

History of Law and the Environment

Environment 298.68
Spring 2006 — Professor Hart

Syllabus

Text: Carolyn Merchant, ed., *Major Problems in American Environmental History: Documents and Essays* (2d ed. 2005), ISBN 0-618-30805-9.

Other readings will be e-reserves, which you can print from the Library web-page (search “Author = Hart, John”) or from our “Blackboard” web-site, at <http://courses.duke.edu>.

1. Is Ownership of Natural Resources Inherently Harmful? (1/11)

The Book of Genesis

Act of Parliament (1402).

John Winthrop, “The grounds of settling a plantation in New England” (1629), in
Merchant, ed., 70-71.

John Locke, *Second Treatise of Government* (1690), ch.1.

William Blackstone, *Commentaries on the Laws of England* (1765), I:135 ; II:2.

Garrett Hardin, “The Tragedy of the Commons,” *Science* 162: 1243-48 (1968).

John F. Beggs, *Historical Conceptions of Property in the Ecological Age* (1995),
900-01.

2. Early Laws on Fish, Wetlands and Coastline (1/23) I. Historical

Propositions to Evaluate

Thomas R. Dunlap, *Saving America’s Wildlife* (1988), 5.

M. Bergoffen, *Endangered Species Act Reauthorization* (1995), 31.

II. The Law of Wildlife Before 1800

A. Blackstone, *Commentaries* (1765), II: 389-95.

B. Anadromous fish: Introduction

Laws of Virginia

Petitions to the Virginia General Assembly

III. The Law of Wetlands Management

Overview; Massachusetts Act of 1795

IV. Coastline Preservation

3. Was the Constitution Meant to Constrain Regulation?

- I. Introduction: The Takings Clause and the Regulatory Takings Doctrine
- II. English Background: Blackstone's *Commentaries*.
- III. James Madison, *Property* (1792).
- IV. Early Court Cases
 - Stoughton v. Baker* (Mass. 1808)
 - People v. Platt* (N.Y. 1819)
- V. The Original Understanding As Reconstructed By Scholars
 - Sax, Bosselman, Epstein, Treanor, Hart, Gold.

4. The "Release of Energy:" Nuisance Doctrine & Industrialization in 19th Century America

- I. The Place of Nuisance Doctrine in the History of Land Use Law (pp. 1-6)
 - Pooley, *Planning and Zoning in the United States* (1961).
 - Kwartler, "Legislating Aesthetics" (1989).
 - Abeles, "Planning and Zoning" (1989).
 - Horwitz, *The Transformation of American Law, 1870-1960* (1992).
 - Ely, *Guardian of Every Other Right* (2d ed. 1998).
 - Platt, *Land Use and Society* (rev. ed. 2004).
- II. Nuisance Doctrine and Industry in the 18th Century (pp. 7-10)
 - Blackstone, *Commentaries* (1765), III: 216-18; IV: 166-67.
- III. Nuisance Doctrine and Industry in the 19th Century U.S. (pp.11-17)
 - Hurst, *Law and the Conditions of Freedom in the 19th c. U.S.* (1956)
 - Friedman, *History of American Law* (2d ed. 1985)
 - Horwitz, *The Transformation of American Law, 1870-1960* (1992)
 - Ely, *Guardian of Every Other Right* (2d ed. 1998)

Kmiec, "At Last, The Court Solves the Takings Puzzle" (1995)
Andrews, *Managing the Environment, Managing Ourselves: A History of American Environmental Policy* (1999)

IV. Nineteenth-Century Nuisance Doctrine (pp. 18-46)

Wheatley v. Chrisman (Pa. 1855)

Brown & Bros. v. Illius (Conn. 1858)

Huckenstine's Appeal (Pa. 1871)

Kelley, "Miners & Farmers," in Merchant, *Major Problems*, 270-74.

Woodruff v. North Bloomfield Gravel & Mining (U.S.N.D.Cal.1884).

Pennsylvania Coal Co. v. Sanderson (Pa. 1886).

Price v. Grantz (Pa. 1888)

5. Water Rights and Water Use in the West

I. Introduction to Water Rights Concepts

II. A Chronology of Water Rights and Water Use

"Explorers Observe Pueblo Irrigation," in Merchant, Major Problems, 36-37.

Norris Hundley, "Hispanic Water Rights."

"The California Gold Mines" (1870), in Merchant, Major Problems, 255-59.

John Wesley Powell, "Report on the Arid Lands" (1878), in Merchant, Major Problems, 342-45.

Coffin v. Left Hand Ditch Co. (Colo. 1882).

Reclamation Act of 1902, in Merchant, Major Problems, 347-48.

III. Interpretation: Causes and Effects of Western Water Regimes

Terry L. Anderson, *Water Crisis: Ending the Policy Drought* (1983), 26-43.

Donald Worster, *Rivers of Empire* (1985), 88-115.

Marc Reisner, "Reclamation" (1986), in Merchant, Major Problems, 366-72.

Donald Pisani, *To Reclaim a Divided West* (1992), 31-35.

Donald Pisani, *Water, Land, and Law in the West* (1996), 7-23.

Robert Glennon, *Water Follies* (2002), 13-19.

6. Roosevelt, Taft and the Fight Over Public Lands

A. Working Through Congress

Samuel Hays, *The Gospel of Efficiency: The Progressive Conservation Movement 1890-1920* (1959), 22-26.

Donald Pisani, "Forests and Reclamation, 1891-1911," in Harold K. Steen, ed., *The Origins of the National Forests* (1992), 237-51.

Gary B. Libecap, "Contracting for Changes in Federal Land Policies," in *Contracting for Property Rights* (1989).

B. Parks

Frederick Law Olmsted, "The Value of Parks" (1865), in Merchant, *Major Problems*, 384-85.

John Muir, "Wilderness Preservation" (1912), *ibid.*, 391-94.

The National Parks Act (1916), *ibid.*, 394-95.

Roderick Nash, "The Value of Wilderness" (1977), *ibid.*, 395-403.

Alfred Runte, "Railroads Value Wilderness" (1990), *ibid.*, 403-09.

C. Government Purchase of Private Land for Forestry

Bernhard Fernow, *Economics of Forestry* (1902), 269-73.

Congressional Debate; The Weeks Act (1911); Its Supporters

in Frank E. Smith, ed., *Conservation in the United States: A Documentary History*, 2:205-07, 218-23, 231.

D. Presidents Roosevelt and Taft (1901-13)

Gifford Pinchot, *Breaking New Ground* (1947), 387-407.

7. “Conservation” Laws and Private Property: Wildlife, Timber, Subsurface Resources

I. “Conservation,” generally:

Introduction

A. Primary Texts (Participants)

In Merchant, *Major Problems*: George Perkins Marsh (1864), 340-42;

Theodore Roosevelt (1908), 350-52; George Knapp (1910), 352-53;

Mrs. Marion Crocker (1912), 353-55; Gifford Pinchot (1947), 356-57.

B. Secondary Texts (Historical Perspective):

In Merchant, *Major Problems*: Hays, “Conservation as Efficiency,” 358-59;

Moneyhon, “Conservation as Politics,” 360-66;

Merchant, “Women and Conservation,” 373-82.

II. Wildlife (Birds, Beaver)

Robin W. Doughty, *Feathers, Fashion and Bird Preservation* (1975).

Richard Judd, *Common Lands, Common People: The Origins of Conservation in Northern New England* (1997).

Barrett v. State, 220 N.Y. 423 (1917).

III. Timber

Bernhard Fernow (1902), in Merchant, *Major Problems*, 348-50.

Ernst Freund, *The Police Power* (1904), 449-50.

Samuel P. Hays, *The Gospel of Efficiency: The Progressive Conservation Movement 1890-1920* (1959), 27-33.

Richard Judd, *Common Lands, Common People: The Origins of Conservation in Northern New England* (1997), 85, 90-99.

Ralph R. Widner, ed., *Forests and Forestry in the American States* (1968), 165-71, 276-79.

Michael Williams, *Americans and Their Forests: A Historical Geography* (1989), 320-23.

IV. Natural Gas

Lindsley v. Natural Carbonic Gas Company, 220 U.S. 61 (1911).

Walls v. Midland Carbon Company, 254 U.S. 300 (1920).

8. “Reform” and the Urban Environment, 1890-1930

Introduction

I. Depicting and Addressing the Urban Environment, generally

A. Primary Texts (Participants)

In Merchant, *Major Problems in American Environmental History*:

Frederick Law Olmstead, Urban Parks (1870), in Chudacoff, *Urban History*, 97-98.

Robert Woods on the City Wilderness (1898), 415;

An Editor Comments on the Noise Nuisance (1900), 416;

A Woman Reformer Advocates Civic Cleanliness (1901), 417;

Jane Addams on Garbage in Chicago (1910), 418-20;

Smoke Worse Than Fire: An Engineer on Smoke Pollution (1911), 420;

A Woman Reformer Promotes Smoke Abatement (1912), 422;

Booth Tarkington Depicts Urban Growth and Pollution (1914), 423-25;

A Black Migrant Experiences the Urban Environment (1927), 425.

B. Secondary Texts (Historical Perspective):

In Merchant, *Major Problems*:

Martin Melosi, City Wastes, 427-34;

Suellen Hoy, Women and City Wastes, 434-38.

Robert H. Wiebe, *The Search For Order, 1877-1920* (1967), 174-76.

Richard N. L. Andrews, *Managing the Environment, Managing Ourselves: A History of American Environmental Policy* (1999), 128-35.

Jon Peterson, “The Impact of Sanitary Reform on American Urban Planning, 1840-1890,” in Krueckeberg, *Introduction to Planning History* (1983), 26-33.

II. Planning the Built Environment; Building Regulation

A. Primary Texts

U.S. Dept. of Commerce, *A Zoning Primer* (1926).

U.S. Dept. of Commerce, *Standard State Zoning Enabling Act* (1926).

B. Secondary Texts

Keith D. Revell, *Building Gotham: Civic Culture and Public Policy in New York City, 1898-1938* (2003), 200-09.

9. The Rise of the Regulatory Takings Doctrine

Introduction

I. Treatises and Judicial Opinions

James Kent, *Commentaries on American Law* (1826-30).

Christopher Tiedemann, *A Treatise on the Limitations of Police Power in the United States* (1886), 426-28.

Huber v. Merkel (Wis. 1903).

Bacon v. Walker, 204 U.S. 311 (1907).

Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908).

Hadacheck v. Sebastian, 239 U.S. 394 (1915).

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

Miller v. Schoene, 276 U.S. 272 (1926).

II. Historical Generalizations to Evaluate

Morton Horwitz, *The Transformation of American Law, 1870-1960* (1992).

U.S. Supreme Court opinions

Doctrinal Commentary

10. Federal “Environmental” Laws

A. Primary Texts

In Merchant, *Major Problems in American Environmental History*:

Aldo Leopold Proposes a Land Ethic (1949), 454-58.

Rachel Carson, *Silent Spring* (1962), 493-96.

President Kennedy Assesses the Environment (1963), 496-98.

National Environmental Protection Act (1969), 498-500.

Alaska National Interests Lands Act, 502.

A Federal Director Discusses Environmental Risk (1983), 524-26.

A Business Leader on Industry’s Environmental Responsibilities (1987), 531-33.

B. Secondary Texts (Historical Perspective):

Robert V. Percival et al., *Environmental Regulation: Law, Science and Policy* (3d ed. 2000), 103-07, 146-49.

In Merchant, *Major Problems*:

Samuel Hays, *From Conservation to Environment* (1982), 503-11.

Jack Lewis, *From Laissez Faire to Environmental Regulation*, 511-16.

A Conservationist Summarizes the State of the Environment (1987), 533-36.

Theodore Goldfarb, *Environmental Legislation* (1987), 547-51.

Faber & O’Connor, *Environmental Politics* (1989), 551-59.

Elliott, Ackerman & Millian, “Toward A Theory of Statutory Evolution: The Federalization of Environmental Law” *J. Law, Econ. & Org.* (1985), 1: 313, excerpted in Richard L. Revesz, *Foundations of Environmental Law and Policy* (1997), 209-18.

11. Endangered Species Law

I. Judicial Interpretation

TVA v. Hill, 437 U.S. 153 (1978).

Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687 (1995).

Bennett v. Spear, 520 U.S. 154 (1997).

II. The Political Sustainability of Endangered Species Law

T.D. Feldman & A.E.G. Jonas, "Sage Scrub Revolution? Property Rights, Political Fragmentation, and Conservation Planning under the Federal Endangered Species Act," *Annals of the Ass'n of American Geographers*, 90(2): 256-92 (2000).

Palumbo bill

12. Originalism and the Property Rights Movement

I. Historical Claims and Property Rights

Richard Epstein, Charles Rowley

Congressional Testimony of James W. Ely, Jr., Poger Pilon

II. Executive Order No. ____ (1984).

III Regulatory Takings Legislation

Federal bills

State laws

Oregon Measure 37 (2004)

IV. "Right to Farm" Laws

David Callies, ed., *Cases and Materials on Land Use* (3d ed. 1999), 661-63.

13. The Supreme Court's Recent Environmental Jurisprudence: Calculating a Future Trajectory

I. The Reach of Congress's Power to Address Environmental Harm

Solid Waste Agency of Northern Cook Co. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).

II. The Regulatory Takings Doctrine

Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992).
Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

III. Anticipating the Environmental Impact of Two New Supreme Court Justices: Circuit Court opinions of John Roberts and Samuel Alito

Course Requirements:

1. E-mail Comments

By 9:00 p.m. the evening before class, please submit by e-mail a one-page reaction to the assigned reading, critically analyzing such aspects of the texts as an author's assumptions or value judgments, the persuasiveness of a writer's arguments, similarities or contrasts among texts, connection to previous readings, or similar aspects of the reading. (Do not simply summarize the readings.) The task of formulating comments will lend a focus to your reading and help me to make class sessions as useful as possible.

My e-mail address is jhart@duke.edu. Please include (in the message itself, so that it will appear when I print it out) your name and the class session the comments pertain to (e.g., "Class No. 5"). If you miss class because of illness, you may send in comments when you feel better. E-mail comments will account for 35% of the final grade.

2. Class Participation

Because this is a discussion course, every student is expected to do the readings on a current basis, bring the readings to class, and contribute to class discussions. Participation can take the form of volunteering your own opinions, responding to the teacher's questions, responding to others students' comments, or asking questions yourself. Participating in class will account for 25% of the final grade.

3. Attendance

After enrolling, each student is allowed two unexcused absences. (If you miss class because of illness, please let me know by e-mail.) For additional unexcused absences, two points (out of 100) will be deducted from the final grade. Thus you should attend class even if you fall behind in your reading.

4. Final Examination

An open-book essay examination will account for 40% of the final grade.

Consultation with Instructor

Please feel free to approach me with questions or concerns at any time.

A. Office hours: Wednesdays and Thursdays, 1:30 to 2:30, 110 Carr Building.

B. I will be happy to arrange to meet at another time.

C. The best way to reach me, to ask questions or schedule a meeting, is by e-mail: jhart@duke.edu. <mailto:johnhart@uchicago.edu>.

D. I will always be available to talk after class.

E. My office telephone number is 684-6624.

For help regarding the “Blackboard” web-site, call 684-2200.