

CONTEXTUALIZING THE ROOTS OF ENVIRONMENTAL LAW

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Karl Boyd Brooks. *Before Earth Day: The Origins of American Environmental Law, 1945–1970.* Lawrence: University Press of Kansas, 2009. xxii + 263 pp. Photos, notes, bibliography, and index. \$34.95.

Occasionally, one can associate a new piece of literature with the reaction that singularly captures the gravity of the piece: Finally! In his new book, *Before Earth Day: The Origins of American Environmental Law, 1945–1970*, Karl Boyd Brooks justifiably seeks this association for his groundbreaking account of environmental law's roots. Brooks sets upon the chaos and controversy of the quarter-century following World War II to explain this era as unappreciated but critically important to the development of environmental law. His treatment is thoughtful and poetic as he dives deep into the political, social, economic, and legal constructs of the environment and identifies events and decisions that influenced our contemporary regulatory scheme. Through Brooks' caring attention to the legal developments arising in this time period, he convincingly illustrates the debt that environmental law owes to the persistence of early conservationist pioneers. Of course, with such an ambitious project, we have to question whether the author exceeds the charge: in some cases, an examination of a new account challenges the conventional wisdom on the matter because the evidence demands it; yet in others, the evidence fails to undermine our current understandings of the subject matter and might be better understood not as a new path, not as a new picture, and not as a new paradigm, but rather as exactly what we thought the examination would uncover. Whether Brooks' research reinvents environmental legal history or merely confirms that environmental law has been a struggle throughout its evolution is a question that persists, not so much in his storytelling as in the framework he employs to draw his conclusions.

Most of the literature on environmental law focuses on the explosion of legal attention to environmental protection in the 1970s. Included in this analysis are the dogged insistence of environmental scientists, the creativity of lawyers, the hostility of economic growth, the vision of environmental activists, and the compromise of politicians. The dialogue is as robust as it is interdisciplinary,

and the variety of perspectives leaves environmental law open to complexity in organization and pluralism in its foundations. Such is the grist of Brooks' project. However, the main thrust of his research is that the common understanding of environmental law as a revolutionary moment of the convergence of science, policy, and ethics in (or around) 1970 is built upon a complacent account of environmental legal history, one that ritualistically leaves us with an incomplete, incoherent, and insincere understanding. Brooks' project is to excavate the site of environmental law, to uncover the artifacts and symbols that have meaning to this discipline, not merely as a historical matter, but also (and more importantly) as they relate to the environmental consequences of an incremental approach to building a scheme of environmental law. Brooks' project is intended to make us—those who have accepted the thesis that environmental law was essentially created in or around 1970—uncomfortable with the conventional understanding of environmental law.

The stories told in *Before Earth Day* illuminate the intertwined fates of humans and the environment as both causes and effects of the postwar development of environmental law. To drive the point, Brooks insists that the history of environmental law be told as a narrative to capture the perspective of the subject. He bids the reader to visit the human places where laws were negotiated and navigated to describe the dynamic—yet quite ordinary—process of emerging legal regimes.¹ "The water tastes better," invites Brooks, in part because of the economic circumstances, politics, and social pressures that shaped our understanding of the human place in nature (p. 1). Yet Brooks defies the notion that we can understand environmental law merely by reference to human action: environmental law begins as an appreciation for the environment itself. We need to look more closely at the "nonhuman environmental lawmakers," the "not-so-silent partners in legal change" that have "exercised sovereignty's prerogative by posing challenges to some humans and presenting opportunities to others" (p. 5). In this "more complete but more complex account" of the birth of environmental law, nature itself has played its own agent and, in the process, dictated our policies toward the environment (p. 11). "Earth's own sovereignty has perpetually operated through the influences that even the most sophisticated natural sciences have only slowly revealed," influences to which "humans have had to adapt their rules" (p. 142).

Brooks' narrative reinvents the story of environmental law by harkening back past the "environmental decade" to 1946. The subsidence of World War II excitement was met with a dialogue based on reconstruction and a redefinition of national social goals. In this period of adjustment, the U.S. engaged its natural surroundings as architects of a new legal consciousness and developed five principles that came to underlie environmental law—the right of public participation, the courts' duty to scrutinize governmental environmental management, property's limits on rights to use, the environmental arbitrari-

ness of political boundaries, and the notion of baseline relationships between pollution and environmental health. During this time, the politics and pressures of the postwar era faced environmental quality in a way that may not have "replaced unrestrained environmental transformation with managed change, nor fundamentally challenged power's disposition," but still "incited a transformation in conservation ideology and methods" (p. 39).

Although Brooks champions the postwar period as the birthplace of environmental history, he does not lionize the legal regime created in that time period. Rather, as Brooks reflects on the evidence, we learn that environmental law is a failure today due to the adoption of laws during the postwar period that "blunted legal change to protect prosperity" (pp. 209, 122). We remain frozen, argues Brooks, because of our mistaken celebratory grasp on the "environmental decade" of the 1970s. When understood through Brooks' lens, postwar environmental law was merely a political choice of convenience, compromise, and stasis; the law of the environmental decade "mostly ratified and regularized" its roots (p. 7). Ultimately, the hope of *Before Earth Day* is that environmental law can be "revived" by learning from the postwar development of environmental policies. Breaking free of past compromises, Brooks suggests, will enable law to "attain its founder's hopes by becoming a vibrant mechanism of community-made rules to preserve the natural environment while striking better balances between private and public interests" (p. 209).

Undoubtedly, Brooks has prepared an unparalleled account of a neglected time period in environmental law's history. Yet, the divide between Brooks' stated goals and the text suggest that the book is important, but perhaps not in the way that Brooks himself proposes. Indeed, had Brooks left his readers to chew on the stories and anecdotes from the postwar era, we could only find his treatment a great accomplishment and a necessary addition to a collection on environmental law's roots. Instead, in framing his case, Brooks aggrandizes his findings against the legal academy and expresses his discontent at the entire body of existing literature on environmental law. These volumes of scholarship, practitioners' handbooks, and newsletters—which were developed by scholars and practitioners that presaged, drafted, litigated, and then catalogued environmental law—generally identify the environmental laws of the 1970s as a significant starting point and "sharp break from the past," an historical interpretation that Brooks claims to have "proved wrong" (p. 208). Brooks chastises law teachers for perpetuating the "conclusory, repetitive contention that environmental law began in 1969 and 1970" (p. 9). Environmental law, he argues, "did not appear in revolutionary moments of intense rational creativity after 1969," and instead "emerged steadily, over more than a quarter-century, in the most ordinary, commonplace ways" (pp. 6–7). Brooks charges that law professors first failed to anticipate the emergence of environmental law, and then failed to acknowledge it until 1970 (p. 8).

It may be worth noting that Brooks' "law professors" are made of straw: despite Brooks' repeated insistence, nobody seriously contends that environmental law has no roots.² Yet, most environmental law casebooks do not, in fact, provide more than a few pages on the postwar artifacts of environmental law. In part, the omission is pedagogical: law casebooks are used to teach the practice of law, a purpose that is better served by focusing on the contemporary legal scheme (which largely relies on the laws of the 1970s) than the detailed history of primitive law provided by Brooks. In part, the omission is semantic, represented in the acknowledgment that the term "environmental law" did not even exist before 1970 (p. 197). But conceptually, the omission is pragmatic, reflecting on the relevance of context to understanding the character of law: the notion that legal changes are careful, intentional and incremental is not necessarily incompatible with identifying particular legal changes as significant. The trick is the context. Of course, environmental law did not "begin" in 1969, if by the term "environmental law" we mean (as Brooks does) merely the principles of property, administrative law, public participation in lawmaking, and concerns about our natural surroundings. Indeed, if these principles exhausted the meaning of the term "environmental law," our journey through environmental law's history would necessarily reach back centuries, rather than decades. In short, Brooks' identification of "environmental law," and the term as it often appears in the legal scholarship that Brooks detests are clearly not the same "environmental law."

Brooks' thesis of incrementalism is not problematic because *incrementalism* is wrong, but because Brooks' use of it attempts to prove too much.³ Incrementalism provides a helpful account of law because it internalizes the notion that law may be incapable of long strides. Law, when understood as a product of evolution and incremental growth, rarely (if ever) allows for revolutionary paradigm shifts. That is, law adapts to changing conditions, but typically does so only "from molar to molecular motions," resolving new disputes from within a more comprehensive legal scheme and typically seeking the least destructive resolution.⁴ In an important way, incremental changes insure that law's continual adaptation is managed and that the incidental effects of emerging legal principles are not unintended.

The development of environmental law provides a good example of how contextual forces help determine law's evolution. Environmental law provides tools to manage human use and abuse of nature, and as such, regulates the intersection of identity and community, private choices and public needs, and property value and value in a broader sense. Yet environmental law does not exhaust the concept of law—law also regulates interpersonal behaviors through tort, contract, and criminal law; regulates governmental action through the Constitution; regulates access to remedies through procedural rules, and so forth; and environmental law borrows from, or overlaps with, all of them. The

point, of course, is that law is a larger project than environmental law, and the failure to recognize the situatedness of environmental law is a hope for autonomy that is simply not available. Indeed, as a relative newcomer to the legal arena, environmental law's incremental development might be due to political compromise, but also is the product of being forced into an existing legal regime comprised of property, liberty, and nature as resource. Incrementalism allows (if not demands) acknowledgment of such circumstances for their role in determining the direction of law.

The reason that incrementalism presents a challenge for Brooks' effort—not a fatal flaw of the book, but an important discussion point for his stated thesis—is that incrementalism alone cannot disprove the significance of particular moments in transition: revolutions in the law cannot be disproved, they can only be contextualized. In the appropriate context, the conventional understanding of environmental law *does* have merit beyond the "grain of truth" that he is willing to concede (p. 7). The "environmental decade" of the 1970s signifies a shift in our *approach* to regulating nature and it—not coincidentally—fostered the inception of the term "environmental law" (p. 197). The environmental decade hosted the informational demands of the National Environmental Policy Act (NEPA), the point-source and technology-forcing scheme of the Clean Water Act, the uniform and national standards approach of the Clean Air Act, and expansion of the "take" prohibitions in the Endangered Species Act outside of the limited National Wildlife Refuge System, to name only a few.⁵ What is important about the laws of the 1970s *is* their distinct emergence from the notably inspired but largely aspirational and ineffective past iterations. This new generation of environmental law, although fundamentally grounded in existing legal principles, diverged from the past laws' inability to compel changes in environmental quality and focused on the individual polluters' behavior.

Was this a revolutionary shift? It is difficult to measure from *Before Earth Day*, which denies the existence of any substantial changes in the 1970s but does not resolve the developments identified by legal scholars. Of course, we can answer the question with only a little imagination: environmental law was revolutionary to those whose expectations were challenged by the new scheme, including property rights holders, industrial facilities operators, municipal sewage treatment operators, anyone participating in "major federal actions," agencies (or persons in need of an agency permit) whose plans would disrupt an endangered species or the habitat of that species, and so on. These laws were revolutionary because they regulated *human action* and because, for the first time in environmental law's "environmental history," the law made it possible to conceive of environmental quality without resort to nuisance lawsuits.⁶ What Brooks fails to notice is that environmental law (like all shifts in law) can be illuminated by both evolutionary and revolutionary analyses,

and that both descriptions are relevant.⁷ Hence, although Brooks contributes to environmental legal history by detailing the importance of the postwar period, he has not disproved the importance of the environmental decade or undermined environmental law pedagogy.

Before Earth Day makes an important contribution to environmental legal history. Brooks' research and taste for storytelling take us into the early struggles of environmental advocates, those whose vision for a relationship with nature helped to shape the legal status of the environment. The story informs our efforts to become citizens of a broader biotic community and forces us to confront the complex tensions affecting the direction of legal change. In the process, *Before Earth Day* relates the process of legal developments from places where a natural history of environmental law has occurred. By recognizing the co-dependency of human and environmental sovereignty in contributing to environmental law, Brooks is able to focus on the "continuous interplay of human action, natural response, and legal change" (p. 14). In the meantime, however, Brooks has not bested the legal academy by discovering a hidden secret about environmental law, legal evolution, politics, or even nature. Environmental law has always appeared at the crossroads of environmental challenge, economic needs, property, identity, and community—regardless of its name and regardless of the date of its inception. Yet we cannot avoid the environmental law of the 1970s, when the convergence of disciplines informed our regulatory approach and when the immediate need for environmental quality became part of the law.

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1. For an example of a historical legal analysis that illuminates attention to ordinary people, commonplace events, and everyday activities as a way of gaining insights into the time, see Jason A. Gillmer, "Base Wretches and Black Wenches: A Story of Sex and Race, Violence and Compassion, During Slavery Times," *Alabama Law Review* 59 (2008), 1501.

2. This perspective problem pervades *Before Earth Day*. For example, Brooks states bluntly that Richard Lazarus' recent exploration of environmental law's roots attribute the birth of environmental law to the Airlie House Conference in 1969 (p. 182). Yet, Lazarus, like many others, considers Brooks' main point by recognizing that "the legal regime [of contemporary environmental law] that emerged may well have seemed to erupt out of nowhere, but both the social movement and statutory precedent that underlay it had been a long time in development." Richard J. Lazarus, *The Making of Environmental Law* (2004), 54. For other historical analyses of environmental laws and their effects before 1970, see also: Scott Hamilton Dewey, *Don't Breathe the Air: Air Pollution and U.S. Environmental Politics, 1945-1970* (2000); William L. Andreen, "The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part I," *Stanford Environmental Law Journal* 22 (2003), 145, and "Part II," *Stanford Environmental Law Journal* 22 (2003), 215.

3. Many contemporary scholars, including myself, have identified and relied on an evolutionary approach in understanding legal changes. For example, see generally, E. Donald Elliott, "The Evolutionary Tradition in Jurisprudence," *Columbia Law Review* 85 (1985), 38, 39; J. B. Ruhl, "The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy," *Vanderbilt Law Review* 49 (1996), 1407, 1434; Keith H. Hirokawa, "Some Pragmatic Observations About Radical Critique in Environmental Law," *Stanford Environmental Law Review* 21 (2002), 225, 272-78.

4. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, at 221 (1917) (Holmes, J., dissenting). Of course, Justice Holmes was specifically confronting restraint on the judiciary, but the proposition also reflects the ongoing tension between continuity of law and legal change in the face of changing social tides.

5. National Environmental Policy Act of 1969, 42 U.S.C. §4331, et. seq.; Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251, et. seq.; Clean Air Act of 1970, 42 U.S.C. §§7408-7410; Endangered Species Act of 1973, 16 U.S.C. §1531, et. seq.

6. See, for example, *Union Electric Co. v. EPA*, 427 U.S. 246 (1976): "The 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution."

7. By way of example, consider the evolution of zoning. "Euclidean zoning," a term that encompasses many of the contemporary land use planning practices, refers to the United States Supreme Court's 1926 decision in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). Reference to the 1926 decision does not mean that lawyers, politicians, and advocates were unaware that land use regulations were in place before 1926, or that these players were not experimenting with zoning before 1926. Rather, the term pays due respect to the notion that publication of the 1926 decision is the moment at which zoning was harmonized with tensions throughout property, constitutional, and administrative law. In 1926, zoning found a home in the police power, and so took its place within an existing legal scheme. Hence, the Euclid decision constituted an incremental legal development, in a sense, because the court's approval of zoning was premised on zoning's "fit" into existing law. Yet, the *Euclid* decision was also a revolutionary moment for land use law, at least because the decision could have gone the other way.