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Autonomy in the Anthropocene? Libertarianism, Liberalism and the Legal Theory of Environmental Regulation

Jason MacLean
University of Saskatchewan

Jason MacLean*

Autonomy in the Anthropocene? Libertarianism, Liberalism, and the Legal Theory of Environmental Regulation

Can there be autonomy in the Anthropocene? Libertarian environmental law scholar Bruce Pardy's Ecolawgic: The Logic of Ecosystems and the Rule of Law *argues that contemporary environmental law violates the right to autonomy and runs afoul of the rule of law. Pardy proposes an alternative model of environmental law premised on the logic of ecosystems and free markets. Pardy's* Ecolawgic *suffers, however, from the very same conceptual infirmities that substantially undermine the real-world application of the free market paradigm on which Ecolawgic is largely based. Notwithstanding this critical flaw,* Ecolawgic *may be read as an aspirational model of environmental law and policy capable of disciplining the practice of environmental governance. The result—"autonomy in the Anthropocene"—gestures toward a pluralist and polycentric model of environmental regulation capable of enhancing our freedom to fashion a collective future in an existentially threatening epoch of our own making.*

Peut-il y avoir une autonomie dans l'anthropocène? Dans Ecolawgic: The Logic of Ecosystems and the Rule of Law, *Bruce Pardy, juriste libertarien et spécialiste du droit de l'environnement, soutient que le droit contemporain de l'environnement viole le droit à l'autonomie et contrevient au principe de la primauté du droit. Bruce Pardy propose un modèle différent du droit de l'environnement fondé sur la logique des écosystèmes et du libre marché.* Ecolawgic *souffre toutefois des mêmes carences conceptuelles qui minent considérablement l'application dans le monde du paradigme du libre marché sur lequel il se fonde. Malgré ce défaut critique,* Ecolawgic *peut être lu en tant que modèle ambitieux de droit et de politique de l'environnement, modèle capable d'imposer une discipline à la pratique de l'intendance environnementale. Le résultat—« autonomie dans l'anthropocène »—mène à un modèle pluraliste et polycentrique de réglementation environnementale capable de renforcer notre liberté de modeler un futur collectif dans ce qui est une époque existentiellement menaçante de notre propre fabrication.*

* Assistant Professor, University of Saskatchewan College of Law. I thank Jocelyn Stacey for her insightful comments on a draft, and Bruce Pardy and Sara Slinn for their helpful and encouraging comments on a presentation of an earlier version of this paper.

> Ecosystems cannot be harmed but only changed.[1]
>
> Considering these and many other major and still growing impacts of human activities on earth and atmosphere, and at all, including global, scales, it seems to us more than appropriate to emphasize the central role of mankind in geology and ecology by proposing to use the term "anthropocene" for the current geological epoch.[2]

Introduction

The imperative of addressing global climate change in the Anthropocene epoch calls for a systematic and scalable response. The critical question, however, is what that response should optimally look like. Should it be bottom-up and based on the so-called "wisdom of the crowd," as U.S. environmental law scholar and former head of Connecticut's Department of Energy and Environmental Protection Daniel Esty argues?[3] Is the best

1. Bruce Pardy, *Ecolawgic: The Logic of Ecosystems and the Rule of Law* (Kingston, ON: Fifth Forum Press, 2015) at 57. Pardy also acknowledges, however, that "[o]nly human beings have been able to monopolize ecosystems" (*ibid* at 28).

2. Paul J. Crutzen & Eugene F Stoermer, "The 'Anthropocene'" (2000) 41 Global Change Newsletter 17 at 17. See also Colin N Waters et al, "The Anthropocene is functionally and stratigraphically distinct from the Holocene" (2016) 351 Science 137; Damian Carrington, "The Anthropocene epoch: scientists declare dawn of human-influenced age," *The Guardian* (29 August 2016), online: <https://www.theguardian.com/environment/2016/aug/29/declare-anthropocene-epoch-experts-urge-geological-congress-human-impact-earth>.

3. See, e.g., Daniel C Esty, "Bottom-Up Climate Fix," *The New York Times* (21 September 2014), online: <http://www.nytimes.com/2014/09/22/opinion/bottom-up-climate-fix.html>. See also Daniel C Esty, "Regulatory Transformation: Lessons from Connecticut's Department of Energy and Environmental Protection" (2016) 76:3 Public Administration Rev 403; Beth Simone Noveck, *Wiki Government: How Technology Can Make Government Better, Democracy Stronger, and Citizens More Powerful* (Washington, DC: Brookings Institution Press, 2009).

approach, rather than bottom-up, polycentric?[4] Should we simply let the market decide, as most economists and public policy pundits suggest?[5] Or is there still a role for the regulations and policies of nation-states? Notably, Harvard economist Dani Rodrik argues that global climate change places green industrial policy—i.e., economic development based on the sustainable use of non-renewable resources that fully internalizes environmental costs—squarely on the policy agenda of governments.[6] But Rodrik also candidly concedes that "industrial policy has a very chequered history."[7]

In *Ecolawgic: The Logic of Ecosystems and the Rule of Law*,[8] Canadian environmental and libertarian law scholar Bruce Pardy pushes this caveat one step further, arguing that "[g]overnment policies are not able to dictate how ecosystems or markets work. The notion of prescribing particular ecological or economic ends conflicts with the natural behaviour of these systems and their immutable rules."[9] Pardy argues instead for an environmental law regime modeled on the logic of ecosystems and the natural right to autonomy. In particular, Pardy proposes an "ecolawgic": a "manifesto for ecosystems, markets and the rule of law that reconciles individual autonomy, free markets and environmental protection."[10]

How to resolve this tension in modern environmental governance, which Pardy rightly characterizes as being torn between laissez-faire supporters of so-called free markets and market-based instruments, and statists advocating for various forms of government intervention to correct market failures?[11] Part I of this article briefly summarizes the core elements of Pardy's proposed *Ecolawgic* and its critique of liberal,

4. Elinor Ostrom, "A Polycentric Approach for Coping with Climate Change" (2009) World Bank Policy Research Working Paper 5095.

5. See, e.g., Terry L Anderson & Donald R Leal, *Free Market Environmentalism* (New York: Palgrave, 2001). But see Noah Smith, "Economists Are Out of Touch With Climate Change," *Bloomberg View* (14 March 2016), online: <http://www.bloombergview.com/articles/2016-03-14/economists-are-out-of-touch-with-climate-change>.

6. Dani Rodrik, "Green industrial policy" (2014) 30:3 Oxford Rev of Economic Policy 469 at 472 [Rodrik, "Green industrial policy"]. See also Dani Rodrik, "Roepke Lecture in Economic Geography—Who Needs the Nation-State?" (2012) 89:1 Economic Geography 1 at 11-12, 16.

7. Rodrik, "Green industrial policy," *supra* note 6 at 472.

8. Pardy, *supra* note 1.

9. *Ibid* at ii.

10. *Ibid* at iii.

11. *Ibid* at i. This tension may be characterized much more broadly as a tension in modern governance writ large. For over two hundred years, liberals in the classical sense have argued that individuals ought to be trusted to make their own decisions. Regulators, on the other hand, increasingly want to protect individuals from themselves. For an overview of how this tension continues to shape debates over the nature and extent of public governance and regulation, see, e.g., Cass R Sunstein, *Simpler: The Future of Government* (New York: Simon & Schuster, 2013).

instrumental government regulation of the environment. Part II critically responds to the first core principle of Pardy's model—"the right to autonomy in ecosystems"[12]—by drawing on a broad variety of sources and perspectives to illustrate how individual autonomy is not natural but rather historically contingent and normative. Individual autonomy, far from being a constitutive element of the state of nature, is but one normative principle competing among a rich array of cultural values, means, and ends.[13] Moreover, autonomy is not the antithesis of regulation, but rather a product of regulation. Part III proceeds by critically responding to Pardy's second core contention, that markets are spontaneously self-organizing and naturally self-correcting. By drawing on institutionalist approaches to economics, Part III argues that the critical question is not whether to regulate the environment and correct market failures, but *how*. Part IV extends the institutionalist approach to rules and regulations in order to critically examine Pardy's related argument that a dynamic ecosystem model of law is capable of establishing an internally coherent and objective rule of law, not only for environmental law, but also for law generally. Part V shifts from critique to critical reconstruction, and argues that Pardy's ambitious argument not only incites a reconsideration of the liberal legal theory of environmental regulation, but that it also suggests ways in which environmental regulations may be significantly enhanced. The article concludes by arguing for a pragmatic counter-proposal in the form of a pluralist, polycentric model of environmental regulation and policy that is capable of, if not fully reconciling, then at least accommodating individual autonomy, free-*ish* markets, and environmental stewardship in the Anthropocene. Autonomy in the Anthropocene depends, not on deregulation, but on the ability of governments to provide equal and meaningful opportunities for the public to participate in environmental governance aimed at fashioning a collective future.

I. *The logic of* Ecolawgic

> Entire books could be written about the techniques of rulemaking.... Surprisingly, and perhaps disturbingly, very few such books have in fact been written. Maybe it is thought that such things are self-evident, but they are not.[14]

12. *Ibid* at iii.
13. David Matless, "Climate change stories and the Anthroposcenic" (2016) 6 Nature Climate Change 118.
14. Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, MA: Harvard University Press, 2009) at 202, n 25.

It is important to signal at the outset that Pardy's argument is not only directed at environmental law, but at contemporary law and liberal legal theory generally. "Modern legal regimes," argues Pardy, "do not respect how ecosystems and markets operate, but ecosystems and markets can provide insight about how the law should work."[15] Pardy's target is instrumentalist, *ad hoc* legal decision-making writ large, and his admirably ambitious aim is to reform the law as a system of rule-based governance. This article concentrates specifically on the implications of Pardy's argument for environmental law and policymaking, both to narrow the scope of Pardy's provocative challenge to contemporary legal decision-making and theory, and to focus on what is arguably the world's most pressing legal and public policy problem—environmental stewardship in the Anthropocene.[16]

Pardy argues that much contemporary law—be it the product of legislation or adjudication—is founded on morality, utilitarian cost-benefit analysis, claims about the public interest, or even natural law. He contends that the official force of the state is used to enforce subjective preferences, be they the instrumentalist priorities of decision-makers or the particular versions of the law taken for granted by decision-makers as natural, right, and good.[17] The result, Pardy claims, is the arbitrary use of state power to pursue particular ends and the repeated imposition of one group's preferences and priorities over those of others—the familiar allegory of robbing Peter to pay Paul. Against this state of affairs, Pardy

15. Pardy, *supra* note 1 at ii.

16. This article's focus on the environmental law implications of Pardy's proposed *Ecolawgic* is also warranted by the fact that much of Pardy's scholarship, out of which *Ecolawgic* arises, concerns environmental law. See e.g. Bruce Pardy, "The Logic of Ecosystems: Capitalism, Rights, and the Law of 'Ecosystem Services'" (2014) 5 J Human Rights & Environment 136; Bruce Pardy, "Towards and Environmental Rule of Law" (2014) 17 Asia Pac J of Envtl L 163; Bruce Pardy, "Eviscerating Property in the Name of Sustainability" (2012) 3 J Human Rights & Environment 292; Bruce Pardy, "The Dark Irony of International Water Rights" (2011) 28 Pace Envtl L Rev 907; Bruce Pardy, "Environmental Assessment and Three Ways Not to Do Environmental Law" (2010) 21 J Envtl L & Prac 139; Bruce Pardy, "The Hand is Invisible, Nature Knows Best, and Justice is Blind: Markets, Ecosystems, Legal Instrumentalism and the Natural Law of Systems" (2009) 44 Tulsa LJ 67; Bruce Pardy, "The Pardy-Ruhl Dialogue on Ecosystem Management, Part V: Discretion, Complex-Adaptive Problem Solving, and the Rule of Law" (2008) 25 Pace Envtl L Rev 341; Bruce Pardy, "Goods, Services and Systems: A Review of Ruhl, Kant & Lant's *The Law and Policy of Ecosystem Services*" (2008) 46 Osgoode Hall LJ 445; Bruce Pardy, "Environmental Law and the Paradox of Ecological Citizenship: The Case for Environmental Libertarianism" (2006) 33 Environments 25; Bruce Pardy, "Ecosystem Management in Question: A Reply to Ruhl" (2006) Pace Envtl L Rev 209; and Bruce Pardy, "In Search of the Holy Grail of Environmental Law: A Rule to Solve the Problem" (2005) 1:1 JSDLP 29 [Pardy, "In Search of the Holy Grail of Environmental Law"].

17. Pardy, *supra* note 1 at 13. For an internal judicial analysis of legal incoherence, see David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) Social Science Research Network, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733751>.

seeks to justify the application and force of law on the basis of "standards that are naturally unassailable, objectively true, and independent of human preference."[18]

Enter ecosystems and markets. Pardy characterizes ecosystems as "intangible systems producing patterns and outcomes" which operate "according to their own *immutable* characteristics and rules."[19] For Pardy, the logic of ecosystems runs as follows: "competition for scarce resources leads to natural selection, where those organisms better adapted to ecosystem conditions survive and reproduce, leading to evolutionary change. All participants are equally subject to their forces; *systems do not play favourites.*"[20]

Similarly, in Pardy's view markets are also dynamic systems. Like ecosystems, he argues, markets "operate according to their own *immutable* characteristics and rules."[21] Moreover, markets "arise spontaneously whenever people think they will be better off by trading."[22] While Pardy concedes that "[l]aws and governments can make markets more stable and efficient, such as by enforcing contracts and creating a supply of money," he nonetheless maintains that laws and governments "create neither the activity of trading nor the market dynamics that the transactions create."[23] Indeed, Pardy argues that markets "share the logic of ecosystems."[24] Markets, he argues, share the same characteristics and principles that "drive the logic of competitive selection."[25] These characteristics include (1) resource scarcity, where supply is insufficient to meet demand; (2) the constitutive relationship of supply and demand; (3) naturally autonomous individuals, whereby sellers and buyers "make their own self-interested choices about what to sell and buy, and at what price"; (4) the pursuit of self-interest, subject to monopolistic forces ("Only human beings have been able to monopolize ecosystems"[26]); (5) survival of the fittest via adaptation, specialization, and efficiency; (6) diversification and resilience arising out of competition; (7) failure as a normal and necessary event;[27] (8) dynamic stability and self-correcting mechanisms: whereas "failures of organisms and enterprises are necessary events, failure of the system

18. Pardy, *supra* note 1 at 14.
19. *Ibid* at 16 [emphasis added].
20. *Ibid* at 18 [emphasis added].
21. *Ibid* at 22 [emphasis added].
22. *Ibid.*
23. *Ibid.* I will return to this "concession" (as I characterize it) below.
24. *Ibid* at 25.
25. *Ibid.*
26. *Ibid* at 28.
27. *Ibid.*

itself is not"[28] because of the effects of positive and negative feedback loops, which effectively limit the misallocation of scarce resources; and (9) non-linear systems in non-equilibrium, where continuous, nonlinear, and unpredictable change is the rule.[29] Pardy concludes his comparison of ecosystems and markets thus:

> Ecosystems and markets arise spontaneously. They are not created or invented by human design. They operate according to their own rules, which cannot be changed by government decree. Ecosystems and markets may be interfered with, but the nature of their processes cannot be altered. These systems are not just collections of things. They consist of relationships and interactions that express information and produce outcomes. They are organic and evolutionary, changing through time. These systems reflect their own logic. The idea of dictating ecological or economic results is inconsistent with the way they behave.[30]

So much, then, for green industrial policy. Never mind sustainable development.

But that is not the end of it. Pardy extends his argument beyond market regulation to regulation and the rule of law writ large. Pardy draws on long-standing characterizations of the Western legal tradition as being awkwardly composed of both the rule of law—the foundational principle that government officials and citizens are obligated to abide by a regime of legal rules—and instrumentalism, the equally foundational if irreconcilable principle that the law is a means to an end, an instrument for the public good.[31] Pardy's point is that the rule of law and legal instrumentalism are mutually antagonistic, and the clash between the two "prevents law

28. *Ibid* at 31.
29. *Ibid* at 33-35.
30. *Ibid* at 35.
31. *Ibid* at 50, quoting Brian Tamanaha, "How an Instrumental View of Law Corrodes the Rule of Law" (2007) 56:2 Depaul LR 469 at 469-470. Interestingly, however, Pardy merely asserts rather than demonstrates his claim that instrumentalism is pervasive in contemporary legal decision-making. In *Thinking Like a Lawyer*, Schauer argues just the opposite. For Schauer, what is pervasive is not instrumentalism, but formalism: "the pervasive formality of the law—its tendency to take its rules and their words seriously even though in some cases they might work an injustice—is what distinguishes law from many other decision-making contexts" (*supra* note 14 at 33). Legal philosopher Ronald Dworkin, by contrast, argued that principled (as opposite to formalistic) decision-making was highly typical of American legal decision-making. See, e.g., Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) and Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986). Or it could be that while most legal rules are relatively clear, most reported decisions involve disputes about the fringes rather than the core of legal rules, and that this selection effect skews legal analysis and doctrine in the direction of instrumentalism. See, e.g., George L Priest & William Klein, "The Selection of Disputes for Litigation" (1984) 13 J Leg Stud 1. The resolution of this discrepancy, which is interpretive and empirical nature, is beyond the scope of this article. For further discussion, see the Symposium: *Developing Best Practices for Legal Analysis* (6–7 May 2016) 84:1 U Chicago L Rev. This is a critically important area for future research.

from operating as a system—dispassionate, impersonal, objective, and consistent."[32]

Instead, Pardy argues that law should operate as a system, in particular a system closely resembling ecosystems and markets. Pardy puts it this way:

> Law is a system too. Its abstract features should resemble those of ecosystems and markets: generally applicable rules and principles, intrinsic neutrality, and internal coherence and integrity. The mandate of decision-makers is not to "do right" but instead to "let the system speak." People make their own decisions and craft their own survival strategies based on the generally applicable framework that the law provides, and they are allowed to succeed or fail on the basis of those strategies. Their actions and decisions contribute to markets and ecosystems, and their aggregate effects make those systems what they are.[33]

This is, to be sure, a novel application of systems thinking to law. How, for instance, are decision-makers—judges, legislators, administrators—supposed to "let the system speak"? Pardy ups the ante:

> Like ecosystems and markets, the law should be internally coherent. *Every rule and principle should be connected. Every decision should be related to all others.* Within a properly constituted legal system, there is an answer for every dispute that arises. Such a system treats its participants dispassionately and equally, subjecting all to the same rules. *Systems do not play favourites.*[34]

Pardy's *Ecolawgic* makes a novel contribution to the ongoing—and seemingly interminable—debate about the ideal conceptualization of the relationship obtaining among state, market, and society.[35] In proposing a model of law-making premised on the supposedly neutral, systemic properties of ecosystems and markets, Pardy seeks an objectively true and fair method for resolving the fundamental questions at stake in democratic politics: What interests are at stake? Who speaks for whom? How to balance efficiency and fairness? Who decides?

It is important to acknowledge, however, that laissez-faire models of governance (of which *Ecolawgic* is a novel variant) are not alone in seeking

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32. Pardy, *supra* note 1 at 51.
33. *Ibid* at 112.
34. *Ibid* at 112 [emphasis added].
35. For a useful overview of this debate, see K Sabeel Rahman, "Conceptualizing the Economic Role of the State: Laissez-Faire, Technocracy, and the Democratic Alternative" (2011) 43:2 Polity 264 [Rahman, "Economic Role of the State"]; for a more technical account, see K Sabeel Rahman, "Envisioning the Regulatory State: Technocracy, Democracy, and Institutional Experimentation in the 2010 Financial Reform and Oil Spill Statutes" (2011) 48 Harv J on Legis 555 [Rahman, "Envisioning the Regulatory State"].

neutrality and fairness in decision-making. Technocratic approaches to economic regulation ever since Keynes, for example, have sought and continue to seek out neutral, objective, and rational mechanisms of governance.[36] On this view, regulatory authority and expertise are capable of promoting the public good while preventing regulatory capture (i.e., rent-seeking, or gaming the system) and substantive incompetence and ineffectiveness.[37] Notably, both the technocratic and the laissez-faire paradigms have been criticized for failing to fully excavate the normative presuppositions underlying their prescriptions: in the case of technocratic managerialism there is the largely unexamined assumption that regulatory means and ends can be neatly compartmentalized and cordoned off from special interest politics, and normative priors;[38] in the case of laissez-faire market models, there is oft-asserted but less often—if ever—established argument that markets are governed by "natural" laws.[39] Part II below critically examines the latter assumption and the role that it plays in Pardy's *Ecolawgic*.[40]

II. *The trouble with the principle of autonomy, or why nature needs no manifesto*

> Law is concerned with freedom, the worthiest and holiest thing in man, the thing man must know if it is to have obligatory force for him.[41]

The trouble with principle, according to literary and legal theorist Stanley Fish, is that it does not exist.[42] Fish argues that abstract principles such as fairness, impartiality, mutual respect, and reasonableness cannot be

36. See, e.g., John Maynard Keynes, "Economic Possibilities for Our Grandchildren" in John Maynard Keynes, *Essays in Persuasion* (New York: W.W. Norton, 1963) 358. For an illustration of how Keynesian thought continues to inform debates about the meaning and determinants of good governance, see, e.g., Aziz Rana, "Obama and the New Age of Reform" (2009) 16:2 Constellations 271.

37. Rodrik, "Green industrial policy," *supra* note 6; Rahman, "Envisioning the Regulatory State," *supra* note 35.

38. For an extended discussion of the way that means and ends mutually inform one another, see Michael C Dorf & Charles Sabel, "A Constitution of Democratic Experimentalism" (1998) 98:2 Colum L Rev 267.

39. Rahman, "Economic Role of the State," *supra* note 35 at 277, drawing on Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001 [1944]). Arguably, both the technocratic and the laissez-faire paradigms greatly overestimate the rationality of decision-makers and individual market participants.

40. The assumption of rational decision-makers and economic managers will be addressed below in Part V.

41. Georg WF Hegel, *The Philosophy of Right*, translated by TM Knox (London: Clarendon Press, 1952 [1820]) at §216.

42. Stanley Fish, *The Trouble With Principle* (Cambridge, MA: Harvard University Press, 1999) at 2.

defined in ways that are not always already captured by a prior normative agenda. Any attempt to furnish abstract principles with specific content always and necessarily proceeds from unexamined presumptions about what is good, just, normal, and *natural.* For Fish, the trouble with principle is that the work supposedly performed by principles is really performed by underlying and unacknowledged presumptions.[43] The standard move, he argues, "is to turn historically saturated situations into situations fully detached from any specific historical circumstances and then conclude that a proposed policy either follows from this carefully emptied context or is barred by it."[44] Fish sets out the logic of this move:

> A neutral principle that facilitates the forgetting of history is repeating the forgetting that allowed it to emerge *as* a neutral principle. Neutral principles, if they are to deserve the name, must be presented as if they came first, as if they were before history, even if the inhabitants of history were slow to recognize them. A neutral principle, in short, can have a historical habitation but not a historical cause. Accordingly, the question one asks of it is analytic ("What is its essence?") rather than genealogical ("Where did it come from?"). But once the genealogical question is put and the principle is given a biography, the idea of regarding it as neutral—as without reference to substantive imperatives—will seem less compelling.[45]

A classic example of this move is the trial court decision in the U.S. case of *Lochner v. New York.*[46] In *Lochner*, the U.S. Supreme Court struck down New York's *Bakeshop Act* of 1895, a statute that included a maximum-hours requirement for workers in the baking industry and established minimum conditions for plumbing, flooring, product storage, and sanitation. According to U.S. constitutional law scholar Frederick Schauer, Peckham J.'s conclusion in *Lochner* that the principle of "liberty" in the Fourteenth Amendment of the U.S. Constitution naturally included the freedom of a bakery employee to agree—free from state interference—to work over 60 hours a week and over 10 hours per day was premised on the assumption that no other meaning of "liberty" was possible.[47] For Schauer, Peckham J.'s reasoning, while ostensibly based on the plain and ordinary

43. *Ibid* at 3.

44. *Ibid* at 4. For what is arguably the foundational defence of abstract, neutral principles, see Herbert Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73:1 Harv L Rev 1.

45. Fish, *supra* note 423 at 6 [emphasis original]. Neutral, abstract principles have often been criticized as offering a "view from nowhere." In the context of US environmental law, for example, the recourse to abstract and neutral economic concepts is critically examined by Douglas A Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity* (New Haven: Yale University Press, 2010).

46. *Lochner v New York*, 198 US 45 (1905) at 64.

47. Schauer, *supra* note 14 at 30.

meaning of the word "liberty," was actually based on a tacit public policy choice.[48] "When legal decision-makers like Peckham J., who are actually (and perhaps, in this case, necessarily) making a policy or political choice act as if there were no choice to be made," argues Schauer, they "act as if it is the form that matters, but in fact it is the substance that is doing the work."[49] This is the trouble with principle—its tacit, unexamined substantive (political) baggage.[50]

A critical precondition—and unexamined presumption—of Pardy's *Ecolawgic* is the natural right to autonomy in ecosystems and markets: "Autonomous behaviour is the main ingredient of markets and ecosystems[...]Human beings are part of nature when they are one of many competing species in an ecosystem—the ecological equivalent of one of the many buyers and sellers in a competitive marketplace."[51] And competition, argues Pardy, "is a neutral, impersonal dynamic which arises from the autonomous pursuit of self-interest in an environment of scarcity, driving selection and adaptation."[52] While Pardy simultaneously acknowledges that the "right to personal autonomy has a long and rich history in common law jurisdictions,"[53] Pardy nonetheless presumes that the right to autonomy is natural, prior to, and independent of any system of law or morality. Law can either recognize or ignore this natural right, either respect it or interfere with it. For Pardy, negative rights respect the natural right of autonomy, whereas positive rights—whereby governments redistribute resources—"are inconsistent with self-regulating systems and

48. *Ibid.* For example, Lawrence Lessig argues that the Supreme Court interpreted the purpose of the statute, not as concerning the health of overworked bakers, which was how New York State defended its legislation, but as benefitting labour at the expense of capital. According to Lessig, the Court ruled that the Fourteenth Amendment prohibited any such redistributive taking from Peter to give to Paul. See Lawrence Lessig, "Democracy After Citizens United," *Boston Review* (September/October 2010), online: <http://new.bostonreview.net/BR35.5/lessig.php>. While *Lochner* has long been considered wrongly decided, some see a possible resurgence of *Lochner* as a means of constitutionalizing negative rights to economic liberty. See, e.g., Timothy K Kuhner, "*Citizens United* as Neoliberal Jurisprudence: The Resurgence of Economic Theory" (2011) 18:3 Va J Soc Pol'y & L 395 at 398-401; Jedediah Purdy, "Neoliberal Constitutionalism: Lochnerism for a New Economy" (2014) 77:4 Law & Contemp Probs 195; Thomas B Colby & Peter J Smith, "The Return of *Lochner*" (2015) 100:3 Cornell L Rev 527.

49. *Ibid.*

50. In this sense, Fish's account of the trouble with principle closely tracks Lon Fuller's response to HLA Hart's positivist argument in favour of the objective interpretation of legal rules in their famous exchange in the pages of the *Harvard Law Review*. Fish appears to agree with Fuller that the plain meaning of the words used in a legal rule can never produce a clear outcome absent close attention to the purpose underlying the rule. See Lon L Fuller, "Positivism and Fidelity to the Law—A Reply to Professor Hart" (1958) 71:4 Harv L Rev 630, replying to HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71:4 Harv L Rev 593.

51. Pardy, *supra* note 1 at 54, 58-59.

52. *Ibid* at 55.

53. *Ibid.*

autonomous individuals."[54] On this view, private property rights "are a corollary of individual autonomy."[55] The essence of individual autonomy derives, not from a given "right to be wrong," but rather "from the reality that, when it comes to the self-interest of the individual, no one else has the knowledge, perspective or authority to define what 'wrong' means."[56]

Thus does Pardy's *Ecolawgic* depend on the presumption of a natural right of individual autonomy, a right given, not by history or circumstance, not by political process or regulation, but by nature itself. This is a powerful and, if accurate, compelling claim. But what if the answer to Pardy's analytic question about the essence of autonomy is reframed, to adapt Fish's argument about the trouble with principle, as a question about the *historical and normative genealogy* of individual autonomy?[57] What if, in other words, the individual and the right to individual autonomy are human inventions—social constructions—rather than the products of evolution and natural selection?[58]

This is precisely the question pursued in Larry Siedentop's magisterial account of the cultural origins of western liberalism.[59] At the core of so-called "ancient" thinking, whether in the domestic sphere or in public life, Siedentop argues that the Greeks and Romans did not subscribe to the norm of individual autonomy. "Rather, they instinctively saw a hierarchy or pyramid."[60] The ancient view of reality did not include naturally free and autonomous individuals flourishing or failing by dint of their own choices. The norm of individual autonomy originates, not out of a primeval state of nature, but rather from the origins of Christianity, particularly the foundational teachings of St. Paul.[61] "Let it be known to you, therefore, my

54. *Ibid* at 74.
55. *Ibid* at 56.
56. *Ibid* at 71.
57. For example, natural rights and canon law historian Brian Tierney observes that the idea of subjective rights has become central to our political discourse, but we still have no idea of the origin and early development of the idea. Brian Tierney, *The Idea of Natural Rights* (Grand Rapids, MI: Wm B Eerdmans, 1997).
58. David Kennedy, in examining the contested nature of economic, political, and legal expertise, argues that the common tendency in debates over expertise is "to frame positions and projects as expressions of a universal rather than a particular interest." Kennedy approaches the construction of expertise about global law and policy by "stepping back from this kind of model…to resist the temptation to treat the hegemonic outcomes of past struggle as a fixed terrain for new engagements." David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton, NJ: Princeton University Press, 2016) at 7.
59. Larry Siedentop, *Inventing the Individual: The Origins of Western Individualism* (New York: Penguin Books, 2015).
60. *Ibid* at 51. See also Benjamin Constant, "On the Liberty of the Ancients compared to that of the Moderns" in Benjamin Constant, *Political Writings*, Biancamaria Fontana, ed (Cambridge: Cambridge University Press, 1988) 309.
61. *Ibid* at 58. See also Acts, 13:38-39 (NRSV), quoted.

brothers," Paul reportedly preached, "that through this man forgiveness of sin is proclaimed by you; by this Jesus everyone who believes is set free...."[62] According to Siedentop, "Paul's conception of the Christ overturns the assumption on which ancient thinking had hitherto rested, the assumption of *natural inequality*."[63] Paul's vision on the road to Damascus "amounted to the discovery of human freedom—of a moral agency potentially available to each and everyone, that is, to individuals."[64] Paul's radical interpretation of the meaning of Jesus, in Siedentop's view, "introduced to the world a new picture of reality. It provided an ontological foundation for 'the individual', through the promise that humans have access to the deepest reality as individuals rather than merely as members of a group."[65]

How did Paul accomplish this radical ontological shift? The premise of Paul's argument—the moral equality of individuals—requires a human will that is pre-social and thus removed from conventional social roles, categories, and unequal statuses in the then-obtaining social division of labour.[66] The problem with this conceptual move, however, is that if thought depends on language, and if language is a social institution, how then can individual agency and equality have a pre-social foundation? Paul's answer, according to Siedentop, was a leap of faith in the Christ, which requires "seeing oneself in others and others in oneself."[67] For Paul, human autonomy is paradoxically realized through submission to the mind and will of God as revealed in the Christ, and that act of submission constitutes a "new creation."[68] Siedentop concludes his account of Paul's radical thinking thus:

> So in Paul's writings we see the emergence of a new sense of justice, founded on the assumption of moral equality rather than on natural inequality. Justice now speaks to an upright will, rather than describing a situation where everything is in its 'proper' or fated place. Paul's conception of the Christ exalts the freedom and power of human agency, when rightly directed. In his vision of Jesus, Paul discovered a moral reality which enabled him to lay the foundation for a new, universal social role.[69]

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62. *Ibid* at 59-60.
63. *Ibid* [emphasis added].
64. *Ibid.*
65. *Ibid* at 63. This is not to suggest, however, that Paul's was an atomized model of society. Rather, he argued for a voluntary instead of a coercive basis of human association joined by a common belief: *ibid* at 62. See also Albrecht Dihle, *The Theory of Will in Classical Antiquity* (Berkeley: University of California Press, 1982) at 10-19.
66. *Ibid* at 61, 63.
67. *Ibid* at 65.
68. *Ibid.*
69. *Ibid* at 66.

In other words, Paul effected the very move identified by Fish above by purposefully forgetting the aristocratic assumptions about the proper ordering of society in antiquity in order to construct a new essence—"a new, universal social role"—for human beings as equal, autonomous, and individual "children of God." Whereas in the Hellenistic period philosophers began to conceive of a universal or "human" nature precisely to legitimize their own rational superiority, Paul's conception was fundamentally subversive.[70]

Substantive and political differences aside, however, the process underlying each move is precisely the same, and that process of forgetting and reconceiving remains the principal way knowledge is unmade and remade. As Kennedy describes his analytically analogous research into the making of global political economy and expert knowledge, "I am interested in the way experts forget their struggles and their role in distribution to celebrate their knowledge as universal, their world as ordered, their path aligned with progress."[71]

Siedentop's genealogy of western liberalism proceeds by tracing the cultural contestation and construction of individualism through the development of the Christian church and the adoption of Christianity in the Roman empire to the development of monasticism, to the ideas and profound influence of Augustine, and finally to the relationship between this new conception of human freedom and questions of church and state governance and law, including so-called barbarian codes, Roman law, and Christian institutions. While it is well beyond the scope of this article to fully retrace Siedentop's fascinating history of western liberalism, Siedentop's closely related and counter-intuitive account of the connection of Christianity, the state, and the market merits a brief discussion.

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70. *Ibid* at 46. Even if Siedentop is wrong about Paul's contribution, he is wrong in an interesting and instructive way. Contemporary appeals to "ancient" culture and thought are fraught with ideological tension. As emerging work in classical reception studies suggests, the dialogue between the so-called ancient past and contemporary politics tends to continuously modify both concepts in ways that are difficult to discern. See, e.g., Barbara Goff & Miriam Leonard, "Introduction: The Legacy of Greek Political Thought" (2016) 8:1 Classical Reception Journal 1.

71. Kennedy, *supra* note 58 at 5. The remainder of Kennedy's point merits quotation in full:

> Modern expertise knows and it forgets—or refuses to know—its powers and its limits. When they forget—and we forget—it becomes all the more difficult to understand how this world, with all its injustice and suffering, has been made and reproduced. And more difficult to identify levers of change or experience the place we stand as a fulcrum of possibility. The result of continuous struggle is an eerie stability it is hard to imagine challenging or changing.

As Siedentop observes, so entrenched was the ancient assumption of natural human inequality as the organizing norm of religious belief, the family, and government that it took centuries to displace: Siedentop, *supra* note 59 at 177.

Siedentop recounts the adaptation and modification of Roman law in the creation of a new canon law to undergird a centralized papal rule in Europe. The opening words of Gratian's *Decretum* in or around the year 1140 illustrate the place of moral equality in canon law: "Natural law [*jus*] is what is contained in the Law and the Gospel by which each is to do to another what he wants done to himself and forbidden to do to another what he does not want done to himself."[72] This conception upended the assumptions about social role and status embedded in Roman law dating back to antiquity. For example, the second-century Roman jurist Gaius set out a three-part test to establish personal status: Is the person (1) free or unfree? (2) a citizen or foreign-born? (3) a paterfamilias or in the power of an ancestor?[73] Canon law reversed these assumptions, and the consequences were far-reaching. According to Siedentop: "This shift away from the assumptions of the ancient world gave birth to the idea of sovereignty. By making the individual the unit of legal subjection—through the stipulation of 'equal subjection'—the papal claim of sovereignty prepared the way for the emergence of the state as a distinctive form of government."[74]

Near the end of his account, Siedentop asks rhetorically why any of this matters. His answer: "It reveals how Christian moral intuitions played a pivotal role in shaping the discourse that gave rise to modern liberalism and secularism."[75] For Siedentop, the developments of the sixteenth through the nineteenth centuries mirror—and are made possible by—the evolution of canon law from the twelfth to the fifteenth century. The sequence begins with the insistence on the equality of individual status, followed by the assertion of a range of basic individual human rights, and concluding with claims for self-government. The crucial difference between the two periods—and this is particularly significant for our purposes here—is that eighteenth-century philosophers "denatured God and deified nature."[76] The basis for the claim to individual liberty became—and still remains—"human nature."[77]

For Siedentop, it is no mere coincidence that in English and French historical dictionaries the words "individual" and "state" (as sovereign authority) arise at about the same time.[78] Their meanings are interdependent:

72. *Decretum* of Gratian Part 1: D1 c 1, quoted in Siedentop, *ibid* at 216.
73. *Ibid* at 217.
74. *Ibid* at 219.
75. *Ibid* at 359.
76. Carl Becker, *The Heavenly City of the Eighteenth-Century Philosophers* (1932), quoted *ibid.*
77. Siedentop, *supra* note 59 at 359.
78. *Ibid* at 347.

"*It was through the creation of states that the individual was invented.*"[79] As the next part of this article attempts to show, much the same can be said about so-called "free markets." As Siedentop suggests, "[i]t should not come as a surprise, therefore, that we often find the motives and actions of Europeans by the fifteenth century easier to understand—more familiar and more 'modern'. The kind of means/ends rationality or thinking that we associate with market relations was emerging clearly."[80]

Before proceeding, however, a brief word about "nature" is in order. The title of this part is "The Trouble With the Principle of Autonomy, or Why Nature Needs No Manifesto." The trouble with the principle of autonomy as the defining feature of the human nature undergirding Pardy's *Ecolawgic* is that it does not exist. Autonomy is constructed, contingent, and continuously contested. It cannot do the work that Pardy's proposal requires. To foreshadow one of the conclusions reached below, this renders Pardy's Ecolawgic yet another form of proposed reregulation based on largely tacit assumptions about what is "good, moral, and desirable,"[81] not a principled basis for deregulation.

But what of "nature"? While it can be argued that "nature" is as much a social construction as is the "individual,"[82] the point here is different. Pardy argues that ecosystems operate according to their own immutable rules—while they can be interfered with, the nature of their processes cannot be altered.[83] Bracketing for now whether the emergence of the Anthropocene epoch is fatal to this line of reasoning, the point is twofold. First, on Pardy's account, nature just is. Accordingly, nature needs no manifesto. But no such claim can be made for human nature or human autonomy. Autonomy is invented, not natural; it needs a manifesto. Several, actually: Paul's letters are but one example, although an extraordinarily influential one. Second, manifestos arguing for, or premised on, individual autonomy (including *Ecolawgic*) are, and will always be, on an equal ontological playing field with other manifestos arguing for a different vision of the law and the appropriate balancing of private and public interests (e.g., the controversial Leap Manifesto[84]). No manifesto, however, can legitimately decide the debate in advance by claiming to be objectively preferable because objectively natural and true. That is not principle; that is politics.

79. *Ibid* [emphasis added].
80. *Ibid.*
81. Pardy, *supra* note 1 at 109.
82. See, e.g., Andrea Wulf, *The Invention of Nature: Alexander Von Humboldt's New World* (New York: Knopf, 2015); Aaron Sachs, *The Humboldt Current: Nineteenth-Century Exploration and the Roots of American Environmentalism* (New York: Penguin Books, 2006).
83. Pardy, *supra* note 1 at 109.
84. The Leap Manifesto, online: <leapmanifesto.org>.

But it is politics in the very best sense of the term: "the art of *expanding* the possible."[85]

III. *"I've found a flaw": The myth of naturally free and self-correcting markets*

> Yes, I've found a flaw. I don't know how significant or permanent it is. But I've been very distressed by that fact.[86]

For Pardy, markets—like ecosystems—arise naturally and ought not be interfered with. The idea of dictating ecological or economic outcomes is inconsistent with the way ecosystems and markets behave.[87] This is a complex claim and needs to be unpacked.

The first part of Pardy's claim is that markets are not made; they arise spontaneously. Pardy offers no evidence, however, to corroborate this proposition, which is manifestly inaccurate. Governments, after all, make markets all the time. Recently, for instance, the Ontario provincial government joined a greenhouse gas emissions cap-and-trade market, the Western Carbon Initiative, a market created by the governments of California and Quebec.[88] Even more recently, the provincial governments of Ontario and Quebec "signed an agreement with the Mexican government to jointly develop carbon markets with the aim of allowing companies in those provinces to purchase Mexican greenhouse-gas-reduction credits to satisfy provincially regulated emission caps."[89]

More generally, only the crudest, simplest forms of exchange can be accurately described as arising spontaneously. While it is true that exchange relationships will arise in almost all communities, what distinguishes modern economies is the refinement and systemic complexity of their market structures. Several state initiatives have enabled modern markets

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85. I owe this formulation to Andrew Coyne, "Harper exit, above all, brings relief," *National Post* (31 May 2016) A4 [emphasis added].

86. PBS News Hour, "Greenspan Admits to 'Flaw' to Congress, Predicts More Economic Problems," PBS News Hour (10 October 2008), online: <http://www.pbs.org/newshour/bb/business-july-dec08-crisishearing_10-23.html>; see also Edmund L Andrews, "Greenspan Concedes Error on Regulation," *The New York Times* (23 October 2008), online: <http://www.nytimes.com/2008/10/24/business/economy/24panel.html?_r=0>.

87. Pardy, *supra* note 1 at 35.

88. Jason MacLean, "Ontario's cap-and-trade regime off to a shaky start," *Toronto Star* (3 March 2016), online: <https://www.thestar.com/opinion/commentary/2016/03/03/ontarios-cap-and-trade-regime-off-to-a-shaky-start.html>.

89. Shawn McCarthy, "Ontario, Quebec sign climate policy deal with Mexico," *The Globe and Mail* (1 September 2016), online: <http://www.theglobeandmail.com/report-on-business/international-business/latin-american-business/ontario-quebec-sign-climate-policy-deal-with-mexico/article31637425/>.

to develop beyond barter exchange. Such initiatives include the publicly subsidized creation of courts of law (and later administrative agencies and tribunals) to judicially enforce contracts and nonpossessory interests in personal property, the sovereign grant of corporate status to encourage the pooling of capital, and the creation and control of currency (*legal* tender).[90] "Government regulation here not only facilitates market freedom, *it helps create it.*"[91] The same is true for the institution of property. As Bentham famously observed: "Property and law are born together, and die together. Before laws were made, there was no property; take away laws, and property ceases."[92]

To see why this is so, it is again useful to frame the question in terms of genealogy rather than essence. Private property as we presently understand it is the result, not of any form of deregulation, but of regulation that redistributed the property rights of feudal lords to their tenants.[93] As is well known, soon after being crowned king in 1066, William the Conqueror (also known as the Bastard) dispossessed most of the English lords, claimed ownership of the whole of England, and parceled out rights to pieces of it to his trusted allies in return for obligations to provide him knights to defend the realm. His allies, the new lords, in turn subinfeudated by making arrangements with tenants (sublords, or vassals) who would provide the services the new lords required in exchange for access to land. Vassals then secured tenants of their own (peasants), who lived and worked on the land with the assistance of serfs (villeins), who were unfree (slaves).[94] Under feudalism, there was neither complete nor private ownership of land; nor was there anything remotely like the modern conception of individual autonomy (other than for William the Bastard, that is). Instead, feudalism comprised multiple pledges of fealty—tenants pledged fealty to lords; lords pledged fealty to the Crown.[95]

Over time, however, the political power of the lords increased; the council of lords became Parliament, and King John was forced to sign

90. See Roderick A Macdonald, "Understanding Regulation by Regulations" in I Bernier & A Lajoie, eds, *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) 81 at 115 [Macdonald, "Understanding Regulation"]; see also Joseph William Singer, *No Freedom Without Regulation: The Hidden Lessons of the Subprime Crisis* (New Haven: Yale University Press, 2015).

91. Macdonald, "Understanding Regulations," *supra* note 90 at 115 [emphasis added].

92. Jeremy Bentham, *Theory of Legislation* (1840), quoted in Singer, *supra* note 90 at 15.

93. My account here borrows liberally from the historical account provided by Singer, *supra* note 90 at 32-44.

94. *Ibid* at 32-33; see also David Carpenter, *The Struggle for Mastery: The Penguin History of Britain 1066–1284* (London: Penguin Books, 2013) at 84-85, 403-406.

95. Singer, *supra* note 90 at 33.

the Magna Carta.[96] At the same time, the property rights of lords also diminished. With the development of the common law, the royal courts began to recognize and protect the property rights of the lords' tenants.[97] As Singer concludes, "[p]easants gained both property and freedom not by deregulation; they gained independence by regulatory limitation on the powers of landlords and redistribution of property rights from lords to tenants."[98]

Like Siedentop, Singer asks rhetorically why any of this history matters to us today. His answer: "Freedom is not possible without regulation, and markets cannot exist without law. The free market is based not on a lack of government regulation but on a regulatory principle that abolishes feudalism and promotes individual choice within the bounds of law."[99] Singer proceeds to put an even finer point on the issue:

> A democratic society recognizes each person as free and equal. Such societies do not emerge from a state of nature. They are born from struggles to limit the power of kings and lords and to free slaves and servants from their masters. History teaches us that this can be achieved only by regulating the terms of contractual and property arrangements to abolish feudal and slave relationships and to spread access to property and opportunity.[100]

Libertarian legal theorists are not anarchists; they recognize the necessity of law, and Pardy is no exception. But Pardy's *Ecolawgic* rests on a common, tacit, and ultimately false dichotomy between legitimate laws necessary for the existence of markets, on the one hand, and illegitimate measures seeking to regulate the effectiveness and redistribute the fruits of markets on the other.[101] This false dichotomy rests on top of yet another untenable distinction, between freedom and order.[102] As Singer puts it (in the American political context): "Conservatives use the word 'regulation' to mean 'bad laws.' …Conservatives tend to use the word 'regulation' only for laws they dislike. When conservatives want regulation, they

96. *Ibid* at 34.
97. *Ibid.* As Siedentop recounts, the condition of labour under feudalism (as opposed to slavery during antiquity) was marked by the nascent belief that there were limits to the rightful power of one man over another. "There was an opening, however slight, for a private sphere and for freedom. It is probably no coincidence that the tenth century also saw the stirrings of a market economy": Siedentop, *supra* note 59 at 181-182.
98. *Ibid* at 35. Singer proceeds to recount how the process unfolded, *mutatis mutandis*, in the American colonies, including the legislative abolition of fee tail ownership.
99. *Ibid* at 44.
100. *Ibid* at 56.
101. Macdonald, "Understanding Regulation," *supra* note 90 at 115-116.
102. *Ibid* at 116; see also Bernard E Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Cambridge, MA: Harvard University Press, 2011) at 18, 44-45, 52.

tend to justify it by calling it something other than "regulation." They may call it 'preventing fraud,' 'enforcing contracts,' 'protecting property rights,' or 'promoting the rule of law.'"[103] But, as Macdonald observed in respect of the Canadian regulatory context, those who assert the distinction between state endeavours as legitimate structural market preconditions versus inappropriate regulatory interventions "have never succeeded in providing a criterion" capable of justifying it.[104] Hence the recourse to the "state of nature," or the free market as part of a "natural order." As Bernard Harcourt observes in his fascinating comparison of the Parisian *police des grains*—"the intricate and extensive web of royal decrees and ordinances that governed every aspect of the commerce of grain under the ancien régime"[105]—and the present-day Chicago Board of Trade, the idea of a naturally free, efficient, and self-correcting market naturalizes and masks the market rules and regulations that actually exist. According to Harcourt: "This, in turn, effectively keeps us from making the connection between the different methods of organizing markets and their distributive consequences, and from fully assessing the justice of the resulting outcomes."[106] And this, in yet another turn, makes it difficult if not impossible to frame the question of regulation, not in terms of *whether* to regulate (including *whether* to regulate markets), but how to determine *which* regulations are required to address a given policy problem.[107] That is the question taken up by the next part of this article regarding the rule of environmental law.

Before proceeding, however, there is the small matter of the infamous "flaw" of free market ideology. In the midst of the subprime mortgage crisis in 2008, Alan Greenspan testified before Congress. Greenspan, of course, had long and famously argued that markets work well—indeed work *best*—in the absence of regulation, and that regulations designed to cure market imperfections are worse than the disease. Representative Henry Waxman put it to Greenspan that this was the reason that Greenspan had refused in his capacity as the Chairman of the U.S. Federal Reserve to "prevent irresponsible lending practices that led to the subprime crisis."[108] Greenspan admitted that there was a "flaw" in the free market model that he had long used to define "how the world works."[109] Crucially, Greenspan

103. Singer, *supra* note 90 at 8, 12.
104. Macdonald, "Understanding Regulation," *supra* note 90 at 116.
105. Harcourt, *supra* note 102 at 6.
106. *Ibid* at 52.
107. Singer, *supra* note 90 at 8; Macdonald, "Understanding Regulation," *supra* note 90 at 146.
108. PBS New Hour, "Greenspan Admits Flaw," *supra* note 86.
109. *Ibid.*

further admitted that he now understood that free markets have limitations and that regulations may be required to prevent future catastrophic market failures.[110]

More recently, in a provocative and extraordinarily candid paper entitled "Neoliberalism: Oversold?,"[111] three members of the International Monetary Fund's (IMF) Research Department identified yet another flaw in the free market model: its core promise of increasing economic growth. The IMF authors describe the free market (or "neoliberal") paradigm as being based on two main planks: (1) increased competition achieved through deregulation and the opening up of domestic markets, and (2) a smaller role for the state achieved through privatization and limits on governments' ability to run fiscal deficits and accumulate debt.[112] They proceed to analyze the performance of these two policy planks by examining the effects of two more specific policies: (1) removing restrictions on the movement of capital across borders ("capital account liberalization"); and (2) fiscal consolidation, or policies that reduce deficits and debts ("austerity").[113]

Regarding cross-border flows of capital, the IMF authors conclude that the relative weighting of costs and benefits depends on the type of flow (e.g., long-term versus short-term) but "may also depend on the nature of supporting institutions and policies."[114] Regarding austerity measures, the authors observe that "the need for consolidation in *some* countries does not mean all countries—at least in this case, caution about 'one size fits all' seems completely warranted."[115] The underlying lesson here is that the idea of a single, paradigmatic, and naturally free market model is more myth than reality. (This point and its positive implications are explored further in Part V below.)

Overall, the IMF authors reach what they call "three disquieting conclusions" about the purported benefits of the neoliberal agenda.[116]

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110. *Ibid.* Of course, Greenspan's admission unwittingly discloses yet another flaw, the idea that markets can function—much less exist—absent regulations: Singer, *supra* note 90 at 5. Even liberal economists like Joseph Stiglitz commit the conceptual error of distinguishing markets and regulations. Commenting on the economic success of Chile, for instance, Stiglitz noted that the country is "an example of a success of combining markets with appropriate regulation." Joseph Stiglitz, "The Chilean Miracle: Combining Markets with Appropriate Reform" (2002) Commanding Heights interview, online: <https://www.pbs.org/wgbh/commandingheights/shared/minitext/int_josephstiglitz.html#4>.

111. Jonathan D Ostry, Prakash Loungani & Davide Furceri, "Neoliberalism: Oversold?" (2016) 53:2 Finance & Development 38, online: <http://www.imf.org/external/pubs/ft/fandd/2016/06/ostry.htm>.

112. *Ibid* at 38.

113. *Ibid.*

114. *Ibid* at 39.

115. *Ibid* at 40.

116. *Ibid* at 39.

First, when looking at a broad group of countries, the expected benefits of economic growth are "difficult to establish."[117] Second, "the costs in terms of increased inequality are prominent."[118] And third, increased inequality "hurts the level and sustainability of growth."[119] "In sum," they conclude, "the benefits of some policies that are an important part of the neoliberal agenda appear to have been somewhat overplayed."[120] Accordingly, and not a little astonishingly, given the source, the IMF authors counsel that "in some cases the untoward distributional consequences will have to be remedied after they occur by using taxes and government spending to redistribute income. Fortunately, the fear that such policies will themselves necessarily hurt growth is *unfounded*."[121]

Remarkable as these findings are, although remarkable only because of their source, they should not be surprising. As Macdonald observed over thirty years ago, the "free market" is simply another regulatory choice.[122] Therefore, the "flaw" identified by Greenspan and the IMF was the flaw of imagining that "free markets" operate outside of regulatory frameworks, and then paying insufficient attention to the design and effectiveness of those frameworks. Because markets are not natural phenomena, so-called deregulation is essentially "reregulation where the delegates of regulatory power (the holders of publicly created and protected property rights) are not subjected to due process controls over the exercise of their delegated discretion....Most deregulation is nothing more than reregulation without a democratic face."[123] Accordingly, "free market" governance should alarm libertarian legal theorists like Pardy and anyone else concerned about the integrity of the rule of law just as much as other government regulations

117. *Ibid.*
118. *Ibid.*
119. *Ibid.*
120. *Ibid* at 40.
121. *Ibid* at 41 [emphasis added]; see also Jonathan D Ostry, "We Do Not Have to Live With the Scourge of Inequality," *Financial Times* (3 March 2014), online: <https://www.ft.com/content/f551b3b0-a0b0-11e3-a72c-00144feab7de>. Pardy's analysis is subject to the same correction. Pardy argues, for example, that "[w]hen environmental quality is cast as a public good, government paradoxically becomes the sole source of protection and the leading source of trouble" (Pardy, *supra* note 1 at 106). Pardy's argument is empirically unsubstantiated. While assessing the costs and benefits of regulation is notoriously difficult, there exists evidence suggesting that major environmental protection legislation more than pays for itself. For example, the US EPA estimates that the annual costs of the 1990 amendments to the *Clean Air Act* will reach US$65 billion by the year 2020. But the EPA also estimates that by 2020 those amendments will save 230,000 adult deaths from particulate pollution and prevent 5.4 million lost school days and 17 million lost workdays per year. In all, peer-reviewed analysis estimates the benefits in the year 2020 to be US$2 trillion, exceeding the costs estimate by a ratio of 30 to 1. See Environmental Protection Agency, *The Benefits and Costs of the Clean Air Act from 1990 to 2020* (Washington, DC: Environmental Protection Agency, 2011).
122. Macdonald, "Understanding Regulation," *supra* note 90 at 146.
123. *Ibid* at 146, 136.

do.[124] This raises the question, raised anew in the Anthropocene epoch, about the meaning of the rule of raw and its relationship to environmental regulations.

IV. *What is the rule of environmental law? It depends on what the meaning of the word "is" is*

> In modern discussions of governmental regulatory activity, probably the most praised, most maligned and most misunderstood conception is that of the Rule of Law.[125]

Singer argues that another word for "law" is "regulation," and "regulation" is simply another word for "the rule of law."[126] On the classic Diceyan formulation, the rule of law entails the following three principles: (1) legislative legitimation, (2) judicial independence, and (3) executive minimalism.[127] These principles are founded on three corresponding assumptions: (1a) the law is primarily a static common law, and that any legal change must occur by means of a specified legal form that is individually normative (i.e., justifiable by an appeal to corrective justice) rather than institutionally normative (i.e., justifiable by an appeal to redistributive justice); (2a) law is distinct from politics, and must remain so—the objectivity of law is maintained by filtering all questions of policy into prescriptive legislation enacted by Parliament and applied impartially and mechanistically by courts; and (3a) unfettered Parliamentary supremacy.[128] These aspirations of a highly formal and explicit rule of law, finally, are operationalized through rules that are general, abstract, stable, prospective, publicly announced, and internally coherent.[129]

How does this classic formulation of the rule of law relate to the ideal form and substance of environmental regulations in the Anthropocene? Recall that for Pardy, the rule of law is composed of "[g]enerally applicable, abstract rules and limited state discretion…. In this way, legal disputes are

124. Macdonald puts the issue this way: "deregulation consists of expanding rather than contracting the scope of uncontrolled regulatory discretion by substituting property owners for state officials as titularies of delegated power, and by deploying the market, as opposed to formalized administrative procedures, as a regulatory process" (*ibid* at 128). For an analysis of how manipulation and deception are shot through supposedly free markets (i.e., insufficiently and improperly regulated markets), see George A Akerlof & Robert J Shiller, *Phishing for Phools: The Economics of Manipulation and Deception* (Princeton, NJ: Princeton University Press, 2015).

125. *Ibid* at 117.

126. Singer, *supra* note 90 at 2.

127. Macdonald, "Understanding Regulation," *supra* note 90 at 117; see also Harry Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17:1 Osgoode Hall LJ 1.

128. *Ibid.*

129. *Ibid* at 120.

insulated from individualized notions of justice and from the politicization of law."[130]

Modern environmental law, argues Pardy, respects neither the logic of ecosystems and markets nor the rule of law. Rather, "[i]t is a policy-driven, intensely political phenomenon."[131] To illustrate his critique, Pardy conjures a hypothetical regulatory standard issued under an imaginary statute.[132] He asks us to assume that the statute's purpose is to "prohibit pollution that harms the environment and endangers human health"; the statute's standard restricts the concentration of substance X in effluent to .02 micrograms per litre.[133]

How was the standard established? Pardy offers a possible explanation through an imagined cross-examination of the regulator. There are three key moments in Pardy's fictional exchange. The first unfolds as follows:

> Q: So you still haven't answered the question: why at this particular number?
>
> A: We judged that the benefits of lowering the number from .02ug/1 in terms of likelihood of adverse effect and magnitude of that effect did not justify the additional burdens of achieving the lower standard.
>
> Q: Burdens on whom?
>
> A: The regulated industries.
>
> Q: So you are measuring the difficulty in complying with a more onerous standard?
>
> A: Yes.[134]

This moment illustrates a crucial and unavoidable aspect of accountable environmental law making: weighing and comparing the benefits and costs of regulatory compliance. Ideally, this is done on the basis of the best available independent science. It is difficult to imagine an environmental regulation that ignores compliance costs, or one that is established on the basis of unproven benefits, as being considered democratically legitimate, particularly in the case of an institutionally normative regulation such

130. Pardy, *supra* note 1 at 8-9. More recently, Pardy defined the concept as "the proposition that no office or officers are above the law and are not empowered to make it up as they go": Bruce Pardy, "The Unbearable License of Being the Executive: A Response to Stacey's Permanent Environmental Emergency" (2015) 53:3 Osgoode Hall LJ 1029 [Pardy, "The Unbearable Licence of Being the Executive"]; see also Jocelyn Stacey, "The Environmental Emergency and the Legality of Discretion in Environmental Law" (2015) 52:3 Osgoode Hall LJ 985 [Stacey, "The Environmental Emergency"]; Jocelyn Stacey, "The Promise of the Rule of (Environmental) Law: A Reply to Pardy's Unbearable License" (2016) 53:2 Osgoode Hall LJ 681 [Stacey, "The Promise of the Rule of (Environmental) Law"].

131. *Ibid* at 105.

132. *Ibid* at 92-97.

133. *Ibid* at 92.

134. *Ibid* at 93.

as the one featured in Pardy's hypothetical, which clearly contemplates redistribution. Indeed, this was a critical threshold issue in several U.S. states' challenge to the U.S. E.P.A.'s "clean power rule"[135] enacted under the *Clean Air Act*.[136] The E.P.A. deemed power-plant regulation "appropriate" because the plants' carbon emissions pose risks to human health and the environment. But even under the remarkably deferential standard of review of agency decisions under U.S. administrative law,[137] the Supreme Court held that the E.P.A. erred in failing to consider the costs of regulatory compliance as part of its determination of the appropriateness of the regulation.[138]

The second key moment in Pardy's imagined cross-examination unfolds like this:

> Q: And you have factored in the effects of synergistic and cumulative effects of other toxic substances that might be in the water?
>
> A: To the best of our ability.
>
> Q: What do you mean by that?
>
> A: It is impossible to know conclusively all the other substances that might be present in all the bodies of water to which the standard applies.
>
> Q: Then how do you draw the line?
>
> A: We gather as much information as we can about other suspected hazardous substances.[139]

This moment discloses both a fair question and an honest (if hypothetical) answer, and yields at least two important lessons, the first specific and the second more general. Specifically, cumulative effects assessment is notoriously complex and, as currently practiced, decidedly suboptimal. The Canadian Council of Ministers of the Environment recently defined a cumulative effect as "a change in the environment caused by multiple interactions among human activities and natural processes that accumulate across time and space."[140] According to a recent review of cumulative effects assessment (CEA) in Canada, "meaningful CEA requires much

135. *Michigan v Environmental Protection Agency*, 576 US _ (2015).

136. *Clean Air Act*, 42 USC §7401 et seq (1970).

137. Known as "*Chevron* deference," for the decision of *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837 (1984).

138. The rule has been remanded to the Environmental Protection Agency for correction.

139. Pardy, *supra* note 1 at 95-96.

140. Canadian Council of Ministers of the Environment, *Canada-wide Definitions and Principles for Cumulative Effects* (Ottawa: Canadian Environmental Assessment Agency, 2014), online: <http://www.ccme.ca>.

more than just good science."[141] Instead, effective CEA requires a mindset capable of examining environmental impacts through the following three lenses: (1) technical, (2) law and policy, and (3) public-participatory.[142] Moreover, the "CEA mindset cannot just be legislated—legislation will just help to guide and encourage thinking toward the mindset by attending to what has been agreed to be important—but the mindset itself is an ethos of CEA that all engaged in CEA processes must embrace."[143]

More generally, scientific certainty cannot be a precondition for regulating behaviour in order to protect human health and the environment. One need not accept the validity of the precautionary principle, for example, in order to accept that regulatory decisions and actions are frequently if not almost always made in a context of epistemic uncertainty. Which leads to the third key moment in Pardy's imagined exchange:

> Q: I would be hard pressed to state the general rule you have followed to develop the standard for substance X.
>
> A: There is no general rule. Context is everything.
>
> Q: But there must be a common set of criteria, or a standard definition for environmental harm that you use each time.
>
> A: It doesn't work that way. We can't define it, but we know it when we see it.[144]

Here, Pardy implies that standards are derived from rules, preferably general and stable rules. But rules and standards do not necessarily exist in such a derivative, hierarchical relationship. They are better understood as two different and sometimes competing *forms* of legal norms.[145]

What is the relevant legal norm at play in Pardy's hypothetical? He does not identify it explicitly, but it emerges implicitly in the imagined exchange as being sustainability, or socially inclusive and environmentally sustainable economic growth.[146] Sustainable economic development, particularly in the context of climate change and the Anthropocene, is an example *par excellence* of a complex, superwicked public policy problem

141. A John Sinclair, Meinhard Doelle & Peter N Duinker, "Looking Up, Down, and Sideways: Reconceiving Cumulative Effects Assessment as a Mindset" (2016) 62 Environmental Impact Assessment Rev 183.

142. *Ibid.* The third—i.e., public-participatory—lens is critical. I will return to this perspective as a matter of general, democratic principle in the next section of this article.

143. *Ibid.*

144. Pardy, *supra* note 1 at 97.

145. See, e.g., Pierre J Schlag, "Rules and Standards" (1985) 33:2 UCLA L Rev 379.

146. This is the formulation of Jeffrey D Sachs, *The Age of Sustainable Development* (New York: Columbia University Press, 2015) at 3.

that resists resolution because of its "enormous interdependencies, uncertainties, circularities, and conflicting stakeholders."[147]

Given this normative objective, how should the norm itself be formulated: in the form of a general and stable rule, or as a standard, which allows for a greater range of regulatory choice and discretion within a set of mandatory considerations?[148] Macdonald argued that rules "are not a particularly appropriate mechanism where indeterminate and variable policy objectives are to be pursued, for their efficacy depends on their relative permanence, stability and generality."[149] U.S. legal theorist Lawrence Solum similarly characterizes the choice this way: "Some decisions involve very complex judgment calls that involve the application of multiple and incommensurable factors to particular situations that are highly variegated or even unique. This is a situation where rules are unlikely to work well, and therefore standards or discretion seems appropriate."[150]

In closing his hypothetical cross-examination Pardy adapts the observation of U.S. Supreme Court Justice Potter Stewart, who famously remarked that when it came to defining obscenity, "I know it when I see it."[151] No doubt Pardy ends with this flourish to put a fine point on the objectionable nature of discretionary decision-making. But the flourish fails. There is a kind of wisdom, easily recognized if not easily defined (we know it when we see it) in Stewart J.'s reasoning, based as it was on considerable judicial experience. What if the anonymous regulator in Pardy's hypothetical possesses great experience and practical wisdom when it comes to the administration of environmental protection standards? Would that change the way we read the exchange? Would it change the way we value the virtues of the Diceyan conception of the rule of law? Consider Schauer's take on the value of the rule of law in the real world:

> Of course, we do not live in Plato's utopia, and thus we understand that the values of legal reasoning and the Rule of Law may serve important goals in constraining the actions of leaders lacking the benign wisdom of Plato's hypothetical philosopher-kings. But even when we leave Plato's utopia and find ourselves in the real world with real leaders and their real flaws, the same dilemma persists. Legal reasoning in particular and the Rule of Law in general will often serve *as an impediment to wise policies and to the sound discretion of enlightened, even if not perfect, leaders.*[152]

147. Richard Lazarus, "Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future" (2009) 94 Cornell L Rev 1153 at 1159 [Lazarus, "Super Wicked Problems"].
148. I owe this formulation of a legal standard to U.S. legal theorist Lawrence B Solum, "Legal Theory Lexicon," online: Legal Theory Blog <http://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_3.html> [Solum, "Legal Theory Lexicon"].
149. Macdonald, "Understanding Regulations," *supra* note 90 at 141.
150. Solum, "Legal Theory Lexicon," *supra* note 148.
151. *Jacobellis v Ohio*, 378 US 184 (1964), Stewart J concurring.
152. Schauer, *supra* note 14 at 12 [emphasis added].

Applied specifically to sustainability, Jeffrey Sachs argues that "[c]omplex systems require a certain complexity of thinking as well. It is a mistake to believe that the world's sustainable development problems can be boiled down to one idea or one solution."[153] A skilled sustainable development practitioner, Sachs imagines, must be capable of "acknowledging the complexity of the issues and looking to make a *specific diagnosis of each specific case*."[154]

Pardy anticipates this line of counter-argument and calls it "arbitrary law and lazy science."[155] He argues that "[l]egal decisions of all kinds are frequently made in the face of scientific and evidential uncertainty by applying abstract rules and principles."[156] However, Pardy offers no particular real-world examples of abstract, general, and relatively stable rules that have in fact succeeded both in respecting the logic of ecosystems and in protecting them at the same time.

But what is most telling about Pardy's hypothetical—and libertarian legal theory more generally—is not its intolerance of ad hoc, political decision-making that is effectively *above* the law. That much is familiar and a reasonable concern. Rather, it is the libertarian blind spot regarding ad hoc, political interference in the very making of legislation in the first place, *before* the law, as it were. Recall how Pardy sets up his hypothetical: "Consider a hypothetical regulatory standard issued under an imaginary statute."[157] Following his cross-examination of the hypothetical regulator tasked with administering this statutory standard, Pardy offers the following closing argument: "Officials are willing to substitute their own assessment of reasonable risk in place of the personal assessments of the people who will be subjected to them. Such decisions belong to autonomous individuals."[158]

We are given no details about the origins of the statute, why it was enacted, or how it was conceived, drafted, and ultimately passed into law. We have to assume, along classic Diceyan lines, that it is legislatively legitimate. But then how can we fault the regulator in this hypothetical? The regulator cannot be said to be an official "willing" to substitute his or her own assessment of risk in place of the personal assessments of the people subjected to them—the regulator *must* exercise judgment and

153. Sachs, *supra* note 146 at 8.
154. *Ibid.*
155. Pardy, *supra* note 1 at 106.
156. *Ibid.*
157. Pardy, *supra* note 1 at 92.
158. *Ibid* at 97.

discretion given the form and substance of the statutory standard enacted by the legislature that the regulator is duty-bound to follow.

Now, is there any reason to suspect that the statutory standard itself, and not the regulatory judgment and discretion it necessitates, may not reflect "the personal assessments of the people who will be subjected" to the risks that the statute seeks to address? Well yes, actually. Earlier in the hypothetical cross-examination, there is a further telling exchange:

> Q: So if the cost of compliance is very high, the standard becomes less onerous than it would have been?
>
> A: Well, no, not necessarily. This industry is particularly fragile. And the government has spent many resources trying to develop it.[159]

This smacks, not only of regulatory complexity, but also of regulatory *capture*, or "the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent or action of the industry itself."[160] The phenomenon of regulatory capture and the political interference of market advocates and participants it represents is rarely if ever acknowledged by libertarian and rule of law critiques of legal decision-making, which tend to focus on the application of legal rules rather than their formulation in the first place. Indeed, in an earlier analysis, Pardy proposed a single rule to guide environmental law, which he formulated "apart from the issue of political feasibility," arguing "[t]hat there is little point in lamenting political obstacles [to environmental law reform] if, *should those obstacles disappear*, there is no ready-made legal approach that is capable of achieving the environmental goals that so many espouse."[161]

What is this single rule of environmental law? Pardy formulates it as follows:

> No one may produce environmental impact that, if multiplied by the number of humans in the ecosystem, would cause a permanent ecosystem change, unless a larger encompassing ecosystem can be identified in which no permanent change would result from the impact multiplied by the number of humans in that larger system.[162]

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159. *Ibid* at 94.

160. Daniel Carpenter & David A Moss, eds, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (New York: Cambridge University Press, 2014) at 13. For an application of regulatory capture to Canadian environmental law, see Jason MacLean, "Striking at the Root Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture" (2016) 29 J Envtl L & Prac 111 [MacLean, "Striking at the Root Problem of Canadian Environmental Law"].

161. Pardy, "In Search of the Holy Grail of Environmental Law," *supra* note 16 at 37-38 [emphasis added].

162. *Ibid* at 50; see also Pardy, *supra* note 1 at 65.

Of course it is possible to quibble with this rule: it is anthropocentric, and yet it fails to recognize that when it comes to climate change in the Anthropocene there is no other larger, encompassing ecosystem to move to. But to Pardy's immense credit, this rule extends libertarian and rule of law theorizing well beyond Morton Horwitz's still-resonant critique of the rule of law as promoting "a consciousness that radically separates law from politics, means from ends, processes from outcomes."[163] Pardy's proposed rule of environmental law—and his *Ecolawgic* more generally—attempts to attend simultaneously to procedural and substantive (environmental) justice, furnishing an important exception to the observation that "a 'legalist' consciousness that excludes 'result-oriented' jurisprudence as contrary to the rule of law also inevitably discourages the pursuit of substantive justice."[164] This sets Pardy's *Ecolawgic* apart from the standard line of libertarian legal theory.

Nevertheless, Pardy's general rule ignores "the question of limits for corporations"[165] and appears to fall under the spell of the "mythology in which private power is benign, markets are efficient (and objective) arbiters of exchange."[166] After all, we all have blind spots and ideological priors. Toward the end of Singer's *No Freedom Without Regulation*, for instance, after attempting to reconcile liberal versus libertarian conceptualizations of freedom and regulation, Singer admits that a close friend once gave him a button that reads: "stubbornly clinging to utopian illusions."[167]

What is the ideal rule of environmental law, then? As the title of this Part suggests, the answer depends on what the meaning of the word "is" is. This is meant to suggest that legal rules are dynamic rather than static. As Macdonald argued, law is always in the process of becoming itself. But Macdonald himself was at times a utopian: "Law, like the state, is more than a system of rules and offices. It is a symbol; it is an achievement which reflects the aspirations of the society out of which it has arisen."[168] Except, that is, when it reflects the *conflicting interests* of the society out of which it has arisen. Pardy's *Ecolawgic* shares more with Singer's and Macdonald's accounts than he might care to admit. *Ecolawgic* is an

163. Morton J Horwitz, "The Rule of Law: An Unqualified Human Good?" (1977) 86:3 Yale LJ 561 at 566.

164. *Ibid.*

165. Pardy, "In Search of the Holy Grail of Environmental Law," *supra* note 16 at 53.

166. Macdonald, "Understanding Regulation," *supra* note 90 at 136. For example, not once in *Ecolawgic* does Pardy acknowledge—let alone address—political rent-seeking on the part of market participants. His critical gaze is cast solely on "the process of utilitarian, discretionary, case-by-case decision making *tightly held by political officers*": Pardy, *supra* note 1 at 107 [emphasis added].

167. Singer, *supra* note 90 at 179.

168. Macdonald, "Understanding Regulation," *supra* note 90 at 146.

idealistic conception of what legal rules *should optimally be*, quite apart from a pragmatic or political solution to real-world regulatory impasse. The question, pursued in the next part of this article, is whether Pardy's idealistic conception can enhance environmental regulation in the world that we live in, or what economists like to call the world of the "second best."[169]

V. *Making the second best of it: Can* Ecolawgic *enhance environmental regulation in the real world?*

> First we had market failure; so we tried regulating markets.
> Then we had regulatory failure; so we tried reforming regulation;
> Now, it seems, we have "reform failure."[170]

And so we tried reforming reform.[171] And we are still trying.[172] Which brings us to the key—if not entirely intended—contribution that *Ecolawgic* has to make to the liberal legal theory of environmental regulation.

Pardy's *Ecolawgic* is an example *par excellence* of what is described in economic theory as first-best thinking.[173] First-best economic thinking presumes both that it is possible to determine *ex ante* a unique set of appropriate institutional arrangements, and that convergence toward such arrangements is inherently ideal.[174] Leaving aside their supposed naturalness, and bracketing markets' abundant flaws and failures, first-best thinking in economics nonetheless presumes that markets are in fact free, perfectly competitive, based on complete information, and free of externalities and public goods. This state of affairs is typically expressed

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169. See, e.g., Dani Rodrik, "Second-Best Institutions" (2008) 98:2 American Economic Rev 100 [Rodrik, "Second-Best Institutions"]; Richard G Lipsey & Kelvin Lancaster, "The General Theory of Second Best" (1956) 24:1 Review of Economic Studies 11 [Lipsey & Lancaster, "The General Theory of Second Best"]. In the context of climate change policy, see Paul Krugman, "The Big Green Test—Conservatives and Climate Change," *The New York Times* (22 June 2014), online: <http://www.nytimes.com/2014/06/23/opinion/paul-krugman-conservatives-and-climate change.html?_r=0>.

170. Colin S Diver, "Regulating the Regulators," Book Review of *Reforming Federal Regulation* by Robert E Litan & William D Nordhans (1984) 132:5 U Pa L Rev 1234 at 1234.

171. See, e.g., Roderick A Macdonald, "Law Reform for Dummies (3rd Edition)" (2014) 51:3 Osgoode Hall LJ 859 [Macdonald, "Law Reform for Dummies"]; Roderick A Macdonald & Hoi Kong, "Patchwork Law Reform: Your Idea is Good in Practice, but It Won't Work in Theory" (2006) 44:1 Osgoode Hall LJ 11.

172. See, e.g., K Sabeel Rahman, "Rethinking Regulation: Preventing capture and pioneering democracy through regulatory reform," White Paper, April 2016, online: Roosevelt Institute <http://rooseveltinstitute.org/rethinking-regulation/>.

173. The *locus classicus* of this view with respect to welfare economics is Kenneth J Arrow, "An Extension of the Basic Theorems of Classical Welfare Economics" in J Newyman, ed, *Proceedings of the Second Berkeley Symposium on Mathematical Statistics and Probability* (Berkeley: University of California Press, 1951) 507; see also Gerard Debreu, The Theory of Value (New Haven: Yale University Press, 1959).

174. Rodrik, "Second-Best Institutions," *supra* note 169 at 100.

as "Pareto efficiency" and means that no one can be made better off (i.e., through regulation) without making someone else worse off (once again, robbing Peter to pay Paul). As the *locus classicus* of this view readily concedes, however, "the classical criteria in production and consumption, *have little relevance to the actual world*."[175] Or as Stiglitz more recently put it: "whenever information is imperfect or markets incomplete—that is, *always*—there is a presumption that markets are not (constrained) Pareto efficient."[176] Accordingly, Stiglitz concludes that "the notion that markets, by themselves, lead to efficient outcomes has, today, no theoretical justification: no one believes that the conditions under which that statement is true are satisfied."[177]

Enter the theory of the second-best.[178] So-called second best models in economics recognize the real-world complications that betray the fanciful assumptions of first-best, textbook models. Second-best models are, as their name suggests, humbler about the claims economic models can credibly make. These models acknowledge that economies—developed and developing alike—are replete with market imperfections, that questions of efficiency cannot be meaningfully distinguished from questions of distributive justice, and that government regulatory interventions can generate positive outcomes.[179] Because economists working in this school of thought have abandoned the textbook models of classical economic theory, they have an almost infinite variety of models to deploy in addressing real-world public policy issues.[180] Economist Larry Summers neatly expressed the difference between first-best and second-best economic thinking in respect of an analysis of banking reform in China:

> Like experts in many fields who give policy advice, the authors show a preference for first-best, textbook approaches to the problems in their field, while leaving other messy objectives acknowledged but assigned

175. Arrow, *supra* note 173 at 509 [emphasis added].
176. Joseph E Stiglitz, "Government Failure vs. Market Failure: Principles of Regulation" (2008) at 2, Columbia University Academic Commons, online: <http://policydialogue.org/files/events/Stiglitz_Principles_of_Regulation_2.pdf>
177. *Ibid.* See also Marc Blaug, "Competition as an end-state and competition as a process" in B Curtis Easton & Richard G Harris, eds, *Trade technology and economics: essays in honour of Richard G. Lipsey* (Cheltenham: Edward Elgar, 1997) 241 at 255 (arguing that "these beautiful theorems are mental exercises without the slightest possibility of ever being practically relevant").
178. See Lipsey & Lancaster, "The General Theory of the Second Best," *supra* note 169; see also Richard G Lipsey, "Reflections on the general theory of second best at its golden jubilee" (2007) 14:4 International Tax and Public Finance 349 [Lipsey, "Reflections on the general theory of second best"].
179. Dani Rodrik, "Why do economists disagree?" (5 August 2007) *Dani Rodrik's weblog*, (blog) online: <http://rodrik.typepad.com/dani_rodriks_weblog/2007/08/why-do-economis.html>.
180. *Ibid.*

> to others. In this way, they are much like those public finance economists who oppose tax expenditures on principle, because they prefer direct expenditure programs, but do not really analyze the various difficulties with such programs; or like trade economists who know that the losers from trade surges need to be protected but regard this as not a problem for trade policy.[181]

According to *The Economist*, no less, "[t]he best policy-oriented economists, both left and right, are second best economists in the sense that they grasp the lessons of their fictions, but aim at truly feasible ideals, not blackboard utopias."[182] Or as Rodrik concludes, disagreements about first-best and second-best models "are often grounded not in economics per se, but in strongly held prior views about the world in which we live."[183]

Pardy's conceptualization of the rule of law as a kind of ecological system is legal theory's analogue to first-best welfare economics. Recall that he argues that the law ought to operate as a system that closely resembles the ecosystems and markets. As such, the law ought to be made up of abstract and generally applicable rules and principles that are intrinsically neutral and internally coherent.[184] Decision-makers must not attempt to "do right"; rather, their mandate must be to "let the system speak."[185] For Pardy, "[e]very rule and principle should be connected. Every decision should be related to all others."[186] Thus constituted, the legal system treats all its participants equally, "subjecting all to the same rules."[187] Moreover, decision-makers are equally constrained. "Under a systemic rule of law, judges are constrained by the content of the statute, by the non-legislative nature of their judicial role, by the decisions of courts interpreting the same statute in previous cases, by the principles of statutory interpretation, by the expectation that they will articulate reasons for the result that they have reached, and by the availability of appeal to a higher court."[188] Thus

181. Lawrence Summers, quoted *ibid.*

182. *The Economist*, "Making the second best of it" (21 August 2007), *Free Exchange (Blog)*, online: <http://www.economist.com/blogs/freeexchange/2007/08/making_the_second_best_of_it>; for an application of the theory of second best to climate change as a market failure, see "The way forward: Second-best solutions," *The Economist* (28 November 2015), online: <http://www.economist.com/news/special-report/21678959-if-best-method-tackling-climate-change-not-offer-try-something>.

183. *Ibid.* In the context of Canadian climate change policy, for example, Mark Jaccard argues that "[r]ather than listen to those who ignore evidence, [Prime Minister] Trudeau should focus on developing creative solutions in a second-best world." Mark Jaccard, "Want an effective climate policy? Heed the evidence," *Policy Options* (2 February 2016), online: <http://policyoptions.irpp.org/magazines/february-2016/want-an-effective-climatepolicy-heed-the-evidence/>.

184. Pardy, *supra* note 1 at 112.

185. *Ibid.*

186. *Ibid.*

187. *Ibid.*

188. *Ibid* at 84.

does Pardy seek to justify the force of law on the basis of "standards that are naturally unassailable, objectively true, and independent of human preference."[189] Legal rules, in other words, that have little resonance—let alone relevance—in the real world.

Would that it were so simple. If the law were indeed so clear and comprehensive, so precise and prescribed, there would be little need for the exercise of interpretative creativity and discretion on the part of decision-makers. This is precisely the form that Jeremy Bentham, for example, believed the law should take. Were the law so, Bentham believed that neither judges nor lawyers—whom Bentham referred to derisively as "Judge and Co."—would be able to obstruct the operation of precise and largely self-enforcing statutes for their own self-interested purposes.[190]

As Schauer argues, however, we now know just how wrong Bentham was on this point.[191] While detailed statutes have become the norm, so too have the variegated practices of statutory interpretation. This, according to Schauer, is largely due to the inescapable fact that "even the most precise statute cannot come close to anticipating the complexities and fluidity of modern life."[192] Consequently, "detailed statutes have increased rather than decreased the frequency of judicial intervention."[193]

Moreover, as noted above, statutory law is very often a morass, not only of complex details, but also of special and competing short-term interests. In the context of U.S. environmental law, for example, Lazarus notes that since the early 1990s the U.S. Congress has "essentially abdicated its lawmaking responsibilities in environmental law."[194] Making matters worse, Lazarus argues, is that when Congress does actually act in respect of environmental protection it does so through "appropriation bills: omnibus budget bills which can number in the thousands of pages.... It is the worst kind of lawmaking. The riders themselves invariably represent short-term, impulsive interests rather than the application of long-term perspective and expertise."[195] Congress now passes almost no coherent, comprehensive environmental legislation, and it displays no

189. *Ibid* at 14.

190. Jeremy Bentham, "A General View of a Complete Code of Laws" in John Bowring, ed, *The Works of Jeremy Bentham* (1962 [1843]) at 3, 5.

191. Schauer, *supra* note 14 at 150.

192. *Ibid.*

193. *Ibid.* Schauer's analysis cannot be easily dismissed by rule-of-law libertarians, for Schauer is very much an advocate for the position that what is distinctive about legal rules and reasoning is the law's tolerance of outcomes that are best for law as a system, as opposed to any particular dispute.

194. Richard J Lazarus, "Environmental Law at the Crossroads: Looking Back 25, Looking Forward 25" (2013) 2:2 Mich J Envtl & Admin L 267 at 272.

195. *Ibid* at 272-273. For an analysis of this phenomenon in the context of Canadian environmental law, see MacLean, "Striking at the Root Problem of Canadian Environmental Law," *supra* note 160.

ability to deliberate openly and systematically in response to changing circumstances and new information.[196] Not only does this regrettable state of affairs undermine environmental protection, but it also belies the legislative supremacy of environmental law, and the rule of law more generally. On this view of lawmaking, the law is anything but systemic and self-enforcing. It rather more resembles a maze.

Concentrating exclusively on the constrained and deferential role of judges—which is a canonical aspect of rule-of-law theorizing—does little to address this existential threat to the rule of law and democratic accountability. Worse, it distracts legal and policy analyses from the causes of this "worst form of lawmaking," which is largely the result of lobbying activities on behalf of the market actors lionized—or simply left off the hook—not only by libertarian theory, but much legal theory besides.[197] As Lawrence Lessig frames the problem in the American context, "[o]ur Congress is corrupt. It is obvious. Yet we ignore the obvious."[198]

We live in a manifestly second-best world rife with complexity, competing interests, and corruption (both *quid pro quo* and systemic).[199] This is as inescapably true of law as it is of markets. This does not mean, however, that *Ecolawgic* does not have an important contribution to make to the improvement of environmental decision-making and policy-making. On the contrary, *Ecolawgic* may be read as an application of the original purpose of the general theory of second best. The original purpose of second-best economic theory was not simply to oust the first-best models of economics textbooks. As Lipsey reflected on second-best thinking 50 years after its initial articulation, he explained the purpose of second-best thinking thus:

> The upshot is that in practical situations, as opposed to theoretical models, we do not know the necessary and sufficient conditions for achieving an economy-wide, first-best allocation of resources. Achieving an economy-wide second-best optimum allocation looks even more difficult than achieving the first best. *Without a model of the economy's*

196. Richard J Lazarus, "Congressional Descent: The Demise of Deliberative Democracy in Environmental Law" (2006) 94:3 Geo LJ 619 at 625-629.

197. See, e.g., Lee Drutman, *The Business of America is Lobbying: How Corporations Became Politicized and Politics Became More Corporate* (New York: Oxford University Press, 2015).

198. Lawrence Lessig, *The USA is Lesterland* (CreateSpace, 2014) at 29; see also Lawrence Lessig, *Republic, Lost: The Corruption of Equality and the Steps to End it* (New York: Twelve, 2015).

199. See, e.g., Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (Cambridge, MA: Harvard University Press, 2014); for an insider's analysis of the Canadian context, see, e.g., Alison Loat & Michael MacMillan, *Tragedy in the Commons: Former Members Speak Out About Canada's Failing Democracy* (Toronto: Vintage Canada, 2014); see also Donald Savoie, *What is Government Good At? A Canadian Answer* (Montreal: McGill–Queens University Press, 2015) at 265-266.

> *general equilibrium that contains most let alone all of the above sources, we cannot specify the existing situation formally and so cannot calculate the second-best optimum setting for any one source that is subject to policy change.* This is an important point since much of the literature that is critical of second-best theory assumes that economists know a distortion when they see one and know that the ideal policy is to remove the distortion directly, something that is necessarily welfare-improving only in the imaginary one-distortion world.[200]

First-best ideals can serve as parameters that guide the creation of feasible, second-best rules, policies, and institutions. As Lipsey argues, useful "piecemeal policy advising is not impossible."[201] But neither can rules and policies be determined "purely scientifically; instead it is an art, assisted by good economics, both theoretical and empirical."[202]

Rodrik similarly concludes his trenchant insider critique of free market economics and application of second-best thinking, *Economic Rules: The Rights and Wrongs of the Dismal Science*,[203] with a manifesto of sorts ("The Twenty Commandments"), which reads in relevant part as follows:

1. Economics is a collection of models; cherish their diversity.
2. It's a model, not *the* model.

...

5. The world is (almost) always second best.

...

9. Efficiency is not everything.
10. Substituting your values for the public's is an abuse of your expertise.[204]

Ecolawgic can perform the same role in respect of environmental rule-making and policy-making.[205] Perhaps not entirely coincidentally, *Ecolawgic* also concludes with a manifesto.[206] Though largely a concise summary of the book's principal arguments, Pardy's *Ecolawgic* manifesto can also be read as a series of ideal rule-of-law design parameters capable

200. Lipsey, "Reflections on the general theory of second best," *supra* note 178 at 355-356 [emphasis added].
201. *Ibid* at 362.
202. *Ibid.*
203. Dani Rodrik, *Economics Rules: The Rights and Wrongs of the Dismal Science* (New York: WW Norton & Co., 2015).
204. *Ibid* at 213-214.
205. For a related account of the potential of institutional design to articulate how the common law constitutional conception of the rule of law can be fulfilled in environmental law, see Stacey, "The Environmental Emergency," *supra* note 130; but see in direct response Pardy, "The Unbearable License of Being," *supra* note 130; regarding the rule of law as itself aspirational, see Stacey, "The Promise of the Rule of (Environmental) Law," *supra* note 130 at n 59.
206. Pardy, *supra* note 1 at 109-112.

of assessing and enhancing—if not creating[207]—environmental rules and policies.

Pardy argues, for example, that markets and ecosystems "consist of relationships and interactions that express information and produce outcomes."[208] Markets and ecosystems are made up of complex, particular, and piecemeal interactions. Accordingly, interventions in each can produce unintended consequences. This does not, however, necessarily counsel against such interventions, but it does effectively call for regulatory caution and humility. Most environmental scholars accept, for instance, that the principle of precaution has a role to play in standard setting.[209] Pardy's insight also effectively suggests that because attempts at making trade-offs between competing interests and risks may be fraught with risks[210] and uncertainties, rule-making and policy-making might better pursue avoiding trade-offs altogether and treating them as a last resort. Avoiding costly trade-offs, for example, is a defining element of Gibson, Doelle, and Sinclair's proposal for a new, "next generation" environmental assessment law that seeks to imagine, not the least bad economic activity in terms of biophysical impacts, but rather the economic activity that makes a net positive contribution to sustainability.[211] While Pardy is critical of environmental assessment generally, this "next generation" approach respects the logic of ecosystems and markets while also recognizing that intervention in each is inescapable.

Pardy proceeds to similarly observe that in both markets and ecosystems, "the dynamics of the system arise from the interaction of a multitude of individual actions, decisions and adaptations."[212] This insight recalls Macdonald's argument (discussed above) that "the sum of regulation in any given economy is a constant; what vary are the degree of centralization of regulation, and its instrumentalities."[213]

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207. This is a critical caveat. I am ever mindful of Macdonald's warning against evaluating all forms of regulation against a standard drawn from idealized conceptions lest such an evaluation give rise to an artificial symmetry and simplicity. Macdonald, "Understanding Regulation," *supra* note 90 at 106.
208. Pardy, *supra* note 1 at 209.
209. See, e.g., David M Driesen, "Cost-Benefit Analysis and the Precautionary Principle: Can They Be Reconciled?" (2013) 2013 Mich St L Rev 771 at 789.
210. Including so-called "risk/risk" dilemmas, whereby one environmental improvement—say, the switch from coal to natural gas to lower carbon emissions—leads to other risks, including risks to drinking water quality, methane emissions, and even earthquakes. See, e.g., William J Brady & James P Crannell, "Hydraulic Fracturing Regulation in the United States: The Laissez-Faire Approach of the Federal Government and Varying State Regulations" (2012) 14:1 VJEL 39 at 42-43.
211. Robert Gibson, Meinhard Doelle & A John Sinclair, "Fulfilling the Promise: Basic Components of Net Generation Environmental Assessment" (2015) 29 J Envtl L & Prac *257*.
212. Pardy, *supra* note 1 at 110.
213. Macdonald, "Understanding Regulation," *supra* note 90 at 145.

Ecolawgic challenges the liberal legal theory of rule-making and policy-making by contending that liberal legal theory is neither democratically accountable nor legitimate. But Pardy's own manifesto effectively (if not expressly) calls for the same critical skepticism in respect of all forms of decision-making, whether judicial, legislative, or delegated. Recall again Macdonald's insight regarding markets and regulation: Because "markets are not natural phenomena, deregulation is, in essence, reregulation where the delegates of regulatory power (the holders of publicly created and protected property rights) are not subjected to due process controls over the exercise of their delegated discretion."[214] *Ecolawgic* effectively counsels in favour of examining all forms of discretionary rule-making and decision-making—be it judicial, administrative, market-based, or some combination of these[215]—against the stringent and aspirational principles of the rule of law with the aim of enhancing democratic accountability and legitimacy.[216] Given the current federal government's aim of restoring Canadians' trust in its environmental regulations, this is an urgent task for environmental law and policy scholarship and practice.[217]

Pardy's *Ecolawgic* manifesto proceeds to valorize autonomy and competition, arguing that autonomous individuals "are the elements of markets and ecosystems"[218] and that the right to autonomy "includes the right to participate in markets and ecosystems under conditions that exist

214. *Ibid* at 146 [emphasis added].

215. See, e.g., the federal government's decidedly mixed terms of reference for its review of the federal environmental assessment regime, which include: (1) restoring "robust oversight and thorough environmental assessments of areas under federal jurisdiction, while working with provinces and territories to avoid duplication"; (2) ensuring "decisions are based on science, facts and evidence and serve the public's interest"; (3) providing "ways for Canadians to express their views and opportunities for experts to meaningfully participate"; and (4) requiring "project advocates to choose the best technologies available to reduce environmental impacts." Government of Canada, "Review of environmental assessment processes: Expert Panel Terms of Reference" (Ottawa, 2016), online: <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/final-terms-reference-ea.html>.

216. The present legitimacy crisis besetting the National Energy Board's assessment of TransCanada Corp's proposed Energy East Pipeline is a case in point regarding the need for far greater accountability in Canadian environmental administrative decision-making. See, e.g., Globe Editorial, "The National Energy Board has a credibility issue it can no longer afford to ignore," *The Globe and Mail* (29 August 2016), online: <http://www.theglobeandmail.com/opinion/editorials/the-national-energy-board-has-a-credibility-issue-it-can-no-longer-ignore/article31599667/> [Globe Editorial, "The NEB has a credibility issue"]; see also Campbell Clark, "NEB's missteps make Energy East a political problem for Trudeau," *The Globe and Mail* (30 August 2016), online: <http://www.theglobeandmail.com/news/politics/nebs-missteps-make-energy-east-a-political-problem-for-trudeau/article31601223/> [Clark, "NEB's missteps"].

217. See, e.g., Jason MacLean, "How to restore trust in Canada's environmental regulations," *Toronto Star* (23 June 2016), online: <https://www.thestar.com/opinion/commentary/2016/06/23/how-to-restore-trust-in-canadas-environmental-regulations.html>.

218. Pardy, *supra* note 1 at 110.

independently of monopolistic or non-competitive forces, whether public or private."[219] As argued above in Part II, there is no such right that is not granted by some sort of regulation in the first place, but Pardy's point here is nonetheless instructive. Because regulatory processes themselves function very much like markets with "invisible hands," law reform ought to pay attention to stakeholders' ability to meaningfully access and influence rule-making and policy-making processes otherwise marred by asymmetries in information and influence.[220] In the context of environmental policy responsive to climate change, or what Rodrik terms "green industrial policy,"[221] a democratically accountable policy framework "lies between arm's-length [competition] and capture....Government agencies need to be embedded in, but not in bed with, business."[222] There are a number of regulatory design mechanisms capable of facilitating greater access to and competition over rule-making and policy-making influence. These mechanisms, in turn, reflect *Ecolawgic*'s related call for systemic integrity, fairness, and in effect transparency (i.e., decision-makers should "let the system speak";[223] "Systems do not play favourites"[224]). Such mechanism include, but are not limited to, agency disclosure of minutes of meetings with firms and industry groups and periodic audits by independent experts.[225] Better still, environmental rule-making and policy-making processes ought to be opened up to a broader range of stakeholders and social actors, and such pluralistic and polycentric processes should seek to balance these stakeholders' participation against the participation and outsize influence of the usual suspects (i.e., industry insiders).[226] This recommendation best represents the meaning of "autonomy in the Anthropocene" advanced in this article—namely, the free and equally efficacious participation of the public in regulatory processes that seek to enhance our freedom to fashion a collective future in an existentially threatening epoch of our own making.

219. *Ibid* at 111.

220. See, e.g., Daniel Schwarcz, "Preventing Capture Through Consumer Empowerment Programs: Some Evidence from Insurance Regulation" in Carpenter & Moss, *Preventing Regulatory Capture, supra* note 160 at 365.

221. Rodrik, "Green Industrial Policy," *supra* note 6.

222. *Ibid* at 485.

223. Pardy, *supra* note 1 at 112.

224. *Ibid.*

225. Rodrik, "Green Industrial Policy," *supra* note 6 at 488.

226. For a discussion of how this form of engagement might look in the context of a reformed environmental assessment regime in Canada, for example, see Jason MacLean, Meinhard Doelle & Chris Tollefson, "Polyjural and Polycentric Sustainability Assessment: A Once-In-A-Generation Law Reform Opportunity," 30:1 J Envtl L & Prac 36 [MacLean, Doelle & Tollefson, "Polyjural and Polycentric Sustainability Assessment"].

This is not to suggest, however, that the legal foundations of a more pluralist and polycentric environmental regulatory regime are either different or unimportant. The familiar foundations of legitimacy, transparency, and unbiased decision-making premised on evidence-based and publicly-accessible reasoning will assume an even greater importance in a more pluralist and polycentric regime. As Macdonald and Wolfe observe in respect of pluralist social-ordering processes more generally, "[p]olicing the boundaries of fairness in interaction and constraining pathological disproportion of economic power in exchange will be even more significant."[227] Pardy's *Ecolawgic* can serve as a useful model for establishing the ideal boundaries of fairness and equality in environmental decision-making processes.

Finally, Pardy's *Ecolawgic* manifesto usefully reminds us that "[l]ike ecosystems and markets, the law should be internally coherent."[228] Internal legal coherence may well be impossible in the actual world, given its complexity, fluidity, and future that we can at best only dimly perceive. But coherence is nonetheless a worthy aspiration and a critical issue in rule-making and policy-making processes.

Canada's intermittently halting and half-measured efforts to date to establish a national climate change policy[229] illustrate the importance of foregrounding internal coherence. The absence of a coherent, national climate change policy even at the late date of this writing has resulted in an ineffective patchwork of subnational policies and regulations.[230] An internally coherent policy must not only integrate a variety of extant instruments—taxes, emissions trading schemes, energy-efficiency regulations—across jurisdictions, it must also integrate Canada's efforts to craft a sustainability strategy[231] and implement the UN's Sustainable

227. Roderick A Macdonald & Robert Wolfe, "Canada's Third National Policy: The Epiphenomenal or the Real Constitution?" (2009) 59 UTLJ 469 at 496.

228. Pardy, *supra* note 1 at 112.

229. See, e.g., Steven Bernstein et al., eds, *A Globally Integrated Climate Policy for Canada* (Toronto: University of Toronto Press, 2008); Meinhard Doelle, "The Legacy of the Climate Talks in Copenhagen: Hopenhagen or Brokenhagen?" (2010) 4 Carbon & Climate L Rev 86.

230. See, e.g., Nathalie J Chalifour, "Climate Federalism—Parliament's Ample Constitutional Authority to Regulate GHG Emissions" (2016) University of Ottawa Faculty of Law Working Paper No 2016-18, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2775370>.

231. *Federal Sustainable Development Act*, SC 2008, c 33.

Development Goals.[232] While the paradigm of Canadian environmental law and policy—not unlike U.S. environmental law and policy—is "messy, pluralistic, and pragmatic,"[233] it does not follow that environmental law's pluralism cannot be made more pragmatic by aspiring toward greater internal coherence and integration.[234] Greater internal coherence may yield greater external visibility and viability, particularly for the end-users of environmental law and policy who are not fully comfortable with the rich mess of its means/ends pluralism (e.g., judges, parliamentarians, prime ministers, journalists, citizens).

Conclusion: The barbarians are not all on the other side

> Under this rule, the following activities can be expected to be prohibited: clear cutting, operating coal-fired generating stations and nuclear power plants, driving petroleum powered automobiles, spraying pesticides, growing genetically modified crops, operating fish farms, burying inorganic waste, and numerous other everyday practices.[235]

The liberal legal theory of environmental regulation favouring regulation aimed at facilitating sustainability cannot afford to be complacent. While there is much to be said about the suitability of its messy, pragmatic pluralism to our complex and fluid world, it is nonetheless true that other approaches are capable of making compelling claims for political and public support, including market-based approaches aspiring to accountable and efficient least-cost solutions to environmental problems. Given the superwicked nature of climate change and sustainability,[236] environmental law and policy cannot afford to close ranks or become close-minded.

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232. United Nations, Sustainable Development Goals (SDGs), online: <https://sustainabledevelopment.un.org/sdgs>; see also Meinhard Doelle, "The Paris Agreement: Historic Breakthrough or High Stakes Experiment?" (2016) 6 Climate Change L 1. According to the Fall 2016 Report of Canada's Commissioner of the Environment and Sustainable Development, the federal government's draft 2016–2019 Federal Sustainable Development Strategy is silent on the 169 targets associated with the UN's SGDs. See Commissioner of the Environment and Sustainable Development, "The Commissioner's Perspective" in *2016 Fall Reports of the Commissioner of the Environment and Sustainable Development* (Ottawa: Office of the Auditor General, 2016), online: <http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201610_00_e_41670.html>.

233. Kysar, *supra* note 45 at 3.

234. See, e.g., Anthony Ho & Chris Tollefson, "Sustainability-based Assessment of Project-related Climate Change Impacts: A Next Generation EA Policy Conundrum," 30:1 J Envtl L & Prac 67 (arguing that "[a]ny reform to the *CEAA, 2012* that tries to incorporate sustainability criteria and trade-off rules into the statute must be attentive to the weaknesses within any project-level EA framework (including ones employing a sustainability-based approach) in addressing the complex and global phenomenon of climate change. Any such reforms must also be part of a carefully coordinated effort to establish a GHG reduction regime that can provide concrete GHG benchmarks for project EAs).

235. Pardy, "In Search of the Holy Grail of Environmental Law," *supra* note 16 at 53.

236. Lazarus, "Super Wicked Problems," *supra* note 147 at 1159.

In the discipline of economics, Rodrik describes close-minded theorizing as the "barbarians are only on one side" syndrome.[237] According to Rodrik, "[t]hose who want restrictions on markets are organized lobbyists, rent-seeking cronies, and their ilk, while those who want freer markets, even when they're wrong, have their hearts in the right place and are therefore much less dangerous. Taking up the cause of the former gives ammunition to the barbarians."[238] Much the same ideological polarization obtains in informal discussions of environmental laws and policies, particularly in respect of climate change.

The cost of close-mindedness, be it liberal or conservative, libertarian or communitarian, is considerable.[239] The political quagmire of climate change mitigation and oil pipeline project assessment in Canada is a case in point. As noted above, the National Energy Board's (NEB) ongoing review of the Energy East oil pipeline project proposal has generated political and public controversy. Moreover, the NEB's review has thus far run afoul of many of the elements of *Ecolawgic*.

The structure of the NEB's review is dictated by the government's interim project assessment regulations applicable to the Energy East project proposal (as well as the Trans Mountain pipeline proposal).[240] The interim regulations stipulate that the government's decisions on Energy East and Trans Mountain will be based on science and traditional Indigenous knowledge; the views of the public, including affected communities and Indigenous peoples; and the direct and upstream GHG emissions that can be linked to pipelines.[241] This approach, however, is internally inconsistent and incoherent in light of the fact that the majority of GHG emissions attributable to an oil pipeline are *downstream* emissions, which are excluded from the government's review.[242] Moreover, new oil pipeline construction is arguably irreconcilable with Canada's domestic commitment to transition to a clean, renewable energy-based economy,[243]

237. Rodrik, *supra* note 203 at 170.

238. *Ibid.*

239. For a timely and highly readable take on the importance of open-mindedness, see Cass R Sunstein, "Five Books to Change Liberals' Minds," *Bloomberg View* (11 October 2016), online: <https://www.bloomberg.com/view/articles/2016-10-11/five-books-to-change-liberals-minds>.

240. See Jason MacLean, "How to evaluate Energy East? Try evidence," *Toronto Star* (7 February 2016), online: <https://www.thestar.com/opinion/commentary/2016/02/07/how-to-evaluate-energy-east-try-evidence.html>.

241. *Ibid.*

242. *Ibid.*

243. Canadian Intergovernmental Conference Secretariat, "Vancouver Declaration on clean growth and climate change," (3 March 2016), online: <http://www.scics.gc.ca/english/conferences.asp?a=viewdocument&id=2401>.

and its international commitment to pursue economy-wide reductions in GHG emissions.[244]

Nor has the NEB's review of the Energy East proposal in particular proven to be neutral or impartial. As of this writing, public hearings scheduled to take place in Montreal were disrupted and ultimately suspended due to protests alleging, among other things, that the Board has compromised its credibility. As recounted by *The Globe and Mail*, the controversy dates back to 2015, when two of the three NEB commissioners charged with overseeing the assessment of Energy East initiated contact and met privately with former Quebec premier Jean Charest, who at the time of the meeting was under contract as a lobbyist for Energy East's proponent, TransCanada Corp. Making matters worse, the NEB initially—and incredibly—claimed that Mr. Charest did not discuss Energy East with the NEB's commissioners. The NEB proceeded to apologize, but maintained—equally incredibly—that the commissioners were unaware that Mr. Charest was a lobbyist for TransCanada. Then the NEB claimed that its commissioners had also met privately with other Energy East stakeholders, including environmental groups purportedly opposed to the project, as its commissioners prepared for the project's public hearings.[245] These revelations followed and exacerbated an earlier ethical breach. Late in the 2015 federal election campaign, Justin Trudeau was compelled to fire the co-chair of his campaign (and former chief of staff to Charest), Dan Gagnier, when it emerged that Gagnier was simultaneously advising TransCanada Corp. about how to lobby a possible Liberal government in support of Energy East.[246] Dealings like these are unlikely to fulfill what Canada's Minister of Natural Resources Jim Carr states as the government's obligation to "rebuild the public's trust while maintaining certainty for industry and ensuring a thorough [environmental assessment] process that is *fair, transparent and responsible*."[247]

Plainly, no single party, model, or theory has a monopoly over the best approach to a public policy problem as superwicked, polyjural, and polycentric as climate change and sustainability in the Anthropocene.[248]

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244. See, e.g., Wendy J Palen et al, "Energy: Consider The Global Impacts Of Oil Pipelines" (2014) 510 Nature 465; see also Jason MacLean, "The misleading promise of 'balance' in Canada's climate change policy," *Policy Options* (29 March 2016), online: <http://policyoptions.irpp.org/magazines/march-2016/the-misleading-promise-of-balance-in-canadas-climate-change-policy/> [MacLean, "The misleading promise of balance"].

245. Globe Editorial, "The NEB has a credibility problem," *supra* note 216.

246. Clark, "NEB's missteps," *supra* note 216.

247. Quoted in MacLean, "The misleading promise of balance," *supra* note 244 [emphasis added].

248. For a discussion of the polyjural and polycentric nature of climate change and sustainability, see MacLean, Doelle & Tollefson, "Polyjural and Polycentric Sustainability Assessment," *supra* note 226.

While Pardy's *Ecolawgic* ultimately falls short of providing a single, abstract, generally-applicable rule capable of resolving such issues, let alone the overarching issue of mitigating GHG emissions and accelerating the transition to a sustainability-based economy, as discussed in the previous part of this article, his manifesto may nonetheless be usefully read as a series of principles against which regulatory proposals and processes may be critically assessed.

What is more, Pardy's *Ecolawgic* and his general rule of environmental law that opens this part illustrate the rich complexity and potential of means/end complexes. The ends of Pardy's rule of environmental law are manifold and overlap significantly with those of the many other approaches to public interest regulation referenced and discussed throughout this article. The potential for greater rapprochement should not be overlooked. As Singer notes in the ultimately optimistic conclusion to his analysis of markets and regulation in the context of the 2008 financial crisis, "[l]iberals are right to remind conservatives that regulation is needed to structure markets appropriately and define property rights, but conservatives are right to remind liberals that the best way to promote equality is by those properly structured markets and property rights."[249]

Finally, Pardy's *Ecolawgic* effectively gestures toward a democratically accountable approach to what is arguably the root problem of Canadian environmental law and policy: the outsize and pernicious influence of special interest over government policy on matters of public interest.[250] To date, neither market-based approaches nor the technocratic, managerialist approaches typical of liberal legal theory favouring the expertise, autonomy, and authority of administrative agencies[251] has succeeded in imagining a rule-making and policy-making regime immune to this problem. *Ecolawgic*'s emphasis on impartiality, fairness, and the establishment of order arising out of autonomous individual actions shares a great deal with emerging scholarship on regulation and law reform that argues for iterative interaction and experimentation across multiple policymaking domains having the potential to establish common standards and shared commitments over time.[252] In this way, *Ecolawgic* points toward a potentially promising future of environmental legal theory and practice for the Anthropocene.

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249. Singer, *supra* note 90 at 176.

250. See, e.g., MacLean, "Striking at the Root Problem of Canadian Environmental Law," *supra* note 160.

251. Rahman, "Envisioning the Regulatory State," *supra* note 35.

252. The path-breaking and enduring law reform scholarship of Rod Macdonald stands out as exemplary in this regard. See, e.g., Macdonald, "Law Reform for Dummies," *supra* note 171.