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Debunking the “divine conception” myth

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Debunking the “Divine Conception” Myth: Environmental Law before NEPA

A Book Review by Michael C. Blumm* of *Before Earth Day: The Origins of American Environmental Law, 1945-1970*, by Karl Boyd Brooks. (University Press of Kansas 2009).

According to the standard account of the origins of environmental law, the field burst upon the legal scene in the early 1970s on the heels of the first Earth Day as a kind of “divine conception,”¹ somewhat like the “miracle in Philadelphia” in the summer of 1787.² The National Environmental Policy Act (NEPA) was actually enacted four months before Earth Day, as the first statute of the decade;³ the Clean Air and Water and Endangered Species Acts all followed within three years.⁴ 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.⁵ It was a dizzying time, to be sure.⁶

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1. KARL BOYD BROOKS, *BEFORE EARTH DAY: THE ORIGINS OF AMERICAN ENVIRONMENTAL LAW, 1945–1970*, at 14 (2009).

2. *See generally* CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787* (1986).

3. NEPA was signed into law by President Nixon on the first day of the new decade. Statement About the National Environmental Policy Act of 1969, 1 PUB. PAPERS 2 (Jan. 1, 1970) (quoting President Richard Nixon as stating, “[i]t is particularly fitting that my first official act in the new decade is to approve the National Environmental Policy Act”). National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 2, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347 (2006)).

4. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–7671q (2006)); Federal Water Pollution Control (Clean Water) Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (2006)); Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544 (2006)).

5. Resources Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901–6992k (2006)) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, Title II, 79 Stat. 992 (1965)); Safe Drinking Water Act of 1974, Pub. L. No. 93-523, 88 Stat. 1661 (codified as amended at 42 U.S.C. §§ 300f–j (2006)); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675 (2006)); Federal Land Planning and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701–1785 (2006)); National

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—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,⁷ 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 drawn from Bowler's own files.⁸ Bowler acted behind the scenes in influencing the law of citizen standing and judicial review of administrative action, and he also forged unlikely political alliances that benefitted the environment.⁹ For example, his work with the Idaho Wildlife Federation and the AFL-CIO in the 1950s resulted in the passage of a bill that dedicated a fixed percentage of U.S. Forest Service timber-sale receipts to wildlife and recreation projects on national forest lands.¹⁰ He also 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.¹¹

Bowler was a close political ally of Senator Frank Church, whose endorsement of a wilderness bill led Bowler to arrange for conservationists' endorsement of Church's successful reelection to the Senate in 1962,¹² the only time in history a Democratic Senator from Idaho has been reelected.¹³ Through

Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended at 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2006)) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476).

6. Well captured by RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW 67–97* (2004) (cataloging the numerous federal environmental laws passed in the 1970s, in addition to those cited *supra* note 4–5; Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 975 (codified as amended at 7 U.S.C. § 136 (2006)) (amending Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. No. 111-21, 61 Stat. 163 (1947)); Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234 (codified as amended at 42 U.S.C. §§ 4901–4918 (2006)); Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (codified as amended at 42 U.S.C. §§ 1451–1464 (2006)); Federal Coal Leasing Amendments Act of 1976, Pub. L. No. 94-377, 90 Stat. 1083 (codified as amended at 30 U.S.C. §§ 202a, 208-1 (2006)); Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified as amended in scattered sections of 30 U.S.C.); Outer Continental Shelf Lands Act of 1978, Pub. L. No. 95-372, 92 Stat. 629 (codified as amended in scattered sections of 43 U.S.C.)).

7. BROOKS, *supra* note 1, at 2–3, 150–53.

8. *Id.* at 144–77.

9. *See, e.g., id.* at 145–46, 149–57, 161–67.

10. *Id.* at 168.

11. *Id.* at 167–69.

12. *Id.* at 169.

13. Senator Church was elected four times, losing a fifth election in the Reagan Revolution of 1980 by 1 percent of the vote. The Frank Church River of No Return Wilderness Area, the largest wilderness area in the continental United States, bears his name. Act of March 14, 1984, Pub. L. No. 98-231, 98 Stat. 60 (codified as amended at 16 U.S.C. § 1132 note).

which often gave state wildlife agencies and activists ecological information they could use to fight new dams and other federal water projects.¹⁹

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.²⁰ The APA charted a role for the public to participate in federal agency decision making and for courts to review agency actions (albeit on a deferential basis).²¹ 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 law²²—believed there was no environmental law the year before the first Earth Day, although they all offered prescriptions for its improvement.²³ Other notable controversies of the post-war era that Brooks discusses includes the McNary Dam on the Columbia River, which was built;²⁴ and the Nez Perce/High Mountain Sheep project in the Snake Basin and the Storm King project on the Hudson River, which were not.²⁵

19. BROOKS, *supra* note 1, at 34–35.

20. *Id.* at 46.

21. *Id.* at 40–45; Administrative Procedure Act of 1946, Pub. L. No 79-404, 60 Stat. 237 (codified at 5 U.S.C. §§ 551–559, 701–706 (2006)); *see also* BROOKS, *supra* note 1, at 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 *only* if they were arbitrary and capricious, an admittedly low standard of judicial review. *See id.* (failing to recognize the standard deferential level of judicial review of agency action authorized by the APA).

22. *See* LAZARUS, *supra* note 6, at 47–48.

23. BROOKS, *supra* note 1, at 183.

24. *Id.* at 50–51. 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 (partially codified at 33 U.S.C. § 603(a)). This promise was never honored. *See* Michael C. Blumm & F. Lorraine Bodi, *Commentary, We’re from the Government and We’re Here to Help*, in THE NORTHWEST SALMON CRISIS: A DOCUMENTARY HISTORY 120–21 (Joseph Cone & Sandy Ridlington, eds., 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* Endangered Status for Snake River Sockeye Salmon, 56 Fed. Reg. 58,619 (1991); Threatened Status for Snake River Spring/Summer/Fall Chinook Salmon, 57 Fed. Reg. 14,653 (1992). A proposal to breach four lower Snake River dams in the late 1990s also included lowering 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).

25. BROOKS, *supra* note 1, at 149–55, 186–87. For the story of the Storm King controversy, *see* ALLAN R. TALBOT, *POWER ALONG THE HUDSON: THE STORM KING CASE AND THE BIRTH OF ENVIRONMENTALISM* (1972); Robert Lifset, *Storm King Mountain and the Emergence of Modern American Environmentalism, 1962–1980* (2005) (unpublished Ph.D. Dissertation, Columbia University) (on file with Columbia University Libraries); *see also* New York RiverKeeper, *A History of Power*

Less successful is the link Brooks attempts to draw between the enactment of the APA and the construction of Columbia River dams, which is undeveloped.²⁶ And his suggestion that the enactment of water pollution control statutes by forty-seven of the fifty states by 1951 reflected widespread enthusiasm for administrative regulation overlooks a more probable cause for this spate of state legislation: the availability of federal funding.²⁷ 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.²⁸ His discussion of the Krier and Ursin book seems about two chapters late when it finally appears in chapter six.²⁹ Although 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,³⁰ he overlooks several landmark Supreme Court cases of the 1960s establishing federal regulatory control of discharges of waste and oil into waterways and requiring consideration of environmental factors in hydropower licensing.³¹

Plants on the Hudson, <http://www.riverkeeper.org/campaigns/stop-polluters/power-plants/hrsa> (last visited Sept. 10, 2009).

26. BROOKS, *supra* note 1, at 45–51. Brooks notes that there was some sentiment that the APA, in combination with the Coordination Act, might make the Federal Power Commission, the federal agency responsible for licensing non-federal hydroelectric dams, more ecologically sensitive. *Id.* at 44. This aspiration of course never bore fruit.

27. *Id.* at 57. Brooks' problem here seems to be an over-reliance on a student law review comment in the University of Pennsylvania Law Review, Seymour C. Wagner, Note, *Statutory Stream Pollution Control*, 100 PENN. L. REV. 225 (1951), an error he repeats concerning air pollution. BROOKS, *supra* note 1, at 57–58; *see infra* note 29.

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).

28. JAMES E. KRIER & EDMUND URSIN, *POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940–1975* (1977).

29. BROOKS, *supra* note 1, at 133–38. 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 the Krier and Ursin book would have been a better source for the discussion on water pollution in chapter four. *See* KRIER & URSIN, *supra* note 28; BROOKS, *supra* note 1, at 65–74.

30. BROOKS, *supra* note 1, at 75–85.

31. *United States v. Republic Steel*, 362 U.S. 482, 485 (1960) (discharges of waste tailings violated the Rivers and Harbors Act of 1899); *United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1966) (oil pollution without a permit was a violation of the Rivers and Harbors Act); *Udall v. Federal Power Comm'n*, 387 U.S. 428, 450 (1967) (issuance of a federal hydropower license without considering the effects on salmon was a violation of the Federal Power Act). For a discussion of the first two cases, see Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases That Changed the American Landscape* 70 TULANE L. REV. 2279, 2282–91 (1996). On the latter, see Michael C. Blumm, *Saving Idaho's Salmon: A History of Failure and a Dubious Future*, 28 IDAHO L. REV. 667, 675–77 (1992).

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?³² Surely the post-war era built on the efforts of the Progressive Conservation Movement, which, after all, produced the Federal Power Act that Bruce Bowler used to successfully oppose the Clearwater dams.³³ 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,³⁴ *Before Earth Day* is an important and insightful work. Not only is Brooks' main thesis—that Earth Day did not mark the beginnings of environmental law—undeniable,³⁵ but so too is his notion that law is made in an iterative fashion by a multitude of different actors. Activists, property owners, their lawyers, elected representatives, and administrative agencies on both the state and federal levels all take action in

32. 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 ET AL., FEDERAL PUBLIC LANDS AND RESOURCES LAW 124–25 (6th ed. 2007) (noting that Roosevelt proclaimed twenty-four new forests and enlarged eleven 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 the 1880s. See DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW 771–73 (2d ed. 2010) (noting that conservationists began lobbying state legislatures in the 1880s to protect wildlife).

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

34. 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., BROOKS, *supra* note 1, at 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, *id.* at 202, being a victim of the Reagan Administration's anti-regulatory agenda, *id.* at 203, and failing to prevent "Americans 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," *id.* at 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," *id.* at 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 twentieth century, which he considers "dull and prosaic." *Id.* at 205. On the other hand, he portrays late twentieth century criminal law as dynamic and salient. *Id.* at 206–7. 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 is wholly unnecessary to Brooks' main points about the origins and evolution of environmental law. See *id.* at 208 (criticizing middle-aged twenty-first century Americans for being as "impulsive, materialistic, domineering, ignorant, and heedless" as their predecessors).

35. Brooks "rejects the simple 'heroic origins' explanation []" of the origins of environmental law, which dates the beginning of the field around 1970. *Id.* at 14.

reaction to the felt necessities imposed by events.³⁶ This model of a “continuous interplay of human action, natural response and legal change”³⁷ is surely 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 elected representatives or reviewing courts.³⁸ For 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.

36. *Id.* at 5; *see also id.* at 199 (“In spite of popular misconceptions that law is 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.”).

37. *Id.* at 14; *see also id.* at 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).

38. 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. BROOKS, *supra* note 1, at 10–12. On Hurst, *see id.* at 195 (explaining that “gross disparities [around the turn of the twentieth 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. *See HAYS, supra* note 33; *see also* BROOKS, *supra* note 1, at 198 (recognizing the emergence of national markets in the wake of the Civil War, and noting that “[p]rogressive 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 (3d 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 32, at 23 (discussing the founding of the National Park Service in 1916); Tom I. Romero, *Uncertain Waters and Contested Lands: Excavating the Layers of Colorado’s Legal Past*, 73 U. COLO. L. REV. 521, 538–41 (2002) (discussing the Colorado Territory’s water commissioners in 1861, the predecessor to Colorado’s state-wide regulation of water diversions); Charles S. McCowan, Jr., *The Evolution of Environmental Law in Louisiana*, 52 LA. L. REV. 907, 910 (1992) (discussing the Louisiana Department of Conservation-Natural Resources, founded in 1921, the predecessor to Louisiana Department of Wildlife and Fisheries); Gregory S. Weber, *The Role of Environmental Law in the California Water Allocation and Use System: An Overview*, 25 PAC. L.J. 907, 912–13, 918–23 (1994) (discussing the California Water Commission, established in 1913, one of the predecessor agencies of the state’s Department of Water Resources).

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