

# Trust Me, I'm a Pragmatist: A Partially Pragmatic Critique of Pragmatic Activism

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## I. INTRODUCTION

Pragmatism is a robust philosophy, vernacular hand-waving, a method of judicial and administrative decisionmaking, and, more recently, justification for a certain type of political activism. While philosophical, judicial, and administrative pragmatism have garnered substantial attention and analysis from scholars,<sup>1</sup> we have been much stingier with pragmatic activism<sup>2</sup>—that which, in the

1. On administrative and judicial pragmatism, see, for example, DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* (1999); Mary Jane Angelo, *Embracing Uncertainty, Complexity, and Change: An Eco-Pragmatic Reinvention of a First Generation Environmental Law*, 33 *ECOLOGY L.Q.* 105 (2006); Justin Desautels-Stein, *At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 *MICH ST. L. REV.* 565 (2007); Colin S. Diver, *Policy-making Paradigms in Administrative Law*, 95 *HARV. L. REV.* 393 (1981); Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 *S. CAL. L. REV.* 1569 (1990); Jamie A. Grodsky, *The Paradox of (Eco)Pragmatism*, 87 *MINN. L. REV.* 1037 (2003); David Luban, *The Posner Variations (Twenty-Seven Variations on a Theme by Holmes)*, 48 *STAN. L. REV.* 1001 (1996) (reviewing RICHARD A. POSNER, *OVERCOMING LAW* (1994)); Keith Hirokawa, *Some Pragmatic Observations About Radical Critique in Environmental Law*, 21 *STAN ENVTL. L.J.* 225 (2002); Joel A. Mintz, *Some Thoughts on the Merits of Pragmatism as a Guide to Environmental Protection*, 31 *B.C. ENVTL. AFF. L. REV.* 1 (2004); Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 *S. CAL. L. REV.* 1653 (1990); J.B. Ruhl, *Is the Endangered Species Act Eco-Pragmatic?*, 87 *MINN. L. REV.* 885 (2003); Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 *IOWA L. REV.* 1405 (2005); Amy J. Wildermuth, *Eco-Pragmatism and Ecology: What's Leopold Got to Do with It?*, 87 *MINN. L. REV.* 1145 (2003). On traditionally philosophical approaches to environmental pragmatism, see, for example, *ENVIRONMENTAL PRAGMATISM* (Andrew Light & Eric Katz eds., 1996); J. Baird Callicott, *The Pragmatic Power and Promise of Theoretical Environmental Ethics: Forging a New Discourse*, 11 *ENVTL. VALUES* 3 (2002); Anthony Weston, *Beyond Intrinsic Value: Pragmatism in Environmental Ethics*, 7 *ENVTL. ETHICS* 321 (1985).

2. A series of articles from 2011 in the journal *Biological Conservation* do begin to broach the subject of pragmatism in environmental practice, but do not uniformly describe their

spirit of the twenty-first century's 140-character limit, I will call "pragtivism." This Article is an introduction to pragtivism—environmental pragtivism in particular—a critique of the practice, and a constructive framework for addressing some of my critiques. To properly introduce pragtivism, I begin with two stories. Or rather, I begin with one story told two ways:

*In 2012, the United States Fish and Wildlife Service, the State of Texas, and private landowners finalized a landmark conservation plan that represents the cooperative, win-win future of environmental protection.<sup>3</sup> The Texas Conservation Plan offers cost-effective, long-term protection to the imperiled Dunes Sagebrush Lizard while also fostering economic growth and energy independence.<sup>4</sup> The Conservation Plan establishes guidelines that avert many disruptive activities in Lizard habitat and promotes habitat mitigation when landowners cannot avoid development in Lizard habitat.<sup>5</sup> The Plan also establishes a flexible, market-based instrument for efficiently creating effective conservation incentives.<sup>6</sup> The protections offered from this*

analysis as one of "pragmatism" in action and tend to take a more issue-specific approach rather than a critical approach to the application of philosophical and vernacular pragmatism. Thomas O. McShane et al., *Hard Choices: Making Trade-Offs Between Biodiversity Conservation and Human Well-Being*, 144 *BIOLOGICAL CONSERVATION* 966 (2011); Thaddeus R. Miller et al., *The New Conservation Debate: The View from Practical Ethics*, 144 *BIOLOGICAL CONSERVATION* 948 (2011); Ben A. Minteer & Thaddeus R. Miller, *The New Conservation Debate: Ethical Foundations, Strategic Trade-Offs, and Policy Opportunities*, 144 *BIOLOGICAL CONSERVATION* 945 (2011); John G. Robinson, *Ethical Pluralism, Pragmatism, and Sustainability in Conservation Practice*, 144 *BIOLOGICAL CONSERVATION* 958 (2011); Nick Salafsky, *Integrating Development with Conservation: A Means to a Conservation End, or a Mean End to Conservation?*, 144 *BIOLOGICAL CONSERVATION* 973 (2011). J.B. Ruhl has also begun to describe the role of activism and advocacy from something that approaches a pragmatic stance but is still quite distinct. J.B. Ruhl, *A Manifesto for the Radical Middle*, 38 *IDAHO L. REV.* 385 (2002) [hereinafter *Manifesto*]. Doug Kysar and Jim Salzman have also offered a critique of Ruhl's approach that touches on a role for environmental advocates. Douglas A. Kysar & James Salzman, *Environmental Tribalism*, 87 *MINN. L. REV.* 1099 (2003).

3. TEX. COMPTROLLER OF PUB. ACCOUNTS ET AL., TEXAS CONSERVATION PLAN FOR THE DUNES SAGEBRUSH LIZARD (*SCeloporus arenicolus*) (2012), [https://www.fws.gov/southwest/es/Documents/R2ES/TX\\_CP\\_for\\_DSL\\_20120213.pdf](https://www.fws.gov/southwest/es/Documents/R2ES/TX_CP_for_DSL_20120213.pdf) [<https://perma.cc/VWZ4-5CPE>] [hereinafter TEXAS PLAN].

4. *See id.* at 1 ("The goal of the Plan is to facilitate continued and uninterrupted economic activity in the Permian Basin . . . and to promote conservation of the [Dunes Sagebrush Lizard] with the ESA."); *id.* at 12 ("The Plan will provide a streamlined and innovative mechanism for the Permit Holder and other public and private entities to comply with the ESA."); *id.* at 16 ("The proposed term for the Plan is 30 years.").

5. *Defs. of Wildlife v. Jewell*, 815 F.3d 1, 6 (D.C. Cir. 2016).

6. TEXAS PLAN, *supra* note 3, at 10–12.

*innovative plan will protect the Dune Sagebrush Lizard into the future and avoid the need to list the Lizard under the Endangered Species Act.*<sup>7</sup>

Alternatively:

*In 2012, the United States Fish and Wildlife Service denied the Dunes Sagebrush Lizard the vigorous protections of the Endangered Species Act based on a speculative, voluntary, confidential, and unenforceable promise made by the oil and gas industry.<sup>8</sup> The Service determined that the so-called Texas Conservation Plan, a plan crafted and implemented by the oil and gas industry, would offer sufficient protections for the Lizard, and therefore ameliorate the need to offer the Lizard the explicit and enforceable safeguards of the Endangered Species Act.<sup>9</sup> The Texas Conservation Plan is merely a set of voluntary guidelines for landowners, who are free to ignore them.<sup>10</sup> And the plan was approved so shortly before the Fish and Wildlife Service's decision not to list the Dunes Sagebrush Lizard that any benefit of the Texas Plan, which was demonstrably drafted only to avoid real regulation, is purely speculative.<sup>11</sup>*

These sorts of dueling, nominally pro-environmental perspectives on a single environmental action have become common. In addition to other Endangered Species Act decisions of this sort, such as a non-listing of the Greater Sage Grouse,<sup>12</sup> or the de-listing of the Lesser Prairie Chicken as a result of a judicial order that demanded more deference to private voluntary conservation,<sup>13</sup>

7. Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule to List the Dunes Sagebrush Lizard, 77 Fed. Reg. 36,872, 36,872 (June 19, 2012) (“This withdrawal is based on our conclusion that the threats to the species as identified in the proposed rule no longer are as significant as believed at the time of the proposed rule. We base this conclusion on our analysis of current and future threats and conservation efforts.”) [hereinafter *Withdrawal*].

8. *Id.*

9. *Id.*

10. TEXAS PLAN, *supra* note 3, at 10.

11. See *Withdrawal*, *supra* note 7, at 36,878 (noting the Texas Plan's approval date as February 17, 2012); *id.* at 36,872 (showing the withdrawal date of June 19, 2012, only four months after the Plan was approved).

12. Press Release, Office of the Sec'y, U.S. Dept. of the Interior, Historic Conservation Campaign Protects Greater Sage-Grouse (Sept. 22, 2015) (noting reduced threats because of state-level conservation planning).

13. Press Release, Office of Commc'n, U.S. Fish & Wildlife Serv., U.S. Fish and Wildlife Service Lists Lesser Prairie-Chicken as Threatened Species and Finalizes Special Rule Endorsing Landmark State Conservation Plan (Mar. 27, 2014); Press Release, U.S. Fish & Wildlife Serv., U.S. Fish and Wildlife Service Removes Lesser Prairie-Chicken from List of Threatened and Endangered Species in Accordance with Court Order (July 19, 2016); see also *Permian Basin Petroleum Ass'n v. Dep't of the Interior*, 127 F. Supp. 3d 700 (W.D. Tex. 2015) (describing, and finding in favor of, the claims of the oil and gas industry that the Fish

Congress recently passed, and in June 2016 President Obama signed, a law reforming the Toxic Substances Control Act.<sup>14</sup> The President described how the new law would “do away with an outdated bureaucratic formula” and praised the “industry leaders here today who’ve pushed hard for this law.”<sup>15</sup> He also praised the Environmental Defense Fund.<sup>16</sup> The Environmental Defense Fund was there as a representative of the environmental community because most other groups were not supporting the law. The Natural Resources Defense Council, for example, had long expressed concerns including the lack of clear standards and the fact that the new law would prohibit states from actively regulating toxic substances at a higher standard than the federal government provided.<sup>17</sup>

The point of calling attention to this recent legislative action is not to condemn it or the Environmental Defense Fund for supporting it. The purpose is to emphasize open questions that are also embedded in the Dunes Sagebrush Lizard controversy: What is the value of ostensibly win-win, partnership-oriented compromises in environmental policy? Can giving heightened deference to these processes lead to reactionary support for policies that use these processes but may not have good environmental outcomes? And how environmentalists can properly assess what almost amounts to bi-lateral lawmaking.

Returning now to the Lizard, the two perspectives outlined in the story above are not caricatures and this is not a fiction. In June 2012 the United States Fish and Wildlife Service did indeed withdraw an earlier proposal to list the Dunes Sagebrush Lizard under the Endangered Species Act.<sup>18</sup> In its press release accompanying the withdrawal, the Service described the

and Wildlife Service did not properly account for the private conservation agreements meant to protect the species and prevent listing under the Endangered Species Act).

14. Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016); *see also* President Barack Obama, Remarks by the President at Bill Signing of the Frank R. Lautenberg Chemical Safety for the 21st Century Act (June 22, 2016).

15. Remarks by President Obama, *supra* note 14.

16. *Id.*

17. NAT. RES. DEF. COUNCIL, KEY CONCERNS WITH THE CHEMICAL SAFETY IMPROVEMENT ACT (LAUTENBERG/VITTER S.1009) (2013).

18. Withdrawal, *supra* note 7, at 36,872.

“landmark” decision in terms similar to those in the story above.<sup>19</sup> The Environmental Defense Fund, the only environmental group to endorse the controversial policy, likewise issued a press release praising the non-listing and describing it as “proof that working with landowners can pay big dividends for wildlife.”<sup>20</sup> At the same time, the Center for Biological Diversity and Defenders of Wildlife, two environmental groups long invested in the survival of the Lizard, filed a lawsuit challenging the non-listing.<sup>21</sup> The lawsuit highlighted the fact that the Texas Plan was confidential, vague, speculative, voluntary, and most strikingly, managed by lobbyists from the Texas Oil and Gas Association.<sup>22</sup>

The Dunes Sagebrush Lizard lawsuit rose on appeal to the United States Court of Appeals for the District of Columbia, which agreed with the Fish and Wildlife Service that under certain circumstances a voluntary and unproven conservation agreement can supplant the need to list a species under the Endangered Species Act.<sup>23</sup> What is most interesting about the decision is the way that it reflected several key tenets—which I will describe in much more detail below—of a pragtivist approach to decisionmaking.

The court opened its opinion by describing how the Texas Conservation Plan would “*engage* private businesses in conservation efforts.”<sup>24</sup> The court closed with a reminder that “[t]he Texas plan may not be foolproof, but neither is every regulatory regime.”<sup>25</sup> These two phrasings reflect the same pragmatic and pragtivist approaches that I will explore in more detail below.<sup>26</sup> Admitting, for instance, that no regulation is perfect and that a challenge to a

19. Press Release, Office of the Sec’y, U.S. Dep’t of the Interior, Landmark Conservation Agreements Keep Dunes Sagebrush Lizard off the Endangered Species List in NM, TX (June 13, 2012).

20. Press Release, Envtl. Def. Fund, EDF Supports Fish & Wildlife Service Approach for Dunes Sagebrush Lizard (June 13, 2012), <https://www.edf.org/news/edf-supports-fish-wildlife-service-approach-dunes-sagebrush-lizard> [<https://perma.cc/CCT2-KEB9>].

21. Complaint, *Defs. of Wildlife v. Jewell*, 70 F. Supp. 3d 183 (D.D.C. 2014) (No. 13-0919).

22. *Id.* at 2–3.

23. *Defs. of Wildlife v. Jewell*, 815 F.3d 1 (D.C. Cir. 2016).

24. *Id.* at 3 (emphasis added).

25. *Id.* at 17.

26. As described more below, I use the term “pragmatic” or “pragmatism,” except perhaps in the title, to refer only to philosophical pragmatism. I will use the term “vernacular pragmatism” when referring to something less reasoned and critical as it is usually understood in common conversation.

regulatory decision cannot stand simply because of mere imperfections, the opinion embodies a key principle of pragmatism: that absolutes, including perfection, are neither helpful for effective decisionmaking nor are they even useful ideals. As a central principle of their philosophy, pragmatists reject absolutes. Pragmatists, likewise, reject perfect environmental outcomes in deference to those that are, at least arguably, directionally correct. The idea of engaging private business is a more applied, but equally important principle. Pragmatists advocate that decisions are good if they work, if they are based on lessons from experience. Pragmatists believe that because engaging private businesses is a departure from their concept of “traditional” environmentalism, towards a path of less resistance, it is a superior process for environmental protection.

The Texas Plan, however, was not exactly designed to “engage private business in conservation efforts,”<sup>27</sup> as the court said, nor was it “proof that working *with* landowners can pay big dividends,”<sup>28</sup> as the Environmental Defense Fund said. In fact, the plan was largely designed for and managed by private industry, as described more below.<sup>29</sup> The Texas Plan does not represent the Fish and Wildlife Service and environmentalists managing to coax progress out of industry. Rather it represents industry coaxing support out of the government and, much more remarkably, environmental pragmatists—those environmentalists who operate under the banner of pragmatism.

Several questions emerge from the creation of the Texas Plan, the Environmental Defense Fund’s support of the Plan, and the D.C. Circuit’s eventual approval. For instance, does the plan work? Years after its creation there is strong evidence that it does not. There has been significant new habitat disturbance in the Lizard’s range and internal politics within the oil and gas industry have led to the unraveling of the non-profit entity that the Texas Oil and Gas Association created specifically to implement and monitor the

27. *Def. of Wildlife*, 815 F.3d at 2 (emphasis added).

28. Press Release, Evtl. Def. Fund, *supra* note 20 (emphasis added).

29. See, e.g., TEXAS PLAN, *supra* note 3, at 1 (“The goal of the Plan is to facilitate continued and uninterrupted economic activity.”); Complaint, *supra* note 21, at 2 (“Compounding the problem, Texas has delegated authority to implement the agreement to a private entity called the ‘Texas Habitat Conservation Foundation,’ which is actually run by three lobbyists from the Texas Oil and Gas Association, the very industry that benefits from activities that destroy the lizard’s habitat.”).

Plan.<sup>30</sup> If industry-led conservation in this vein is the future of environmentalism, how did we arrive at this point, and how can pragtivist organizations take care not to support decisions as facially flawed as this one? Finally, why do activists so love the word “pragmatic?” Is there a relationship between certain forms of environmental advocacy and pragmatic philosophy or do some use the word simply because of the good reputation it seems to have in society?

This Article is a first attempt to answer some of these questions and to generate more analysis of the influence of pragmatism on environmental activism. The next Part presents a novel typology of pragmatisms, describing the different ways that the philosophy has been applied both explicitly and implicitly by a number of important figures. Part III recounts the Dunes Sagebrush Lizard controversy in more detail to serve as a background on which to view more abstract issues of philosophy and activism. Part IV then attempts to unpack pragtivism, sketching a profile of pragtivism and placing it in contrast to “traditional” environmentalism both because the contrast is helpful in understanding pragtivism and because it is a large part of how pragtivists define themselves. In this same Part, I also offer my own critique of pragtivism, primarily in terms of its real-world application and effectiveness, explaining that it provides a weak basis for lasting environmental protection because it does not adequately consider public input, sufficiently learn from its own shortcomings, or fairly define itself or its alternatives, and at base, there is too little evidence of its positive environmental impacts. Finally, in Part V, I respond to my own critique and offer a constructive framework for decisionmaking that can partially rectify pragtivism’s weak points. That framework insists on attention to transparency, accountability, monitoring, large-scale impacts, precaution, good faith of partners, public participation, long-term strategy, and the signals that a pragtivist

30. Ya-Wei Li, *How a Satellite Helped Protect a Texas Lizard*, DEFENDERS OF WILDLIFE BLOG (May 12, 2014), <http://www.defendersblog.org/2014/05/satellite-helped-protect-texas-lizard> [https://perma.cc/JE7X-LMAB]; Eric Dexheimer & Asher Price, *State Fires Organization Formed by Big Oil to Manage Threatened Lizard*, MYSTATESMAN (Mar. 24, 2016), <http://www.mystatesman.com/news/state-fires-organization-formed-big-oil-manage-threatened-lizard/EZGPYu0Ue2bTyok3cSPSjN> [https://perma.cc/2UXY-MAYV]; *Texas Terminates Foundation Formed to Manage Lizard Species*, CBS LOCAL (Mar. 25, 2016), <http://dfw.cbslocal.com/2016/03/25/texas-terminates-foundation-formed-to-manage-lizard-species> [https://perma.cc/ZJV7-MH4A].



position might send. Although I hope the framework will make pragtivism more satisfying and effective, I am aware that some pragtivists may complain that I have offered too much of traditional environmental law. In a sense, I cannot contend with this likely challenge. But pragmatically, I am compelled to suggest that environmentalists advocate for more of what works, from experience, and less of what doesn't.

## II. A TYPOLOGY AND TAXONOMY OF THE MANY FACES OF PRAGMATISM

The purpose of this Article is to define, understand, and seek to improve the use of pragtivism—that is, pragmatism in activism. The trouble with this endeavor is that “pragmatism” itself is a vague and unruly word. Even when used in its strictest sense, as a century-old American philosophy, the precise definition is sometimes elusive. (Though perhaps that is simply the nature of philosophy.) Part IV of this Article will specifically explore the permutations, expectations, and implementations of pragtivism in detail. This Part, then, attempts to lay out the primary variants of pragmatism in law and governance, ultimately narrowing to a few forms of environmental pragmatism. In parallel with this typology, this Part will also trace a taxonomy, linking some of the relationships and influences between each of the pragmatisms described.

### A. Vernacular Pragmatism

It is necessary to start with vernacular pragmatism because this is the pragmatism with which we are most often confronted. Vernacular pragmatism is a claim to do “whatever works.” Although this form of pragmatism is very common and in some ways easy to define, it is also the least nuanced and least meaningful use of the word. It is common but largely unhelpful. It is, as Lisa Heinzerling has said, “unfancy,” “unphilosophical,” and “an anxious-to-please kind of pragmatism, without much room for strong feelings.”<sup>31</sup> Because it is unphilosophical, uncritical, and unfancy, because it is simply a signal and not a goal, process, or way of knowing, vernacular pragmatism “may provide cover for simple

31. Lisa Heinzerling, *Pragmatists and Environmentalists*, 113 HARV. L. REV. 1421, 1426 (2000) (reviewing FARBER, *supra* note 1).

power politics, unprincipled compromise, and even cynicism.”<sup>32</sup> This unflattering definition is not unique. Almost uniformly, writers, philosophers especially, are obliged to begin discussions of philosophical pragmatism by distinguishing it from vernacular pragmatism.

In one of the first insertions of philosophical pragmatism into environmental ethics, philosopher Anthony Weston began by writing that “[p]ragmatism’ sounds like just what environmental ethics is against: shortsighted, human-centered instrumentalism. In popular usage that connotation is certainly common.”<sup>33</sup> David Luban uses the term “primitive pragmatism” to identify the common usage, explaining that this lewd pragmatism “is what journalists mean when they describe a politician as a pragmatist.”<sup>34</sup> The politician may respect principles and logic but would never let either get in the way of action or drive him to extremes.<sup>35</sup> In his opening essay in the first edited volume to explore pragmatism in environmental thought, Kelly Parker begins immediately by clarifying that “[p]ragmatism’ here refers to a school of philosophical thought—American Pragmatism—and not to that short sighted, allegedly ‘practical-minded’ attitude towards the world that is a major obstacle to environmentally responsible behavior in our time.”<sup>36</sup> Talisse and Aiken assure their readers that “[t]his is a philosophy book, and the pragmatism with which we are concerned is not the pragmatism of common parlance.”<sup>37</sup>

So, what is vernacular pragmatism? A person using the term might say that it is a willingness to do what works to achieve a goal, but in practice, vernacular pragmatism is simply a declaration. It does not rely on underlying process or betray underlying values. While the vernacular pragmatist might say that she is doing “what works,” she has not considered why her plan might work, nor based the plan in any special experience. Likewise, while she has a specific goal in mind, she has not critically examined why that goal is a reasonable or valid goal in the first place.

32. *Id.* at 1427.

33. Weston, *supra* note 1, at 321.

34. Luban, *supra* note 1, at 1007.

35. *Id.* at 1007–08.

36. Kelly A. Parker, *Pragmatism and Environmental Thought*, in ENVIRONMENTAL PRAGMATISM, *supra* note 1, at 21, 21.

37. ROBERT B. TALISSE & SCOTT F. AIKEN, PRAGMATISM: A GUIDE FOR THE PERPLEXED, at 1 (2008).

Vernacular pragmatism, therefore, is the nominal rejection of ideology and dogma, except that the specific goal to which it is aimed may be paradigmatically dogmatic. Take for example the pro-life activist who kills a doctor because the doctor performs abortions. The activist may claim to be pragmatic, insofar as he is willing to do whatever it takes to achieve his goal, expectations and norms be damned. While the killer claims to reject the dogmatic constraints of his fellow activists (that is, killing is wrong), his goal (to end abortion) is no less dogmatic.

This vernacular pragmatism, therefore, amounts to little more than veiling ideologies either without intent or in order to shield tactics from criticism. Any who dare to criticize become ideologues more concerned with their theory than with the real world. The failure of this line of reasoning is captured in a critique from Charles Peirce, one of the founders of philosophical pragmatism. One may resolve not to engage in philosophical speculation given that such speculation may slow or distract from action. Nevertheless, by avoiding philosophical speculation one will not avoid philosophy; one will merely engage with it unwittingly and adopt “crude and uncriticized” ethics.<sup>38</sup> Thus to accept, reject, or adjust pragmatism in any form, it does no good to simply ignore it; rather, we must begin by understanding it.

## B. Philosophical Pragmatism

Philosophers are quick to point out that philosophical pragmatism is difficult to define.<sup>39</sup> When lawyers write about the philosophy they do not hedge quite so much.<sup>40</sup> Environmentalists often avoid definition altogether. Mark Tercek, for example, the former managing partner at Goldman Sachs who went on to become the President and CEO of The Nature Conservancy, the

38. Parker, *supra* note 36, at 24 (quoting 1 CHARLES SANDERS PEIRCE, *How to Make Our Ideas Clear*, in THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE ¶ 129 (Charles Hartshorne & Paul Weiss eds., Harvard University Press 1932)).

39. E.g., Andrew Light & Eric Katz, *Introduction: Environmental Pragmatism and Environmental Ethics as Contested Terrain*, in ENVIRONMENTAL PRAGMATISM, *supra* note 1, at 1, 1–2; BEN A. MINTEER, THE LANDSCAPE OF REFORM: CIVIC PRAGMATISM AND ENVIRONMENTAL THOUGHT IN AMERICA, at 6 (2006); TALISSE & AIKEN, *supra* note 37, at 2.

40. E.g., Desautels-Stein, *supra* note 1, at 574; Mintz, *supra* note 1, at 1; Posner, *supra* note 1, at 1654.

country's largest environmental non-profit,<sup>41</sup> wrote a book on pragmatic approaches to environmental protection, hinting at vernacular pragmatism by saying that "[c]onservation organizations should *do all they can*" to make government, business, and people work together for conservation.<sup>42</sup> In 198 pages, however, he used a variation of the word pragmatism just twice and did not define it.<sup>43</sup> This use of the word, to signal virtue without more, might persuade a particularly harsh critic that pragmatism is merely vernacular pragmatism. Although I have been accused of being a particularly harsh critic,<sup>44</sup> in fact, I will suggest that pragmatism, while flawed, is not so shallow. To work our way to that point, we need to begin by understanding the outlines of the pragmatic philosophy that spawned so many disciples.

Logician and philosopher Charles Sanders Pierce gave birth to pragmatism in the late 1800s.<sup>45</sup> Although my definition here relies on a number of early pragmatic philosophers and later interpretations, Pierce deserves special credit, first, for originating the ideas of pragmatism, and second, for foreseeing the way that his philosophy could be easily taken hostage by "kidnappers."<sup>46</sup> In 1905, Pierce renamed his philosophy "pragmaticism" to distinguish it from emerging variants and, since he believed the new word was ugly, to deter future appropriation.<sup>47</sup> This portends the future misuse of the term pragmatism, but it also suggests that there is not much commonality between Pierce's work and that of later pragmatists. Yet there is a core to this philosophy.

Pragmatism starts with a critical approach to the very idea of truth and knowledge. Whereas others might argue that we can reason our way to absolute knowledge about the world, and about what is right and wrong, pragmatists reject this foundationalism.<sup>48</sup> Using the field of environmental ethics as a case study, it is easy to

41. The Nature Conservancy is the largest environmental non-profit by both revenue and employees. *The 100 Largest U.S. Charities*, FORBES, <http://www.forbes.com/top-charities/list/#tab:rank> [<https://perma.cc/ZA8J-D9Q6>] (last visited May 15, 2017).

42. MARK R. TERCEK & JONATHAN S. ADAMS, *NATURE'S FORTUNE: HOW BUSINESS AND SOCIETY THRIVE BY INVESTING IN NATURE*, at xvii (2013) (emphasis added).

43. *Id.* at xiv, 195.

44. Josh Fortenbery, Editor's Note, *The Discourse on Environmentalism*, 42 ENVTL. L. i, ii (2016).

45. TALISSE & AIKEN, *supra* note 37, at 6.

46. *Id.*

47. *Id.*

48. Parker, *supra* note 36, at 22.

see the importance of the pragmatic rejection of foundationalism. In environmental ethics we often see two competing views of reality. One side insists that nature has intrinsic rights.<sup>49</sup> The other side argues that nature does not have any rights: it is humans who have rights, and if nature has any value, it is only for human purposes.<sup>50</sup> The pragmatist says that it is foolish to believe that either of these statements is absolutely true.<sup>51</sup> In any case, even if we could prove that one “truth” was real and the other was false, that doesn’t necessarily have any influence on our actions.<sup>52</sup> What is more important is which *belief* is more useful.<sup>53</sup>

Another way to look at the issue of foundationalism is through the common means-end distinction. Relying on this distinction suggests that there are some “fixed, final ends objectively grounding the entire field of human striving.”<sup>54</sup> Pragmatism eschews the distinction because it rejects such a certain and externally-driven conception of reality.<sup>55</sup> Instead, pragmatists argue that agents (human or otherwise) set the course of progress, not an independent and unflinching truth that exists apart from the agent.<sup>56</sup> Even if such a truth does exist, our inability to fully define it makes it of little use in practical action. As Richard Posner has said, “The pragmatist’s real interest is not in truth at all, but in belief justified by social need.”<sup>57</sup>

Understanding the rejection of both foundationalism and the related means-ends distinction leads naturally to a second pillar of pragmatism: pluralism. Because there is no single truth, no foundation that we dispute, we are obliged to recognize a multitude of different, perhaps even competing, perspectives and beliefs.<sup>58</sup> These are not just different ways of describing the same underlying belief, but different ways of valuing actions and outcomes.<sup>59</sup> For example, we may enjoy nature because it satisfies

49. Weston, *supra* note 1, at 322.

50. *Id.*

51. *Id.*

52. Desautels-Stein, *supra* note 1, at 579.

53. *Id.*

54. Weston, *supra* note 1, at 321.

55. *Id.* at 322.

56. *Id.*

57. Posner, *supra* note 1, at 1656.

58. TALISSE & AIKEN, *supra* note 37, at 114.

59. *Id.* at 113–14.

our intellectual curiosity,<sup>60</sup> protects our health, or because it is beautiful.<sup>61</sup> In each of these cases, I am describing the way nature is valued *by* humans *for human purposes*. But if we say we should protect nature because *it* has the right to exist, then we are valuing nature for nature's sake. If we say, as the pragmatist must, that we can value nature for the many ways that it benefits people *and* that humans must protect nature because nature has its own rights, then we are embracing pluralism.<sup>62</sup> Both ways of valuing and deciding on action are acceptable. Sometimes they may compete, other times they may cooperate, but there is no way to justify, *a priori*, one method of acting over the other.<sup>63</sup>

Determining which values are best or which techniques are most effective is left to experience rather than fixed rules. A utilitarian or consequentialist might argue that any action that promotes overall wellbeing is appropriate.<sup>64</sup> A deontologist would conversely argue that final wellbeing is not the touchstone and that instead, we must act according to certain exogenous duties that describe some behavior as appropriate and other behavior as inappropriate.<sup>65</sup> The pragmatist says that we look to social goals and our past experience and simply ask which efforts have worked in the past and which can plausibly work in the future.<sup>66</sup> In this respect, experience is also a central component of pragmatism. Philosophical pragmatism emerged shortly after Charles Darwin's explanation of evolution by natural selection and as the role of science and the scientific method were gaining new popularity.<sup>67</sup> Thus, it is easy to see how experience, capitalizing on what works while discarding what does not, could emerge as a key component of philosophical pragmatism.

The final remaining inquiry into philosophical pragmatism, and perhaps the most important, is how to define goals—even if they are merely subjective goals rather than final, objective ends. It is democracy, according to John Dewey, that is the caldron in which

60. EDWARD L. MCCORD, *THE VALUE OF SPECIES*, at 9 (2012).

61. Andrew Light, *Environmental Pragmatism as Philosophy or Metaphilosophy? On the Weston-Katz Debate*, in *ENVIRONMENTAL PRAGMATISM*, *supra* note 1, at 328.

62. *Id.*

63. TALISSE & AIKEN, *supra* note 37, at 113–14.

64. *Deontological Ethics*, STAN. ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/entries/ethics-deontological> [<https://perma.cc/36AY-B2SD>] (last updated Oct. 17, 2016).

65. *Id.*

66. Parker, *supra* note 36, at 25–26.

67. *Id.* at 23.

goals and values are conjured, established, communicated, tested, and ultimately implemented.<sup>68</sup> But to Dewey, democracy is much more than just voting; it is, essentially, communication among the public.<sup>69</sup> Democracy is not just the actions of political agencies; it is an organized and intentional public.<sup>70</sup> To express values and desires that are legitimate progress, not merely shorthand reflections of old symbols and lingering expectations, democracy requires contemporaneous experience and dialogue.<sup>71</sup> Democracy is voting, and it is political agencies, but those things alone can amplify failures,<sup>72</sup> so the public must come together in all its diversity and clearly communicate demands for progress.<sup>73</sup> These demands, emergent from robust democratic participation, are the criteria by which values, progress, and good are established in philosophical pragmatism.

Robust democratic engagement has a parallel benefit for pragmatism in addition to its role in goal setting. A communicative, community-oriented, engaging democratic experience is also satisfying to the public.<sup>74</sup> Thus, Dewey's democracy is a substrate that both produces appropriate social goals, that is, progressive community values toward which society can strive in the absence of an independent and fixed fundamental ends, while it also creates public satisfaction. This satisfaction does not imply that there is public consensus on goals, merely that because the public is engaged and confident in Dewey's democratic system, there is greater satisfaction even with outcomes that do not correspond to the values of each and every individual.

Environmental activists can easily promote this robust democracy, facilitating communications that result in reasonably definite goals, amplifying those goals, and translating them into policy options for the political state. The state itself is often forced to act before any democratic resolution emerges, which makes administrative decisionmaking somewhat more difficult. Many perspectives, implicitly or explicitly tied to pragmatism, have

68. See generally JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY* (Melvin L. Rogers ed., Penn State Press 2012).

69. *Id.* at 118.

70. *Id.* at 119.

71. *Id.* at 118.

72. *Id.* at 119.

73. Parker, *supra* note 36, at 27–28.

74. DEWEY, *supra* note 68, at 158–60.

emerged over the past century to offer a framework for administrative and judicial decisionmaking. I next touch on just two: Charles Lindblom's "muddling through" and Richard Posner's economic legal pragmatism.

### C. Administrative Decisionmaking: Muddling Through

Charles Lindblom introduced "Muddling Through" in 1959.<sup>75</sup> Although he did not reference philosophical pragmatism or any of its proponents by name, he did capture several components of pragmatism. What makes Lindblom's muddling important is that it seems to represent a point on the path from rigorous philosophical pragmatism to more superficial pragmatism. This is not a condemnation of Lindblom's work, which he intended to be as much a description of administrative decisionmaking, as a prescription for improvement.<sup>76</sup> It is a recognition that in applying something as broad and optimistic as philosophical pragmatism, there may need to be techniques for doing *as much as we can* in the absence of all the resources needed to do *the best we can*. This gap between what we strive for and what we can achieve is nowhere more obvious than in the administrative state about which Lindblom wrote.<sup>77</sup>

Muddling begins with a problem: When an administrator is responsible for developing a policy, if she wants to develop the ideal policy, she has an impossible task.<sup>78</sup> To shape an ideal outcome she would need to

list all related values in order of importance . . . . Then all possible policy outcomes could be rated as more or less efficient in attaining a maximum in these values. This would of course require a prodigious inquiry into values held by members of society and an equally prodigious set of calculations on how much of each value is equal to how much of each other value.<sup>79</sup>

75. Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79 (1959).

76. See Charles E. Lindblom, *Still Muddling, Not Yet Through,* 39 PUB. ADMIN. REV. 517, 524 (1979) ("That complex problems cannot be completely analyzed and that we therefore require strategies for skillful incompleteness still seems close to obvious to me.").

77. Lindblom, *supra* note 75, at 79.

78. *Id.*

79. *Id.*



If our administrator could manage these first two steps, in her third step she “would undertake systematic comparison of [her] multitude of alternatives to determine which attains the greatest amount of values.”<sup>80</sup> Having done that, the administrator could “take advantage of any theory available that generalized about the classes of policies” she might ultimately implement.<sup>81</sup> And finally, based on all this assessment, she “would try to make the choice that would in fact maximize [her] values.”<sup>82</sup>

Complicated? That is exactly Lindblom’s point. The step-by-step caricature of ideal decisionmaking here is what scholars—and perhaps pragmatists—prefer to describe, but it is no way to actually make progress because people do not have the time, money, intellect, or even desire to make it a reality.<sup>83</sup>

The reality of practical administrative decisionmaking according to Lindblom is much simpler. It is muddling through. With this approach, our administrative decisionmaker begins by setting out a “principal objective” and then compares that objective to other policy objectives that might complicate the principal.<sup>84</sup> For example, an administrator may identify reduction of carbon dioxide as the principal objective and might clearly see that continued growth of the carbon-based economy is a competing goal. By looking at the decisionmaking process more owlshly, the administrator is free to “disregard most other social values as beyond [her] present interest, and [she] would for the moment not even attempt to rank the few values that [she] regarded as immediately relevant.”<sup>85</sup> She would accept and admit that she has to disregard many important factors, even some that might be related to her principal objective.<sup>86</sup> The administrator would certainly ignore, for example, the politics of a minor oil producing nation, which may be relevant but distant. But she likely would consider the price and availability of coal, which is much more central to her thinking.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 80.

84. *Id.* at 79.

85. *Id.*

86. *Id.*

Our administrator would next roughly detail the various policy options that seem most realistic.<sup>87</sup> Perhaps she will consider a cap and trade system, a carbon tax, a technology requirement, or a fixed emissions rate. In coming up with such ideas and comparing them, the administrator would not dive deeply into a body of theory, but would instead look to familiar past experiences, thereby judging the fit of new policies to the new situation.<sup>88</sup> How, she might ask, have technology standards worked with respect to clean water or other air pollutants? Have cap and trade systems or taxes been used and led to reductions in the past? Do they properly balance competing interests?<sup>89</sup> Based on these inquiries, the administrator selects a specific policy knowing that she will only partially achieve her goals and will need to iterate through this same process to incrementally approach a more transformational policy change.<sup>90</sup>

This is muddling through. It is a process of cabined and incremental decisionmaking that takes account of ideal goals and the human capacity to balance all of them. It recognizes that countervailing pressures and information deficiencies, as well as human processing ability, make transformative policy difficult and therefore allows for step-wise progress as long as there is also a willingness to review outcomes and repeat the process as necessary.

The similarities to and differences from philosophical pragmatism should be obvious. First, muddling accepts pluralism by recognizing the competing values, none of which can be objectively selected as the one true value.<sup>91</sup> Second, muddling at least minimizes the means-ends distinction by focusing on incrementalism rather than a direct jump to an ultimate and foundational end.<sup>92</sup> Third, muddling puts a substantial value on experience and applying policies that have worked in the past and seem likely to work under current conditions.<sup>93</sup> Fourth and finally, muddling gives significant weight to democracy and even public discourse.<sup>94</sup> But here is also where it most significantly differs,

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 80.

91. *Id.* at 81.

92. *Id.*

93. *Id.* at 79.

94. *Id.* at 81.

because muddling recognizes the importance of democracy but attempts to act even when it is impossible to understand the democratic preference.<sup>95</sup> As Lindblom concedes, “preferences have not been registered on most issues; indeed, there often *are* no preferences in the absence of public discussion sufficient to bring an issue to the attention of the electorate.”<sup>96</sup>

I want to emphasize, again, that muddling is explicitly limited to administrative decisionmaking and is not a model for advocacy. This is not to say that advocacy cannot benefit from Lindblom’s many insights, but simply that the roles of the administrator and the advocate are quite different. Twenty years after he wrote “The Science of ‘Muddling Through,’” Lindblom wrote a follow-up to further detail his perspective.<sup>97</sup> In “Still Muddling, Not Yet Through,” he offers an explicit role for activists in his paradigm.<sup>98</sup> Lindblom reasons that the role of advocates in policy analysis drives effective muddling at the administrative level.<sup>99</sup> Interest groups, he explains, contribute partisan analysis that is the “most productive” part of incremental political decisionmaking.<sup>100</sup> Value and interest “fragmentation” and “political interaction among many participants . . . are methods, in many circumstances, of raising the level of information and rationality brought to bear on [administrative] decisions.”<sup>101</sup>

Muddling is one clear intersection between philosophical pragmatism and pragtivism, and that point deserves attention because muddling has a specific and central role for political and public advocacy. If muddling is to work—as an alternative to some more holistic but unrealistic decisionmaking process—advocates must advocate.<sup>102</sup> That should go without saying, but given the forthcoming description of pragtivism, and the increasing prevalence of pragtivism in action, I think it does need saying.

95. *Id.* at 81–82.

96. *Id.*

97. Lindblom, *supra* note 76.

98. *Id.* at 524.

99. *Id.*

100. *Id.*

101. *Id.*

102. Apologies to the late William Safire, who I am sure would have said that “advocates must advocate” is a tautophrase no better than Taylor Swift’s “haters gonna hate,” or, for that matter, Gertrude Stein’s “rose is a rose is a rose.” William Safire, *Tautophrases*, N.Y. TIMES MAG., May 7, 2006, at 22. Alas, as later portions of this Article will demonstrate, I am skeptical that the nature of an advocate is so obvious to some pragtivists.

Muddling makes decisionmaking more realistic and achievable by simplifying the process.<sup>103</sup> It diverges from pragmatism in particular, however, because it tries to simplify while pragmatism cautions that democracy, philosophy, and decisionmaking should be a “struggle” and “must always be a good fight.”<sup>104</sup> But Lindblom’s muddling incrementalism does exemplify many of pragmatism’s key concepts. In particular, it is a form of practice that seeks easier solutions without striving for purity or an unrealistic unified theory of decisionmaking.<sup>105</sup> In that respect, it may remain a closer cousin of philosophical pragmatism than Richard Posner’s economic pragmatism, which I outline in the following Section.

#### D. Judicial Decisionmaking: Posner’s Pragmatism

I have made room for a brief review of Richard Posner’s take on pragmatism for two reasons. First, Posner is one of the key contemporary figures to transfer pragmatism into law, particularly into judicial decisionmaking.<sup>106</sup> Second, Posner’s version of pragmatism is the beginning of a strange trend—central to Farber’s eco-pragmatism,<sup>107</sup> Ruhl’s radical middle,<sup>108</sup> and especially pragmatism—in which behavior that calls itself pragmatic explicitly creates a special pedestal for permanently fixing grand, unified theory rather than relegating such dogmatism to the dustbin, or at least the background, as philosophical pragmatism does. As we will see, Posner’s pragmatism creates a special place for a utilitarian law and economics approach to decisionmaking. Likewise, in the Sections that follow, I will explain how Farber and Ruhl elevate economic, environmentalist, and ecological rationales for environmental protection to special status while pragmatism seeks to move environmental protection from one dogma that it

103. Lindblom, *supra* note 75, at 79–80.

104. Weston, *supra* note 1, at 339.

105. Lindblom, *supra* note 75, at 80.

106. Michael Sullivan & Daniel J. Solove, *Can Pragmatism be Radical? Richard Posner and Legal Pragmatism*, 113 *YALE L.J.* 687, 688 (2003) (reviewing (RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003))) (“For well over a decade, Posner has been the leading proponent of legal pragmatism.”).

107. *See infra* Section II.E.

108. *See infra* Section II.F.

“pragmatically” dismisses to another dogma that it un-pragmatically and uncritically accepts.<sup>109</sup>

Posner’s pragmatism is distinct from what we have so far seen, and will see next, because it is focused squarely on judicial decisionmaking.<sup>110</sup> Posner lays out what he sees as the three elements of pragmatism, which should be familiar: (1) a distrust of the certitudes of “truth,” “reality,” and “nature”; (2) the notion that all propositions should “be tested by their consequences, by the difference they make”; and (3) a commitment to judging laws by their conformity to identified needs rather than by a test of ideology or impersonal criteria.<sup>111</sup>

Posner integrates these elements into judicial assessments. First, Posner asserts that a judge’s goal is not to describe natural law, but to further the welfare of society.<sup>112</sup> One interpretation of furthering social welfare is establishing the expectation that “judges and legislators are officials of the same stripe—guided and controlled by the same goals, values, incentives, and constraints.”<sup>113</sup> This would certainly make judging “greatly simplified; [judging] would be primarily a matter of helping the legislature forge sound policy.”<sup>114</sup> But Posner refuses to accept un-pragmatic foundations of this nature and instead relies on his view of reality, that “the legislative process is buffeted by interest-group pressures to an extent rare in the judicial process. The result is a body of laws far less informed by sound policy judgments than” once believed.<sup>115</sup>

In this respect, Posner rejects a left-leaning dogma. Posner’s second pragmatic assertion is a criticism of right-leaning formalism. “Pragmatism” he says, “remains a powerful antidote to formalism.”<sup>116</sup> Formalism, in this sense, is another simplifying technique, but like the above critique of legislative intent, formalism fails pragmatism because “[i]t asks not, What works?, but

109. These critiques are not necessarily meant as criticisms. I am not a philosopher so I cannot fairly say that I identify as a philosophical pragmatist, and therefore I am not comfortable arguing that a divergence from pragmatism is a per se flaw. Instead, I am identifying these divergences in an effort to create a taxonomy of relevant ideas, their relationships, and their possible origins.

110. See Posner, *supra* note 1, at 1657.

111. *Id.* at 1660–61.

112. *Id.* at 1657.

113. *Id.* at 1658.

114. *Id.*

115. *Id.*

116. *Id.* at 1663.

instead, What rules and outcomes have a proper pedigree in the form of a chain of logical links to an indisputably authoritative source of law . . . ?”<sup>117</sup>

With concepts like intent and formalism cut away, how does Posner think a judge can determine what works? Here is where his pragmatism diverges orthogonally from Dewey’s. Rather than democratic engagement, Posner’s pragmatism measures progress by “the idea that law should strive to support competitive markets and to stimulate their results in situations in which market-transaction costs are prohibitive . . . because of the empirical relation between free markets and human welfare.”<sup>118</sup> This, he argues, is a pragmatic guidepost because it is not grounded in any existing ethics,<sup>119</sup> and because it is the best approach to the “contemporary American legal system to follow, given what we know about markets . . . , about American legislatures, about American judges, and about the values of the American people.”<sup>120</sup>

The centrality of the economic model is pragmatic in Posner’s judgment because it works and it works based on experience and information. The risk, however, is that by identifying a specific concept of progress it can easily become static and therefore lose its pragmatic edge. One is certainly inclined to believe, given Posner’s previous work, that he came to pragmatism *ex ante*, as a defense of law and economics and not the other way around.<sup>121</sup> As we move to the environmental legal pragmatists, this chicken-and-egg question is constantly lingering.

#### E. Farber’s Eco-Pragmatism

Daniel Farber was a legal pragmatist before he was an eco-pragmatist.<sup>122</sup> But his book *Eco-Pragmatism*<sup>123</sup> merged the concepts

117. *Id.*

118. *Id.* at 1167.

119. *Id.* at 1667–68. I am not convinced that law and economics is not grounded, but it may also be irrelevant to philosophical pragmatists. Even if this method is not “grounded in the ethics of Kant or Rawls or Bentham or Mill or Hayek or Nozick,” *id.*, that does not mean that it isn’t a new dogma all its own.

120. *Id.* at 1668.

121. *See, e.g.*, Luban, *supra* note 1, at 1025 (noting that Posner has “offer[ed] an unyielding defense of wealth maximization as the Pole Star of ethics”).

122. *E.g.*, Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the 21st Century*, 1995 U. ILL. L. REV. 163 (1995).

123. FARBER, *supra* note 1.

of environmental protection and pragmatism and spawned significant new scholarship in environmental law.<sup>124</sup>

Eco-pragmatism establishes itself on much the same principle (but not foundation, of course) as philosophical pragmatism: uncertainty. Environmental protection is largely a matter of regulating risks.<sup>125</sup> Whatever fundamental truths may exist in the world, even as we strive to know them, we are confronted by the vast uncertainty that animates pragmatism. In much the same vein, environmentalists—which in Farber’s analysis make a broad swath of the population<sup>126</sup>—want to mitigate long-run risks and are constantly discovering new risks.<sup>127</sup> Both the temporal scope and advances of science that unveil new hazards introduce uncertainty.<sup>128</sup> This uncertainty isn’t exactly the same character as metaphysical uncertainty since at each step Farber is willing to accept “concrete realities,” such as those scientific facts that are necessary to help mitigate environmental risk once such risk is deemed sufficiently likely.<sup>129</sup> But even in a world with some discernable foundations, certain ideologies arise that offer easy answers to complex problems.<sup>130</sup> Challenging these easy answers, *Eco-Pragmatism* continues down the philosophically pragmatic path but veers slightly from the normal course.

Farber introduces what he sees as the two camps competing to have their concept of reality, their easy answers, prevail: the economically dogmatic “bean counters” and the politically positivist “tree huggers.”<sup>131</sup> These camps are familiar in the world of environmental policy. On the one hand, you have those who believe that economic efficiency, as measured by the public’s “willingness to pay,” is the simple answer for determining good environmental policy.<sup>132</sup> If after a cost-benefit analysis a policy is shown to maximize social welfare as measured by economic

124. *E.g.*, SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH (2004); Angelo, *supra* note 1; Grodsky, *supra* note 1; Hirokawa, *supra* note 1; Mintz, *supra* note 1; Ruhl, *supra* note 1; Sinden, *supra* note 1; Wildermuth, *supra* note 1.

125. FARBER, *supra* note 1, at 5.

126. *Id.* at 3.

127. *Id.* at 5.

128. *Id.*

129. *Id.* at 15.

130. *Id.* at 6, 35–36.

131. *Id.* at 39.

132. *Id.* at 39–42.

efficiency, it is a good policy.<sup>133</sup> The simple foundation is that economic efficiency is the metric of “good.” On the other hand, you have those who believe that nature, however defined, has rights that cannot be captured in dollars and cents (or at least has human benefits that can only be captured theoretically, but not in practice) and who, therefore, turn to political processes as the simple answer to making collective decisions.<sup>134</sup>

The world of environmental policy, as characterized by eco-pragmatism, is a never-ending battle over which belief system is more reflective of the “real” human spirit, the “[w]illingness to pay or the willingness to vote.”<sup>135</sup> A large portion of Farber’s book is dedicated to exposing the flaws of both the bean counter and tree hugger logic.<sup>136</sup> But those flaws are not relevant here. What is relevant is the way Farber situates both perspectives in his eco-pragmatism and what that says about the relationship between philosophical and eco-pragmatism.

While pragmatism accepts that dogmas exist, it challenges those dogmas not on their nuance, but on their existential claims to either derive from or lead to an idealized foundation of knowledge and behavior.<sup>137</sup> Legal pragmatism differs slightly because it deals less in metaphysical realities, or the lack thereof, instead substituting hard-and-fast legal rules as the dogmas that pragmatism must reject.<sup>138</sup> It is understandable, then, that Farber’s eco-pragmatism differs from philosophical pragmatism insofar as, after teasing apart and undermining the arguments of both the bean counters and the tree huggers, Farber does not gloat in having disproven yet another set of claims to truth. Instead, he fashions a new constructive framework from his critical rubble.

Eco-pragmatism’s method has one overarching and one underlying principle. The overarching standard is that there is no “purely mechanical method of deciding these difficult issues.”<sup>139</sup> Simplistic dogmas promise escape from tough choices, but they are false promises.<sup>140</sup> The underlying principle is that “society has basic

133. *Id.* at 40.

134. *Id.* at 43.

135. *Id.* at 42.

136. *Id.* at 35–69.

137. *E.g.*, Parker, *supra* note 36, at 22; TALISSE & AIKEN, *supra* note 37, at 114.

138. *E.g.*, FARBER, *supra* note 1, at 9–10.

139. *Id.* at 93.

140. *Id.*



commitments, including one to environmental quality, and those commitments should form the baseline for analysis.”<sup>141</sup> As with Lindblom’s muddling, which offers a simplification of decisionmaking by, in part, starting with experience, Farber proposes that we can at least partially simplify environmental decisionmaking by starting with an environmental baseline reflecting “the environmental norms that our society has unmistakably embraced.”<sup>142</sup> The practical implication of this baseline is that whenever we begin analysis of a new environmental problem, we must start by “requiring the strongest feasible efforts to obtain environmental quality.”<sup>143</sup> At the same time, we must realize that the strongest feasible protections are sometimes “grossly disproportionate to any plausible benefit. Thus, cost-benefit analysis may serve as a useful backstop.”<sup>144</sup> This method demands a presumption for strong environmental protection, “but it is a rebuttable presumption.”<sup>145</sup>

It may not be obvious how the eco-pragmatic method will apply in every situation, but it does have the benefit of being uniquely comprehensible and useful. Lindblom offered a similarly applicable method for decisionmaking, but where Lindblom’s muddling was mostly description, Farber’s eco-pragmatism is mostly prescription.<sup>146</sup>

Eco-pragmatism captures many of the pieces of philosophical pragmatism but, like Posner’s pragmatism, it differs in one significant way. Farber offers a pragmatic method that recognizes the fallacies of rule-based, easy-answer ideologies.<sup>147</sup> But it then carves out a space for exactly this type of thinking in its framework.<sup>148</sup> Of course, Farber never promises to be a strict adherent to philosophical pragmatism, and he only hints at the philosophy that underlies pragmatism in a few brief moments.<sup>149</sup>

As a whole, despite its short attention to philosophical foundations, and one major divergence in its elevation of what we

141. *Id.* at 94.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 114.

146. *Id.* at 206.

147. *Id.* at 43.

148. *Id.* at 94.

149. *Id.* at 9–11, 15, 93.

might call “flexible dogmas,” Farber’s eco-pragmatism does capture the centrality of uncertainty and the resulting fallacy of simple answers in philosophical pragmatism. But one other strand that links eco-pragmatism to philosophical pragmatism is especially interesting. Like Dewey’s promise that democracy is both substantively important and procedurally satisfying, Farber also recognizes the importance of having a method that builds confidence and satisfaction. “The point of a baseline” he says, speaking of the environmental baseline that colors eco-pragmatism, “is not simply to control the results of cases, but also to leave us satisfied with the process of reaching the result.”<sup>150</sup> Even if results turn out to be wrong when judged against new information, if a pragmatic framework leaves people with the feeling that, “heck, at least we did our best,” then the framework is still a valuable one.

And then we have J.B. Ruhl’s “radical middle.” While I grant that his tone may be tongue-in-cheek, as the following discussion demonstrates, it is disruption and passion, rather than satisfaction, that inspire the radical middle.

#### F. Ruhl’s Radical Middle

J.B. Ruhl is a devotee of Farber’s eco-pragmatism.<sup>151</sup> Not only did he author an admiring book review,<sup>152</sup> a few years later he authored a “manifesto” that praised and carried the torch of eco-pragmatism, but sought to take eco-pragmatism “a step further.”<sup>153</sup> That work was “A Manifesto for the Radical Middle.”<sup>154</sup> From it emerged a more radicalized version of Farber’s work, and it lends a distinct impression that if Farber is the lover, Ruhl is the fighter. But what is most important about Ruhl’s version of pragmatism is not how it relates to Farber, but how it relates to pragmatism. As this Section attempts to show, Ruhl’s radical middle is the best link between the more academic pragmatisms so far discussed and pragmatism, which concludes this Part.

150. *Id.* at 113.

151. J.B. Ruhl, *Working Both (Positivist) Ends Toward a New (Pragmatist) Middle in Environmental Law*, 68 GEO. WASH. L. REV. 522, 545–46 (2000) [hereinafter *New (Pragmatist) Middle*] (reviewing FARBER, *supra* note 1).

152. *Id.*

153. *Manifesto*, *supra* note 2, at 387.

154. *Id.*

Searching for a way to describe and mend the deep ideological divisions in environmental policy, Ruhl describes three types of “middle”—places where different positions might come together—in environmentalism. The first middle is the passive middle, the middle over which the pendulum of extremism frequently swings, but never stops.<sup>155</sup> On the one side, Ruhl identifies Deep Ecology,<sup>156</sup> while on the other is the anti-environmental<sup>157</sup> sentiments of former Secretary of the Interior James Watt.<sup>158</sup> This passive middle is “whatever the annihilation process” from the war between the likes of Deep Ecology and Watt, “leaves behind.”<sup>159</sup> It “lacks any coherent philosophy.”<sup>160</sup>

The second middle is the resistive middle. The resistive middle is younger but also more self-sufficient. It is the process of “picking and choosing policies from among” the dominant extremes.<sup>161</sup> To exemplify the resistive middle, Ruhl points to sustainable development, the idea that environment, economy, and justice must not be separate.<sup>162</sup> Central to the resistive middle is an active defense of its policies against extremists.<sup>163</sup>

The third and final middle is the aggressive middle, which, confusingly, Ruhl uses synonymously with “radical middle.”<sup>164</sup> Unlike his other two middles, defined by tactics and then enriched with examples, the radical middle is both tactical and substantive. Tactically, the radical middle “is not simply a compromise position. It advances a philosophy independent of the two extremes.”<sup>165</sup> The radical middle is an aggressive challenge to the status quo.<sup>166</sup> But, substantively, the radical middle is very specifically ecosystem

155. *Id.* at 391.

156. *Id.* at 389.

157. Watt is also notorious for his anti-woman, -Jewish, -disabled, and -African American sentiments. Speaking of the diversity in his ranks, he once quipped, “We have every kind of mixture you can have. I have a black, I have a woman, two Jews and a cripple. And we have talent.” Steven R. Weisman, *Watt Quits Post; President Accepts with ‘Reluctance’*, N.Y. TIMES, Oct. 10, 1983, at A1.

158. *Manifesto*, *supra* note 2, at 391.

159. *New (Pragmatist) Middle*, *supra* note 151, at 523.

160. *Id.*

161. *Manifesto*, *supra* note 2, at 393.

162. *Id.* at 391–92.

163. *Id.* at 393.

164. *Id.* at 398.

165. *Id.*

166. *Id.*

management, “a new idea that the middle hatched on its own.”<sup>167</sup> Very generally speaking, ecosystem management is an adaptive management approach that conserves nature in whole parts,<sup>168</sup> rather than in one-off, immutable species protections, which Ruhl claims are central to the tree hugger dogma.<sup>169</sup>

Like Posner’s economism, ecosystem management may be a wolf in sheep’s clothing. Although Ruhl implies that ecosystem management is a policy invention of the Clinton administration,<sup>170</sup> it is more properly described as an idea that emerged from the ecological sciences, at least as far back as 1988.<sup>171</sup> It is, however, a normative structure to “manage so as not to deny future generations the opportunities and resources we enjoy today.”<sup>172</sup> It is indeed a structure that draws on a number of tools, which Ruhl elaborates by describing the information, models, and dynamics that are part of the equation.<sup>173</sup> And I agree that the tools are robust and valuable. But according to Ruhl, the radical middle of ecosystem management is “its own world view based on its own set of principles. It is not a recipe or amalgam, but an independently-devised, scientifically-based policy position in its own right.”<sup>174</sup> One could say exactly the same of Watt, of course, or Deep Ecology—Ruhl’s un-pragmatic foils. Regardless of its breadth, when a single instrument is presented as the proper tool for resolving environmental disputes, it is likely too fundamentalist to be properly pragmatic. At the very least, when a single instrument is presented, and presented in contrast to alternatives, it becomes very susceptible to migrating from a flexible process to a dogmatic goal. The history of cost-benefit analysis in environmentalism is one such example.<sup>175</sup>

167. *Id.* at 394.

168. *Id.* at 394–96.

169. *Id.* at 390.

170. *Id.* at 394.

171. Norman L. Christensen et al., *The Report of the Ecological Society of America Committee on the Scientific Basis for Ecosystem Management*, 6 *ECOLOGICAL APPLICATIONS* 665, 668 (1996) (listing select definitions of ecosystem management, with the earliest from 1988).

172. *Id.* at 667.

173. *Manifesto*, *supra* note 2, at 399–403.

174. *Id.* at 398.

175. See, e.g., FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2004); DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* (2010); SHAPIRO & GLICKSMAN, *supra* note 124.

A final characteristic of the radical middle that distinguishes it from philosophical pragmatism—but affiliates it with pragtivism—is its reliance on expertise over public engagement. Expertise is essential to environmental protection, and pragmatism, insofar as expertise helps identify problems and solutions, and allows us to look back and assess the effectiveness of the tested solutions. But expertise at the expense of democracy is unsatisfying under Dewey's and Farber's pragmatism. Unfortunately, "public participation," Ruhl says, "has become not the engine of policy deliberation, but an impediment."<sup>176</sup> Recognizing the risk that the radical middle could fail to gain public trust if it does not engage public values, Ruhl offers transparency and access to data as consolation.<sup>177</sup> These are critical components of any pragmatic system, but are they substitutes? If a cabal of political scientists determined that they would appoint the U.S. President every four years without a vote, but would livestream their deliberations, I doubt that would "leave us satisfied with the process of reaching the result."<sup>178</sup>

Pragtivism, finally, the last in our exploration of pragmatism's manifestations, may most resemble Ruhl's radical middle in that it defines itself by its foils, does not embrace democratic engagement, and may be substituting one "grand theory" of policymaking for another. But to Ruhl's credit, he has thoughtfully and forcefully defined his thinking over the years, while pragtivism is hard to pin down because it is not so self-reflective.

### G. Pragtivism

I am coining a new term because I want to describe a strategy, a way of thinking, that is different from philosophical pragmatism and vernacular pragmatism but is nevertheless a consistent ideological approach to environmental activism. To define this term I could describe any number of actors, both inside and outside the environmental field, as pragtivists. But for the purposes of this Article, I am focusing on two organizations and their leadership—The Nature Conservancy ("TNC") under Mark Tercek as well as the Environmental Defense Fund ("EDF") led by Fred Krupp—primarily because they have provided a more complete

176. *Manifesto*, *supra* note 2, at 404–05.

177. *Id.* at 405.

178. FARBER, *supra* note 1, at 113.

written record that is accessible and descriptive of their ideologies. I also focus on these organizations because of their unremitting use of the word “pragmatic” in their self-descriptions.<sup>179</sup>

Pragtivists are most distinct from the other pragmatisms because they are not proposing a method for administrative or judicial decisionmaking but for environmental advocacy. This environmental pragtivism is characterized by both a fixed belief and by a set of tactics. The belief is that environmental protection is essential.<sup>180</sup> As EDF clearly states, “While our tactics vary, our mission never does: a healthier environment and a sustainable future.”<sup>181</sup> Mark Tercek is equally explicit when he says “[a]ll our action must heed and respect nature.”<sup>182</sup>

Tactically, environmental pragtivists rely on a set of tools that are defined, in large part, by how they differ from traditional environmentalist tools. Fred Krupp has described the “reactive opposition” of traditional environmentalism,<sup>183</sup> willing to “stand[] in the way of growth and drive[] up costs.”<sup>184</sup> At The Nature Conservancy, former lead scientist Peter Kareiva has characterized the “environmentally facile stance” of traditionalism, and activism, as a hopeless “heroic stand . . . in the spirit of the lone environmentalist who has chained him or herself to a tree.”<sup>185</sup> Mark Tercek, likewise, says “[e]nvironmentalists generally believe in nature’s inherent value.”<sup>186</sup> And this, he worries, can “alienat[e]

179. A search for variants of the word “pragmatism” on The Nature Conservancy’s website returned 230 results. A search on the Environmental Defense Fund’s website returned 134. By contrast, a search of the Natural Resources Defense Council’s website returned only 92 results. Also by contrast, both TNC and EDF used “pragmatic” to define themselves, as evidenced in the citations in this Section, while NRDC used the word primarily to describe others. (Searches conducted June 8, 2016.)

180. *E.g.*, Eric Pooley, *15 Years of “Ways That Work” for People and Planet*, ENVTL. DEF. FUND (Sept. 12, 2014), <https://www.edf.org/blog/2014/09/12/15-years-ways-work-people-and-planet> [<https://perma.cc/PPQ7-ZRU6>]; *About Us: Vision and Mission*, NATURE CONSERVANCY, <http://www.nature.org/about-us/vision-mission/index.htm?intc=nature.tnav.about> [<https://perma.cc/M7F2-N23J>] (last visited May 15, 2017).

181. Pooley, *supra* note 180.

182. TERCEK & ADAMS, *supra* note 42, at 198.

183. Frederic D. Krupp, Opinion, *New Environmentalism Factors in Economic Needs*, WALL STREET J., Nov. 20, 1986, at 34.

184. Fred Krupp, Opinion, *A New Climate-Change Consensus*, WALL STREET J., Aug. 6, 2012, at A13.

185. Peter Kareiva, *Conservation Science: How the Conservancy Leads with Science*, NATURE CONSERVANCY, <http://www.nature.org/science-in-action/leading-with-science/index.htm> [<https://perma.cc/HSS9-4YPX>] (last visited May 15, 2017).

186. TERCEK & ADAMS, *supra* note 42, at xvii.

potential supporters” and cabin environmentalists’ own “ability to reach a broader audience and to mine sources of new ideas.”<sup>187</sup> More bluntly, he says that “the business guys are pretty smart. It’s the environmentalists . . . who have more to learn here.”<sup>188</sup>

Pragtivism describes itself as a challenge to reactive opposition, facile heroism, and alienation, so one can be forgiven for thinking that at the same time it is a call for more compromise. Pragtivists are explicit that they are not aiming for compromise.<sup>189</sup> Pragtivism is more proactive than mere compromise, because it sees itself as a third way rather than a hybrid way.<sup>190</sup> In practice, however, and as discussed more in Part V, attempting to create a workable third way ultimately results in frequent compromise.

Pragtivists focus on non-confrontational corporate partnerships and collaboration (sometimes even replacing external activism with internal consulting, cutting out the government and public entirely),<sup>191</sup> economic and market-based programs,<sup>192</sup> science,<sup>193</sup> and more broadly changing the general impression of environmentalism.<sup>194</sup> To the pragtivists, these tools have a series of benefits. Corporate partnerships and voluntary programs are efforts to push those with environmental footprints to be protective without mandates, or even to go beyond mandates, unlike the

187. *Id.*

188. Greg Hanscom, *Nature’s CEO: Mark Tercek Says Conservation Is Good for Business*, GRIST (May 15, 2013), <http://grist.org/cities/natures-ceo-mark-turcek-says-conservation-is-good-for-business> [<https://perma.cc/DRF7-XJ4B>].

189. Krupp, *supra* note 183 (writing that his ideas are “in no sense a move toward compromise”).

190. *Id.*

191. *E.g.*, TERCEK & ADAMS, *supra* note 42, at 165–87; *About Us: Protecting the Lands and Waters on Which All Life Depends*, NATURE CONSERVANCY, <http://www.nature.org/about-us> [<https://perma.cc/T7ZV-XTXT>] (last visited May 15, 2017).

192. *E.g.*, Krupp, *supra* note 183; Fred Krupp, *The Making of a Market-Minded Environmentalist*, STRATEGY+BUSINESS (June 10, 2008), <http://www.strategy-business.com/article/08201?gko=97ea9> [<https://perma.cc/CB3L-2D9M>] [hereinafter *Making of a Market-Minded Environmentalist*].

193. *E.g.*, Kareiva, *supra* note 185. Somewhat humorously, Krupp has shown a little confusion at the exact nature of science, confusing empiricism with anecdote. After recounting the story of a business leader describing how his business could profit from market-based regulations, Krupp joyfully wrote, “At that moment, my enthusiasm for market-based environmentalism grew 10-fold. Because here, in the real world, was *empirical evidence* that these ideas were as powerful as we’d dreamed.” *Making of a Market-Minded Environmentalist*, *supra* note 192 (emphasis added).

194. *Making of a Market-Minded Environmentalist*, *supra* note 192.

command-and-control demands of traditional environmentalism.<sup>195</sup> Market-based approaches can be either based on a regulatory platform, in which there are caps on pollution or extraction, or on a cost-internalization platform, in which a tax or fee is added to account for the costs of environmental damage, but both provide flexibility.<sup>196</sup> The role of science in pragtivism is a little harder to nail down, but it may well be a critique of the straw traditional environmentalist who is willing to regulate out of sheer precaution, regardless of the real risks.<sup>197</sup> Perhaps most importantly, pragtivism wants to change the tenor of environmentalism, changing the perception of environmentalists in an effort to push past the traditional debates that have slowed environmental progress.<sup>198</sup>

This last factor is undoubtedly the one with the clearest mark of philosophical pragmatism. Pragtivists recognize a value divide, which they believe is based on fallible dogmatic beliefs about the world.<sup>199</sup> Recognizing this counterproductive foundationalism, pragtivists can address pluralism by removing value from the environmental debate, or by relying on multiple values.<sup>200</sup> They can remove value by focusing on what they identify as more value-neutral tools, and win-win solutions,<sup>201</sup> but they can also introduce any tools that work because they are not beholden to any positivism.<sup>202</sup>

195. *Id.*; TERCEK & ADAMS, *supra* note 42, at 167; Krupp, *supra* note 184; Pooley, *supra* note 180.

196. TERCEK & ADAMS, *supra* note 42, at 136–37; Krupp, *supra* note 183; Pooley, *supra* note 180.

197. See Kareiva, *supra* note 185 (stating that “[o]ur science is intensely pragmatic” and that “none of our assumptions go unchallenged”); see also SHAPIRO & GLICKSMAN, *supra* note 124, at 2 (“Since the 1970s, risk regulation has come increasingly under vigorous attack. . . . The mantra of these criticisms is that risk regulation is ‘irrational’ . . . because regulators too often address problems that pose minimal risks to the public or the environment.”).

198. TERCEK & ADAMS, *supra* note 42, at 187, 197; *Making of a Market-Minded Environmentalist*, *supra* note 192; Krupp, *supra* note 183.

199. TERCEK & ADAMS, *supra* note 42, at xv–xvii, 197–98; Krupp, *supra* note 183.

200. See TERCEK & ADAMS, *supra* note 42, at xv (“Valuing nature does not mean replacing one set of compelling arguments for conservation with another, but it provides an additional and important rationale for supporting the environment.”).

201. See, e.g., *About Us: Protecting the Lands and Waters on Which All Life Depends*, *supra* note 191 (“We pursue non-confrontational, pragmatic solutions to conservation challenges.”); Pooley, *supra* note 180 (“It’s clear that the pursuit of profit is an enormously powerful force in the modern world, and so we often seek to create conditions where investors, inventors and entrepreneurs . . . have an economic incentive to protect the environment.”).

202. See TERCEK & ADAMS, *supra* note 42, at xv.



But again, all of this is done with at least one foundational ideology at the center of pragtivist belief: environmental protection. Pragtivists do not rebuff all foundationalism, because they still accept the need to protect the environment without reference to a method for determining what goals are valid. Tercek, however, has expressed the most philosophically pragmatic view on this issue, writing that all the various values are valid, from the inherent rights of nature to nature as an economic engine.<sup>203</sup> But it is enough, I think, to say that pragtivism does accept at least one underlying certainty: the environment is important.

Where pragtivists differ from Posner, and others, is that they do not offer a method for determining which of their various tools are most appropriate under any given circumstance. Posner's economic ideology includes the goal of unfettered markets and the method, cost-benefit analysis. Farber and Ruhl give us a dynamic integration of feasibility analysis and cost-benefit analysis or an application of ecosystem management, respectively. Pragtivism just offers a litany of tools but no guidance on how to apply them.<sup>204</sup>

For example, Tercek tells the story of a Dakio Paul, a fisherman on the Pacific island of Pohnpei.<sup>205</sup> The story, which Tercek offers as a great success, reaches its apex when Dakio sets out with a gun and a small boat to guard a fishery that the government and community won't protect.<sup>206</sup> It is a provocative story, but it leaves the reader wondering two things. First, isn't this sort of self-help more tantamount to command-and-control regulation than partnership or incentive-based conservation? And how is an aspirational pragtivist to know when to get a corporate partner to help, when to call a scientist, when to lobby government, or when to load a gun?

One last point on pragtivism's relationship to other pragmatisms. There is an implicit tendency in pragtivism, like the one explicit in Ruhl's radical middle, to reduce the role of democracy and public input. Unlike Ruhl's approach, this is not an intentional challenge

203. *Id.* at xiv–xv.

204. See SHAPIRO & GLICKSMAN, *supra* note 124, at 154 (“Even among those, including some major national environmental groups, which enforce incentive-based techniques such as emissions trading as a valuable method of regulatory compliance, the appropriate mix of more traditional regulatory devices (such as performance standards) and incentive-based techniques nevertheless remains a matter of ongoing debate.”).

205. TERCEK & ADAMS, *supra* note 42, at 107.

206. *Id.* at 109.

to the inefficiency of the non-expert public sticking its value-laden nose into a technical process. Rather, pragtivism's reliance on win-win situations, usually negotiated as voluntary and incentive based programs, take place outside of the regulatory process that is studded with opportunities for public comment, data review, and even lawsuits. For example, EDF's early foray into a corporate partnership with McDonald's resulted in the company's reduced use of polystyrene, but the public and government were both excluded from that negotiation, which was tantamount to a consultant-client relationship, and, of course, the public didn't have a chance to sue either party if they were unhappy with the outcome.<sup>207</sup> More broadly speaking, the very idea of a win-win solution implies that there is no need for a public debate because nobody has anything at risk: there are just environmental and economic benefits for all.

This rosy picture of environmental protection achieved through win-win solutions may be another positivist foundation inherent in pragtivism. The intuition is natural that win-win is better than conflict and regulation, but when an intuition becomes a driver of environmentalist decisionmaking without serious questioning, it amounts to yet another un-criticized dogma.

The common thread between the three environmental strands of pragmatism is that all three have a substantive outcome orientation, environmental protection, integrated into their frameworks. This sets them apart from philosophical pragmatism and muddling, which are strongly method oriented. Nevertheless, it is important to notice that both Farber and Ruhl offer methods that don't necessarily lead to more environmental protection. Their versions of pragmatism err on the side of protection—they integrate protection as one goal, even a default goal—but they do not demand protection as an outcome. Pragtivism is distinctly different. It is the only pragmatism in this typology with a specific goal in mind.

Recognizing pragtivism's explicit outcome orientation, we have to ask how that plays out in the real world. Certainly there have been incredible success stories. EDF was instrumental in developing the Clean Air Act Amendments of 1990 that

207. *McDonald's Reduces Waste—and Saves Money*, ENVTL. DEF. FUND, <https://www.edf.org/partnerships/mcdonalds> [<https://perma.cc/G4HB-75ZA>] (last visited May 15, 2017).

incorporated an acid rain trading program, which reduced sulfur dioxide concentrations by seventy-two percent.<sup>208</sup> But there are also failures. Empirical research suggests that voluntary corporate environmental practices have little environmental impact,<sup>209</sup> and the effort to institute a carbon dioxide trading program in 2009 based on a corporate-environmentalist partnership, in which EDF was also a leader, was a spectacular bust.<sup>210</sup>

The story of the Dunes Sagebrush Lizard is another such story, much smaller in scale and much further under the radar. In a sense, the Lizard story is unfair, as it is such a dramatic failure of environmental protection. Likewise, no environmental group was behind the initiation of this debacle—though they were certainly behind the general regulatory strategy that led to it—and the dirty politics are perhaps more insidious than normal. But that is exactly why it makes a good example. The Environmental Defense Fund offered its support for the industry-led conservation plan because of what the plan represented as opposed to what it achieved (not very pragmatic). And just like pointing to the 1990 acid rain program as a great success, pointing to this failure can help us explore the contrast more clearly.

### III. A PRAGMATIC APPROACH TO AN UNCOMPROMISING LIZARD

Scientists discovered the Dunes Sagebrush Lizard (the “Lizard”) in 1968.<sup>211</sup> In 1982, the United States Fish and Wildlife Service (“FWS” or the “Service”) classified the Lizard as a “Category 2” species, meaning that it was probably in need of Endangered Species Act (“ESA”) protections, but the scientific information on the species was still too thin to support such a final designation.<sup>212</sup> For nearly thirty years the Lizard’s legal status was in limbo as it flipped and flopped between different FWS definitions,<sup>213</sup> until, spurred by a 2002 petition from the environmental group Center

208. Pooley, *supra* note 180.

209. *See infra* Section IV.B.

210. *E.g.*, THEDA SKOCPOL, NAMING THE PROBLEM: WHAT IT WILL TAKE TO COUNTER EXTREMISM AND ENGAGE AMERICANS IN THE FIGHT AGAINST GLOBAL WARMING, at 3, 31 (2013).

211. Endangered and Threatened Wildlife and Plants; Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. 77,801, 77,802 (Dec. 14, 2010) [hereinafter Proposed Listing].

212. *Id.*

213. *Id.*

for Biological Diversity,<sup>214</sup> FWS finally proposed listing the Lizard as endangered in 2010.<sup>215</sup>

The Endangered Species Act mandates that FWS consider five criteria when determining whether or not to list a species.<sup>216</sup> The criteria are, in summary: danger to the species' habitat; overuse of the species; disease or predation on the species; inadequacy of existing regulation; and other natural or man-made factors.<sup>217</sup> Addressing each factor, FWS found that habitat had decreased by forty percent since 1982, habitat fragmentation due to oil and gas operations was particularly acute,<sup>218</sup> current state and federal regulations, including an enforceable conservation plan covering the Lizard's New Mexico habitat, did not sufficiently reduce threats to the Lizard,<sup>219</sup> and pollution from oil and gas development created a present and ongoing threat.<sup>220</sup> According to these various existing pressures and future threats, FWS explained that an endangered listing was required.<sup>221</sup> FWS then opened a sixty-day comment period during which it would receive further input on the proposed listing.<sup>222</sup>

#### A. Political Preparations and Lack Thereof

Although the oil and gas industry and the State of Texas might have started preparing to conserve the Dunes Sagebrush Lizard in 1982 when FWS first announced the likelihood of a listing, or in 2001 when FWS first described the Lizard's listing as high priority,<sup>223</sup> or in 2002 when the Center for Biological Diversity petitioned for listing, or in 2004 when the FWS again reiterated the high priority for listing the Lizard,<sup>224</sup> or even in 2010 as soon as FWS proposed listing the Lizard, it was not until February 2012 that Texas and the industry finally proposed a plan to conserve the

214. *Id.*

215. *Id.* at 77,801.

216. 16 U.S.C. § 1533(d)(A)–(E) (2012).

217. *Id.*

218. Proposed Listing, *supra* note 211, at 77,805.

219. *Id.* at 77,811.

220. *Id.* at 77,813.

221. *Id.*

222. *Id.* at 77,801.

223. *Id.* at 77,802.

224. *Id.*

Dunes Sagebrush Lizard.<sup>225</sup> To be clear, this is thirty years after threats to the Lizard were first identified, but also two years and two comment periods after FWS first proposed listing.

In the two years after the listing proposal and before the Texas Conservation Plan, two critical political happenings took place. In 2011 Warren Chisum, then a Texas State Representative and member of the Texas Oil and Gas Association, sponsored an industry-backed amendment to an under-the-radar bill.<sup>226</sup> The purpose of the amendment was to move authority over endangered species from the Texas Parks and Wildlife Department to the state Comptroller, the office otherwise responsible for budget and fiscal issues.<sup>227</sup> Not only did the new arrangement take responsibility away from an organization with substantive expertise, it gave that responsibility to an organization headed by Susan Combs, a vocal opponent of the Endangered Species Act.<sup>228</sup>

Once she was in control, Comptroller Susan Combs began working with industry to craft the Texas Habitat Conservation Plan for the Dunes Sagebrush Lizard (“Texas Plan,” “Texas Conservation Plan,” or the “Plan”) in an effort to avoid the restrictions that would have come with FWS listing.<sup>229</sup> Because the Comptroller’s office lacked environmental expertise, and perhaps the will, to take responsibility for species conservation, the Texas Plan had to rely on an outside organization to operate all facets such as recruitment, monitoring, reporting, and mitigation work, as necessary. Fortunately for the Comptroller, the same oil and gas lobbyists who initially proposed transferring authority away from Parks and Wildlife volunteered to establish a new nonprofit, run

225. See, e.g., Withdrawal, *supra* note 7, at 36,875 (“The comment period was then reopened on February 24, 2012, in order for the Service to consider the Texas Conservation Plan.”) (internal citation omitted).

226. Jay Root, *Oil Lobbyists Oversee Protection of Threatened Lizard*, TEX. TRIB. (Apr. 24, 2013), <https://www.texastribune.org/2013/04/24/oil-lobbyists-oversee-threatened-lizard-protection> [<https://perma.cc/C5RF-ZVVY>].

227. *Id.*

228. Dexheimer & Price, *supra* note 30. At least in the vernacular sense, moving authority from one department to another in this way was a pragmatic amendment; the industry wasn’t beholden to old biases such as having subject-matter experts govern in their areas of expertise. In order to achieve their goal of regulatory avoidance, they were willing to do whatever worked.

229. Root, *supra* note 226.

entirely by oil and gas lobbyists, to oversee Dunes Sagebrush Lizard conservation.<sup>230</sup>

The Texas Habitat Conservation Foundation—with three board members who were primarily employed as full time lobbyists for the Texas Oil and Gas Association—launched in February 2012.<sup>231</sup> With the drafting of the Texas Conservation Plan and the new nonprofit just off the ground, FWS determined that the Dunes Sagebrush Lizard was no longer in jeopardy.<sup>232</sup>

The Environmental Defense Fund immediately praised the decision as “proof” that cooperative arrangements “can pay big dividends for wildlife.”<sup>233</sup> It is difficult to understand how an agreement that had been in place for less than six months is proof of anything. But more surprisingly, EDF called the Texas Plan a “pro-active approach embraced here by industry,”<sup>234</sup> ignoring the three-decade delay and political machinations. This is pragmatism at its weakest, advocating something simply because it looks like the type of voluntary partnership and market-oriented approach that EDF champions, but failing to critically review the details or consider the signal that such support sends to the industry.

#### B. The Details of a Vague Plan

The Texas Conservation Plan itself is a 150-page document that lays out a framework for oil and gas development in Lizard habitat.<sup>235</sup> The Plan, of course, because it is entirely voluntary, does not apply to all landowners in Lizard habitat. Landowners may decide whether to enroll and become subject to the Plan’s guidelines.<sup>236</sup> Should they choose to enroll, they negotiate a Certificate of Inclusion with the Texas Habitat Conservation Foundation, which you will recall was created and run entirely by oil and gas industry lobbyists. The Certificate includes all the details and specific requirements for each landowner.<sup>237</sup> This is a critically important point. The Texas Plan lays out the broad outlines of a conservation framework, but the detailed conservation

230. *Id.*

231. *Id.*

232. Withdrawal, *supra* note 7, at 36,875.

233. Press Release, Envtl. Def. Fund, *supra* note 20.

234. *Id.*

235. TEXAS PLAN, *supra* note 3.

236. *Id.* at 1.

237. *Id.*

actions and any specific requirements, if any exist, are contained only in individual Certificates of Inclusion, which, as described below, are confidential even to the U.S. Fish and Wildlife Service.<sup>238</sup>

As a general outline, the Texas Plan has two key components. The first is the action plan, which lays out a structure of avoidance-reclamation-minimization-mitigation.<sup>239</sup> The Plan suggests that developers first avoid development in Lizard habitat, in conjunction with reclamation activities such as habitat fragmentation reduction and removal of non-native invasive species that impact the Lizard's habitat.<sup>240</sup> If a participant chooses not to avoid development in the Lizard's habitat, then the Plan recommends that developers minimize their impacts on the Lizard through a series of suggested conservation techniques.<sup>241</sup> Finally, as what FWS calls "a last resort," if the developer does destroy habitat he must mitigate the loss of habitat<sup>242</sup> through a market-based mitigation-banking program.<sup>243</sup>

The second major component of the Texas Plan is a habitat loss ceiling, which may limit overall destruction of the Dunes Sagebrush Lizard's habitat.<sup>244</sup> Specifically, the Plan limits destruction to 21,257 acres of habitat (roughly ten percent) during the thirty-year life of the Plan.<sup>245</sup>

Although there are a number of more specific critiques of this Plan, which are described in more detail in the litigation briefing challenging the Plan,<sup>246</sup> there are three shortcomings that deserve special attention. The Texas Plan includes almost no mandatory language; instead, it delegates enforceable promises to private contracts, the critical details of Plan implementation are confidential, and there is no incentive to comply with even the vague guidance of the Plan.

238. Withdrawal, *supra* note 7, at 36,885.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. TEXAS PLAN, *supra* note 3, at 73–87.

244. *Id.* at 58.

245. *Id.*

246. *E.g.*, Complaint, *supra* note 21; Reply in Support of Plaintiffs' Motion for Summary Judgment and Opposition to Defendants' and Defendant-Interveners' Cross-Motions for Summary Judgment, *Def. of Wildlife v. Jewell*, 70 F. Supp. 3d 183 (D.D.C. 2014) (No. 13-0919); Initial Opening Brief of Appellants Defenders of Wildlife, Et Al., *Def. of Wildlife v. Jewell*, 815 F. 3d 1 (D.C. Cir. 2014) (No. 14-5284).

Rather than setting clear, mandatory standards for conservation, the Plan is quite clear in its language that it should not limit the operations of enrolled landowners. For instance, the Plan does not address all activities in Lizard habitat. Rather, it addresses only specifically defined “covered activities.”<sup>247</sup> Within these activities, it provides a wide berth. When describing how the Plan will reduce habitat loss, the Plan says, “In general, Covered Activities will be conducted outside and away from DSL [Dunes Sagebrush Lizard] Habitat *when possible*.”<sup>248</sup> With respect to fragmentation, the Plan states: “it is expected that the consolidation and removal of lines *when possible* may reduce habitat fragmentation. Some new pipelines, flowlines, and power lines will be able to be routed around DSL Habitat or use existing rights of way *when possible*.”<sup>249</sup> To address other man-made threats, “the Plan will *encourage* appropriate Conservation Activities . . . to reduce these impacts *when possible*.”<sup>250</sup>

If there are any enforceable standards that landowners must follow, they are not included in the Plan. Rather, the Plan leaves all the details of avoidance, conservation, and mitigation to each specific Certificate of Inclusion—that is, to each individual landowner who volunteers to participate in the Texas Plan.<sup>251</sup>

The only apparent mandate actually included within the Plan itself is the assurance that it will cap total habitat destruction at ten percent. Even that, however, is a bit of an exaggeration. In fact, the Plan promises that oil and gas development will not destroy more than ten percent of “DSL Habitat.”<sup>252</sup> The Plan later defines “DSL Habitat” as areas in which the Lizard has actually been found, as opposed to habitat that is suitable for the Lizard.<sup>253</sup> Thus, the Plan does not limit destruction to ten percent of the Dunes Sagebrush Lizard’s total habitat, only to those habitat areas where scientists have actually seen the Lizard. This is particularly troubling since the Lizard is so small and difficult to find.<sup>254</sup>

247. TEXAS PLAN, *supra* note 3, at 16.

248. *Id.* at 89 (emphasis added).

249. *Id.* (emphasis added).

250. *Id.* (emphasis added).

251. *Id.* at 1.

252. *Id.* at 94.

253. *Id.* app. J at 2.

254. *E.g.*, Withdrawal, *supra* note 7, at 36,872.



There is also an argument that despite the language of the Plan, which says it will limit destruction to ten percent of Lizard habitat, the real intent and only enforceable interpretation is that the Plan will limit destruction only to ten percent of voluntarily enrolled habitat. The problem here is that whoever is responsible for implementing the Plan will monitor only activities on enrolled property and can only determine habitat destruction on those properties. Thus, any habitat destruction outside the purview of the Plan will be disregarded. At first blush this suggests that the Plan will allow destruction of a smaller portion of the Lizard's habitat, which would obviously be better for the Lizard. In fact, however, landowners who enroll in the Plan are free to drop out at their own pleasure because enrollment and continued engagement with the Plan is entirely voluntary.<sup>255</sup> Therefore, if the Plan managers are monitoring only destruction of enrolled habitat, as soon as the sum of habitat destruction on enrolled lands approaches ten percent, the Plan managers could strategically ask particularly destructive landowners to un-enroll from the Plan, thereby creating more space under the ten percent cap.

Regardless of the various interpretations, even if the ten percent cap is flawlessly designed and enforced, the Fish and Wildlife Service has indicated that fragmentation, not simply habitat loss, is a major contributor to the Lizard's decline.<sup>256</sup>

Amplifying the underlying problem that there are no enforceable mandates in the Plan and a constrained and questionable upper limit to habitat destruction, the most significant problem is that all the pertinent conservation details are totally confidential, even to the Fish and Wildlife Service.<sup>257</sup> As a consequence, the Certificates of Inclusion, which contain the actual details of each landowner's conservation promises, the names of the enrolled landowners, whether there are any Lizards present on any enrolled property, and even whether the property contains quality Lizard habitat, are not available to the Fish and Wildlife Service.<sup>258</sup>

255. TEXAS PLAN, *supra* note 3, at 56. The incentive for enrollment is that *if* the Lizard was listed, FWS could not impose any restrictions on enrolled landowners other than those already imposed by the Plan. Because FWS chose not to list the Lizard, the incentive to remain in the Plan is significantly diminished.

256. Proposed Listing, *supra* note 211, at 77,805.

257. TEX. GOV'T CODE ANN. § 403.454 (West 2015).

258. *See* TEXAS PLAN, *supra* note 3, at 32.

One cannot overstate the importance of this confidentiality provision: it keeps the Fish and Wildlife Service completely in the dark about the conservation *requirements* (as opposed to the mere guidelines in the public Plan), the lands that must comply with those requirements, and the presence or absence of the species that those requirements are meant to protect. Without this information, the Texas Plan is not only voluntary but also unenforceable and amounts to nothing more than a vague suggestion that the industry will self-govern.

While the threat of listing the Dunes Sagebrush Lizard as endangered was certainly an incentive to create a plan, landowners have no parallel incentive to carry out whatever vague promises they may have made, because there is no mechanism or practical opportunity for enforcement. And one should not forget that the only authorities with access to the confidential conservation promises and other relevant data are the Texas Comptroller—charged with this responsibility at the behest of the Texas Oil and Gas Association—and, initially, the Texas Habitat Conservation Foundation—created by the Texas Oil and Gas Association and governed by a three-member board comprised entirely of Texas Oil and Gas Association lobbyists.

To see the startling inadequacy of the Texas Plan in action, one need not look very far. After taking the helm of the Texas Habitat Conservation Foundation, the three oil and gas lobbyists promised to step away from their involvement with Plan implementation as soon as they appointed a new board.<sup>259</sup> They inauspiciously took the first step in that process by appointing none other than Warren Chisum, the former State Representative who was responsible for transferring control over endangered species from the Parks and Wildlife Department to the Comptroller. By the time he was appointed chairman, Chisum had also become a lobbyist for the Texas Oil and Gas Association.<sup>260</sup> When asked if it made sense that the oil and gas industry was implementing the Texas Plan, Chisum explained that the industry should be in charge because they were paying.<sup>261</sup>

As it turns out, Chisum and his compatriots performed just as expected. For a number of years, the Texas Habitat Conservation

259. Root, *supra* note 226.

260. *Id.*

261. *Id.*

Foundation was permitting enrolled landowners to destroy Dunes Sagebrush Lizard habitat without performing any mitigation efforts.<sup>262</sup> It probably had little idea of how much mitigation was required because the Foundation was also failing to conduct monitoring to ensure that enrolled landowners were living up to the requirements of their (completely confidential) Certificates of Inclusion.<sup>263</sup>

The environmental group Defenders of Wildlife has also discovered serious shortcomings in the Texas Plan's implementation. Periodically, the Texas Habitat Conservation Foundation reported to the Texas Comptroller and then to the Fish and Wildlife Service on the general activities under the Plan.<sup>264</sup> Defenders of Wildlife reviewed the reporting activity and noticed that the reports explicitly said there were no compliance issues and no reported habitat disturbances.<sup>265</sup> Defenders of Wildlife used Google Earth images to identify clear evidence of disturbances within the Dunes Sagebrush Lizard's habitat.<sup>266</sup> At first the Texas Comptroller denied that there had been any habitat disturbances, but he later recanted and confirmed the unreported violations.<sup>267</sup>

After all this failure, the Texas Comptroller finally decided to fire the Texas Habitat Conservation Foundation in the spring of 2016.<sup>268</sup> This is a move in the right direction and certainly removes direct industry oversight over conservation. However, the Comptroller is still the final authority on Plan implementation, not the Fish and Wildlife Service, and matters of unenforceability and confidentiality remain.

### C. An Overabundance of Pragmatists

The Endangered Species Act didn't always make room for FWS to consider voluntary agreements when considering the likely future state of an at-risk species. Without rehashing all the details,

262. Dexheimer & Price, *supra* note 30.

263. *Id.*

264. YA-WEI LI ET AL., DEFS. OF WILDLIFE, HABITAT DISTURBANCES UNDER THE TEXAS HABITAT CONSERVATION PLAN FOR THE DUNES SAGEBRUSH LIZARD, at 3 (2013).

265. *Id.*

266. *Id.* at 4.

267. Li, *supra* note 30.

268. Dexheimer & Price, *supra* note 30.

which are well described elsewhere,<sup>269</sup> the thrust of the ESA reforms was two-fold. First, the Clinton administration breathed new life into the Habitat Conservation Plan, an old tool for landowner flexibility once a species was listed. Second, the administration created a new tool for pre-listing flexibility—the same tool used in the Texas Conservation Plan—Candidate Conservation Agreements with Assurances. As you might expect, these flexible and industry-responsive reforms were part of the pragmatic reinvention of environmentalism that pragmatists like The Nature Conservancy and the Environmental Defense Fund promoted.<sup>270</sup>

Habitat Conservation Plans (“HCPs”) were initially added to the Endangered Species Act in 1982.<sup>271</sup> The purpose was to add a measure of leeway if landowners planned to carry out an otherwise lawful activity but that activity might result in harm to a listed species or its habitat.<sup>272</sup> Congress determined that FWS should allow such behavior, through an Incidental Take Permit, if “the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking” and “the taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild.”<sup>273</sup> The Fish and Wildlife Service can only issue an Incidental Take Permit if the landowner first provides a conservation plan that specifies a number of factors including the impact of her activity, how she will minimize and mitigate any impact, funding sources to implement minimization and mitigation, and alternative actions that the landowner has considered.<sup>274</sup> Habitat Conservation Plans did not garner significant interest from developers until the 1990s when the Fish and Wildlife Service developed the No Surprises Policy, which assures a developer that whatever efforts she undertakes as part of a

269. *E.g.*, Ruhl, *supra* note 1; J.B. Ruhl, *Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 367 (1998) [hereinafter *Who Needs Congress?*]; Kirsten Uchitel, *PECE and Cooperative Conservation: Innovation or Subversion Under the Endangered Species Act?*, 26 J. LAND RESOURCES & ENVTL. L. 233 (2006).

270. Michael J. Bean et al., *Safe Harbor Agreements*, CONSERVATION BIOLOGY PRAC., Spring 2001, at 8; Press Release, Env'tl. Def. Fund, National Endangered Species “Safe Harbor” Policy Announced (June 17, 1999).

271. 16 U.S.C. § 1539(a)(1)(B) (2012).

272. Ruhl, *supra* note 1, at 922.

273. 16 U.S.C. § 1539(a)(2)(B)(ii), (iv) (2012).

274. *Id.* § 1539(a)(2)(A)(i)–(iii).

Habitat Conservation Plan, FWS will not, even under changed circumstances, impose additional requirements.<sup>275</sup>

Candidate Conservation Agreements with Assurances (“CCAAs”), unlike Habitat Conservation Plans, are designed to incentivize pre-listing conservation that will prevent the need for listing. CCAAs are relatively simple bi-lateral agreements in which a landowner agrees to take specific conservation measures and in return FWS offers special protections.<sup>276</sup> The landowner must undertake conservation that, if done in combination with other landowners undertaking the same measures, would be sufficient to protect the candidate species to prevent listing.<sup>277</sup> In return, the Fish and Wildlife Service guarantees the landowner that it will not impose any new requirement, even if the scientific information on which the plan is based turns out to be faulty.<sup>278</sup> Likewise, FWS assures the landowner that if they do eventually list the species, the landowner will not be subject to liability under the ESA’s prohibitions on harming a species or its habitat as long as the landowner continues to operate under her conservation promises.<sup>279</sup>

The Texas Conservation Plan for the Dunes Sagebrush Lizard is essentially an amalgam of these tools, as well as others.<sup>280</sup> Some tools, like the CCAA, are immediately applicable once FWS finalizes its agreement to the Plan.<sup>281</sup> The HCP embedded in the Texas Plan, as a counterexample, will become active should the Fish and Wildlife Service eventually decide that a listing is warranted for the Dunes Sagebrush Lizard.<sup>282</sup>

It was the heady pragmatic days of the Clinton administration that gave birth to the notion of these flexible, bi-lateral, and landowner-centric provisions. Throughout the 1990s there was a widespread agreement that the Endangered Species Act was due

275. Habitat Conservation Plan Assurances (“No Surprises”) Rule, 63 Fed. Reg. 8859, 8859 (Feb. 23, 1998); Notice of Availability of Final Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 61 Fed. Reg. 63,854, 63,856 (Dec. 2, 1996).

276. *E.g.*, Jack G. Connors, *Conserving Habitat Before It Is Too Late*, 35 PUB. LAND & RES. L. REV. 147, 160–61 (2014).

277. *Id.*

278. *Id.*

279. *Id.*

280. TEXAS PLAN, *supra* note 3, at 3–7.

281. *Id.* at 25–26.

282. *Id.*

for reform.<sup>283</sup> The exact nature of the necessary reform was less unanimous, but there was a prevailing feeling that the Act had become its own worst enemy. “Rather than convincing the American people of the need to preserve biological diversity,” argued Professor Fred Cheever in 1996, “the Act has apparently convinced many that endangered species preservation is just another onerous form of federal regulation.”<sup>284</sup> The solution, therefore, was to encourage more private landowner engagement in the process of protecting at-risk species through “cooperative conservation” and negotiated compromises.<sup>285</sup> All are hallmarks of environmental pragmatism.

J.B. Ruhl, probably the leading expert on the Endangered Species Act and, as described above, an avowed pragmatist of the “radical middle,”<sup>286</sup> has described the Clinton-era ESA reforms as possibly the most pragmatic environmental agenda of the twentieth century.<sup>287</sup> It is, therefore, natural to offer this framework, and the Dunes Sagebrush Lizard, as a model of pragmatism in action.

#### IV. UNPACKING PRAGMATISM

The Endangered Species Act, which seemed so unanimously in need of reform and increased flexibility in the mid-1990s,<sup>288</sup> was not always the strict and uncompromising dictator that it is often made out to be.<sup>289</sup> In fact, the Endangered Species Act as we know it today—and as the pragmatists knew it in the 1990s—was an outgrowth of two earlier laws, the Endangered Species Preservation

283. *E.g.*, *Who Needs Congress?*, *supra* note 269, at 368–69.

284. Federico Cheever, *The Road To Recovery: A New Way of Thinking About the Endangered Species Act*, 23 *ECOLOGY L.Q.* 1, 4–5 (1996).

285. Uchitel, *supra* note 269, at 233.

286. *Manifesto*, *supra* note 2.

287. Ruhl, *supra* note 1, at 890–91.

288. *See, e.g.*, Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of “New Age” Environmental Protection*, 41 *WASHBURN L.J.* 50, 51 (2001) (“Buffeted by the winds of controversy, in the mid-1990s the ESA seemed in danger of snapping.”); Jessica Owley, *Keeping Track of Conservation*, 42 *ECOLOGY L.Q.* 79, 89 (2015) (describing the Clinton administration reforming the ESA in order to “stave off attacks on the ESA by hostile Republicans in the U.S. House of Representatives”); *Who Needs Congress?*, *supra* note 269, at 370 (arguing that Congress should “scrap the ESA entirely and start over by designing a law that protects both ecosystems and economic interests in an effective, balanced manner”).

289. This is the point at which every other article ever written about the Endangered Species Act has described it as a “pit bull.”

Act of 1966<sup>290</sup> and the Endangered Species Conservation Act of 1969.<sup>291</sup> In only a few short years between the enactment of these laws and the 1973 Endangered Species Act, several things had become quite clear to Congress. The “most notable weakness” of the 1966 Act, for instance, “was that it placed no restriction whatever on the taking of any species.”<sup>292</sup> The Endangered Species Act’s predecessors additionally failed because they simply didn’t prohibit killing individuals of endangered species, and the federal government was only prohibited from killing when “practicable and consistent with the primary purposes” of the agency.<sup>293</sup> This latter shortcoming is uncannily similar to the terms of the Texas Agreement, which requests that industry protect the Dunes Sagebrush Lizard, only when it does not disturb their primary purpose, oil and gas development.

Pragmatism, as we have seen, is about rejecting fundamentalism in deference to empiricism, using experience to balance values and promote progress. I take these to be unimpeachable concepts, not just in a philosophical framework, but also for good decisionmaking in any endeavor. We need to ask, then, whether pragmatism carries these good practices forward or merely sits idly on the good impression that the word “pragmatic” seems to have in society.

In this Part, I begin by giving a brief background on traditional statutory environmental law so that we can decide whether it is based on faulty ideology or practical experience. With that background in view, we can dig deeper into a critique of pragmatism, which will ultimately provide the basis for some constructive improvements offered in Part V.

290. Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926.

291. Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275.

292. MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 195 (3d ed. 1997). I cannot help but point out that the Environmental Defense Fund was responsible for supporting this book, which, updated in 1997, clearly expressed concern about the ineffectiveness of too much flexibility in wildlife conservation even while the Environmental Defense Fund was working with the Clinton administration to add significant new leeway to the Endangered Species Act. See Press Release, *Envtl. Def. Fund*, *supra* note 270.

293. BEAN & ROWLAND, *supra* note 292, at 199.

### A. A Brief Profile of Traditional Environmental Law

To tell the story of traditional environmental law, I will use the outline that EDF's Fred Krupp provided in his groundbreaking 1986 op-ed in *The Wall Street Journal*, "New Environmentalism Factors in Economic Needs,"<sup>294</sup> with one major addition. In Krupp's telling there are two waves of environmentalism that existed before his "third wave" of pragmatism. The first wave is the land and wildlife preservation of Teddy Roosevelt.<sup>295</sup> In the early twentieth century, the lessons of John Muir and his Sierra Club were becoming widespread and Roosevelt's government made it a priority to protect land and wildlife from the damage that humans could cause in order to ensure that the same would be available to future generations.<sup>296</sup>

The second wave emerged with Rachel Carson's book, *Silent Spring*.<sup>297</sup> This second environmental enlightenment was a wake-up call to America, a lesson in the connectedness of humans and their environment. Carson alerted the world to the way that pollutants entered water, food, and air, and then entered our human systems.<sup>298</sup> The environment was no longer just something to protect for its own good, and for future generations, but also for human health and wellbeing in the here-and-now. This realization was one part of Krupp's second wave environmentalism. It was one part of the unrest that led to the Clean Water Act and Clean Air Act, among other laws.<sup>299</sup> The Carson wave taught us the risk of pollution, but it didn't tell us what type of laws would solve the problem. That was the business of a political scientist.

While Carson provided the motivation for environmental law, it was Theodore J. Lowi's book, *The End of Liberalism*,<sup>300</sup> which provided the structure. In this self-described polemic,<sup>301</sup> Lowi explains an emergent structure of governance that he called

294. Krupp, *supra* note 183.

295. *Id.*

296. *E.g.*, JEDEDIAH PURDY, AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE 37–38 (2015).

297. RACHEL CARSON, SILENT SPRING (1st ed. 1962); Krupp, *supra* note 183.

298. CARSON, *supra* note 297, at 6.

299. Krupp, *supra* note 183.

300. THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY (1st ed. 1969).

301. *Id.* at ix.



“interest-group liberalism.”<sup>302</sup> “[I]nterest-group liberalism,” Lowi wrote, “has sought to solve the problems of public authority by defining them away.”<sup>303</sup> It seeks to “end the crisis of public authority by avoiding law and by parceling out to private parties the power to make public policy.”<sup>304</sup> Lest you doubt how Lowi felt about interest-group liberalism, he calls it “[a] most maladaptive political formula . . . [that] will inevitably exacerbate rather than end the crisis, even though its short-run effects seem to be those of consensus and stabilization.”<sup>305</sup>

This is Lowi’s critique of interest-group liberalism written nearly a half century ago—just before the crafting of our most prominent environmental laws. And there is no question that Lowi’s ideas helped shape the environmental laws of the 1970s.<sup>306</sup>

“[T]he role that money plays in American politics gives, in effect, louder voices and more votes to those who benefit from the present economy, with all its ecological harms, than to those who seek to change it.”<sup>307</sup> Thus, strong, enforceable, and ratcheting standards, strict deadlines, mandates with limited flexibility, and especially citizen suits allowing outsiders to force government agencies to follow the law, were all tools for breaking down the interest-group liberalism and agency capture that Lowi identified.<sup>308</sup> Each of these strictures, decried by pragmatists, was a recognition that flexibility, bi-lateral negotiations, and collaborative governance were impediments to achieving substantive public interest goals.<sup>309</sup>

In one sense, pragmatism is not new in the last decades, it is simply a yearning to return to the days of interest-group liberalism. As Sousa and Klyza described only a few years ago: “Frustration with excessive adversarialism has pushed policy making down an old and well-beaten path, one that policymakers of the 1970s thought they had closed off with statutory mandates that are now widely viewed as far too inflexible.”<sup>310</sup>

302. *Id.* at 55.

303. *Id.* at 58.

304. *Id.*

305. *Id.*

306. David J. Sousa & Christopher McGrory Klyza, *New Directions in Environmental Policy Making: An Emerging Collaborative Regime or Reinventing Interest Group Liberalism*, 47 NAT. RES. J. 377, 381 (2007).

307. PURDY, *supra* note 296, at 271.

308. Sousa & Klyza, *supra* note 306, at 399.

309. *Id.*

310. *Id.* at 381. Make interest group liberalism great again?

## B. A Less Brief Critique of Pragtivism

Lowi had the chance to specifically consider his ideas applied to pragtivism. In 1999 he confronted the pragtivist approach, characterizing the pragtivists as believing that “we can have our central government and reject it too.”<sup>311</sup> And there can be little question that this is a key pragtivist talking point. In his 1986 op-ed, for instance, Krupp assures those who are weary of environmentalism that market-oriented approaches and coalitions with the regulated community are central, but then he reassures environmentalists that his third wave “will still need skillful advocacy—even in court—against narrow institutional vision or vested interest in the status quo. . . . Strong regulation of pollution will continue to be necessary.”<sup>312</sup> Tercek makes the same promises in his book, describing the three-legged stool that will only stand with business-environmentalist partnerships, but also with governments that are willing “to enact strong and effective policies.”<sup>313</sup>

In his essay on the problems with the third wave of environmentalism, Lowi pegged one of the motivations of pragtivism. Where there is growing unrest or distrust of an idea, some of the idea’s proponents will “try to finesse the coercive nature of public authority in order to validate, or embrace, or make more convincing the key principles of that ideology as it goes into decline.”<sup>314</sup> It may be unfair to assert that environmentalism was, or is, in decline, but after eight years of the hostile Reagan administration, and then again an overtly anti-environmental Congress in the 1990s, one can be forgiven for thinking that environmentalism was indeed in decline and that this political moment was the catalyst for pragtivism’s emergence. Or rather, as we can now see, for environmentalism’s nominally pragmatic turn to an old structure that was already a manifest failure.

This is the first criticism of pragtivism, grounded in both philosophical pragmatism and general good sense: it is important to learn from mistakes and failures and to improve upon those errors, but pragtivism is rehashing a dusty model that we have already intentionally discarded. As Mary Jane Angelo has stated,

311. Theodore J. Lowi, *Frontyard Propaganda*, BOS. REV., October/November 1999, at 15.

312. Krupp, *supra* note 183.

313. TERCEK & ADAMS, *supra* note 42, at xvii.

314. Lowi, *supra* note 311.

“[t]he pragmatist will look to what has worked best in the experience of environmental law to date, and what has worked best is, at least arguably, technology-based approaches”—that is, “standards.”<sup>315</sup>

Unfortunately, this is not just poor hindsight, because pragtivists have not just failed to learn from lessons of the more distant past. The recent past is also proving a challenge. The response to the disintegration of the U.S. Climate Action Partnership (“USCAP”) is a prime example.<sup>316</sup> USCAP was a group of corporations and environmental organizations that came together to advocate for federal climate change legislation.<sup>317</sup> That legislation died in Congress in 2010.<sup>318</sup> After Harvard political science professor Theda Skocpol released a damning report, arguing that USCAP failed to capture the public spirit,<sup>319</sup> the Environmental Defense Fund’s Eric Pooley authored an article challenging Skocpol’s conclusions.<sup>320</sup>

Pooley makes several good points, but he fails to see the bigger picture. The failure of the climate change legislation, he argues, was not due to the existence of USCAP and its bi-lateral negotiations. Instead, it was due to the President’s failure to prioritize, the financial meltdown, and the rise of the Tea Party.<sup>321</sup> Pooley is obviously right; each had to play a role. But with respect to the President’s prioritization and the rise of the Tea Party, USCAP is relevant. The decision to focus on high-level negotiations with corporate leadership rather than dedicating more resources to generating on-the-ground excitement for climate change action is entirely tied up in the politics of presidential prioritization, while the emergence and power of the Tea Party is a perfect example of the benefits of value-oriented campaigning over backroom negotiating. This is but one example, but such a high profile one warrants more self-reflection.

315. Angelo, *supra* note 1, at 129.

316. Note here that I do not want to point a finger at USCAP in itself as a problem, merely the way its pragtivist members responded in the aftermath.

317. *E.g.*, Eric Pooley, *Why the Climate Bill Failed: It’s Not that Simple*, GRIST (Jan. 18, 2013), <http://grist.org/climate-energy/why-the-climate-bill-failed-its-not-that-simple> [<https://perma.cc/7N6F-LPUC>].

318. *E.g.*, *id.*

319. SKOCPOL, *supra* note 210.

320. Pooley, *supra* note 317.

321. *Id.*

I am in no position to say where the real failure lies, but when Pooley digs his heels in on pragtivism and says that bi-lateral collaboration is “the single most effective element of the climate campaign,”<sup>322</sup> it makes one wonder whether he is learning from experience. Pooley further argues that “EDF’s [USCAP] strategy in 2009 wasn’t driven by disdain for public involvement or a love of insider deals; it was based on a hardheaded view of what presented the best opportunity at the time.”<sup>323</sup> So at the time, the pragtivist strategy seemed best. Fair enough. And as pragmatists, we should now presume that EDF learned from experience. But they did not. Instead, Krupp returned to the pages of *The Wall Street Journal* to assure readers that conservatives, corporations, and environmentalists are still on the same page and only their “consensus” will deliver solutions.<sup>324</sup> Again, it is not that this is facially wrong, only that it doesn’t demonstrate self-reflective pragmatism; it demonstrates dogmatic attachment to pre-determined tools.

USCAP does highlight another shortcoming of pragtivism, the one that Skocpol identified: a reduced respect for democratic engagement. Simply put, when corporate-environmentalist or corporate-government negotiations make environmental policy rather than traditional legislative or administrative processes, it cuts out the opportunity for public input.<sup>325</sup> “It [gives] ordinary citizens no way to resist environmental destruction.”<sup>326</sup> In the development of Habitat Conservation Plans and Candidate Conservation Agreements with Assurances, to use Endangered Species Act examples, it is the private party that decide who gets to join the negotiation.<sup>327</sup> It is the Comptroller and the Texas Oil and Gas Association, not the Fish and Wildlife Service, not even the Environmental Defense Fund, who invite in the public.

It is arguable, perhaps even taken for granted, that public participation is valuable in itself, but it is also valuable because it

322. *Id.*

323. *Id.*

324. Krupp, *supra* note 184.

325. John W. Maxwell & Thomas P. Lyon, *An Institutional Analysis of Environmental Voluntary Agreements in the United States*, in ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 340–41 (Eric W. Orts & Kurt Deketelaere eds., 2001).

326. PURDY, *supra* note 296, at 258.

327. Alejandro E. Camacho, *Can Regulation Evolve? Lessons from a Study in Maladaptive Management*, 55 UCLA L. REV. 293, 309 (2007).

opens a dialogue that increases the legitimacy of any outcome. It aids the satisfaction that both Farber and Dewey demand in a good process. Dewey argued that we need to make room for all values in order to reduce “political strife,” but bi- or even multi-lateral partnership is not the democracy he had in mind.<sup>328</sup> Broad public engagement is superior; it avoids strife and builds legitimacy because it creates opportunities for public input as well as public persuasion, the latter being as much a part of good law and policy as the substantive output.<sup>329</sup> And as much as democracy creates space for persuasion, pragtivism cuts it out. Nick Salafsky argues that the pragmatic approach to conservation is actually the worst among many choices because it uses vague notions of win-win solutions to woo participants, but when platitudes dampen the demand for real debate, they strangle public dialogue.<sup>330</sup> When we have debates rather than false promises of win-win solutions, however, we open up the policy alternatives to robust criticism. As Thomas McShane cautions, environmental problems are “exacerbated by the rhetorical elegance of the win-win paradigm.”<sup>331</sup>

Although distinct from the democratic deficit in pragtivism, the rhetorical use of straw men is another way that pragtivism subtly pushes aside a more robust public dialogue. Because pragtivism defines itself, in part, by the ostensible ideologues with whom it is parting ways, it is prone to mischaracterizing alternative strategies. These are the environmentalists Krupp described in 1986 who “are restlessly negative, opposing industry by reflex, standing in the way of growth and driving up costs.”<sup>332</sup> In fairness, Krupp didn’t exactly describe environmentalists this way himself, but said “some believe” in this construction.<sup>333</sup> Ruhl is more explicit. In describing the fatal dogma of traditional environmentalists, he points to the Environmental Protection Information Center (“EPIC”), which was fighting to protect the old-growth Headwaters Forest.<sup>334</sup> He describes EPIC’s “narrow-minded”<sup>335</sup> positivist extremism, writing

328. HUGH P. McDONALD, JOHN DEWEY AND ENVIRONMENTAL PHILOSOPHY 171 (2004).

329. Hirokawa, *supra* note 1, at 255.

330. Salafsky, *supra* note 2, at 974.

331. McShane et al., *supra* note 2, at 969.

332. Krupp, *supra* note 183.

333. *Id.*

334. *New (Pragmatist) Middle*, *supra* note 151, at 534.

335. *Id.*

that they were “advocating for the immediate, unequivocal preservation of old growth redwoods.”<sup>336</sup>

The characterization is too facile, merely a straw man, and ignores the strategic benefits of staking out a strong and uncompromising position. The environmentalists of EPIC and the timber barons who were logging the old-growth forest certainly had different values and perspectives, but it is unhelpful to paint them each in only one cartoonish dimension. It is not only unfair, but in a few respects also factually inaccurate. For example, EPIC was a small regional group and it is not fair for Ruhl to use them as a broader caricature of environmentalists. Most of the mainstream environmental movement opposed the old-growth logging, but they were not involved in the Headwaters campaign.<sup>337</sup> Moreover, although EPIC did advocate for a complete halt to logging in the Headwaters, they were flexible in their tactics. They were willing, for example, to promote a ballot initiative that included a sustained yield system, not an unequivocal prohibition on all old-growth logging.<sup>338</sup> EPIC also played a part in what might have been the first ever debt-for-nature swap to protect the forest.<sup>339</sup> This is one of the instruments that pragmatists proudly embrace today as a their own novel strategy.<sup>340</sup> And ultimately, perhaps most importantly, EPIC’s tactics were effective, leading to full protection of the old-growth Headwaters Grove.<sup>341</sup>

Had EPIC announced that they were willing to compromise, or even detailed the compromise that they would have accepted, their negotiating position, their ability to achieve full protection, might have failed. With regard to the Dunes Sagebrush Lizard, now that the oil and gas industry and the Fish and Wildlife Service know that a major environmental group is willing to accept a plan like the one in Texas, they have little incentive to offer anything more protective.

336. *Id.*

337. DOUGLAS BEVINGTON, *THE REBIRTH OF ENVIRONMENTALISM: GRASSROOTS ACTIVISM FROM THE SPOTTED OWL TO THE POLAR BEAR* 41 (2009).

338. *Id.* at 49.

339. *Id.* at 56.

340. *E.g.*, *Swapping Debt to Save Oceans*, NATURE CONSERVANCY, <https://www.nature.org/ourinitiatives/regions/africa/wherewework/seychelles.xml> [<https://perma.cc/8PFZ-S6FR>] (last visited May 16, 2017).

341. BEVINGTON, *supra* note 337, at 83.

In developing his cartoon, Ruhl begins at a single point in time, without looking at the trajectory of experience and environmental impact, or considering how that trajectory necessarily impacts bargaining positions. Had EPIC been as dogmatic and unequivocal as Ruhl implies, one might not blame them—might not even call their actions unequivocal—when considering that the redwoods of Headwaters once covered two million acres, but ninety-five percent of that area had been logged by the time of the Headwaters fight.<sup>342</sup> EPIC had lost ninety-five percent of their fight before it even began. To criticize them for being unequivocal is like criticizing a triple amputee for his unwillingness to lose his last limb. Ruhl's story would certainly be less effective if he explained that EPIC was willing to compromise despite the fact that they were fighting to protect only a portion of the last five percent of acreage on which the magnificent redwoods lived. While EPIC may have been “dogmatic” in their environmental goals, they did not display inflexibility in their tactics, as Ruhl suggests.

On the whole, the use of straw men such as this gives the false impression that “traditional” environmentalism is unwilling to compromise, alienating, and ultimately undermining environmental protection, despite evidence that claims of dogmatism are unwarranted and that traditional environmentalists have had remarkable successes.<sup>343</sup>

It is easier to criticize others through straw men than turn the microscope on oneself, and the lack of definition around the use of the word “pragmatic” in environmental action is a perfect example of that. I have chosen the word *pragtivism* because I want to define something that is not philosophical pragmatism, is not environmental or legal pragmatism, but seems to be more consistent than mere vernacular pragmatism. The very fact that “pragmatism” or “pragmatic” appears so frequently on the material of organizations that embody similar principles demonstrates that there is some uniformity in use.<sup>344</sup> Perhaps I have not explained the use of “pragmatic” exactly as the *pragtivists* would explain it, but that is evidence of an underlying problem. There has been too little effort on the part of *pragtivists* to define “pragmatism” for themselves.

342. *Id.* at 42.

343. *Id.* at 228–29.

344. *See supra* note 180.

One glaring omission in pragtivism, which we cannot escape without better definition, is where the value of environmentalism comes from if it is really philosophical pragmatism from which pragtivism descends. Among environmental philosophers, the term pragmatism is used almost exclusively to understand what ethics are appropriate for motivating environmental protection.<sup>345</sup> Pragmatism in this sense means we need not rely solely on intrinsic values, or solely on anthropocentrism, to justify environmental protection.<sup>346</sup> Both can work. In pragtivism, the term “pragmatic” is wielded to defend the use of multiple strategies, taking underlying ethics as a given. This, I think, is a risk. Advocacy organizations should pair their policy development and analysis with efforts to establish a stronger public interest in environmental protection rather than trying, essentially, to fool people into supporting environmental protection under the guise of economic growth as they do when they urge that a solution such as the Texas Plan is a win-win for business and the environment.

A good pragmatist would surely tell you that there is no reason to insist that we protect the environment only for the sake of protecting the environment, and I agree with that in principle. This is not a criticism of incorporating multiple values. It is a criticism of a substitution of values and false claims of neutrality. Pragmatic philosopher Ben Minteer, writing on this point, essentially argued that it is not pragmatic to knock down one dogma only to embrace a different one.<sup>347</sup> But strategically, not pragmatically, it is a particular risk for three reasons.

First, significant overt focus on paths of least resistance, on business risk and economic matters, distracts from communicating and influencing *lasting* public values:<sup>348</sup> “the more we express conservation’s questions as matters of risk, the less able we seem to be to grasp and communicate them as meaningful and momentous choices in life.”<sup>349</sup> According to Cary Coglianese, “[t]he pragmatism underlying the environmental mainstream” which is

345. *E.g.*, ENVIRONMENTAL PRAGMATISM, *supra* note 1.

346. Weston, *supra* note 1, at 322.

347. *See* MINTEER, *supra* note 39, at 2 (describing the shortcomings of “dualistic narrative[s]” that only offer competing dogmas).

348. I had thought of titling this article “Advocating From Nowhere,” but decided on something different out of respect for Doug Kysar. *See* KYSAR, *supra* note 175.

349. Jamison E. Colburn, *Qualitative, Quantitative, and Integrative Conservation*, 32 WASH. U. J.L. & POL’Y 237, 238–39 (2010).



intent on moving from engendering values to spreading tactics, “has contributed to a sense of alienation and division that has grown within some quarters of environmentalism.”<sup>350</sup> The pragmatic reform, “if it is to have an enduring impact, needs to be accompanied by a genuine change in public values.”<sup>351</sup> As it stands, pragtivism is not focused on values; it is focused on the path of least resistance, and if economic factors or business motivations change and that path becomes more resistant, myopic pragtivism undercuts the robust foundation of values.

Environmentalists may agree to work within a paradigm of economic growth and corporate flexibility, but we ask very little of our corporate partners in return. We put all our chips on their motives, convincing them that conservation is good for the bottom line. But we do not demand, in turn, that economic growth or flexibility sometimes give ground in deference to human curiosity, aesthetics, any intrinsic rights of non-humans, or whatever other values might animate environmentalism.<sup>352</sup> In this respect, pragtivism is adhering to a “stubborn dogmatism”<sup>353</sup> of economic-oriented policy, and substituting that dogma for any lingering non-economic motives, while only paying lip service to the latter.<sup>354</sup> We have hardly tried to persuade those who hold only economic values that they should be loosening their positivism about unfettered economic liberty.

“Environmentalists,” writes Keith Hirokawa, “have initially succeeded in convincing their adversaries to see the other side of the land—the side not defined by economic value. The challenge is to continue the progress.”<sup>355</sup> This is a valid challenge, but one that pragtivists seem not to have taken.

The second risk is that it may be primarily values, not tactics, that are essential to reaching policy goals, and therefore, if we are not

350. Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 108 (2001).

351. *Id.* at 109.

352. See, for example, Tercek’s statement that it’s the environmentalists who have to learn, not the businessmen. Hanscom, *supra* note 188.

353. MINTTEER, *supra* note 39, at 255.

354. *E.g.*, TERCEK & ADAMS, *supra* note 42, at xiv (“Environmentalists tend to love nature for its own sake, love being outdoors, and believe their children and generations beyond should inherit a world as vibrant and as diverse as the one they experienced. These are all enormously important reasons to protect nature. A business perspective, however, reveals other, perhaps less lofty but no less important reasons to do so.”).

355. Hirokawa, *supra* note 1, at 281.

explicit about values, we will fail to reach our goals regardless of tactics. To wax poetic for a moment: We can have the best map in the world, but it does us little good if we don't know our destination. In a recent paper, Michael Livermore and Richard Revesz make this point by explaining that in the 1970s and 1980s, industry groups were strong proponents of using economic tools for policy development, while environmental groups opposed them.<sup>356</sup> Today, tactics have flipped completely. Both groups want the same thing—more environmental protection or less regulation—but they rely on the opposite tactics to get there.<sup>357</sup> If pragmatists are too “pragmatic,” eschewing old values in favor of new tools, then there is little to stop them from becoming attached to the tools regardless of the benefit they provide. If we lose track of the “dogmatic,” “ideological,” “positivistic” “extremism” of preserving the environment, if we have no grounding, then how do we know which direction will lead us home?

Similarly, the third risk of undefined motivations is the way it can slyly facilitate a one-directional policy trajectory. Without being clear about the baseline motivations, it is too easy to move from a strict Endangered Species Act in 1973 to a circumscribed Incidental Take allowance in 1982, to a more flexible “no surprises” policy in the 1990s, and to the Dunes Sagebrush Lizard today (but sadly, probably not tomorrow). The Lizard story is a striking example of the way adherence to a tactical dogma but haze around the underlying value motivation could allow EDF to support an agreement with as many flaws as the Texas Plan for the Dunes Sagebrush Lizard.

But this isn't at all limited to the Endangered Species Act. In 1986 Fred Krupp assured the public that his new environmentalism was “in no sense a move toward compromise.”<sup>358</sup> That isn't how it has played out in practice. Speaking of efforts to address climate change at the 1992 Rio Earth Summit, Krupp lamented the fact that “delegates decided that each nation would make its own plan” to meet greenhouse gas reduction targets.<sup>359</sup> The Environmental Defense Fund, Krupp recounts, “knew this would be futile.”<sup>360</sup> By

356. Michael A. Livermore & Richard L. Revesz, *Interest Groups and Environmental Policy: Inconsistent Positions and Missed Opportunities*, 45 ENVTL. L. 1, 2–3 (2015).

357. *Id.* at 3.

358. Krupp, *supra* note 183.

359. *Making of a Market-Minded Environmentalist*, *supra* note 192.

360. *Id.*

2016, however, Krupp called the Paris climate change agreement, which relies on each country developing its own plan for greenhouse gas reductions,<sup>361</sup> a “critical breakthrough.”<sup>362</sup> In 2008 Krupp was strongly critical of a carbon tax as an alternative to cap and trade, arguing that a tax has never “solved an air pollution problem.”<sup>363</sup> In 2016 Krupp believes that a carbon tax is one way to harness “the collective wisdom of the market.”<sup>364</sup>

Maybe it is just that new information is making these more permissive policies seem more substantively effective. It may also be that when you describe a mission as “ways that work,” but don’t ever define what “work” really means, then it is too easy to compromise by substituting “work to get anything done” for “work to protect the environment.”

And as it turns out, at least some aspects of pragtivism are not successful at protecting the environment. The Dunes Sagebrush Lizard is one such example, but it is just a case study. As this Section concludes, a brief return to Lowi’s work is instructive. In his 1999 essay criticizing over-reliance on flexibility in environmental policy, he noted that too many supporters of pragtivism “use case studies to give the impression of empirical support for their process.”<sup>365</sup> Though possibly overbroad, the criticism is reasonable. Mark Tercek’s book is a compelling read and encouragingly optimistic, but it is a series of stories about The Nature Conservancy’s successes, not an empirical analysis.<sup>366</sup> Fred Krupp’s 1986 declaration of a new environmentalism told several success stories as well.<sup>367</sup> These are useful stories, but they distract from the empirical evidence, which is decidedly more negative than pragtivists would have us believe.

361. Paris Agreement to U.N. Framework Convention on Climate Change, *opened for signature* Apr. 22, 2016, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (entered into force Nov. 4, 2016)

362. Leonardo DiCaprio & Fred Krupp, *Five Ways to Deliver on the Paris Climate Talks*, THE GUARDIAN (Apr. 22, 2016), <https://www.theguardian.com/commentisfree/2016/apr/22/leonardo-dicaprio-climate-talks-paris-agreement> [<https://perma.cc/T574-8P8E>].

363. *Making of a Market-Minded Environmentalist*, *supra* note 192.

364. Francesca McCaffrey, *Balancing Realism and Hope for the Future*, MIT NEWS (Apr. 20, 2016), <http://news.mit.edu/2016/balancing-realism-and-hope-future-0420> [<https://perma.cc/46PJ-CHTM>].

365. Lowi, *supra* note 311.

366. TERCEK & ADAMS, *supra* note 42.

367. Krupp, *supra* note 183.

Speaking to the effectiveness of the Endangered Species Act's HCP flexibility, Alejandro Camacho reported on the empirical evidence of their success, which he found "reveals that the HCP program predominantly serves to allow bilateral, ill-informed HCPs to circumvent the ESA's" prohibitions.<sup>368</sup> Camacho summarizes a series of empirical studies and explains that the data show shortcomings in HCP development and implementation.<sup>369</sup> In development, only forty percent of plans have any public participation and when there is any negotiation it is only between a regulated party and FWS.<sup>370</sup> Where private developers are involved, the level of public participation drops even lower.<sup>371</sup> In HCP implementation, stakeholders are routinely shut out from monitoring, which is left entirely to the regulated party.<sup>372</sup> But studies show that more public input produces better HCPs in part because participation leads to better integration of scientific data.<sup>373</sup> The Dunes Sagebrush Lizard plan, of course, reinforces these studies, having been negotiated by the oil and gas industry and the Texas Comptroller as an unenforceable way to avoid the ESA's genuine requirements.

In the wider world of voluntary environmental agreements, Borck and Coglianese developed a conceptual model of the effectiveness of volunteerism and reviewed existing empirical work, finding there is no evidence volunteerism works better than regulation, and the opposite is probably true.<sup>374</sup> Their model proposes that effectiveness is a factor of the number of participants multiplied by the average environmental benefit per participant, plus any spillover effect on non-participants.<sup>375</sup> There is, they find, research in all three parameters,<sup>376</sup> but no evidence of how the three work together.<sup>377</sup> This lack of integrative evidence may lead designers of voluntary programs to err on the side of low average effects in

368. Camacho, *supra* note 327, at 308–09.

369. *Id.* at 313–17.

370. *Id.* at 313–14.

371. *Id.* at 315.

372. *Id.* at 316–17.

373. *Id.* at 319–20.

374. Jonathan C. Borck & Cary Coglianese, *Voluntary Environmental Programs: Assessing Their Effectiveness*, 34 AN. REV. ENVTL. RES. 305, 320–21 (2009).

375. *Id.* at 310.

376. *Id.* at 310.

377. *Id.* at 318–19.

order to increase total participation,<sup>378</sup> and that can have a negative environmental impact if done in lieu of enforceable regulation.<sup>379</sup>

In more recent work, Coglianese and Nash expand on the downsides of voluntary environmental programs, explaining that while they lower the costs of compliance, they also lower environmental protection.<sup>380</sup> Any environmental protection “that can be attributed solely to voluntary programs tend[s] to be small—nearly indistinguishable in most cases from what might well have happened anyway, in the absence of these programs.”<sup>381</sup> And importantly, these small protections, where they do happen, happen in only a small universe. The drivers of volunteerism—regulatory avoidance, customer appeal, and managerial values—“have proven insufficient to persuade any large fraction of polluting firms to join voluntary programs let alone invest in major, costly environmental improvements.”<sup>382</sup> The research that Coglianese and Nash review further demonstrates that pragtivist clamor for more collaboration and less regulation is self-defeating insofar as the reduced threat of mandatory regulation undermines what little effectiveness voluntary programs might otherwise have.<sup>383</sup>

In short, for both conservation and pollution, the record of win-win “approaches is decidedly mixed,”<sup>384</sup> and this is no short-term assessment. In international conservation, more than twenty years’ experience indicates that “initiatives that produce win-win outcomes appear to be the exception as opposed to the rule.”<sup>385</sup>

It is tempting to say, based on the evidence, that if pragtivists take their claim of pragmatism seriously, it is time to accept the evidence that their strategy doesn’t work. But that may be too simplistic. Tweaks, not wholesale rejection, are the way to start.

378. *Id.* at 320.

379. *Id.* at 317–18.

380. Cary Coglianese & Jennifer Nash, *Motivating Without Mandates? The Role of Voluntary Programs in Environmental Governance*, in *DECISION MAKING IN ENVIRONMENTAL LAW* 237 (Lee Paddock et al. eds., 2016).

381. *Id.* at 246.

382. *Id.* at 238–39.

383. *Id.* at 239–40.

384. McShane et al., *supra* note 1, at 966.

385. *Id.* at 967.

## V. A FRAMEWORK FOR MORE PRAGMATIC PRAGTIVISM

Pragtivism has promised us political and substantive success. It takes as its premise that it can get things done, that it works. But so far, as the previous Part argued, and the Dunes Sagebrush Lizard particularly highlights, pragtivism has not been entirely successful on the political front or in its environmental protection goals. I hope that there are ways to improve this track record, and in this Part I offer a framework of nine considerations, a check-list that might help guide pragtivists to more consistent success.

The purpose of this framework is two-fold. First, as mentioned, I hope the list will make the pragmatic strand of environmentalism more effective. Second, I hope that this checklist will add definition to the efforts of those who call themselves pragtivists. The title of pragmatism is a claim to blankness, to no driving philosophy, ideology, or dogma. It is, however, unrealistic to imagine that any individual or organization acts without some heuristic to guide decisionmaking. Pragtivists merely hide their biases rather than expressing them and opening them to challenge or refinement. Having just offered an extensive challenge, I now also propose a refinement.

### A. Transparency

Transparency is a simple demand for “[o]penness; clarity; [and] lack of guile and of any attempt to hide damaging information.”<sup>386</sup> With respect to policy advocacy, transparency is a two-part demand. First, if an organization prides itself on making surprising decisions that unsettle expectations, there must be transparency in the organizations’ internal decisionmaking. The second demand is that the policy or outcome on which the organization is deliberating must have a sufficient degree of transparency as well. This is a subjective determination, of course, but that does not forgive a policy that completely lacks transparency. If there is a good argument for avoiding transparency in a policy, the supportive organization should publicly explain why that lack of transparency is essential to positive environmental outcomes.

Support for the Texas Conservation Plan for the Dunes Sagebrush Lizard illustrates a lack of transparency in both pragtivist

386. *Transparency*, BLACK’S LAW DICTIONARY (10th ed. 2014).

decisionmaking and in the policy outcome. The Environmental Defense Fund's support of the Plan says nothing—literally nothing—about the specific provisions of the Texas Plan.<sup>387</sup> Why, despite the obvious political and substantive shortcomings, would EDF support this Plan? There is no transparency in decisionmaking, so we simply don't know.

The outcome likewise lacks transparency. Texas law makes the details of each landowner's specific obligations, if any exist, completely confidential. There is no way to know what private parties have promised to do in return for assurances that they will not be subject to future regulation. This lack of openness, lack of clarity, is a fatal flaw.

### B. Accountability

For any environmental policy to be effective, there must be some degree of recourse if the regulated parties do not fulfill their obligations. The subject of a policy must be “[r]esponsible; answerable.”<sup>388</sup> There must be sufficiently precise standards and some form of consequence for partners who do not meet these standards. Citizen suits are one of the most well-known and effective forms of holding both regulatory subjects and government agencies to account. As a general rule of accountability, environmentalists should always encourage citizen suit provisions and precise standards that, when violated, can give rise to suits. But lawsuits are a blunt object and may not be appropriate for all circumstances. In the absence of citizen suits, any policy should have some mechanism to make sure that parties remain faithful to the terms of the policy.

The Texas Plan lacks sufficient accountability. Putting aside the fact that neither the Fish and Wildlife Service nor the public are privy to any requirements, the Texas Plan is limited in its application; only those parties that voluntarily enroll are subject to any requirements.<sup>389</sup> Thus, by not listing the Dunes Sagebrush Lizard under the Endangered Species Act, all non-participating landowners are not accountable to anybody for any acts related to the Lizard. For those who are enrolled, the remedy under the

387. Press Release, Env'tl. Def. Fund, *supra* note 20.

388. *Accountable*, BLACK'S LAW DICTIONARY (10th ed. 2014).

389. TEXAS PLAN, *supra* note 3, at 1.

Texas Plan is expulsion from the Plan.<sup>390</sup> Once expelled, the landowner is subject to even fewer restrictions. The downside of expulsion is that *if* FWS ever lists the Lizard, a landowner who does not participate in the Texas Plan may be subject to new restrictions.<sup>391</sup> The risk here is low because the Comptroller, not FWS, decides whether or not to expel a Plan participant,<sup>392</sup> and because the expulsion of a single landowner doesn't undo the Plan. As long as the Plan meets FWS's relatively low standards for effectiveness, the agency is unlikely to list.

### C. Monitoring

Like accountability, monitoring has two components. The first component is data availability. There should be provisions for data collection in any policy, and that data should be available to both the government and the public or at least an independent third party. The second component of monitoring is adaptability. Any environmental program should include a defined process for revisions, including increasing stringency, when data suggests that such revisions are necessary. Nobody who uses the word "pragmatic," even in its loosest sense, can ignore the need for monitoring success and responding to failures.

Here the Texas Plan fares slightly better than it does compared to other elements. The Plan has provisions for compliance monitoring, effectiveness monitoring, and adaptive management.<sup>393</sup> The compliance monitoring provisions are hollow because they merely describe what general items may be included in a compliance-monitoring plan, but they leave details to the confidential individual Certificates of Inclusion.<sup>394</sup> The effectiveness monitoring structure does identify specific techniques for data gathering and adopts standards and protocols.<sup>395</sup> The primary shortcoming is that effectiveness monitoring is aimed only at Lizard presence or likelihood of absence, rather than habitat destruction, fragmentation, or other baselines that are more

390. *Id.* at 53–54.

391. *Id.* at 56.

392. The Plan does allow FWS to suspend or revoke participation for individual landowners, but because FWS does not have access to the applicable requirements for each landowner, making such a determination would be impossible. *Id.*

393. *Id.* at 29–30, 33–36.

394. *Id.* at 30–31.

395. *Id.*



indicative of long-term survival.<sup>396</sup> Finally, the Plan has adaptive management provisions, but those provisions include a major loophole, which is that the parties agree to adapt their efforts only when “agreed to by both parties,” meaning there is no adaptation if the industry doesn’t prefer it.<sup>397</sup> And for all these provisions, the Plan does not include third party or public monitoring. It allows industry self-monitoring that is only presented to the Fish and Wildlife Service as an aggregated summary.<sup>398</sup>

#### D. Outcome Aggregation

Good policy is good not only in isolation, but in the aggregate. Mission-oriented policy analysis will thus benefit from the practical exercise of asking whether a policy that might seem sufficient on its own would be sufficient if replicated *ad infinitum*. Would the environmental outcomes of a single policy be sustainable if a similar policy were repeated across the board?

The Texas Plan, if anything, promises that it will disturb a maximum of ten percent of habitat in which the Lizard is actually located. Can non-human species survive if humans destroy ten percent of their occupied habitat? How do we account for the fact that this ten percent destruction allowance comes on top of unfettered habitat destruction that took place for decades before Lizard conservation was even on the radar? This is a scientific question, of course, and too difficult to answer. We can instead tackle the policy question. Can we expect to protect the environment if we *only* engage with voluntary, standard-free, unenforceable environmental programs? The evidence suggests that we cannot.<sup>399</sup>

This may seem like exactly the sort of un-pragmatic argument that a pragmatist would disdain. “We cannot,” they would challenge, “expect a perfect outcome every time. We must be willing to get the best outcome in some cases, or even a compromise. We hurt the environment by holding out only for ideal solutions.” But I am not urging that we wait for perfect solutions. I don’t even urge waiting for the very best solution. All I suggest is that we only

396. *Id.*

397. *Id.* at 33–36.

398. *Defs. of Wildlife v. Jewell*, 815 F.3d 1, 27 (D.C. Cir. 2016).

399. Borck & Coglianese, *supra* note 374, at 318–19.

accept solutions that would not, in aggregate, be a net negative for the environment we are trying to protect.

#### E. Precaution

Effective policy must be sufficiently precautionary. This is not a standard recitation of the precautionary principle. It is not a blanket resistance to new practices because of potential negative outcomes. Precaution is a reminder to pragmatists to ask whether their proposal relies on a speculative future contingency such as economic changes or technological innovations and, if it does, what costs would we encounter if the contingency does not come to pass. When the costs of a policy are born by a politically and economically isolated interest and the costs are irreversible, the need for more precaution is paramount.<sup>400</sup> Colin Diver cautioned decades ago that “when small errors in policy can cause irreversible or even catastrophic harm,” such as the case with endangered species, it is proper to rely on a less pragmatic, and more precautionary approach.<sup>401</sup> So the precaution here is not so much about the outcome of policy as about the value orientation of the policy itself, and how much the policy seeks to achieve.

When given the choice between listing a species under the Endangered Species Act or subjecting it to a speculative voluntary agreement that is contingent on economic factors, the irreversibility of extinction clearly weighs in favor of the enforceable public law and not unenforceable industry promises.

#### F. Confidence

Confidence in the good faith of a partner in a bi-lateral environmental program is essential. Has the partner demonstrated a commitment to environmental protection in the past? Has the partner entered into negotiations because it shows genuine interest in improving its environmental performance or at least in proactively improving its bottom line, or has it entered in order to avoid a more environmentally protective regime? These questions are about the motivation of the partner, but it is not inherently important that the partner’s motivation is unimpeachable. These inquiries are important because they are proxies for how well a

400. Diver, *supra* note 1, at 431.

401. *Id.*

resulting policy is likely to work. If the partner has the right motivations it will increase the chances of honest and successful implementation.

But there must be an opportunity for actors with bad reputations to redeem themselves. Partnership-based environmentalism cannot be limited only to those already working toward protection. A sliding scale can resolve this apparent limitation. In cases with more trustworthy partners, there is room for more flexibility in implementation. Where partners have questionable motivations and track records, more stringent programs are necessary.

Given the decades-old resistance of Texas and the oil and gas industry to conserve the Dunes Sagebrush Lizard, as well as the political manipulation that the industry orchestrated in the run-up to the Texas Plan, a stricter program with more certainty of success was required. Instead, the Texas Plan is on the most flexible and speculative end of the implementation spectrum.

#### G. Participation

Environmentalism exists because there is public interest at stake in protecting the environment, whether it is economic, aesthetic, or otherwise. When the public interest is central to a policy, public participation is essential. Public participation is necessary in both the policy development stage and the implementation stage. The public should have an opportunity to weigh in on not only project development but also, and more importantly, project implementation.

The development of the Texas Plan did have an opportunity for public input because FWS incorporated the Plan into the public comment period for its proposed rule to list the Dunes Sagebrush Lizard.<sup>402</sup> In the implementation phase there is no public participation whatsoever. From the confidentiality of the conservation provisions to the private nature of the implementation, those with interest in the Lizard's survival are excluded from the process.

#### H. Strategy

Each environmental policy does not stand on its own; it is part of a larger strategic ecosystem, and an advocate must, therefore,

402. Withdrawal, *supra* note 7, at 36,875.

consider the strategic impact of any individual policy position. Advocates should particularly ask how a policy impacts bargaining position in future interactions. Do not approach a policy debate by starting where you hope to end. For example, if a party to a negotiation is willing to accept \$10, she is advised to start by asking for \$50, not by telling her counterparty that she will ultimately accept as little as \$10. The same strategy applies to policy debates.

If the Environmental Defense Fund is willing to accept Lizard conservation that requires, at best, a cap of habitat destruction at ten percent, then it is strategically unwise to announce that to a counterparty. In the case of the Dunes Sagebrush Lizard, the Environmental Defense Fund was not a part of the negotiation, so their error was validating a weak outcome. In so doing, they alerted the Fish and Wildlife Service to the fact that they are willing to accept such an insignificant conservation result. They likewise signal to industry partners (or opponents, should that happen) that they are willing to accept an outcome on par with the Texas Plan. In future negotiations that is now the starting point, not the end point. Now that all parties know what EDF is willing to accept, remembering that industry and property-rights advocates with their own interests are on the other side of the negotiating table, we can expect a future negotiation to produce a less restrictive result even than the Texas Plan.

### I. Signaling

The concept of signaling is uniquely important to decisionmaking in the advocacy context. Signaling is the process of communicating or influencing values above and beyond the mere language of a policy. Passage of a law can communicate more to the public than the bald letter of the law.<sup>403</sup> Speaking of the passage of the Wilderness Act of 1964, Jedediah Purdy wrote that it “won acreage for a new idea, adding wilderness to the geography of American ideals.”<sup>404</sup> Passage of the Act, and other environmental laws, signaled a commitment and a prioritization of certain

403. *E.g.*, JONATHAN Z. CANNON, ENVIRONMENT IN THE BALANCE: THE GREEN MOVEMENT AND THE SUPREME COURT, at 5 (2015); PURDY, *supra* note 296, at 210–11; Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 905 (1991).

404. PURDY, *supra* note 296, at 190.

values.<sup>405</sup> Put differently, a pragtivist should ask not only what a law or policy will require, but what it says to the public about important issues. In some cases, a policy not only achieves discrete goals, it engenders cultural acceptance of new values.<sup>406</sup> Sometimes lawmakers, but especially advocates, need to get in front of public opinion, not merely respond to it. That isn't always possible, but at the very least, no environmental advocate should support a policy that sends a signal of declining environmental values.

A number of more specific inquiries can help a pragtivist parse out the signal that a policy might send. The timing of the action, for instance, can indicate whether the policy signals proactive and precautionary action or brinksmanship and delay. The fact that the oil and gas industry did not respond to known threats to the Lizard's existence until thirty years after problems were first identified, or even until after the close of the first FWS comment period, demonstrates an effort at avoidance and brinksmanship on the part of industry. When EDF lent its support to the weak outcome of this game-playing, it sent the wrong signal.

The effort that a regulated party displays is also relevant. This is counterintuitive since the momentum is clearly behind more efficiency and less burdensome regulations, and there are very good reasons for this. But we have to ask whether a policy permits the regulated community to do as little as possible or to put skin in the game. It may seem superficial, but when a public interest is at stake, the public has *its* skin in the game and industry sends an important signal when it refuses to share that burden.

Signaling, in essence, is a consideration of whether the process of developing a new policy was sufficiently satisfying—in the Deweyan and Farberian sense—to attract support, or at least avoid condemnation, from most participants.

By supporting a policy that was crafted by and for the industry, contained few enforceable provisions, did an end-run around a seminal environmental law, provided no assurances of effectiveness, and expressed clear preference for uninterrupted industrial activity in lieu of species conservation, support for the Texas Plan sends exactly the wrong signal. If pragtivism is a focus on tactics rather than values, this lesson may be hard to absorb, but it is no less essential.

405. *Id.*

406. *Id.*; Farber & Frickey, *supra* note 403, at 905.

## VI. CONCLUSION

Pragtivists do not claim to adopt philosophically pragmatic ground rules for their efforts, so it is not entirely fair to critique their work only as divergent from philosophical principles. For that matter, pragtivists do not even claim that, in using the word “pragmatic,” they are adopting any consistent meaning or implying a unique brand of activism. Nevertheless, as I hope this Article shows, there is indeed a style of practice attached to pragtivism, and that style deserves more rigorous attention.

I have argued that pragtivism is a series of policy tools that define themselves in opposition to traditional environmental law and to the typical values that underlie traditional environmental law. In contrast to strict standards and timelines, citizen participation, and strong enforcement options, pragtivism is focused on regulatory flexibility, bi- or multi-lateral negotiations, and volunteerism. This framework is premised on the importance of engaging economic actors and assuring them minimal burden. To be absolutely clear, I believe these approaches are essential to environmental policy, but they should be just that: a part of environmentalism, not a central doctrine. When they become the central doctrine—as the Dunes Sagebrush Lizard experience exposes—they can weaken the entire endeavor. The constant refrain of “pragmatic” in the new environmental lexicon elevates the importance of pragtivist tools and obfuscates their exact nature.

Here is the most important point of this Article: Pragtivists use and re-use the term pragmatic but never explain it, allowing the word to mask complex and important tactical and value judgments that should be more explicit because these judgments have significant influence on environmental protection. The word masks judgments that should be considered and debated, not waved away. Just as laws can have power to stimulate values that are farther reaching than the letter of the law, words too have power beyond their definitions. Sometimes that power creates excitement, sometimes dread, often something in between. But sometimes that power disguises deeper meaning. This is, in part, Charles Taylor’s “ethics of articulacy—the work of saying what we mean, finding words for what we see and feel.”<sup>407</sup> This is about moving beyond proxy wars and discovering motivating values. If we

407. PURDY, *supra* note 296, at 266.

don't grasp the meaning of a word, we cannot debate the practices carried out in the shade it casts. Pragmatism demands debate, as does effective environmental decisionmaking.