Debunking the "Divine Conception" Myth: Environmental Law Before NEPA

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According to the standard account of the origins of environmental law taught in most law schools, the field burst upon the legal scene in the early 1970s on the heals of the first Earth Day in April of 1970 as a kind of “divine conception” (p. 14), somewhat like the “miracle in Philadelphia” in the summer of 1787. The National Environmental Policy Act (NEPA) was actually enacted four months before Earth Day, as the first statute of the decade; the Clean Air and Water and Endangered Species Acts all followed within three years. By the end of the decade, the nation had a comprehensive hazardous waste statute, safe drinking water legislation, a program to remediate waste sites, and new federal planning programs for federal lands. It was
a dizzying time, to be sure.⁵

But Karl Brooks aims to reorient the conventional wisdom about the origins of environmental law. According to Brooks, the notion that modern environmental law resulted from the heroic efforts of the enlightened 1970s is a myth. His engaging account, *Before Earth Day*, argues—and in the main succeeds—in making the case that environmental law originated long before 1970.

Brooks begins with the Idaho Wildlife Federation’s successful opposition to dams on the Clearwater River in the mid-1950s (pp. 2-3, 150-53), largely due to the *pro bono* efforts of an unsung Boise lawyer, Bruce Bowler. Brooks gives Bowler his posthumous due throughout, especially in a reverent chapter (chap. 7), drawn from the lawyer’s own files. Bowler was a

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behind-the-scenes influence on the law of citizen standing and judicial review of administrative action, and he also forged unlikely political alliances that benefitted the environment, as between the Idaho Wildlife Federation and the AFL-CIO, concerning bills that would dedicate a fixed percentage of Forest Service timber-sale receipts to wildlife and recreation projects on national forest lands (p. 168). He helped the Wildlife Federation, the largest conservation group in Idaho, successfully oppose dredge mining and chemical spraying, support funding of sewage treatment facilities, and block the Clearwater dams (pp. 167-69). Bowler also was a close political ally of Senator Frank Church, whose endorsement of a wilderness bill led to Bowler to arrange for conservationists’ endorsement of Church’s successful reelection to the Senate in 1962 (p. 170), the only time in history a Democratic Senator from Idaho has been reelected.6 Through Brooks, we learn of this otherwise unknown pioneer of environmental law in the unlikely outpost of Boise, Idaho.

One of the chief virtues of the Brooks’ book is its spotlight on similarly overlooked figures who played important roles in forging post-war environmental law,7 like Virginia


7 Among those whose conservation efforts are featured by Brooks are Charles Callison, editor of the Missouri Conservationist (pp. 17-18, 37); John Gwathmey, chair of the Richmond Isaac Walton League chapter and outdoors editor of the Richmond Times-Dispatch (pp. 26, 28); Mack Hart, chair of the Virginia Conservation Commission (p. 26); Gabe Gabrielson, Director of the U.S. Fish and Wildlife Service (pp. 19, 36-37); Virginia Congressman Schyler Otis Bland, chair of a House subcommittee influential in the passage of the Fish and Wildlife Coordination Act (pp. 40-50, 59); Paul Needman, head of Oregon’s fish hatchery efforts (pp. 47-48, 50); J. T. Barnaby, regional head of the U.S. Fish and Wildlife Service (pp. 48, 50); Mert Folts, head the Oregon Wildlife Federation and the Oregon Izaak Walton League (pp. 49-50); Edgar Averill, head of the Portland, Or. Izaak Walton League (pp. 49-50); O.L Kaupanger, of the Minnesota Conservation Committee (pp. 49-50); Kenneth Reid, national director of the Izaak Walton
Congressman and Senator Willis Robertson (the father of the TV evangelist, Pat Robertson), a committed outdoorsman who was instrumental in the enactment of three major pieces of post-war federal legislation: the 1946 Fish and Wildlife Coordination Act, the 1947 Federal Insecticide, Fungicide, and Rodenticide Act, and the 1948 Federal Water Pollution Control Act (p. 21). 8 Robertson was also a namesake of the Pittman-Robertson Act, a 1937 statute that established a federal excise tax on guns and ammunition that still supplies state conservation agencies with an important revenue stream (p. 10). 9 Robertson helped fashion an effective coalition of sportsmen (often led by the Isaac Walton League) that produced important federal environmental legislation more than two decades before the first Earth Day (pp. 26-39).

A particularly illuminating portrait that Brooks paints is the negotiations that led to the passage of the Fish and Wildlife Coordination Act, a forerunner of NEPA, requiring federal water developers to consult with state fish and wildlife agencies. 10 Robertson, Isaac Walton League leaders like William Voigt, and other grassroots activities eventually prevailed over the opposition of the Army Corps of Engineers, the Bureau of Reclamation, the Federal Power Commission, and the Truman Administration. This surprising result led to federal funding of state-recommended fish and wildlife mitigation projects at federal projects, including “biological surveys,” ecological studies that often gave state wildlife agencies and activists information they would use to fight new dams and other federal water projects (pp. 34-35).

10 Fish and Wildlife Coordination Act 1934, c. 55, § 1, Mar. 10, 48 Stat. 401 (codified
Brooks also rightly points to other significant milestones in the post-war environmental law world like the passage of the Administrative Procedure Act (APA), signed into law three days after the Coordination Act (p. 46). The APA charted a role for the public to participate in federal agency decisionmaking and for courts to review agency actions (albeit on a deferential basis) (pp. 40-45). These participatory rights gave skillful lawyers like Bowler opportunities to press the arguments of their conservation clients, and they did so with enough effectiveness that no one attending the Airlie House Conference of 1969—sometimes celebrated as the dawn of environmental law—thought that there was no environmental law the year before Earth Day (p. 184), although they all offered prescriptions for its improvement. Among the more notable controversies of the post-war era was the McNary Dam on the Columbia (pp. 50-51), which was built; and the Nez Perce/High Mountain Sheep project in the Snake Basin and the Storm King

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11 60 Stat. 237 (codified at 5 U.S.C. §§ 551-559, 701-706 (2006)). See also p. 199 (“Despite its formal title, the APA makes as much environmental as “procedural” law. Many “little APAs” have exerted equally significant impact, over time, on the shape and consequences of state-made environmental law.”) Unfortunately, Brooks does not seem to grasp that one of the APA’s innovations was to authorize courts to strike down agency actions if they were arbitrary and capricious, an admittedly low standard of judicial review. See p. 199 (failing to recognize the standard deferential level of judicial review of agency action authorized by the APA).

12 See Lazarus, supra note 5, at 47-48.

13 The authorization of the McNary Dam on the Columbia River just below its confluence with the Snake River stipulated that “adequate provision shall be made for the protection of anadromous fishes [sic] by affording free access to their natural spawning grounds or by other appropriate means” River and Harbors Act of 1945, Pub. L. No. 79-14, ch. 19, § 2, 59 Stat. 10, 22. This promise was never honored. See JOSEPH CONE & SANDY RIDLINGTON (EDS.), THE NORTHWEST SALMON CRISIS: A DOCUMENTARY HISTORY 120-21 (1996). In addition to the usual salmon mortality due to upstream and downstream fish passage problems, the reservoir behind the dam inundated important salmon spawning grounds, and therefore played a role in the listing of salmon species in the 1990s. See 56 Fed. Reg. 58619 (1991) (listing Snake River sockeye as endangered); 57 Fed. Reg. 14,653 (1992) (listing Snake River chinook as threatened). A proposal to breach four lower Snake River dams in the late 1990s also included lowering
project on the Hudson, which were not (pp. 149-55, 186-87).¹⁴

Less successful is the link Brooks attempts to draw between the enactment of the APA and the construction of Columbia River dams (pp. 45-51), which is undeveloped. Moreover, his suggestion that the fact that forty-seven of fifty states enacted water pollution controls statutes delegating significant authority to administrative agencies by 1951 was a reflection of enthusiasm for administrative action (p. 57) overlooks a more probable cause for the state legislation: the availability of federal funding.¹⁵ Further, Brooks’ brief treatment of air pollution legislation underuses the pioneering work by Jim Krier and Edmund Ursin on the evolution of air pollution regulation in California.¹⁶ His belated discussion of Krier and Ursin seems about two reservoirs to restore salmon spawning in the mainstem Columbia River. See Michael C. Blumm et al., Saving Snake River Water and Salmon Simultaneously: The Biological, Economic, and Legal Case for Breaching the Lower Snake River Dams, Lowering John Day Reservoir, and Restoring Natural River Flows, 28 Envtl. L. 997(1998).


¹⁵ Brooks’ problem here seems to be an over-reliance on law student comment in the University of Pennsylvania Law Review, Note, Seymour C. Wagner, Statutory Stream Pollution Control, 100 PENN. L. REV. 225 (1951) (pp. 57-58), an error he repeats concerning air pollution. See infra note 17.

Another error involves the use of a quote by Mark Twain as the epigram for his concluding chapter. Twain alleges that customs (“rock”) are more sturdy than laws (“sand”), when actually laws often codify customs, as in the case of western water law, in which states passed laws giving effect to the rules followed by miners in mining camps. See, e.g., CHARLES WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE AMERICAN WEST 231-42 (1992).

chapters late when it is finally discussed in chapter 6 (pp. 133-38). While Brooks’ chief focus is on water, a closer link to contemporaneous developments in air pollution regulation, especially in California, would have strengthened his argument. Finally, although Brooks does devote some attention to Supreme Court justices like William Douglas and Felix Frankfurter (pp. 75-85), he overlooks several landmark Supreme Court cases of the 1960s establishing federal regulatory control discharges of waste and oil pollution into waterways and requiring consideration environmental factors in hydropower licensing.

A larger criticism of Before Earth Day is that, while Brooks’ main point about the origins of environmental law pre-dating 1970 seems unassailable, why limit the origins to the post-war era? Surely the post-war era built on the efforts of Progressive Conservation Movement which,

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17 Brooks’ problem again seems to be an over-reliance on a student law review comment, this time in the Stanford Law Review, Note, California’s Water Pollution Problem, 3 STANFORD L. REV. 649 (1951), when a better source was available for the discussion in chapter 4, the Krier and Ursin book, supra note 16 (pp. 65-74).


19 For example, numerous municipal smoke ordinances were enacted in the 1880s. See Frederick R. Anderson, Daniel R. Mandelker & A. Dan Tarlock, Environmental Protection: Law and Policy 128 (1st ed. 1984) (noting that Chicago and Cincinnati passed ordinances in 1881). Presidents began creating national forest reserves (now national forests) under the authority of the Act of June 4, 1891, ch 2, § 1, 30 Stat. 35, culminating in a frenzy of national forests created by Theodore Roosevelt in 1907. See George C. Coggins, Charles W. Wilkinson, John D. Leshy & Robert Fischman, Federal Public Lands and Resources Law 124-25 (6th ed. 2007) (noting that Roosevelt proclaimed 24 new forests and enlarged 11 others before signing a law that revoked the president’s authority to establish forest reserves). State wildlife regulation designed to regulate “market hunting” of wild birds was widespread in
after all, produced the Federal Power Act that Bruce Bowler used to successfully oppose the
Clearwater Dams. Perhaps Brooks should devote his next book to tying the Progressives’
significant contributions to environmental law to the post-war efforts he so enthusiastically
describes.

Despite these shortcomings, Before Earth Day is an important and insightful work. Not
only is Brooks’ main thesis—that Earth Day did not mark the beginning of environmental law—undeniable, but so is his notion that law is made in an iterative fashion by a multitude of

the 1880s. SEE DALE D. GOBLE, ERIC T. FREYFOGLE, WILDLIFE LAW 853-54 (2002) (noting
that conservationists began lobbying state legislatures in the 1880s to protect wildlife).

20 On the Progressive Conservation Movement, see SAMUEL P. HAYS, CONSERVATION
AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920
(1959).

21 There are some others. For example, Brooks attributes a level of judicial oversight of
which most environmental litigants might dream but which is not evident in practice. See, e.g.,
p. 196 (“Courts stopped reflexively deferring to governmental agencies’ plans to alter natural
features and remodel natural forces.”) Also, in the book’s conclusion, Brooks faults
environmental law for, among other things, compromising with capitalism (p. 202), being a
victim of the Reagan Administration’s anti-regulatory agenda (p. 203), and failing to prevent
“Americans from from heating the earth’s atmosphere to ecologically dangerous levels,
consuming a disproportionate share of the earth’s irreplaceable resources, patronizing industries
that moved their pollution to poorer nations, and ignoring national policies that condemn the
world’s poor to lives threatened by scarce water, poor nutrition, and unequal power to shape
nature’s fate” (p. 204). Rather than propound this Malthusian world-view (complaining that
environmental law’s “character flaws” allow people “to drive big private cars, subdivide open
green spaces, build huge houses that require vast amounts of energy... p. 204), Brooks would
have better confined himself to explaining the effect that the post-war environmental law had on
the shape of the post-1970 world. Brooks also attempts to draw an undeveloped analogy to
labor law in the late 20th century, which he considers “dull and prosaic” (p. 205). On the other
hand, he portrays late 20th century criminal law as dynamic and salient (pp. 206-07). These
unsupported observations make the conclusion of the book seem unrelated to the history Brooks
tells during its first eight chapters. Similarly, Brooks indictment of modern environmental law
for not substantially changing individual human behavior (p. 208, criticizing middle-aged 21st
century Americans for being as “impulsive, materialistic, domineering, ignorant, and heedless”
as their predecessors) is wholly unnecessary to Brooks’ main points about the origins and
evolution of environmental law.

22 Brooks “rejects the simple ‘heroic origins’ explanation []” of the origins of
different actors—including activists, property owners, their lawyers, elected representatives, and administrative agencies on both the state and federal levels—in reaction to the felt necessities imposed by events (p. 5).\(^2^3\) This model of a “continuous interplay of human action, natural response and legal change” (p. 14)\(^2^4\) is surely is a better depiction of how laws are actually made and evolve than the more formalistic view—still held by many members of the Senate Judiciary Committee—that law is made exclusively by elective representatives or reviewing courts.\(^2^5\) For

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\(^2^3\) See also pp. 199 (“In spite of popular misconceptions that law if for lawyers, ordinary citizens—whether a state legislative committee drafting a pollution bill or a federal court jury weighing a takings claim for money damages—have frequently had to decide the meaning of the nation’s foundational legal document...).  
\(^2^4\) See also pp. 196 (“Citizens both biological and corporate, clients and legal counsel, elected legislators and executives, and appointed judges and administrators all combine their distinctive shares of sovereignty.”); 200 (explaining the importance of the states’ police power in environmental law).  
\(^2^5\) Brooks acknowledges his debt to Willard Hurst’s LAW AND ECONOMIC GROWTH: LEGAL HISTORY OF THE WISCONSIN LUMBER INDUSTRY (1964), and Lawrence Friedman’s HISTORY OF AMERICAN LAW (1st ed. 1973), both of which emphasized the lawmaking function of ordinary people over the promulgation of doctrine by courts (pp. 10-12). On Hurst, see p. 195 (explaining that “gross disparities [around the turn of the 20th century] produced so much political inequality that it destabilized the nineteenth-century legal order, leading to lawmaking restraining individual freedom to protect human health), which makes this reviewer wonder why Brooks did not give greater prominence to the Progressive Conservation Movement, supra note 20. See also p. 198 (recognizing the emergence of national markets in the wake of the Civil War, and noting that “Progressive reformers at both the state and national levels began grafting new branches onto private law’s old roots: legislative statutes administered by expert civil servants in executive branch agencies”).  
Brooks seems unaware that administrative agencies with environmental responsibilities date not from the 1930s but from the Progressive Era and before. See, e.g., KERMIT L. HALL, PAUL FINKELMAN & JAMES W. ELY, JR, AMERICAN LEGAL HISTORY: CASES AND MATERIALS 364-65 (3rd ed. 2005) (explaining that the U.S. Sanitary Commission, functioning as a public-health auxiliary to the Union army, established public health controls in military camps and in cities during the Civil War, helping to control an outbreak of yellow fever in New Orleans, and that New York and Massachusetts built upon this experience by establishing statewide boards of health shortly after the war); see also HAROLD K. STEEN, THE U.S. FOREST SERVICE: A HISTORY 17 (1976) (discussing the Division of Forestry, established in 1891, as a predecessor to the U.S. Forest Service); Coggins et al., supra note 19, at 23 (discussing the founding of the
both of these lessons, Karl Brooks’ valuable survey of environmental law during the post-war years before NEPA is worthy of a place on many bookshelves and in many classrooms.

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