



**Essential Readings in Environmental Law**  
**IUCN Academy of Environmental Law ([www.iucnael.org](http://www.iucnael.org))**

## **THE HISTORY OF ENVIRONMENTAL LAW (1)**

**Robert V. Percival**, University of Maryland, USA

### **OVERVIEW OF KEY SCHOLARSHIPS**

1. White, L. J., “The Historical Roots of Our Ecologic Crisis”, (1967)155 Science 1203
2. Rabin, L. R., “Federal Regulation in Historical Perspective”, (1986) 38 Stan. L. Rev. 1189
3. Nash, R.F., *The Rights of Nature: A History of Environmental Ethics* (Univ. of Wisconsin Press, 1989).
4. Kloepper, M., *Z. Geschichte, Des Deutschen Umweltrechts* (Dunker & Humblot, 1994).
5. Novak, J. W., *The People’s Welfare: Law and Regulation in Nineteenth Century America* (University of North Carolina Press, 1996).
6. Rodgers, H. W. J., “The Most Creative Moments in the History of Environmental Law: “The Whats,”” (2000) U. Ill. L. Rev. 1
7. Davis, D., *When Smoke Ran Like Water: Tales of Environmental Deception and the Battle Against Pollution* (Basic Books, 2002).
8. Morag-Levine N., *Chasing the Wind: Regulating Air Pollution in the Common Law State* (Princeton University Press, 2003).
9. Lazarus, R. J., *The Making of Environmental Law* (University of Chicago Press, 2004).
10. Lausche, B. J., *Weaving a Web of Environmental Law* (IUCN Environmental Law Programme, 2008).
11. Houck, O. A., *Taking Back Eden: Eight Environmental Cases That Changed the World* (Island Press, 2010).
12. Percival, R. V., “Law, Society and the Environment” in Gordon, W. R., and Horwitz, M. J. (eds.), *Law, Society, and History: Themes in the Legal Sociology and Legal History of Lawrence M. Friedman* (Cambridge University Press, 2011).

### **Background**

Most work in environmental history is not written by lawyers or law professors: after all, few lawyers have been trained to be professional historians. Professional historians who are not trained in law often gloss over unfamiliar legal details, but they have conducted valuable

research in how human activity has altered the environment over time. Legal historians, such as my mentor **Lawrence M. Friedman**, by necessity are trained in law, but they rarely are specialists in the complex field of environmental law. Thus, Friedman's acclaimed *A History of American Law* says virtually nothing about the history of environmental law. Thus, most of the important historical work has been produced by environmental lawyers and environmental law professors who have practiced and taught for so long that they have personally witnessed much of the evolution of the field.

Below are listed what I consider to be twelve of the most important reference works that focus on the history of environmental law. They are listed in chronological order by date of initial publication. An annotation follows each work explaining what it covers and its significance. Afterwards I have listed other important works on the history of environmental law, organized by which aspect of the field they address. This is followed by paragraphs describing the most important organizations that focus on environmental history, websites associated with them, and an oral history project on the history of environmental law.

#### **Essential works in the history of environmental law**

1. **L. White's** influential article *The Historical Roots of Our Ecologic Crisis* explores the historical evolution of mankind's attitudes toward nature, criticizing Christian theology for emphasizing man's dominion over nature.
2. **R. L. Rabin's** book titled, *Federal Regulation in Historical Perspective*, is a comprehensive history of federal regulation to protect human health, safety, and the environment in the United States from the early days of the republic.
3. **R. F. Nash's** *The Rights of Nature: A History of Environmental Ethics* traces the history of philosophical and religious beliefs regarding nature and the concept that nature has rights. The author hails the enactment of the *U.S. Endangered Species Act* as a breakthrough in human history because it is the first time humans expressly extend rights to nonhuman species. The author is also the author of *Wilderness and the American Mind* (Yale Univ. Press, 3d ed. 1982).
4. **M. Kloepfer's** *Zur Geschichte Des Deutschen Umweltrechts* provides a history of German environmental law from the perspective of a professor who is the author of a standard reference text on German environmental law. The author has done substantial research on environmentally-relevant law in ancient civilizations.
5. In the book *The People's Welfare: Law and Regulation in Nineteenth Century America* **W. J. Novak** provides a comprehensive review of efforts to protect public health through law and regulation during nineteenth century America. Common law courts wrestled with

how to balance protection of human health and the environment against the hazards of new technology without trying to stifle its development.

6. In his article titled, *The Most Creative Moments in the History of Environmental Law: "The Whats"*, **W. H. Rodgers Jr.** selects what he believes are the ten most significant events in the history of U.S. environmental law. The author also wrote a companion article (**William H. Rodgers, Jr.,** *The Most Creative Moments in the History of Environmental Law: The "Whos,"* 39 Washburn L.J. 1 (1999)) that reviewed some of the most creative legal strategists in the history of environmental law and how their actions influenced the development of the field, and *The Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology*, 27 Loyola of L.A. L. Rev. 1009 (1994).
7. **D. Davis'** *When Smoke Ran Like Water: Tales of Environmental Deception and the Battle Against Pollution* provides a history of efforts to control toxic pollution including the Donora tragedy, London's killer smog, leaded gasoline and CFCs.
8. **N. Morag-Levine'** book *Chasing the Wind: Regulating Air Pollution in the Common Law State* contains an impressive review of the history of air pollution control law that traces the historical roots of current tensions between common law and precautionary approaches to regulation. Comparing U.S. experience with that of Europe, the book combines a remarkable blend of legal history, comparative law, and political theory in discussing the historical development of the common law, comparing pollution control regulation in common law and civil law countries, and discussing why some communities continue to face air pollution problems more than 30 years after enactment of the *Clean Air Act*.
9. In *The Making of Environmental Law*, **R. J. Lazarus** provides an excellent review of why environmental problems pose such difficult challenges to lawmakers. He then traces how the U.S. legal system responded to them with a flood of legislation enacted during the 1970s and 1980s. He is also the author of a study of the voting records of U.S. Supreme Court Justices in environmental cases (*Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 U.C.L.A. L. Rev. 703 (2000)).
10. **B. J. Lausche's** book titled, *Weaving a Web of Environmental Law*, provides the definitive historical record of the Environmental Law Programme of the International Union for the Conservation of Nature (IUCN) from IUCN's establishment in 1948.
11. **O. A. Houck**, in his book *Taking Back Eden: Eight Environmental Cases That Changed the World*, tells the stories of courageous citizens in eight countries (Canada,

Chile, Greece, India, Japan, the Philippines, Russia, and the United States) who took legal action to defend the environment and to force change in places and at times when environmental law was either nonexistent or rarely enforced.

12. The article by **R. V. Percival** titled, *Law, Society and the Environment*, is a chapter in a *Festschrift* in honor of the renowned legal historian Lawrence M. Friedman. It traces the evolution of environmental law from its roots in British common law to today's vast regulatory infrastructure. Inspired by Friedman, the author also conducted original research on the history of environmental law in the Supreme Court in the papers of Blackmun (Environmental Law in the Supreme Court: Highlights from the Blackmun Papers, 35 Env. L. Rep. 10637 (2005)) and Justice Marshall (Environmental Law in the Supreme Court: Highlights from the Marshall Papers, 13 Environmental Law Reporter 10606 (Oct. 1993)), providing a behind-the-scenes review of how the Court handled environmental cases from 1967 to 1994. He also authored a history of the evolution and application of the precautionary principle focusing on the history of government efforts to combat lead poisoning and asbestos use (Who Is Afraid of the Precautionary Principle? 23 Pace Environmental Law Review 801 (2006)).

#### **Other important works on the history of environmental law**

1. Hurst., J.W., *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Belknap Press 1964)
2. Hays, S. P., *Beauty, Health and Permanence: Environmental Politics in the United States 1955-1985* (1987).
3. Beck, U., *Risk Society: Towards a New Modernity*. Volume 17, SAGE Publications Limited, (1992).
4. Sale, K., *The Green Revolution: The Environmental Movement 1962-1992*. (Macmillan 1993).
5. Adler, R. W., J. C. Landman, and D.M. Cameron, *The Clean Water Act 20 Years Later* (Island Press 1993).
6. Shabecoff, P., *A Fierce Green Fire: The American Environmental Movement* (Hill and Wang 1993).
7. Andrews, R. N. L., *Managing the Environment, Managing Ourselves: A History of American Environmental Policy* (Yale Univ. Press 1999).
8. Rodgers, W. H., Jr., *The Most Creative Moments in the History of Environmental Law: The "Whos,"* 39 Washburn L.J. 1 (1999).
9. Warren, C., *Brush with Death: A Social History of Lead Poisoning* (Johns Hopkins Univ. Press 2000).
10. Wirth, J.D., *Smelter Smoke in North America: The Politics of Transborder Pollution* (Univ. of Kansas Press 2000).

11. Davis, D., *When Smoke Ran Like Water: Tales of Environmental Deception and the Battle Against Pollution* (Basic Books 2002).
12. Percival, R.V., *Who Is Afraid of the Precautionary Principle?* 23 *Pace Environmental Law Review* 801 (2006).
13. Andreen, W.L., *Of Fables and Federalism: A Re-Examination of the Historical Rationale for Federal Environmental Regulation*, 42 *Env'tl L.* 627 (2012).

### **History of environmental infrastructure**

1. Melosi, M.V., *The Sanitary City: Urban Infrastructure from Colonial Times to the Present* (Johns Hopkins Univ. Press 2000).
2. Benidickson, J., *The Culture of Flushing: The Social and Legal History of Sewage* (UBC Press 2007).

### **History of environmental economics**

1. Coase, R.H., "The Problem of Social Cost", (1960) 3 *J. of Law & Econ.* 1.
2. Calabresi, G., and A.D. Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral", (1972) 85 *Harvard L. Rev.* 1089.
3. Cropper, M.L. and W.E. Oates, *Environmental Economics: A Survey*. 30 *Journal of Economic Literature* 675 (1992).
4. Costanza, R., R. d'Arge, R. De Groot, S. Farber, M. Grasso, B. Hannon, K. Limburg *et al.*, "The Value of the World's Ecosystem Services and Natural Capital." 387 *Nature* 253 (1997).

### **History of natural resources law**

1. Petulla, J. M., *American Environmental History: The Exploitation and Conservation of Natural Resources* (Boyd & Fraser Publishing Company 1977).
2. Laitos, J. G. and T.A. Carr, "The Transformation on Public Lands", 26 *Ecology L.Q.* 140 (1999).

### **History of environmental philosophy**

1. Tribe, L.H., "Ways Not to Think about Plastic Trees: New Foundations for Environmental Law", 83 *Yale Law J.* 1315 (1974).
2. Nash, R., *Wilderness and the American Mind* (Yale Univ. Press 3d ed. 1982).
3. Sagoff, M., *The Economy of the Earth: Philosophy, Law and the Environment* (Cambridge Univ. Press 1988).
4. Coyle, S., and K. Morrow, *The Philosophical Foundations of Environmental Law* (Hart Publishing 2004).
5. Rich, B., *To Uphold the World: The Message of Ashoka & Kautilya for the 21<sup>st</sup> Century* (Penguin 2008).

## **The judiciary and the environment**

1. Sax, J. L., The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970).
2. Brenner, J. F., Nuisance Law and the Industrial Revolution, 3 J. Legal Studies 403 (1974).
3. Percival, R.V., Environmental Law in the Supreme Court: Highlights from the Marshall Papers, 13 Environmental Law Reporter 10606 (Oct. 1993)
4. Lazarus, R. J., Restoring What's Environmental About Environmental Law in the Supreme Court, 47 U.C.L.A. L. Rev. 703 (2000).
5. Percival, R. V., The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance, 55 Ala. L. Rev. 717 (2004).
6. Lazarus, R. J., and O.A. Houck, eds., Environmental Law Stories (Foundation Press 2005).
7. Percival, R. V., Environmental Law in the Supreme Court: Highlights from the Blackmun Papers, 35 Env. L. Rep. 10637 (2005).
8. Pring, G. and C. Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunals (Access Initiative 2009).

## **The executive branch and the environment**

1. Whitaker, J. C. , *Striking A Balance: Environment and Natural Resource Policy in the Nixon-Ford Years* (American Enterprise Institute & Hoover Institution 1976).
2. Quarles, J., *Cleaning Up America: An Insider's View of the Environmental Protection Agency* (Houghton Mifflin 1976).
3. Soden, D.L., ed., *The Environmental Presidency* (State Univ. of N.Y. Press 1999).
4. Train, R. E., *Politics, Pollution and Pandas: An Environmental Memoir* (Island Press 2003).
5. Whitman, C. T., *It's My Party Too: The Battle for the Heart of the GOP and the Future of America* (Penguin 2005).
6. Percival, R.V., *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?* 79 Fordham L. Rev. 2487 (2011)..

## **The legislative branch and the environment**

1. Elliott, E.D., B. A. Ackerman and J. C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L. Econ. & Org. 313 (1985).

2. Rodgers, W. H. Jr., *The Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology*, 27 Loyola of L.A. L. Rev. 1009 (1994).
3. Bean, M.J. and M. J. Rowland, *The Evolution of National Wildlife Law* (Praeger 3d ed. 1997).
4. Percival, R.V., *The Political Origins of Modern Environmental Law: Environmental Legislation and the Problem of Collective Action*, 9 Duke Env't'l L. & Policy Forum 9 (1998).
5. Milazzo, P.C., *Unlikely Environmentalists: Congress and Clean Water, 1945-1972* (Univ. of Kansas Press 2006).

### **History of federal/state environmental relations**

1. Percival, R.V., *Environmental Federalism: Historical Roots and Contemporary Models*, 54 Md. L. Rev. 1141 (1995)
2. Houck, O.A., and M. Rolland, *Federalism in Wetlands Regulation: a Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Maryland L. Rev. 1242 (1995).

### **History of international environmental law**

1. Cagin, S., and P. Dray, *Between Earth and Sky: How CFCs Changed Our World and Endangered the Ozone Layer* (Pantheon Books 1993).
2. Schreurs, M.A., and E. Economy, eds., *The Internationalization of Environmental Protection* (Cambridge Univ. Press 1997).
3. Benedick, R. E., *Ozone Diplomacy: New Directions in Safeguarding the Planet* (Harvard Univ. Press 2d ed. 1998).

## **IV. ORGANIZATIONS, WEBSITES AND PROJECT**

### ***ORGANIZATIONS ACTIVE IN ENVIRONMENTAL HISTORY***

**American Society for Environmental History** (<http://aseh.net>). Founded in 1977, the American Society for Environmental History (ASEH) promotes scholarship and teaching in environmental history and a greater understanding of the history of human interaction with the rest of the natural world. Few of its members are lawyers or law professors, but they are most welcome to join the organization. ASEH publishes the peer-reviewed journal *Environmental History*, and holds terrific annual conferences.

**Forest History Society** (<http://www.foresthistory.org>). The Forest History Society is a nonprofit library and archive dedicated to collecting, preserving, and disseminating forest and conservation history for all to use.

### ***WEBSITES AND BLOGS PERTAINING TO ENVIRONMENTAL HISTORY***

**EPA History Website** (<http://www2.epa.gov/aboutepa/epa-history>). Webpage maintained by the U.S. Environmental Protection agency with useful links to materials on the history of environmental law.

**Environment, Law and History Blog** (<http://environmentlawhistory.blogspot.com>). David Schoor from Tel Aviv University maintains a blog entitled “Environment, Law and History”

**Envirotech Website** (<http://envirotechweb.org>). This website is maintained by Finn Arne Jørgensen, an Associate Senior Lecturer in History of Technology and Environment at Umeå University, Sweden. It focuses on the relationship between technology and nature.

### ***ENVIRONMENTAL LAW ORAL HISTORY PROJECT***

**Environmental Law Institute Oral History Project.** As part of its *Environment 2050* Project, the Environmental Law Institute, a non-profit NGO located in Washington, has been filming interviews with several of the founders of environmental law in the U.S. The interviews cover what their original vision was, their assessment of what has been accomplished, and their recommendations for the future.