusion

Legal debates demonstrating the difficulty of arguing from incommensurable positions have littered legal scholarship for some time. One may recall the hotly contested Hart-Devlin debate on legal moralism,237 or the Hart-Fuller debate pitting legal positivism against natural law theory.238 At least in the latter, the theorists agree that from the onset the debate was plagued by a lack of a common ground on which to base a fruitful dialogue.239 In theory, these are the types of disagreements that pragmatic analysis can help resolve—or at least move beyond. Pragmatism may not alter the views of the proponents of alternative paradigms, but it can provide an indicator of when persuasion depends on finding a common ground.

This article has questioned whether the debate on environmental values and natural resources conservation is relegated to the fate of a polemic; whether we are limited to being either property rights proponents or environmental activists. Environmental pragmatism, by its own terms a middle ground to any debate, offers a means to fuse the various value paradigms into a coherent system of law. Environmentalists are beginning to experiment with this type of visionary thinking, and have initially succeeded in convincing adversaries to see the other side of the land—the side not defined by its economic value. The challenge is to continue the progress and find better environmental solutions that both effect a change in the way we treat the environment and are practical enough to be adopted by our legal system. In taking up this challenge, it is imperative that loyalties to the goals of environmental protection include a willingness to modify, or even discard, radical environmental theories in an effort to secure far-reaching results.

239. Id.