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978-1-107-03347-4 - Environmental Law and Contrasting Ideas of Nature:

A Constructivist Approach

Edited by Keith H. Hirokawa

Excerpt

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Introduction: Constructing Nature through Law

Keith H. Hirokawa

FOXES, PROPERTY, AND LAW'S IDEA OF NATURE

In theory, our ability to understand and communicate about the world is aided by frames, or social constructs, that filter, organize, and prioritize our experiences. Through this exercise, social constructions provide meaning to our interactions. Hence, when an apple falls from a tree and strikes me on the head, the event might be explained through gravity, or the ill will of an angry tree, or the mysterious phenomena of wizardry: the particular construct employed explains the world and its events in its own way. Of course, any event that is not accounted for in the particular construction may appear as irrelevant or an anomaly. Perhaps more importantly, there are many different, frequently conflicting and competing constructions of the world.

We use social constructions in law, and law is often the arbiter of constructions. Consider the concept of property, a construct that subjects nonhuman facts and values to the preferences of property owners. A helpful introduction to property might begin with the controversy of *Pierson v. Post*, a case well known among law students in the United States. In this case, Lodowick Pierson and Jesse Post disagreed over the ownership of a fox carcass. Perhaps this story began as a surprise: one early morning, some 200 years ago, a lone fox awoke in the forests of Long Island, New York, to the frightful sounds of hounds in pursuit. For the hunters, the purpose of the pursuit may have been the chase itself: the goal may have been to take the fox as a prize, but it was as likely that the hunters raced to enjoy the leisurely and recreational event of the foxhunt.¹ In the meantime, the fox tore through the underbrush with the immediacy of a self-aware entity frantically fleeing for its life.² As the hounds of

¹ See Caroline Jones, *Fox Hunting in America*, 24 AM. HERITAGE 62 (Oct. 1973).

² See *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805); for a detailed description of the circumstances of this particular hunt, see also Bethany R. Berger, *It's Not about the Fox: The Untold History of Pierson v. Post*, 55 DUKE L. J. 1089 (2006).

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imperial descent grew closer, and as the fox's fears matched the hunters' excitement, the fox may have thought, "What could I possibly have done to make these folks so angry?"

Not surprisingly, historical records do not provide a detailed discussion of deep empathy shown by the hunters, or of the many ways that this particular hunt was designed to minimize the pain and suffering of this particular fox. There is little discussion to be found regarding any engaged debates among the hunters about the suitability of this fox to the chase, about how to take the fox, or where to take the fox. The family lineage of this fox is lost to history, as has been the fox's breakfast menu.

Perhaps the history books are silent on these questions because the law did not imbue the activity with positive values to describe the fox. What is certain is that the fox that Pierson chased and Post captured was a creature the likes of which we may never see again. Until this case, the fox might have been claimed as property by virtue of a desire to own the fox, or a first sight of the creature, or even the initiation of a hunt with hounds of imperial descent. Indeed, at this time there were judges who were willing to support such a claim. At the resolution of this controversy, foxes were acknowledged by the courts to be wily rascals that could not be claimed as property until being dominated by a person. As such, although the taking of this fox may not have been the most significant moment in the development of legal constructions in American law, it did serve as an affirmation of the way that the concept of property is intended to interact with the nonhuman world. The court was not concerned with the well-being of the fox, the mood of the fox, whether it was hungry, whether it was in fact a he or a she, whether the fox enjoyed the landscape during the chase, or if the fox needed a break from the chase altogether – these matters were not raised by the court, precisely because the construction of law that was organizing the values and claims at hand did not concern these questions at all. The needs of the fox were made unimportant to law by elevating other values through the property paradigm. The fox was made unimportant by subjecting nature to law in what is known as the rule of capture.

The *Pierson* court debated the point and purpose of property acquisition in wild animals – an appropriate task to impose order on a resource subject to scarcity or competition – and concluded that *ferae naturae* are not transformed into property simply by a vocalized claim, or an earnest intention, or even by donning special hunting shoes or purchasing "hounds of imperial stature."³ The court favored a rule triggered by the exercise of human dominion and

³ 3 Cai. R. at 182 (Livingston, J., dissenting).

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control, where through an act a thing is denied its own natural liberty and is subjected to the will of an individual.⁴ Luck and lack of skill alike can keep a pursuer from acquiring such control and, as such, the court decided to measure property as a consequence of domination. Here, the hunter's claim was preempted by Pierson, a passer-by who successfully captured the fox by delivering a mortal blow. Of course, there are many different things in the world, each having its own characteristics and, as a result, manner in which it might be dominated. Hence, capture might not in every case require the physical possession of an animal carcass or a confirmed killing blow. Rather, if the pursuer "does all that it is possible to do to make the animal his own, that would seem to be sufficient" to vest a right in property.⁵

Although social constructions about nature are often founded in observations about a particular natural entity, it is equally important to note that constructions reflect back onto the world and help determine the character of nature – its grounding in society. Hence, when the court adopted the rule of capture to allocate rights to the fox, it indentured law to two additional rhetorical commitments. First, the rule of capture assumes a hierarchy among things in the world, where owned things are more valuable by virtue of having been captured: reducing a thing to ownership is the process of adding value to things in the world. This version of nature assumes the Lockean construction that the nature is composed of potentially valuable things, and that until transformed by the efforts of humans and civilization, nature is composed of waste.⁶ John Locke argued that "[o]f the products of the earth useful to the life of man, nine-tenths are the effects of labor."⁷ Untapped water resources, unexcavated minerals, and free-roaming animals are, under this scheme, merely waiting to become valuable through the act of domination represented in the rule of capture: as Locke argued, "bread is worth more than acorns, wine favored than water, and cloth or silk, than leaves, skins or moss."⁸ Hence, this construction denies nature a claim of a pre-capture or

⁴ 3 Cai. R. at 179.

⁵ *Ghen v. Rich*, 8 Fed. 159, 162 (D. Mass. 1881).

⁶ John Locke, *THE SECOND TREATISE OF GOVERNMENT* 22–23 (Basil Blackwell ed., 1946). Locke stated that "land that is left only to nature, that hath no improvement of pasturage, tillage, or planting, is called, as indeed it is, waste; and we shall find the benefit of it amount to little more than nothing."

⁷ *Id.* at 22.

⁸ John Locke, *THE SECOND TREATISE OF GOVERNMENT* 22–23 (Basil Blackwell ed., 1946) (favoring transformed things to natural ones, stating that "bread is worth more than acorns, wine favored than water, and cloth or silk, than leaves, skins or moss."). See Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 *ECOLOGY L. Q.* 631, 633–634 (1996) (discussing a Lockean approach to property rights).

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pre-transformative value.⁹ During the hunt, Pierson's fox exhibited only potential value, and it remained so until the fox could no longer evade the hunt. Obviously, the rule of capture does not require hunters to accommodate the health or well-being of the evasive fox.¹⁰

Second, because the rule of capture was intended to resolve competitive disputes about claims of property ownership, it is also evident that the rule establishes an individual's entitlement to take natural things, to exclude others from them, and to defer to nobody in determining the thing's fate. That is, capture transforms waste and chaos into value and order; capture confirms that a natural thing has become a valuable, owned thing and, as such, capture is the mechanism whereby law favors individual preference over ecological need. The consequence is protection for the destruction of nature; as Aldo Leopold pointed out in the *Sand County Almanac*, "[w]e abuse land because we regard it as a commodity belonging to us."¹¹

The doctrine of capture, then, allows humans to seek domination and destruction of natural things. By subsuming the values of nature into property and privatization, capture and its property context have encouraged humans to think of nature as reducible to control and have rewarded such acts through protection of a right to property. Property – at least property from the perspective of the capture construct – casts natural things as things that must be dominated and transformed to be useful, valuable, and valued. Hence, a nature left to itself is not valuable. Moreover, the rule of capture leaves little room for judicial recognition of value in the fox or in nature; the court merely applies the rule of capture and allocates an entitlement to the spoils of the hunt.

The idea of nature as transformable and improvable exclusively through the efforts of humans can be considered responsible for fostering a particular (and particularly influential) relationship between humans and nature. The idea of capture as first-in-time drove the taming of nature in the West. The rule of capture provided certainty and stability¹² and encouraged the domination of an untamed "nature" and natural processes.¹³ The United States was faced

⁹ See Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1442 (discussing the "transformative economy," in which property rights arise from transforming nature into a "useful" state).

¹⁰ See Eric T. Freyfogle, *Ownership and Ecology*, 43 CASE W. L. REV. 1269, 1277 (1993) ("If the land is injured in a way that the market does not value, the injury is irrelevant."); Lea VanderVelde, *The Role of Capture and the Rule of Capture*, 35 ENVTL. L. 649, 655 (2005).

¹¹ Aldo Leopold, *A SAND COUNTY ALMANAC*, at viii (1949).

¹² See, generally, Richard Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

¹³ This, of course, included eliminating the presence of Native Americans, who were already occupying the lands and interfered with the first possession idea behind capture. See Daniel M. Friedenber, *LIFE, LIBERTY, AND THE PURSUIT OF LAND* 27 (1992).

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with the perceived dangers and unbounded opportunities in the unending West. Mining claims and water diversions in the West rested their property claims on the Lockean notion of desert in property: “[H]e who first connected his labor with the property . . . in natural justice acquired a better right to its use and enjoyment than others who had not given such labor.”¹⁴

This book recognizes that the idea of property may constitute one of the building blocks of human identity, economy, and imagination. Property may be seen as so fundamental to personhood and identity that it be considered a governing dynamic in social structures: “There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”¹⁵ However, this book also recognizes that property is only a reflection of how we have chosen to view nature in the law: property is *only one* idea of nature, and nature always underlies the structures of law.

Of course, we may want to believe that law is free from the contingencies identified by the constructivist exercise. Indeed, we may even find comfort in the idea that law had shed such contingency to govern the world effectively. Law regulates the character of associations between humans and nature, including the ways in which humans compete with natural processes, fear natural events and natural entities, and draw advantage from natural resources. Law prioritizes certain values in nature by favoring rights to particular land uses or commodity values of natural resources. The construct of nature that results from law’s classifications and value adjustments is often cast in the abstract but often concerns utility, location, accessibility. The construct may distinguish between natural and a variety of nonnatural categories. The system of law provides a complex and ever-evolving set of rules that govern interaction between and among competing constructions of nature.

In the meantime, law does not necessarily adjudicate the correctness of a particular construction of nature, even if one must be chosen to govern. Indeed, a broad introduction to the variety of nature constructions might cover different political perspectives, emotional attachments, and values of civil society that arise when we interact with nature. Occasionally, these different notions of nature will serve quite distinct purposes, such as enabling us to recognize nature (constructs that distinguish natural from artificial), facilitate the protection of nature (constructs that identify nature’s

¹⁴ *Jones v. Adams*, 6 P. 442, 446 (Nev. 1885).

¹⁵ 2 William Blackstone, *COMMENTARIES ON THE LAWS OF ENGLAND* 3 (Wayne Morrison ed., 2001) (1765–1769).

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vulnerabilities), authorize the use of force to protect us from nature (constructs that justify fear of natural things), provide a basis to value nature (constructs that facilitate valuation, such as market value), authorize improvement upon nature by fixing or with artificial environments (constructs that identify better-than-nature values), or even encourage domination over nature (constructs that incentivize capture, control, and transformation of natural things). Indeed, the wealth of constructions appearing even in the last several decades prompted sociologist William Cronon to remark that “‘nature’ is not nearly so natural as it seems. Instead, it is a profoundly human construction.”¹⁶ Of course, the point is not that the world is a fiction. Rather, as argued by Cronon, “the way we describe and understand that world is so entangled with our own values and assumptions that the two can never be fully separated. What we mean when we use the word ‘nature’ says as much about ourselves as about the things we label with that word.”¹⁷

Not surprisingly, evolution in the law has resulted in a wide variety of stories about nature. Some of these stories are more central than others are to core social, ethical, and economic beliefs, such as the role played by the rule of capture in developing the wild West or the Edenic narrative in preserving wilderness. Other stories are more hidden, despite being pervasive, such as the influence of Judeo-Christian beliefs in our categorization and treatment of animals. Because of the possibility that, as Rik Scarce has pointed out, “[w]e can never see Nature [sic] for what it is, only for what we want it to be,”¹⁸ the value of the contributions in this collection is in the identification of the ways that ideas of nature have percolated through law, absorbed law’s fallacies and fictions, and reflected visions of a nature that have justified – and simultaneously been justified by – choices made in our legal doctrines.

CONTRASTING THE IDEAS OF NATURE

The essays in this book address laws that regulate human activity in the environment, where the idea of nature is important both in the ways that nature is considered the *context* for human action and where the idea of nature has particular meaning in relation to human needs or the built environment. These essays reflect recurring constructivist challenges in law with respect to

¹⁶ William Cronon, *Introduction: In Search of Nature*, in *UNCOMMON GROUND: TOWARD REINVENTING NATURE* 25 (William Cronon ed., 1995).

¹⁷ *Id.*

¹⁸ Rik Scarce, *FISHY BUSINESS: SALMON, BIOLOGY, AND THE SOCIAL CONSTRUCTION OF NATURE* 189 (2000).

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the character and value of nature and address the conceptual commitments, biases, and opportunities arising in natural resource conflicts. They reveal the ways in which watershed, ecosystem, and property constructs have driven human dominance over nature and continue to play a pivotal role in environmental protection.

In Chapter 1, Keith H. Hirokawa and Rik Scarce provide background information on the orientation of this project. Hirokawa and Scarce explain the origins of constructivism in sociology and its application in law and also address the criticisms leveled at constructivist method.

In Chapter 2, Katrina Fischer Kuh argues that the law is constructed in a way that keeps people from appreciating the impacts of their own (small) choices on the environment as well as how environmental degradation will ultimately affect them. Professor Kuh details how law obscures individual environmental harms in many ways, such as by focusing on commercial and industrial sources of pollution to the exclusion of individual effects on the environment. Professor Kuh argues that this disconnect between nature and individuals can affirm and institutionalize unsustainable practices that further deteriorate the global environment.

In Chapter 3, Jonathan D. Rosenbloom evaluates the consequences of committing to common pool and privatization models in allocating resource responsibilities. Rosenbloom explains that the notion of the “common pool resource” incorporates several legal and ecological concepts that seek to capture the complex places where nature and the governance of nature collide. This chapter identifies the rhetorical commitments embodied in the common pool resource framework and considers the idea of nature that is driven by such commitments. Professor Rosenbloom explores the intended and unintended consequences of using the common pool resource definition and questions the relationship between such a definition and efforts to manage nature in a sustainable way.

Jessica Owley in Chapter 4 illustrates that property constructs of nature may be ill equipped to sustain environmental stability and may be maladapted to the pressures of climate change. She points out that the property principle of perpetuity is in conflict with nature, which we know is in a constant state of flux. Moreover, even more progressive property tools, such as those that implement models of land conservation, focus on preserving the present state of land in perpetuity. By failing to challenge the status quo, such legal concepts turn a blind eye to the fact that nature is ever changing. Professor Owley’s thesis is further explored in the context of both traditional property servitudes and conservation easements. Particularly where these private land restrictions

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are intended to preserve today's landscape, such property tools illustrate the inherent conflict between the changing natural world and rigid legal structures.

Robin Kundis Craig in Chapter 5 also explores the conceptual difficulties in interacting with a constantly shifting nature. Specifically, Professor Craig identifies an institutionalized assumption that nature is stably resilient and able to absorb and recover from the barrage of insults that human activities have leveled on the environment. Professor Craig contrasts such assumptions with resilience thinking and our understanding of shifting ecological baselines, which acknowledges that human activities may compel ecosystems to shift into new states that relate to different baselines, ecological needs, and ecological processes. Craig argues that resilience thinking better captures the risks that exploitative activities pose, suggests new ways of thinking about natural resource exploitation, and prepares for the uncertainty of knowing nature in our interactions.

In Chapter 6, Irus Braverman contributes a study of the ways in which animals have been constructed in place and law. Professor Braverman points out that U.S. cities are designed and regulated with humans in mind. However, a range of nonhuman animals also dwells in urban space: rabbits, beavers, birds, and bees, to name just a few. Professor Braverman explores how law governs the presence of nonhumans in the city. Her chapter introduces law's project of classification that divides animals into pet, farm, wild, and pest and examines the implications of such classifications on how animals in the city live and die. This exploration illuminates the nature of law as a mechanism for attributing value and meaning not only to humans but also other animate things.

In Chapter 7, Stephen R. Miller describes how environmental law has changed the way it operates since the wilderness movement. Professor Miller identifies five approaches to city boundaries that illustrate the tensions maintained in the law between humans, nature, and place. Professor Miller concludes that the concept of wilderness has retained a great deal of power but also that legal constructs have created a new vision of what the city must be in its relation to nature. Miller also argues that the boundaries between the city and nature have been redefined because wilderness is affected by the city no matter how far away it may be.

Rik Scarce in Chapter 8 draws on his extensive research into the people, actions, history, and philosophies behind the "radical" environmental movement to provide insightful tales of struggle against practices and behaviors that are, in large part, legal. Professor Scarce identifies tensions between dominant social constructions and the malleable character of "nature." This

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examination suggests a constitutive role for law in defining counterculture and, perhaps especially, perceptions of environmental value.

In Chapter 9, Sandra B. Zellmer considers the design of laws that fit humans into a particular idea of nature and in which human values are dependent on how we understand “natural” circumstances and values. Professor Zellmer depicts wilderness as the place where law battles for an understanding of nature. Expectations of wilderness protection are high, as the Wilderness Act contemplates the preservation of undisturbed ecosystem processes, idyllic views, and unadulterated solitude, peace, and quiet. In this sense, preservation of wilderness values may enhance the Edenic narratives that support our imagination of nature. Moreover, as climate change challenges our perception of nature in an increasingly altered society, Professor Zellmer explains that the idea of wilderness will take on new, constitutive roles in the human relationship with nature. Yet the protections promised in wilderness legislation are often open to interpretation and influence from nonnatural values and priorities. As a result, societal pressure may bring about a far more malleable interpretation of wilderness than was ever intended.

In Chapter 10, Catherine Iorns Magallanes relies on situatedness and sense of place as defining characteristics of Native American cultures and explores locational contingency as the reason that native beliefs and practices are often described as appreciative of and integrated with nature. Yet Native American values and nature have commonly suffered a shared and unenviable fate under the law. Terms like “native” and “natural” have been employed to disassociate both nature and Native American values from the structure and substance of law, facilitating the coordinated dehumanization and disempowerment of Native American cultures with destruction of the natural environment.

Shannon M. Roesler in Chapter 11 discusses the historical background of the environmental justice movement, its critiques of the mainstream environmental movement, and how the ideas of nature and social equity have produced social tensions in the environmental movement. Professor Roesler explains why the law has accepted certain pieces of the environmental justice movement’s conception of nature and also why law has been reluctant to take on the movement in a wholesale fashion. She concludes by examining the obstacles to further acceptance of the environmental justice movement’s objectives by the law and suggests areas where the law can be more responsive to competing environmental and social constructions of fairness.

In Chapter 12, Dan A. Tarlock argues that conceptions of water in the law of natural resource allocation and protection have been anything but

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static. From workhorse to natural flows, water has taken on a variety of legal meanings that have been influenced by social and economic needs, trends, and practices. Professor Tarlock investigates these different conceptions and links the modern priorities for instream water with the values that support that ideal.

In Chapter 13, Craig Anthony (Tony) Arnold addresses the practice of framing in the management of watersheds. Watershed managers have long struggled to formulate a watershed description that is inclusive of economic, geographical, social, and ecological concerns. Contemporary framing literature suggests that the perception of different instruments may have an impact on the support garnered for a particular regulatory instrument choice. As such, watershed framing – which concerns the way our regulatory responses to particular watershed problems may be influenced or even determined by the way the challenges are presented – plays a constitutive role in regulatory legitimacy. Professor Arnold evaluates the pitfalls in the various alternative conceptions of watershed health, function, and value in relation to watershed governance.

Finally, in Chapter 14, Michael Burger reconstructs the litigation surrounding Shell Oil's attempt to drill for oil and gas in the Beaufort and Chukchi seas off of Alaska's northern coastline. This effort helps examine the ways in which the tropes and storylines that constitute "the imaginary Arctic" help shape the law. The case study of Arctic litigation offers insights into the competing storylines about frontiers and the Arctic that are deeply imbedded in American environmental thought, just as it explores how lawyers and judges incorporate these ideas into their rhetorical strategies. The study reveals that the "eulogized space" of the Arctic has been made "indifferent" by its subjection to the technocratic, managerial narrative of environmental and natural resources law.

Through their contributions, these authors examine the ways in which nature provides the physical backdrop against which humans build homes and cities and the resources that allow commerce and economy, as well as the processes that sustain life and diversity on the planet. In the meantime, the authors explain that it is law's *idea* of nature that allows humans to relate to their surroundings, challenges, and opportunities. In some instances, law uses nature to identify a baseline for assessing change or normalcy, an ideal for measuring morality, or a context for defining identity. Hence, if we think of water as an infinitely renewable resource that serves growth needs, we might not be concerned with how that resource is acquired, used, or even wasted. On the other hand, if we believe that water is a scarce and essential resource, we may find that an allocation scheme bears the weight of accomplishing many