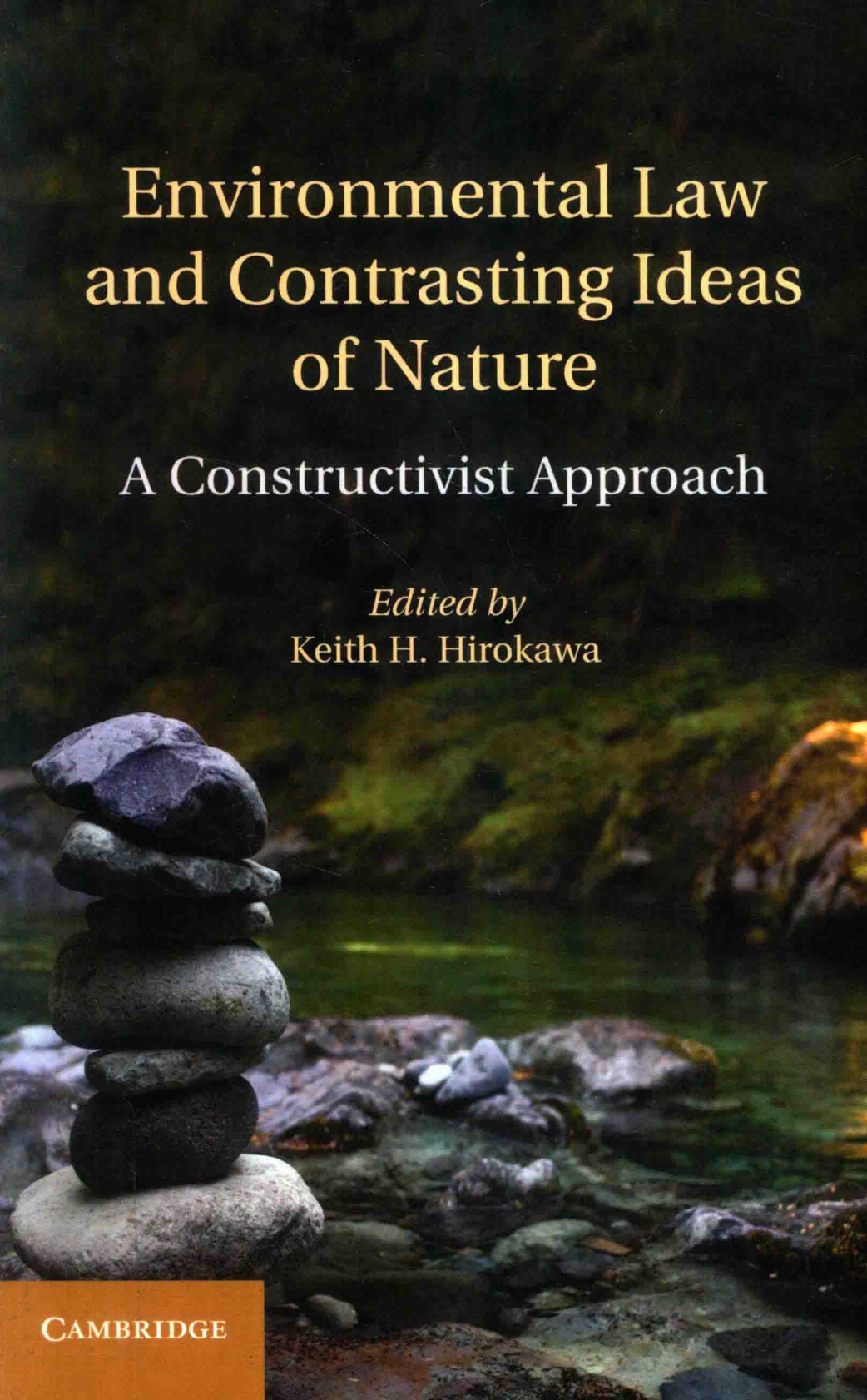


The background of the cover is a photograph of a river. In the foreground on the left, a stack of seven smooth, grey stones is balanced vertically. The river flows through the center, with mossy rocks visible on the banks. The lighting is soft, creating a serene atmosphere.

Environmental Law and Contrasting Ideas of Nature

A Constructivist Approach

Edited by
Keith H. Hirokawa

CAMBRIDGE

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ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE

Law's ideas of nature appear in different doctrinal and institutional settings, historical periods, and political dialogues. Nature underlies every behavior, contract, or form of wealth and, in this broad, sense influences every instance of market transaction or governmental intervention. Recognizing that law has embedded discrete constructions of nature helps in understanding how humans value their relationship with nature. This book offers a scholarly examination of the manner in which nature is constructed through law, both in the "hard" sense of directly regulating human activities that impact nature and in the "soft" manner in which law's ideas of nature influence and are influenced by behaviors, values, and priorities. Traditional accounts of the intersection between law and nature generally focus on environmental laws that protect wilderness. This book builds on the constructivist observation that, when considered as a culturally contingent concept, "nature" is a self-perpetuating and self-reinforcing social creation.

Keith H. Hirokawa is an associate professor of law at the Albany Law School. His scholarship has explored convergences in ecology, ethics, economics, and law, with particular attention given to local environmental law, ecosystem services policy, watershed management, and environmental impact analysis. He has authored dozens of professional and scholarly articles in these areas and has coedited (with Dean Patricia Salkin) *Greening Local Government* (2012).

CAMBRIDGE
UNIVERSITY PRESS

32 Avenue of the Americas, New York, NY 10013-2473, USA

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107033474

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First published 2014

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Environmental law and contrasting ideas of nature : a constructivist approach / Keith H. Hirokawa, Albany Law School.
pages cm

ISBN 978-1-107-03347-4 (hardback)

1. Environmental law – United States – Philosophy. 2. Human ecology.
3. Constructivism (Philosophy) I. Hirokawa, Keith H., editor of compilation.

KF3775.E4682 2014

344-7304'6-dc23 2013045322

ISBN 978-1-107-03347-4 Hardback

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To my boys, Owen and Ethan, and their insatiable curiosities

Contributors

EDITOR

Keith H. Hirokawa joined the faculty at Albany Law School in 2009. He teaches courses involving environmental and natural resources law, land use planning, property law, and jurisprudence. Professor Hirokawa's scholarship has explored convergences in ecology, ethics, economics, and law, with particular attention given to local environmental law, ecosystem services policy, watershed management, and environmental impact analysis. He has authored dozens of professional and scholarly articles in these areas and has coedited (with Dean Patricia Salkin) *Greening Local Government* (2012). Prior to joining the faculty at Albany Law, Professor Hirokawa was an associate professor at Texas Wesleyan University School of Law and an adjunct professor at the University of Oregon School of Law. Professor Hirokawa practiced land use and environmental law in Oregon and Washington and was heavily involved with community groups and nonprofit organizations. He studied philosophy and law at the University of Connecticut, where he earned his JD and MA degrees. He earned his LLM in environmental and natural resources law from Lewis & Clark Law School.

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Professor Arnold received his JD with distinction from Stanford Law School, where he was the founding executive editor of the *Stanford Law & Policy Review* and graduate student Fellow in the Center for Conflict and Negotiation. He received his BA with highest distinction from the University of Kansas, where he was elected to Phi Beta Kappa and earned two national honors, the Harry S. Truman Scholarship and the *TIME Magazine* College Achievement Award. He currently chairs the advisory board for the University of Kansas College of Liberal Arts and Sciences.

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Miller researches in the areas of economic development, sustainable development, land use, environmental law, and local government law. His academic works have been published by or are forthcoming from *Harvard Environmental Law Review*, *Environmental Law Reporter*, and the *Journal of Land Use and Environmental Law*, among others. Miller currently also blogs at Land Use Profs Blog and runs the Economic Development Clinic at Idaho Law School.

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Professor Zellmer is a coauthor (with Laitos and Wood) and principal editor of a casebook, *Natural Resources Law*. She has published dozens of book chapters and articles and was awarded Best Paper by the American Bar Association for her work on "Missouri River Mud: Clean Water and Endangered Species," which she presented at the ABA's Annual Water Law Conference in 2011. She also served as a committee member on the National Academy of Sciences/National Research Council Committee on Missouri River Recovery; the committee report was published in 2010. Also in 2011, Zellmer gave a presentation about U.S. water law at the M.S. Swaminathan Institute in Chennai, India, with members of the Global Water for Food Institute. For the past few years she has conducted a training session on wilderness management at the Carhart Federal Wilderness Center in Missoula, Montana.

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Foreword

Law touches many subjects that are important to our daily lives. What we eat and how we get it, what our children learn in school, the things that we look at as we gaze out of our windows – all are at some point influenced by a standard in law. Importantly, when we engage the law with these many subjects, we usually do so because we think the proposed laws are right, or justified, or compelled. As such, it is sometimes difficult to second-guess our laws and the ideas represented in our laws. Laws addressing nature illustrate this point.

The trailblazing work of Professor Keith H. Hirokawa and the contributing authors to this compendium of essays causes readers to question traditional norms of legislative and administrative decision making when it comes to critical land use and environmental actions. These essays expand the framework of possibilities for appropriate assessment of human impacts on the natural environment, which in turn directly impacts human health and sustainability. The rich lessons from each chapter provide a platform for robust discussion among all stakeholders about the role of government in approaching the challenges of envisioning a sustainable built environment.

Environmental advocates, regulators, applicants, and community members alike will benefit from the suggestions of how to view ideas advanced today against uncertain or nonstatic future events that may alter the original intent in ways decision makers have failed to consider. Despite the fact that scientific evidence may not always be available to prove or disprove perceived potential harms, this book demonstrates that our socio-legal history and experience with balancing demands between the built and natural environments offer perspective and quantitative compelling evidence that the force of nature must be a part of our conscious decision-making rubric. The theory of nature through law that is developed in these pages changes the narrative about the dynamics of the built environment.

Above all, today's most pervasive threat – climate change and its far-reaching impacts – compels us to question the value we place on nature and the human relationship with it. Recurring natural disasters – from wildfires to hurricanes, tornados, and earthquakes – demand more thoughtful and creative approaches to how we value the natural environment and what trade-offs society is willing to make in the name of economic development or community amenities. Reliance on old and outdated legal structures, such as property rights, should be seen for the hurdles they raise against progressive problem solving. The insights on lessons from the social justice movement that should be employed to ensure sustainability provide a critically important lens for policy makers and anyone with the power to decide whether and how land should be used. Legal impediments to collaboration, as well as legal constructions of nature that encourage cooperation, should be scrutinized to determine their effects on natural processes. In short, this book is a must-read for all who have a responsibility to ensure sustainability.

Patricia E. Salkin
Dean and Professor of Law
Touro Law Center
August 2013

Contents

<i>List of contributors</i>	<i>page</i> ix
<i>Foreword by Patricia E. Salkin</i>	xvii
Introduction: Constructing Nature through Law <i>Keith H. Hirokawa</i>	1
1 Nature in a Constructed World: Grounding the Constructivist Method <i>Keith H. Hirokawa and Rik Scarce</i>	12
2 An Unnatural Divide: How Law Obscures Individual Environmental Harms <i>Katrina Fischer Kuh</i>	28
3 Defining Nature as a Common Pool Resource <i>Jonathan Rosenbloom</i>	47
4 Property Constructs and Nature's Challenge to Perpetuity <i>Jessica Owley</i>	64
5 Perceiving Change and Knowing Nature: Shifting Baselines and Nature's Resiliency <i>Robin Kundis Craig</i>	87
6 Animals and Law in the American City <i>Irus Braverman</i>	112
7 Boundaries of Nature and the American City <i>Stephen R. Miller</i>	133

8	Constructing Nature the Radical Way: Extreme Environmentalism and Law <i>Rik Scarce</i>	163
9	Wilderness Imperatives and Untrammeled Nature <i>Sandra Zellmer</i>	179
10	Native American Values and Laws of Exclusion <i>Catherine Iorns Magallanes</i>	200
11	Challenging What Appears “Natural”: The Environmental Justice Movement’s Impact on the Environmental Agenda <i>Shannon M. Roesler</i>	230
12	The Transformation of Water <i>A. Dan Tarlock</i>	248
13	Framing Watersheds <i>Craig Anthony (Tony) Arnold</i>	271
14	The Last, Last Frontier <i>Michael Burger</i>	303
	<i>Index</i>	333

Introduction: Constructing Nature through Law

Keith H. Hirokawa

FOXES, PROPERTY, AND LAW'S IDEA OF NATURE

In theory, our ability to understand and communicate about the world is aided by frames, or social constructs, that filter, organize, and prioritize our experiences. Through this exercise, social constructions provide meaning to our interactions. Hence, when an apple falls from a tree and strikes me on the head, the event might be explained through gravity, or the ill will of an angry tree, or the mysterious phenomena of wizardry: the particular construct employed explains the world and its events in its own way. Of course, any event that is not accounted for in the particular construction may appear as irrelevant or an anomaly. Perhaps more importantly, there are many different, frequently conflicting and competing constructions of the world.

We use social constructions in law, and law is often the arbiter of constructions. Consider the concept of property, a construct that subjects nonhuman facts and values to the preferences of property owners. A helpful introduction to property might begin with the controversy of *Pierson v. Post*, a case well known among law students in the United States. In this case, Lodowick Pierson and Jesse Post disagreed over the ownership of a fox carcass. Perhaps this story began as a surprise: one early morning, some 200 years ago, a lone fox awoke in the forests of Long Island, New York, to the frightful sounds of hounds in pursuit. For the hunters, the purpose of the pursuit may have been the chase itself: the goal may have been to take the fox as a prize, but it was as likely that the hunters raced to enjoy the leisurely and recreational event of the foxhunt.¹ In the meantime, the fox tore through the underbrush with the immediacy of a self-aware entity frantically fleeing for its life.² As the hounds of

¹ See Caroline Jones, *Fox Hunting in America*, 24 AM. HERITAGE 62 (Oct. 1973).

² See *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805); for a detailed description of the circumstances of this particular hunt, see also Bethany R. Berger, *It's Not about the Fox: The Untold History of Pierson v. Post*, 55 DUKE L. J. 1089 (2006).