# Is Resilience Resilient?

**Author :** Steve Gold

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Robert L. Fischman, [Letting Go of Stability: Resilience and Environmental Law](#)**,** 94 **Ind. L.J.** 689 (2019).

All it took was a frequently lethal, highly infectious, globally distributed virus. In anxious self-protection, *Homo sapiens* drastically curtailed the planet-altering behaviors we call "economic activity." The non-human parts of our ecosystems responded. Above cities, toxic and murky air cleared. Fossil fuel extraction sputtered; greenhouse gas emissions slowed. Wild animals returned to places from which they had long been exiled. Birds singing for mates vied more with each other and less with the drone of humanity. Even Earth's own seismic rumbling sounded more distinctly against a diminished background of people's percussive pounding.

The pandemic pause accomplished, however briefly, results that have eluded all the world's environmental policy makers. These results reminded us just how tight the correlation is between the human economy and human environmental impact–and, by negative implication, exploded the myth that "sustainability" can be a pragmatic and achievable goal of environmental law. The Earth has shown that to sustain normal levels of human population and economic growth, ecosystems must absorb massive, deeply disruptive, perturbations. In *Letting Go of Stability*, Professor Robert Fischman rejects the sustainability shibboleth and thoughtfully explores the potential of resilience, rather than sustainability, to provide a conceptual anchor for environmental law in the decades ahead.

Fischman, as he acknowledges, is not the first to question the merit of sustainability or to highlight the potential of resilience as a guiding principle of environmental law. *Letting Go of Stability* stands firmly on the shoulders of at least two scholarly traditions in the scientific, social-scientific, legal, and environmental planning literature: the development of adaptive management techniques for natural resources and the consideration of system resilience for legal regulatory design in many policy contexts. Using an admirable mix of theory and case description, Fischman argues that the scientific study of resilience in ecosystems offers specific lessons that will help society to address the persistent "fundamental questions of environmental law."

Why resilience? Fischman observes that environmental law, like much of law, implicitly has endorsed the goal of stability, seeking, for example, predictable and consistent production of ecosystem services. But to expect stability is unrealistic. Ecosystems, and their interactions with people that form numbingly complex "social-ecological systems," are intrinsically and unpredictably dynamic. Hence, Fischman contends, instead of trying to *maintain* social-ecological systems in some desired equilibrium state, it makes more sense for law to aim to protect systems' ability to *restore* a desired equilibrium in response to stress. That is, to keep systems resilient.

Fischman would, accordingly, have environmental law focus more on process and less on results. But as a goal, resilience is atypical and slippery. Resilience, after all, is a property that inheres in a system rather than an output that results from a system. And human beings (especially adherents of a certain school of legal and economic theory) just love designing systems to maximize output.

Fischman appreciates that for the most part, we value ecosystems not for what they are, but for what we get from them–whether nesting birds or irrigation water. Nevertheless, he argues, the goal of resilience should not and would not be indifferent to outputs. Process for process's sake, Fischman emphasizes, is not nearly sufficient as a policy goal. Achieving resilience may not maximize or stabilize the production of a particular system output, but it can enhance human and environmental welfare by narrowing variability and reducing the probability of significant disruption. "The greatest challenge for resilience as an environmental law objective," Fischman writes, "is that it will not fulfill the expectation of sustaining what we like." (P. 718.) The solace is that "*[r]esilience will promise less but deliver more of what it promises.*" (P. 709, emphasis in original.)

Moreover, Fischman astutely observes that there are some types of promises that environmental law based on resilience could fulfill more easily than is possible in a legal regime focused on stable outputs. Using the example of a degraded stream in Indianapolis, Fischman describes how resilience could be used not just to achieve narrowly-conceived environmental quality objectives but to reimagine and reconfigure the entire social-ecological system of the stream and its surrounding community. Resilience need not always buttress an existing equilibrium; sometimes a resilience frame moves policy toward a change large enough to push a system into a new and better equilibrium.

Can the attribute of resilience also push environmental law itself to a new and better equilibrium? In addition to being an overarching policy objective, should resilience be a design element of environmental law as well? The final section of *Letting Go of Stability* ponders these "meta" questions.

Of course, our legal system as a whole is built for resilience: by Constitutional design, common-law tradition, and institutional reality, it resists change, even to a fault. So how would design for resilience inform and improve environmental law particularly? Fischman argues that the features that make real-world systems resilient are uniquely applicable to environmental law because of environmental law's heavy emphasis on process and the polycentric nature of environmental policy puzzles. As he notes, the existing body of environmental law already incorporates some features of resilient systems, such as statutes that allow relatively large amounts of regulatory discretion and that require agencies periodically to reassess their prior decisions. Optimistically, he envisions that designing resilience into environmental law will entail "inviting new voices to the table," thereby enhancing environmental justice and "substantially increas[ing] the constituency of Americans who recognize how they benefit from environmental law." (P. 722.)

This article does not focus on particular policy prescriptions. But Fischman's vision is not purely theoretical. He is clear that the shift to a resilience theory of environmental law, if properly executed, would have significant substantive implications. For example, he writes, "[b]urdens of proof in common law and administrative settings need root-to-branch reassessment in light of the resilience framework." (P. 725.) He is certainly right about the need; let us hope that an enlightened generation of legislators, judges, and administrators seize the opportunity.

*Letting Go of Stability* grew out of Fischman's inaugural lecture as the George P. Smith, II Distinguished Professor at the Indiana University Maurer School of Law. This thought-provoking article demonstrates that the appointment was wisely made.

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