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

A Constructivist Approach

Edited by Keith H. Hirokawa

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ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE

Law's ideas of nature appear in different doctrinal and institutional settings, historical periods, and political dialogues. Nature underlies every behavior, contract, or form of wealth and, in this broad, sense influences every instance of market transaction or governmental intervention. Recognizing that law has embedded discrete constructions of nature helps in understanding how humans value their relationship with nature. This book offers a scholarly examination of the manner in which nature is constructed through law, both in the "hard" sense of directly regulating human activities that impact nature and in the "soft" manner in which law's ideas of nature influence and are influenced by behaviors, values, and priorities. Traditional accounts of the intersection between law and nature generally focus on environmental laws that protect wilderness. This book builds on the constructivist observation that, when considered as a culturally contingent concept, "nature" is a self-perpetuating and self-reinforcing social creation.

Keith H. Hirokawa is an associate professor of law at the Albany Law School. His scholarship has explored convergences in ecology, ethics, economics, and law, with particular attention given to local environmental law, ecosystem services policy, watershed management, and environmental impact analysis. He has authored dozens of professional and scholarly articles in these areas and has coedited (with Dean Patricia Salkin) *Greening Local Government* (2012).

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Environmental Law and Contrasting Ideas of Nature

A CONSTRUCTIVIST APPROACH

EDITED BY
KEITH H. HIROKAWA
Albany Law School



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To my boys, Owen and Ethan, and their insatiable curiosities

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Keith H. Hirokawa joined the faculty at Albany Law School in 2009. He teaches courses involving environmental and natural resources law, land use planning, property law, and jurisprudence. Professor Hirokawa's scholarship has explored convergences in ecology, ethics, economics, and law, with particular attention given to local environmental law, ecosystem services policy, watershed management, and environmental impact analysis. He has authored dozens of professional and scholarly articles in these areas and has coedited (with Dean Patricia Salkin) *Greening Local Government* (2012). Prior to joining the faculty at Albany Law, Professor Hirokawa was an associate professor at Texas Wesleyan University School of Law and an adjunct professor at the University of Oregon School of Law. Professor Hirokawa practiced land use and environmental law in Oregon and Washington and was heavily involved with community groups and nonprofit organizations. He studied philosophy and law at the University of Connecticut, where he earned his JD and MA degrees. He earned his LLM in environmental and natural resources law from Lewis & Clark Law School.

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best published in land use and environmental law in their respective years, including his *Harvard Environmental Law Review* article on property as a web of interests. His books include *Fair and Healthy Land Use: Environmental Justice and Planning*; *Wet Growth: Should Water Law Control Land Use?*; and the coauthored sixth edition of *Fundamentals of Modern Property Law*.

Professor Arnold received his JD with distinction from Stanford Law School, where he was the founding executive editor of the *Stanford Law & Policy Review* and graduate student Fellow in the Center for Conflict and Negotiation. He received his BA with highest distinction from the University of Kansas, where he was elected to Phi Beta Kappa and earned two national honors, the Harry S. Truman Scholarship and the *TIME Magazine* College Achievement Award. He currently chairs the advisory board for the University of Kansas College of Liberal Arts and Sciences.

Irus Braverman is an associate professor of law at the University at Buffalo, State University of New York. She acquired her SJD from the University of Toronto and both her Master's in criminology and LLB in law from the Hebrew University of Jerusalem. Her main interests lie in the interdisciplinary study of law, geography, and anthropology.

Professor Braverman was an associate with the Humanities Center at Harvard University, a visiting Fellow in the Human Rights Program at Harvard University Law School, a junior Fellow in the Center of Criminology at the University of Toronto, and a visiting Fellow in the Geography Department at the Hebrew University of Jerusalem. She also served as a public prosecutor and as an environmental lawyer, both in Israel. Braverman's first book, *House Demolitions in East Jerusalem: "Illegality" and Resistance* (in Hebrew), focuses on how planning laws and regulations applied in East Jerusalem create a discriminatory urban landscape and produce illegal spaces. Her second book, *Planted Flags: Trees, Land, and Law in Israel/Palestine* (2009), describes how acts of planting and uprooting trees have facilitated the struggle over land and identity in Israel/Palestine.

Michael Burger teaches environmental and marine law at Roger Williams University School of Law. Prior to his arrival there, he was assistant acting professor of lawyering at New York University School of Law. He is a graduate of Columbia University School of Law, where he was a Harlan Fiske Stone Scholar and an articles editor for the *Columbia Journal of Environmental Law*; and of Brown University, where he graduated magna cum laude and received the Ratcliffe Hicks Prize for highest standing in language and literature. He also holds a Master of Fine Arts degree from the Graduate Creative Writing program at NYU. Between college and law school, Professor Burger worked as

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an overnight editor for a Bay Area news wire, a writer for *The American Lawyer* magazine, and a freelance writer and editor for various other print and online publications. After graduating, he served as an environmental attorney in the Office of the Corporation Counsel of the City of New York, where he worked on matters ranging from global warming to the most local of land use planning. Professor Burger's scholarly interests include environmental law, ocean and coastal law, and law and literature.

Robin Kundis Craig is nationally recognized for her work in all things water. Topics she writes about include the Clean Water Act; climate change and water resources, especially in terms of climate change adaptation; the connection between fresh water regulation and ocean water quality; marine biodiversity and marine protected areas; property rights in fresh water, especially public rights and the state public trust doctrines; the intersection of water and energy policies; and science and water resource protection.

As a result of her Clean Water Act work, including her book *The Clean Water Act and the Constitution* (2009), the National Research Council of the National Academy of Sciences has appointed her, since 2005, to three successive committees to assess the relationship between that Act, water quality in the Mississippi River, and Gulf of Mexico hypoxia. Professor Craig is the author of an environmental law text, *Environmental Law in Context* (2nd ed. 2008) and has published more than fifty law review articles and book chapters, as well as numerous shorter works. She is currently working on two new books: *Toxic and Environmental Torts: Cases and Materials* (with Andrew Klein, Michael Green, and Joseph Sanders, 2011); and *Comparative Ocean Governance: Place-Based Marine Protections in an Era of Climate Change* (2012).

Catherine Iorns Magallanes is currently a senior lecturer in the School of Law at Victoria University of Wellington. She earned her LLM from Yale University Law School in 1991. She has published widely on indigenous peoples' rights in international and domestic law, environmental law and management, and statutory interpretation. Her current research focuses on indigenous political representation in international and domestic laws, indigenous (co-) management of natural resources, indigenous reparations and grievance settlements, implementation of the precautionary principle in domestic law, the use of Maori words in legislation, and the use of parliamentary history materials in statutory interpretation.

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Kuh researches legislative and regulatory processes with an emphasis on environmental policy. At Hofstra, she teaches Environmental Law, Torts, Global Change and U.S. Law, and International Environmental Law.

Stephen R. Miller joined the faculty of the University of Idaho College of Law in 2011. Professor Miller received his undergraduate degree from Brown University and a Master's degree in city and regional planning from the University of California, Berkeley. Miller received his JD from the University of California Hastings College of Law, where he was senior articles editor of the *Constitutional Law Quarterly*. Prior to joining the faculty, Miller practiced land use and environmental law in San Francisco.

Miller researches in the areas of economic development, sustainable development, land use, environmental law, and local government law. His academic works have been published by or are forthcoming from *Harvard Environmental Law Review*, *Environmental Law Reporter*, and the *Journal of Land Use and Environmental Law*, among others. Miller currently also blogs at Land Use Profs Blog and runs the Economic Development Clinic at Idaho Law School.

Jessica Owley is an associate professor at the University at Buffalo Law School, where she teaches environmental law, property, and land conservation. She joined the Buffalo Law School faculty after serving as assistant professor at Pace Law School from August 2009 to July 2010. She received her PhD in environmental science, policy, and management from the University of California–Berkeley in 2005, shortly after completing her JD at Berkeley Law in 2004.

Before entering academia, Owley practiced in the Land Use and Environment Law group at Morrison & Foerster in San Francisco. Prior to private practice, Owley clerked for Judge Harry Pregerson of the Ninth Circuit Court of Appeals and Judge Dean D. Pregerson of the Central District of California.

Professor Owley's teaching interests are in the areas of property, environmental law, administrative law, and Indian law. While her general research is on land conservation and property rights, her current scholarship focuses on using property tools for conservation in the context of climate change.

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Rik Scarce is chair of the sociology department at Skidmore College, where he teaches Environmental Sociology, Social Theories of the Environment, Environmentalisms, Sociological Perspectives, Development of Sociological Thought, Contemporary Social Theory, Social Movements and Collective Behavior, and Political Sociology. Previously, he taught at Michigan State University and Montana State University.

Professor Scarce's newest book is an update of his first one, *Eco-Warriors: Understanding the Radical Environmental Movement* (2006). His previous books include *Contempt of Court: A Scholar's Battle for Free Speech from Behind Bars* (2005); *Fishy Business: Salmon, Biology, and the Social Construction of Nature* (2000); and the first edition of *Eco-Warriors* (1990). Professor Scarce is currently working on a book and documentary project illustrating sustainability in the Hudson River region, tentatively titled *Sustaining This Place: Making the Hudson Region Last*. He has authored or coauthored articles and book chapters on the social construction of nature, the international environmental movement, teaching methods, environmental

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conflict resolution, environmental attitudes, environmental futures, electronic democracy, and research ethics.

A. Dan Tarlock who joined the Chicago–Kent faculty in 1981, is an internationally recognized expert in environmental law and the law of land and water use. He has published a treatise, *Law of Water Rights and Resources*, and is a coauthor of four casebooks: *Water Resource Management*, *Environmental Law*, *Land Use Controls*, and *Environmental Protection: Law and Policy*.

Professor Tarlock is a frequent consultant to local, state, federal, and international agencies, private groups, and law firms and is an elected member of the American Law Institute. From 1989 to 1992, he was chair of a National Academy of Sciences/National Research Council committee to study water management in the western United States. From 1996 to 1997, he was the principal report writer for the Western Water Policy Review Advisory Committee. Professor Tarlock received his bachelor's and law degrees from Stanford University, where he was an officer of the *Stanford Law Review*. He is a member of the California bar. Professor Tarlock is currently one of three U.S. special legal advisers to the NAFTA Commission on Environmental Cooperation. He teaches courses in land use, property, energy and natural resource law, environmental policy, and international environmental law.

Sandra Zellmer began teaching at the University of Nebraska College of Law in 2003. She teaches and writes about natural resources, water law, public lands, wildlife, environmental law, and related topics. She also serves on the steering committee for the university's Global Water for Food Institute.

Professor Zellmer is a coauthor (with Laitos and Wood) and principal editor of a casebook, *Natural Resources Law*. She has published dozens of book chapters and articles and was awarded Best Paper by the American Bar Association for her work on "Missouri River Mud: Clean Water and Endangered Species," which she presented at the ABA's Annual Water Law Conference in 2011. She also served as a committee member on the National Academy of Sciences/National Research Council Committee on Missouri River Recovery; the committee report was published in 2010. Also in 2011, Zellmer gave a presentation about U.S. water law at the M.S. Swaminathan Institute in Chennai, India, with members of the Global Water for Food Institute. For the past few years she has conducted a training session on wilderness management at the Carhart Federal Wilderness Center in Missoula, Montana.

Professor Zellmer was a member of the faculty at the University of Toledo College of Law from 1998 to 2004. She has been a visiting professor at both Tulane Law School and Drake University Law School. Prior to teaching, she

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was a trial attorney in the Environment and Natural Resources Division of the U.S. Department of Justice, litigating public lands and wildlife issues for various federal agencies, including the National Forest Service, National Park Service, and Fish and Wildlife Service. She also practiced law at Faegre & Benson in Minneapolis, and clerked for Judge William W. Justice, U.S. District Court, Eastern District of Texas.

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Foreword

Law touches many subjects that are important to our daily lives. What we eat and how we get it, what our children learn in school, the things that we look at as we gaze out of our windows – all are at some point influenced by a standard in law. Importantly, when we engage the law with these many subjects, we usually do so because we think the proposed laws are right, or justified, or compelled. As such, it is sometimes difficult to second-guess our laws and the ideas represented in our laws. Laws addressing nature illustrate this point.

The trailblazing work of Professor Keith H. Hirokawa and the contributing authors to this compendium of essays causes readers to question traditional norms of legislative and administrative decision making when it comes to critical land use and environmental actions. These essays expand the framework of possibilities for appropriate assessment of human impacts on the natural environment, which in turn directly impacts human health and sustainability. The rich lessons from each chapter provide a platform for robust discussion among all stakeholders about the role of government in approaching the challenges of envisioning a sustainable built environment.

Environmental advocates, regulators, applicants, and community members alike will benefit from the suggestions of how to view ideas advanced today against uncertain or nonstatic future events that may alter the original intent in ways decision makers have failed to consider. Despite the fact that scientific evidence may not always be available to prove or disprove perceived potential harms, this book demonstrates that our socio-legal history and experience with balancing demands between the built and natural environments offer perspective and quantitative compelling evidence that the force of nature must be a part of our conscious decision-making rubric. The theory of nature through law that is developed in these pages changes the narrative about the dynamics of the built environment.

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Foreword

Above all, today's most pervasive threat – climate change and its far-reaching impacts – compels us to question the value we place on nature and the human relationship with it. Recurring natural disasters – from wildfires to hurricanes, tornados, and earthquakes – demand more thoughtful and creative approaches to how we value the natural environment and what trade-offs society is willing to make in the name of economic development or community amenities. Reliance on old and outdated legal structures, such as property rights, should be seen for the hurdles they raise against progressive problem solving. The insights on lessons from the social justice movement that should be employed to ensure sustainability provide a critically important lens for policy makers and anyone with the power to decide whether and how land should be used. Legal impediments to collaboration, as well as legal constructions of nature that encourage cooperation, should be scrutinized to determine their effects on natural processes. In short, this book is a must-read for all who have a responsibility to ensure sustainability.

Patricia E. Salkin
Dean and Professor of Law
Touro Law Center
August 2013