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RESEARCH ARTICLE

Bringing the idea of the environment to law: a comparative study of early environmental law textbooks

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Abstract

From 1948 to 1972 the idea of the environment gained solidity within the sciences and in global politics, as a thing or a concept, which spoke of a need to save humanity from the harms it was inflicting on the natural world. As historians Warde, Robin and Sörlin explain, the idea brought about a revolution in the sciences, casting scientists as environmental problem solvers, fundamentally changing the way they worked. In this paper we connect law and lawyers to this history. We ask, did lawyers contribute new meanings to the idea of the environment when they first presented laws and parts of legal practice as 'environmental'? Were they mere translators of the scientists' ideas? And did they envisage the emergence of new environmental legal experts, who might change legal culture? We examine the early environmental law textbooks in five countries (Australia, Canada, England, New Zealand and the US) and devise ideal types to explain the associations, values and choices which underpinned their presentation of the ideas of 'the environment', 'environmental law' and 'environmental law expert'. We consider that these types are useful conceptual tools which raise ongoing questions about the relationship between environmental law and its broader context.

Keywords: legal history; environmental legal theory; comparative law; environmental law textbooks

Introduction

The idea of the environment within the context of law is of relatively recent lineage. Lawyers began using the terms 'the environment' and 'environmental law' to describe the subject matter of laws and to organise aspects of legal practice from the mid to late 1960s, around 20 years after the idea had begun shaping the sciences and influencing global politics.[1] While the word 'environment' has been around for centuries, for most of this time it was used to refer to the broader context of a person or object. The notion that 'the environment' might also be a 'thing with its own essence that itself became vulnerable, a victim of circumstances'[2] gained momentum through the work of literary ecologists, most notably William Vogt's book *Road to Survival*, published in 1948.[3] It was also in general use at two of the first United Nations conferences, both held in 1948, where the word appeared 'almost as a virus, percolating into minutes, agreements, plans and pamphlets'.[4] By the late 1960s and early

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[1]P Warde et al *The Environment: A History of the Idea* (Baltimore: John Hopkins University Press, 2018) pp 8–14, 23–24.

[2]Ibid, p 8, drawing from R Carson *Silent Spring* (Cambridge, MA: Houghton Mifflin, 1962).

[3]Ibid, pp 9–11.

[4]Ibid, p 24.

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1970s the idea of the environment had gained considerable solidity and had brought about radical and revolutionary changes to global and local politics, as well as to academic disciplines, most notably the sciences.[5]

In this paper we examine the reception and early presentation of the idea of the environment in legal textbooks. We concentrate on how lawyers and legal academics presented the ideas of 'the environment', 'environmental law' and 'environmental law expert' (the 'foundational ideas') in the first and early environmental law textbooks in five countries: Australia, Canada (English speaking), England, New Zealand and the US.

The aim of our study is to understand how the presentations of the foundational ideas in the textbooks connect with, or depart from, the larger social, intellectual and political history of the idea of the environment. By examining early textbooks, we seek to understand the choices, ideas and values underpinning the translation of the idea of the environment to law. And we are curious to learn whether the textbooks added new meanings to the idea of the environment. We consider whether the textbooks gave the idea of environmental law the standing of a new legal category, and whether they envisaged the creation of new environmental experts. Put simply, we seek to understand the imaginative and transformative potential of the early thinking by lawyers and legal scholars, when they began treating the environment as a thing, a subject of legal importance, and not merely a context.

From our analysis of the textbooks, we have constructed four ideal types: 'new legislation', 'citizen action', 'national policy' and 'new label – old law'. Each serves as a conceptual tool which gives tangible qualities and meanings to the associations, values and choices underpinning the way textbook writers presented the foundational ideas. In keeping with Max Weber's theory, the ideal types do not exist anywhere in reality, but are models created from our interpretation of how the foundational ideas were presented across all the textbooks we studied.[6] They help us think about how the books related to the broader political and social context, how they compare to one another, and how the foundational ideas fit within the broader history of the idea of the environment.

The 'new legislation' type refers to the growing body of statutes in the 1970s and 1980s enacted to address public concerns about the environment. This type encouraged lawyers to view the foundational ideas through the lens of this new legislation. Put simply, the creation of this legislation brought the idea of the environment within the bounds of law. Within this type, what constitutes the environment depends on which legislation the lawyer places under the environmental legislation descriptor. The subject matter of this legislation constitutes 'the environment'. By organising laws around this new idea of 'environmental law', lawyers and legal academics are carrying out the legislature's will.

The 'citizen action' type refers to growing public environmental concerns and the emergence of environmentalist groups in the 1960s and 1970s. Here the idea of the environment accords with the way that citizens react to the central threats to their health, wellbeing and surroundings, and to information about these threats in the press or popular scientific literature. Environmental law is not given a firm meaning or identity, as the goal is not about creating conceptual coherence within law or creating a new band of environmental experts. Rather the aim is to empower citizens with knowledge about law and legal processes so that they may take action to protect their environments. In other words, law is conceived in wholly instrumental terms.

The 'national policy' type refers to the way that the idea of the environment was elevated to a central policy agenda.[7] Drawing on the ideas of scientists, national politicians characterised the 'restoration' of the environment as essential to the survival of humanity. Textbooks heavily shaped by this type adopted this survivalist narrative and present the idea of the environment in ways that accord

[5]Ibid, pp 18–20, 24.

[6]M Weber 'Objectivity in social science and social policy' in EA Shils and HA Finch (eds) *The Methodology of the Social Sciences* (Glencoe: Free Press, 1904); R Bendix *Max Weber: An Intellectual Portrait* (New York: Doubleday and Co, 1960) p 274.

[7]Warde et al, above n 1, p 20.

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with the major national policy debates of the day, taking place largely at a national – rather than global or state/province – level.

The final type, 'new label – old law', is of a different kind and quality to the other types in that it suggests that the idea of the environment and its entry into law is of little importance. This is because laws that can be classified as 'environmental' have existed for centuries, before the modern idea of the environment emerged. It either involves an anachronistic reading of the 'environment,' or suggests that the idea of the environment is merely a useful descriptor for laws regulating the natural or built environment, some of which existed long before the legislative developments of the 1960s and 1970s.

The first three types suggest that lawyers *reacted* to ideas about the environment formed or communicated by legislatures, groups of citizens and politicians, and translated those ideas into law. It is their translation exercises that involve creativity, and which makes them important authorities on the idea of the environment. Their translations could strengthen or weaken law's protective potential, either legitimising or overlooking concerns of citizens, environmental scientists and key policy makers. The fourth type, on the other hand, suggests that lawyers took no or little notice of ideas about the environment forming elsewhere and instead looked inwards to the way that law had traditionally and historically treated subjects now labelled environmental.

In addition to the four types described above it is important to acknowledge that the textbook writers were also influenced by local legal cultures. This provides one explanation for why certain types were more prominent in the textbooks in some countries, but not others. One important example of this influence is the way that lawyers thought about the idea of the environment as posing local rather than global issues. We explain that the early tethering of the idea of the environment and environmental law to local contexts constitutes a significant departure from the idea of the environment created by scientists. This may have weakened the early potential of the idea to revolutionise the practice and discipline of law in the same way.

We begin by introducing the two central intellectual traditions grounding this paper, which support our decision to concentrate on the movement of an idea into law by studying early textbooks. We then explain our central methods and approach before describing, with examples, the four ideal types. In conclusion, we emphasise the central findings arising from our study and their significance.

1. The history of an idea

We locate the present study within two intellectual traditions. First, a general historical tradition where historians study the intellectual, political and social origins of an idea, its power and influence and how it changes over time. Of central relevance to the current study is Warde, Robin and Sörlin's history of the idea of 'the environment'.[8]

The second intellectual tradition concerns the role of law textbooks in constituting both law and legal culture through the creation of legal categories. We draw on David Sugarman's seminal work on the making of a textbook tradition in England from 1850 to 1907,[9] as well as more recent studies of law textbooks. These studies demonstrate that in law textbooks have not been mere pedagogical tools summarising orthodoxy but have instead, at least in some instances, created orthodoxy and shaped relationships between different parts of the profession.

(a) The idea of the environment

The idea of the environment 'was fundamentally conceptualised between (roughly) 1948 and 1972'.[10] Warde, Robin and Sörlin explain that the idea provided 'a way of imagining the web of interconnection

[8]Warde et al, above n 1.

[9]See D Sugarman 'Legal theory, the common law mind and the making of the textbook tradition' in W Twining (ed) *Legal Theory and Common Law* (Oxford: Oxford University Press, 1986) p 26.

[10]Warde et al, above n 1, p 171.

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and consequence of which the natural world is made',[11] as well as 'a way to describe the scale and scope of human impact upon that world'.[12] The environment was a 'planet changing idea, because it made the planet visible in a wholly new way',[13] and a 'global idea, fostered by a universal science and growing in importance at the same time as globalisation itself'.[14] The idea of the environment has become a:

> key concept: it drives conversations about what it means to be human in the world on many scales. These conversations include what sorts of responsibilities humans take for the results of their actions in the past, present and future.[15]

It is important to note the way that Warde, Robin and Sörlin distinguish between the idea of the environment and the political changes. They explain that the emergence and rise of the term signified a '*conceptual* revolution, as distinct from the political transformation connected with the environmental social movements and the struggles over environment' which occurred over a decade later.[16] Our study considers whether the presentation of the environment in the early environmental law textbooks laid the groundwork for a similar conceptual revolution in law.

Turning to law we find, wholly from American accounts, that US lawyers began speaking of the idea of the environment within the context of law towards the end of the period of Warde, Robin and Sörlin's study. One lawyer, Victor John Yannocone, claims to have pioneered the term 'environmental law' in the 1960s 'during litigation over DDT'.[17] Legal historian Richard J Lazarus places emphasis on a conference on Law and the Environment held in Warrenton Virginia in September 1969 which brought together academics, lawyers, congressional aids, and others.[18] A number of attendees went on to author the early environmental law textbooks in our study.[19] Tarlock has described this conference as '[o]ne of the seminal events in the creation of the field', which 'helped create the notion that we in what soon became environmental law were part of a special community'.[20] These lawyers considered that the new category should not be narrowly circumscribed, but was best described in reference to the problems it addressed: the 'hideous fact' of 'environmental decay'.[21] They suggested that the best theory 'might well be that there is nothing at all unique about environmental law'.[22]

While these claims to 'first usage' require further interrogation and study in light of developments in other countries, the dating of the first emergence of the term to the mid- to late-1960s seems probable. We acknowledge that these origin stories contribute to the myth that laws governing matters we would now associate with the idea of the environment did not exist prior to this time.[23] However, we consider that it is important to distinguish between the development and grouping of laws as 'environmental', which began occurring in the 1960s and 1970s, and the existence of water, planning,

[11]Ibid, p 1.

[12]Ibid, p 1.

[13]Ibid, p 1.

[14]Ibid, p vii.

[15]Ibid, p 5.

[16]Ibid, pp 24, 171.

[17]See website available at https://yannalaw.com/about/victor-yannacone-biography/.

[18]RJ Lazarus *The Making of Environmental Law* (Chicago: University of Chicago Press, 2nd edn, 2023) pp 59–60.

[19]These include A Dan Tarlock, Jim Krier, Louis Jaffe and Victor Yannacone.

[20]AD Tarlock 'Present and active at the creation' *Ecology Law Currents* (5 December 2014), available at https://www.ecologylawquarterly.org/currents/saxmemorial/.

[21]MF Baldwin and JK Page Jr *Law and the Environment* (New York: Walker and Co, 1970) p ix, cited in Lazarus, above n 18, p 60.

[22]Lazarus, above n 18, p 60.

[23]BJ Richardson *Before Environmental Law—A History of a Vanishing Continent* (Oxford: Hart Publishing, 2023) pp 18–19.

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conservation and other laws which existed prior to this time.[24] The potential intellectual and organisational power of introducing the idea of the environment to law should be clearly acknowledged and studied. Some environmental law scholars have already emphasised the importance of this period, although they have not connected it to the history of the idea of the environment. Elizabeth Fisher, for example, has written that during the 1960s and 1970s 'the foundations of the contemporary structures of environmental law were laid', and that 'environmental law emerged as a subject to be practised and to be taught at law school'.[25] And Erin O'Donnall explains that the environment was first recognised as a 'legal concept' in the 1960s.[26]

To connect our study to the history of the idea of the environment it is important to appreciate some of the key aspects of the idea as it took shape in the 1940s, 50s and 60s and how it brought about changes. Warde, Robin and Sörlin identify four dimensions, coming from the scientists, which they say shaped the concept of the idea of the environment during their period of study (1948–1972): the 'future', 'expertise', 'trust in numbers' and 'scale and scalability'.

The '*future*' refers to the way the environment 'was framed by a narrative about the planet in which scientists both identified a general and advancing degradation in the world around them and felt it incumbent upon themselves to provide solutions'.[27] The second dimension, '*expertise*', was 'a means to try to identify and adjudicate between these possible futures'.[28] Warde, Robin and Sörlin concentrate on scientific expertise and how the idea of the environment fundamentally changed the way that scientists approached their work and viewed themselves, now regarding themselves as problem solvers, 'using scientific facts to establish what might be called a "survivalist agenda"'.[29] In his early work, literary ecologist William Vogt spoke of a 'modern environmental problem category' which included 'population growth (by far the number one issue of the time), water scarcity, soil erosion, overconsumption, overgrazing, overfishing, pests, industrial wastes, the retarding productivity of soils, and species loss'.[30] While some of these topics were old, Warde, Robin and Sörlin explain that the survivalist agenda was new and distinct as:

> [it] was no longer a matter of the survival of the individual of the nation or a single species or a place of natural beauty—what was arguably at stake was the survival of humanity in its entangled and deep relationship with nature.[31]

The idea of the environment became attached to the work of thousands of scientists and their changing practices, gathering and processing *global* information in large groups and using new computer technologies.[32]

The third dimension, '*trust in numbers*', is where new authority is given to the 'capacity of numbers [ie quantification] to indicate change' in the environment. These numbers have strong predictive qualities and provide the veneer of objectivity.[33] Finally, '*scale and scalability*'[34] refers to how the idea

[24]Environmental scholars have defined distinctive periods, or generations, of environmental law. See eg CA Arnold 'Fourth generation environmental law: integrationist and multimodal' (2010–2011) 35(3) William & Mary Environmental Law and Policy Review 771, at 788 ff.

[25]E Fisher *Environmental Law: A Very Short Introduction* (Oxford: Oxford University Press, 2017) p 44.

[26]E O'Donnell *Legal Rights for Rivers: Competition, Collaboration and Water Governance* (Oxford: Routledge, 2019) p 16. See also N Gunningham and C Holley 'Next generation environmental regulation: law, regulation and governance' (2016) 12 Annual Review of Law and Social Science 273, at 275.

[27]Warde et al, above n 1, pp 14–15.

[28]Ibid, p 15.

[29]Ibid, p 23.

[30]Ibid, p 23. See also discussion of Vogt and US urban/industrial environmentalist Alice Hamilton in Lazarus, above n 18, p 64.

[31]Ibid, p 23.

[32]Ibid, pp 15–16.

[33]Ibid, p 17.

[34]Ibid, pp 17–18.

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brought together researchers and professionals working in different fields (biology, public health, geographers, ecologists etc) and on different scales who created projects and collaborations that they once would not have believed possible.

In this study we take a similar approach to Warde, Robin and Sörlin in that we outline the ideas, organisations and actors that initially shaped the foundational ideas presented in the early textbooks. We consider how the four ideal types we constructed interact with Warde, Robin and Sörlin's four dimensions, and how their presentation of these ideas relates to other parts of their history of the environment. Lawyers were late adopters of the idea of the environment. Their adoption occurred at a time when scientists had cast themselves as the ultimate authorities and problem solvers when it came to the environment. To what extent did the way that lawyers thought about the environment and environmental law suggest that they too could become survivalist problem solvers? And did their thinking facilitate new collaborations with other professionals and researchers? Did it increase the size and scale of legal research and lawyerly collaborations by fostering global partnerships? While this paper does not propose to provide complete answers to these questions, it is an important first step towards understanding the potential of the foundational ideas to change law and the legal profession in important ways.

Another aspect of Warde, Robin and Sörlin's thesis of relevance to our study concerns the way that the idea moved into global and national policy areas in the 1960s and 1970s. The emergence of the term 'environmental law' occurred at around the same time. Warde, Robin and Sörlin suggest that:

> both the global critique and the culture of national regulation tended to treat environmental problems as depoliticised matters of fact. On a national level, as was the case with transnational networks of science, environmental problems were often portrayed as *merely technical problems amenable to resolution by science*. In the eyes of politicians this might be their prime virtue, allowing action that *seemed free from ideological positioning* and that could appeal 'across the aisle' to suspicious voters.[35]

This raises an interesting question for our study: to what extent did the early portrayal of environmental law treat the environment as depoliticised? The adoption of the idea of the environment fuelled conservationist movements, which became environmental movements. We were curious to know, to what extent do the textbooks' portrayal of environmental law suggest that the idea of the environment derives meaning principally from scientists, policy makers, politicians, movement actors or other sources? In these various ways, Warde, Robin and Sörlin's history raises questions for law and forms an important background to our study.

(b) Why textbooks?

The second intellectual tradition that grounds our project concerns the role of textbooks in constituting both law and legal culture through the creation of legal categories. Arguably the most important study to demonstrate the broader social, political and intellectual importance of law textbooks and legal categories was David Sugarman's history of the making of the textbook tradition from 1850 to 1907.[36] This was 'the classical or golden age of English legal scholarship', where 'academic lawyers, in partnership with the courts, fundamentally reconceptualised the form and content of English law'.[37] This reconceptualisation led to a domination of the common law mind and its archetype, the textbook tradition,[38] which persisted for decades in England, and many of its colonies, and continues to influence thinking about law today. The reconceptualisation 'assumes that although law may

[35]Ibid, pp 144–145 (emphasis added). See also Lazarus, above n 18, pp 64–66.
[36]Sugarman, above n 9.
[37]Ibid, p 54.
[38]Ibid, p 28.

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appear to be irrational, chaotic and particularistic, if one digs deep enough and knows what one is looking for, then it will soon become evident that law is an internally coherent and unified body of rules'.[39] It suggests that '[t]his coherence and unity stems from the fact that law is grounded in, and logically derived from, a handful of general principles; and that whole subject-areas such as contract and torts are distinguished by some common principles or elements which fix the boundaries of the subject'.[40] These subject areas became enduring legal categories and central to law's architecture. The mindset also conveys a political message that the law and legal profession:

> play a major role in protecting individual freedom; that the rules of contract, torts and constitutional law, for example, confer the maximum freedom on individuals to act as they wish without interference from other individuals or the state.[41]

Sugarman explains how from this frame of mind the classical scholars sought to construct a 'narrow ledge' for themselves, and by creating textbooks and other analytical scholarship, they would become useful expositors of the common law.[42] They were careful not to fuel a turf war. This ledge helped ensure that they would not trespass upon the territory of practising lawyers whose province they conceived as marshalling facts and applying the law to those facts. And by elevating the judiciary to the supreme law maker, and the common law as the supreme law, the ledge provided a reason for judges to support them in their endeavour.[43] Their position suggested that judges were the true guardians of England's legal and political systems.

In addition to providing support for our decision to study textbooks and to think of them as more than pedagogical tools, Sugarman's thesis presents several lines of inquiry for the present study. These include: did ideas about environmental law and the environment complement or challenge the common law frame of mind and the political messages contained within it? Also, did the textbooks create a hierarchy of legal knowledge and legal experts, and did they place law and lawyers at or near the top of other intellectual or political hierarchies?

While there are have been relatively few studies of textbooks which have considered their role in communicating conceptive ideologies, a few have emerged in recent years. A prominent example is Anthea Roberts' book-length study of whether international law is in fact international, which draws heavily on the presentation of international law in textbooks from different nations.[44] Roberts uses textbooks as evidence of how actors construct their understandings of a field and pass them on to the next generation. She considers that textbooks are worth studying for many reasons, including that they are visible, comparable, and understudied.[45] Our study is similar to Roberts' in that it seeks to compare how legal academics and lawyers have portrayed environmental law in different nations, in part to understand the different treatments of the idea of the environment.

Others have treated textbooks as evidence of the way that law, and the aims of legal education, are conceptualised within teaching, as distinct from research and scholarship, to allow for a comparison between the two.[46] In the field of environmental law Stuart Bell (an author of an English textbook in our study) provides a useful, provocative and engaging reflection on the past and present utility of environmental law textbooks. He suggests that these books are of ongoing relevance,[47] and outlines

[39]Ibid, p 26.
[40]Ibid, p 26.
[41]Ibid, p 27.
[42]Ibid, pp 33–36.
[43]Ibid.
[44]A Roberts *Is International Law International?* (New York: Oxford University Press, 2017).
[45]Ibid, p 4.
[46]An excellent example is D Sandomierski *Aspiration and Reality in Legal Education* (Toronto: University of Toronto Press, 2020).
[47]S Bell 'Is your textbook (still) really necessary?' in A Kennedy et al (eds) *Teaching and Learning in Environmental Law: Pedagogy, Methodology and Best Practice* (Cheltenham: Edward Elgar, 2021) p 70.

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some of the choices and challenges textbook writers face in this area. He suggests that books that are structured around environmental issues tend to weaken the coherence of a textbook and suggest that there is no basic core of environmental law.[48] He explains the choice authors must make between structuring textbooks around the 'true context for environmental law – realistic, messy, multi-dimensional, interdisciplinary problems that refuse to sit in self-defined silos of knowledge',[49] and more formalistic accounts of the law, and he advocates for textbooks which centre on case studies of the application of law in the real world.[50] For Bell the coherence of textbooks is important not so much for promulgating the common law mindset described earlier, but rather to provide textbook users with a manageable entry point into the subject.[51]

We appreciate that there are limits to relying exclusively on textbooks to understand the initial portrayal of environmental law. As well as the textbooks, environmental law was portrayed in statutes, policy, the work of government organisations, in the endeavours of lawyers beyond textbook writing and in other works of scholarship. However, we consider that law textbooks remain crucial vehicles that have the potential to legitimise the place of new categories in the ontology of law.[52] They play 'an important socialising role' for law students and legal practitioners encountering environmental law for the first time, shaping understandings of what is the core of the subject, and what is peripheral.[53] Environmental law scholars suggest that the first textbooks, along with statutes, were important conveyers of the essence of the category,[54] and that the goal of law textbooks is not merely to educate, but also to provide authoritative pronouncements, being 'the most significant and widely read accounts of a [legal] subject'.[55] Ben Richardson quotes from recent editions of two Australian environmental law textbooks (one by Gerry Bates[56] and another by Lee Godden and Jacqueline Peel[57]), suggesting they were central conveyers of the myth that laws relating to the environment did not exist prior to the late 1960s and 1970s.[58] His reference to these authorities lends weight to our thesis that environment law textbooks have played an important role in shaping the idea of environmental law, declaring its existence.

In short, drawing on Sugarman's work, and treating textbooks as a document theorist would, we think of the textbooks as documents possessing considerable authority that can create and legitimise a legal category and social and intellectual orders.[59]

2. Selection and approach

For this study we chose to concentrate on the textbooks of five English-speaking, common law countries: Australia, Canada (the English-speaking provinces), England, New Zealand and the US. We considered that the similar legal systems and languages of these countries, along with the emergence of new environmental legislation in each country in the 1960s and 1970s, provided a foundation for comparing the way they thought about the foundational ideas. Examining books from multiple countries with similar legal traditions allowed us to consider whether there were signs that the idea of the

[48]Ibid, p 77.
[49]Ibid, p 81.
[50]Ibid, pp 78, 82.
[51]Ibid, p 73.
[52]Ibid, p 73.
[53]Roberts, above n 44, p 129.
[54]Bell, above n 47, pp 73–74.
[55]L Fisher et al 'The glamour of textbook writing' *Oxford learning link*, available at https://learninglink.oup.com/access/content/fisher2e-resources/fisher2e-the-glamour-of-textbook-writing.
[56]G Bates *Environmental Law in Australia* (Sydney: LexisNexis Butterworths, 10 edn, 2019) p 1.
[57]L Godden and J Peel *Environmental Law* (Melbourne: Oxford University Press, 2010) p 126.
[58]Richardson, above n 23, p 18.
[59]For an explanation of the theory in the context of legal documents see K Biber et al 'Introduction' in K Biber et al (eds) *Law's Documents: Authority, Materiality, Aesthetics* (London: Taylor and Francis Group, 2022) pp 4–22.

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environment had a global or local dimension, whether conceptualisations in one country may have influenced others, and to identify similarities and differences between countries.

As this study is about how lawyers and legal scholars received and initially presented the idea of the environment, we concentrated on law textbooks with the word 'environment' or 'environmental' in the title. We included law textbooks written for practitioners, law students and broader audiences but we excluded books presented as multi-volume treatise, monographs and looseleaf services.[60] In essence, we reviewed textbooks that attempted to distil the essence of environmental law, or law and the environment, in a single volume, written for audiences including students, practitioners, other experts and lay people.

The first environmental law textbook was published in 1970 by Oscar Gray in the US.[61] It was followed by a raft of environmental law textbooks published in the US over the next few years. For example, between 1970 and 1972, we found 10 first edition environmental law textbooks. The other countries published between one and three first edition textbooks in the 20-year period from 1970. Canada published its first textbook in 1974, and Australia and New Zealand published their first textbooks in 1980. England did not publish a textbook until 1986. We have not included any textbooks published after the Rio Conference of 1992, because we consider this event may have inspired new presentations of the foundational ideas and it marks a boundary of just over two decades from the publication of the first textbook.

Our study is about how the idea of the environment was received and presented in the early textbooks of each country, and how that idea was fashioned into a new concept of environmental law. As this reception occurred at different times in the countries studied, the earliest and latest books we studied were published 22 years apart. We acknowledge that developments in environmental law during this time may have contributed to the different presentations of the core concepts; for example it may have encouraged the authors of the 1992 book to speak of the existence of a category of environmental law.

Given the sheer number of US textbooks published between 1970 and 1992, we concentrate on all environmental law textbooks published between 1970 and 1974. Concentrating on all books from this time period, rather than selecting a sample of books across a wider period, provides a varied sample which is not influenced by our subjective views of which books best reflect US approaches. It is also consistent with our approach to the other countries, concentrating on a snapshot in time which accords with the early reception of the idea of the environment in each country, rather than changes over time.

Most authors were legal academics, with a few practitioners, and all but one of the books were written by men. Eva Hanks, a professor at Rutgers University, was one of the first women to become a professor of law in the US and is the only woman author in our study.[62] Appendix A contains a list of all the textbooks we analysed for this study, organised according to their country of origin. We considered both first and second editions, but concentrated on first editions in our analysis.

Our analysis involved studying the books in two central ways. First, we analysed the introductory materials and first chapters of the books to understand how the author/s, either implicitly or explicitly, conceptualised the environment, environmental law and environmental law experts. As Sandomierski observes in his study of Canadian contract law textbooks, 'the prefatory and introductory passages … contain the most explicit statements of the editors' objectives and attitudes'.[63] We also considered reviews and commentary to inform our interpretation of these books.

[60]For this reason, we excluded books such as RT Franson and AR Lucas *Canadian Environmental Law* (Toronto: Butterworths, 1976); FP Grad *Treatise on Environmental Law* (New Providence: LexisNexis, 1973); and J Sax *Defending the Environment: A Strategy for Citizen Action* (New York: Borzoi Books, 1970).

[61]OS Gray *Cases and Materials on Environmental Law* (Washington DC: The Bureau of National Affairs, 1970).

[62]M Diller 'A tribute to Eva Hanks' (2014) 36(2) Cardozo Law Review 403.

[63]D Sandomierski 'Tension and reconciliation in Canadian contract law casebooks' (2017) 54(4) Osgoode Hall Law Journal 1181, at 1190.

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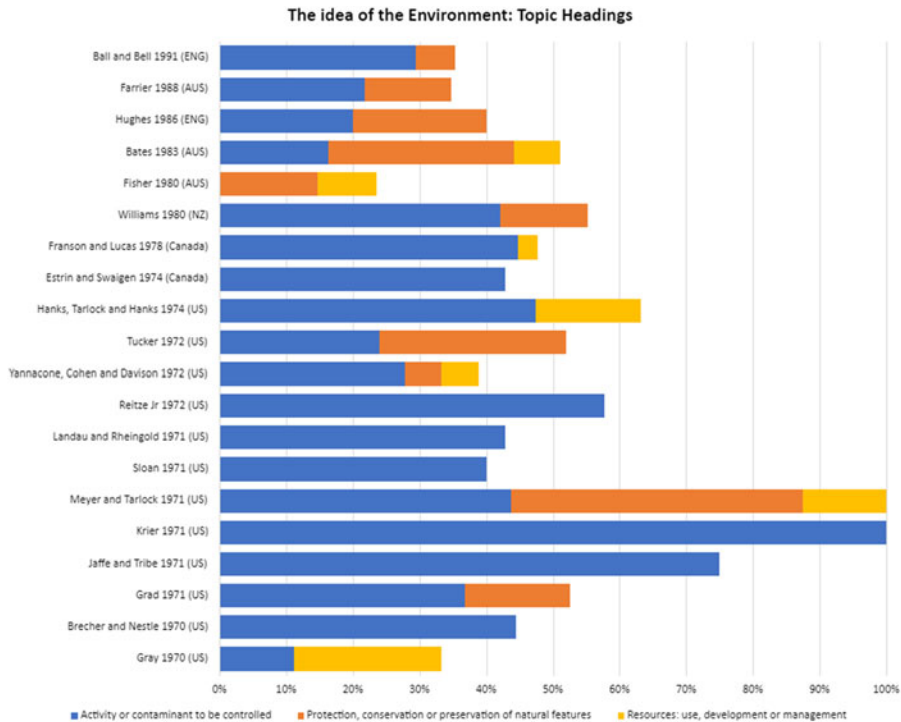

Graph 1. the idea of the environment: topic headings.
Graph 1 shows the extent to which each textbook included in our study was organised around these categories, as a proportion of the total number of level 1 and 2 headings (or the total number of headings for the two textbooks with only 1 heading level). To undertake this analysis, we counted the number of main headings (that is, excluding indexes or appendices) that were either a level 1 heading, usually referring to a part of the book, or a level 2 heading, usually referring to a chapter of the book. We then calculated how many of these headings fell within each category as a percentage of the total number of headings. If a level 2 heading did not clearly fall within one category, we interpreted it with reference to its level 1 heading.

Secondly, we analysed the particular topics the authors used to organise their content, concentrating on the headings of parts and chapters of the book. We wished to understand how these headings communicated ideas about the environment, environmental law and environmental law experts. We have included two graphs (×Graphs 1 and 2) to illustrate our analysis.

The headings present ideas about the environment in two central ways. First, many of the headings conceptualised the environment as a series of issues or problems, identifying either an activity or contaminant to be controlled (such as noise or pollution), or a natural feature – a 'target'[64] – to be the subject of law's protection (such as the protection of forests or wildlife). These headings suggest that the idea of the environment consists of problems to be solved, or threats to be ameliorated, by law and through other means. Some headings, however, instead framed the environment as a resource: something to be used, developed or managed. In Graph 1 we illustrate the extent to which each textbook adopted these presentations of the environment.[65]

The organisational schemes of the textbooks suggest that environmental law consisted of both the response to these environmental and resource issues, and a grouping together of new and old laws.

[64]S Ball and S Bell *Environmental Law – The Law and Policy Relating to the Protection of the Environment* (London: Blackstone Press, 1991) pp 5–6.

[65]We acknowledge that there are several ways to classify the textbook headings. Our categories reflect our reading of the textbook headings alongside environmental law classifications created by legal scholars such as John Swaigen: J Swaigen 'Environmental law 1975–1980' (1980) 12(2) Ottawa Law Review 439, at 447.

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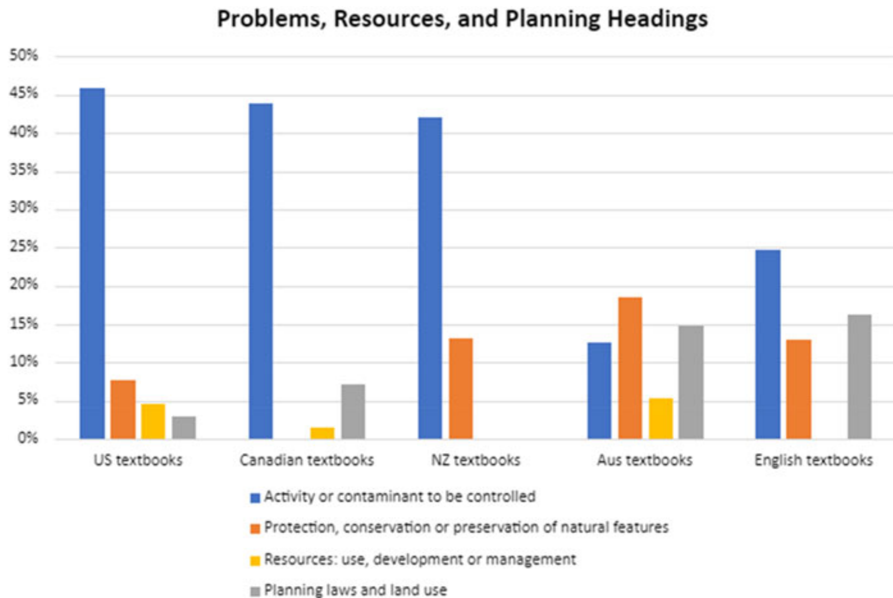

Graph 2. problems, resources and planning.
Graph 2 shows our analysis of the top two levels of headings for each of the countries included in our study. This analysis involved taking an average of the percentages of textbooks from each country (presented in Graph 1).

These old laws included laws drawn from the existing body of common law (such as nuisance and the law of riparian rights and aspects of constitutional law); planning law as a distinct body of law; and laws which facilitated the oversight of environmental decision-making (such as judicial review). The new laws, doctrines, rights and procedures created to respond to environmental issues included, for example, 'a substantive right to environmental quality, the public trust doctrine, environmental impact assessment, and specialized pollution control and wildlife preservation statutes found at the provincial and federal levels'.[66] As it is important to understanding differences between ideal type 1 and 3, we have illustrated in Graph 2 the extent that planning law was part of the organisational scheme of the textbooks, grouped by country. This is explained further below.

It is worth noting at the outset that although all the countries we examined (other than England) were populated by First Nations peoples before British invasion, each with their own cultures and laws relating to their environments, there is almost no recognition of this in the early environmental law textbooks. This is consistent with Eve Darian-Smith's contention that the Anglo-American environmental law literature could be characterised by an almost 'exclusive' focus on 'intergovernmental relations' and 'regulation' pervaded by 'Anglo-American legal norms', with a 'glaring omission' of 'the increasing role of Native American governments in shaping' environmental law.[67] The only textbooks we found with reference to First Nations peoples were the early Australian textbooks, but even these tend to only include references to First Nations legal systems and preserving Aboriginal heritage. Douglas Fisher in his 1980 textbook includes a section on 'The Aboriginal legal system' in his chapter on 'The fragmentation of legal authority'. Gerry Bates' 1983 textbook concentrates on protecting Aboriginal remains or 'preserving the Aboriginal heritage'. In his 1987 second edition, Bates notes that he has removed the subject of Aboriginal land rights from the edition, on the basis that it is

[66]Ibid.
[67]E Darian-Smith 'Environmental law and Native American law' (2010) 6(3) Annual Review of Law and Social Science 359, at 360.

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more properly treated as 'property' law than 'environmental' law.[68] None of the textbooks investigate the relationship between race and environmentalism, or consider the potential discriminatory and racist aspects of the environmental movement.

3. Ideal types for the foundational ideas

In this part we identify four ideal types which we consider help explain the way that the textbooks presented the foundational ideas. We found that each type prevailed most strongly in a single country, although there were examples in others. We also found instances where a single textbook was shaped by two or more types. We describe these types as 'new legislation', 'citizen action', 'national politics' and 'new label – old law' and describe each of them in turn. We developed the ideal types by analysing how the foundational ideas were presented explicitly or implicitly in the text, as well how they were reflected in the organisational schemes of the textbooks. We looked for patterns in the presentation of these ideas – for example, where themes were detected in multiple books – as well as unique presentations in a particular textbook. The ideal types accentuate these patterns and unique presentations.

(a) Type 1: new legislation

(i) The environment and environmental law

The first type, 'new legislation', refers to the increase in legislation enacted in the 1970s and 1980s designed to regulate the environment. As noted in the introduction, this new wave of legislation responded to the public's growing concern over environmental quality and the realisation by politicians that such measures were popular with the public.[69] The legislation has been described as different to what had gone before, as it centred on the idea of the environment and the need to manage or protect it, rather than other concerns such as public health or the maintenance of property rights.[70] This type suggests that the idea of the environment entered law through legislation. The meaning of the 'environment' corresponds with whatever the legislature made the subject of this new and burgeoning legislation, and its meaning was given solidity by lawyers and legal scholars who grouped that legislation under the 'environmental' banner, and organised and interpreted it. While what is included under the banner of environmental law extends beyond legislation to case law, the new legislation defines the ambit of the concerns of environmental law.

It is important to distinguish this type from the third, 'national politics'. In this first type the textbook writer works first from the form and contents of legislation. While they sometimes consider the policy and public debate that led to the creation of that legislation, it is of secondary importance in their presentation of the idea of environmental law and their analysis of the central issues.

The first type presents most strongly in two of the three Australian textbooks, by Douglas Fisher and Gerry Bates.[71] We also found strong traces of this type in the New Zealand, the third Australian and the second English environmental law textbooks.[72] Both Fisher and Bates explicitly adopt a definition of the environment and environmental law that is based on their analysis of state and Federal statutes. Their interpretation of the statutes leads them to define environmental law as possessing three elements: an economic element which considers and may facilitate the use and exploitation of resources; a protection element; and an element which consider how the

[68]G Bates *Environmental Law in Australia* (North Ryde: Butterworths, 2nd edn, 1987) p x.

[69]JJ Brecher and ME Nestle *Environmental Law Handbook* (Berkeley, CA: California Continuing Education of the Bar, 1970) p 5.

[70]See for example G Bates *Environmental Law in Australia* (North Ryde: Butterworths, 1983) p 7.

[71]D Fisher *Environmental Law in Australia* (St Lucia: University of Queensland Press, 1980); Bates, above n 68.

[72]DAR Williams *Environmental Law in New Zealand* (Wellington: Butterworths, 1980); Ball and Bell, above n 64; D Farrier *Environmental Law Handbook: Planning and Land Use in New South Wales* (Sydney: Redfern Legal Centre Publishing, 1988).

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environment might be integrated into decision-making processes.[73] Based on their reading of the statutes, the Australian authors say that the idea of the environment in law must be anthropocentric rather than ecocentric, because 'man' is placed at the centre of the legislative definitions of the environment.[74] Fisher formulates this definition of environmental law, even though he expresses preferences for ecocentric notions of the environment and for confining environmental law to laws about environmental protection.[75]

The approach of the Australian authors acknowledges the democratic mandate of environmental law. Bates, for example, says that environmental law is not simply about the rules but 'represents a recognition by the public and by government of the need to achieve a sensible balance between development and conservation, and the value of non-economic factors in enhancing that "quality of life" to which we all aspire'.[76] And several of the books sitting within this type are critical of the common law, presenting it as marginal in the development of environmental law.[77]

The emphasis on what the environmental law statutes say provides an explanation for why the Australian authors organised their books less through a problem lens than others, and why both Bates and Fisher placed a greater emphasis in the organisation of their books on the use, development and management of resources than many of the other textbooks (see Appendix B and Graph 1). While the discussion of resources in these textbooks involves balancing various economic and other interests, it should be distinguished from the normative approach of early natural resources law textbooks, which focused on the allocation of property rights in natural resources,[78] and which often 'provided little more than blueprints for environmental exploitation'.[79]

All books within this type give the ideas of the 'environment' and 'environmental law' a strong local dimension, concentrating on national law and considering international law only insofar as it is mediated within local laws.[80]

(ii) Environmental law experts and the category of environmental law

Defining environmental law through the lens of legislation suggests that one of the chief roles of environmental law scholars is to identify what constitutes environmental legislation, and act as expert interpreters of that legislation. By focusing on legislation, emphasising its volume and complexity, the Australian authors implicitly make a case for a new kind of environmental legal expert, one which represents a shift in the common law mindset and an erosion of its political message. Whereas Sugarman's jurists were tasked with untangling common law principles and deducing enduring core principles to form legal categories to maintain the common law's legitimacy, Australian environmental law scholars are cast as legislative experts overseeing a dynamic and constantly changing body of law. This different role means that their critiques and law reform proposals are of less consequence to their relationship with the judiciary (as described by Sugarman), as they can propose dramatic reforms to legislation without necessarily questioning the soundness of common law developments. This provides them with greater freedom. However, it also means that the textbooks may exert less influence, as the legislature sits outside the longstanding relationship between the judiciary and legal scholars. They can provide suggestions on how courts and others should interpret the legislation but ultimately it is the legislature and not the courts which creates the bulk of this law.

[73]Fisher, above n 71, pp 7–8; Bates, above n 70, pp 1–2. Farrier also gives emphasis to natural resources: see Farrier, above n 72, pp 17–18.

[74]Fisher, above n 71, pp 6–7; Bates, above n 70, p 1; Farrier, above n 72, pp 19–20.

[75]Fisher, above n 71, p 8.

[76]Bates, above n 70, pp 2–3.

[77]Ball and Bell, above n 64, p vii, ch 8; Fisher, above n 71, pp 9, 11–12; Farrier, above n 72, p 20; Bates, above n 70, p 6; Williams, above n 72, p 5.

[78]Lazarus, above n 18, pp 62–63.

[79]FE Maloney 'Book review: Cases and Materials on Environmental Law. By Oscar S Gray' (1974) 26(4) Florida Law Review 917, at 919.

[80]Ball and Bell treat European Communities law as domestic law: Ball and Bell, above n 64, p 3.

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The Australian textbooks also depart from the common law mindset in that their authors do not attempt to fashion overarching principles as a way of demonstrating the existence of environmental law. While their attempts at defining the environment and environmental law might be seen as efforts to bring coherence to a new category, the authors consider that the law does not (or at least not yet) lend itself to further distillation, with Fisher adding that the fact that environmental law is not a separate category 'does not matter much'.[81]

In contrast, Ball and Bell (authors of the second English textbook in our study) attach considerable importance to environmental law existing as a defined legal category. They say that one of the 'major aims' of their book 'is to illustrate the proposition that there is developing such a thing as environmental law'.[82] They argue that 'environmental law is starting to acquire its own conceptual apparatus, in the sense that there is being built up a set of principles and concepts which can be said to exist across the range of the subjects covered'.[83] Based on Sugarman's thesis, we would suggest that their book is not merely 'illustrating' the development of the category 'environmental law', but is rather contributing to the creation of the category of environmental law in England. Framing category creation and coherence as a 'major aim' suggests the authors considered there is something important to be gained in giving environmental law this complexion.

(iii) Politics and political ideology

Lawyers within this 'new legislation' type fit with Paul Sabin's concept of US 1970s legal liberals: they hold considerable faith in the courts and have respect for liberal institutions, choosing to work from inside rather than outside the system, while questioning whether 'government agencies could effectively represent the public'.[84] Some give the idea of the environment the status of a rule of law value, standing above party politics and political ideology. Bates, for example, draws on the new legislation and statements of superior English, American and Australian judges, to argue that maintaining 'environmental quality' has become an important rule of law value. He considers that while neither judges nor lawyers 'have any business in espousing causes', 'just as the law has previously been prepared to look favourably upon social, female or ethnic equality, so now the signs are that it will be prepared to give full weight also to the maintenance of environmental quality'.[85] For Bates, all citizens are responsible for 'preserving and managing our environmental heritage' and lawyers should increase and improve their contributions to the process.[86]

This brand of legal liberalism involves lawyers challenging administrative decision-making as a way of ensuring that legislation is implemented and enforced appropriately. A significant impetus for these challenges was Joseph Sax's 1971 monograph *Defending the Environment – A Handbook for Citizen Action*,[87] which spoke to the increasingly large role played by administrative agencies in environmental regulation and decision-making. It argues that while 'neither sinister nor superfluous', the agencies had supplanted the citizen as a participant in decision-making.[88] The textbooks we examined which related strongly to the 'new legislation' type, also contain passages which agitate for these kinds of litigious initiatives, designed to hold government agencies accountable.[89] In our analysis of the organisational design of the textbooks, we found that several of the books (including those that more strongly identified with other types) organised some of their content around the topic of

[81]Fisher, above n 71, preface. Bates begins the first chapter of his book by saying that environmental law is different from existing common law categories: Bates, above n 70, p 1. Farrier's conceptualisation of environmental law as mostly about the 'regulation of land', does not speak at all about the existence or creation of a new category akin to the traditional common law categories: Farrier, above n 72, p 10.

[82]Ball and Bell, above n 64, p 5.

[83]Ibid, p 5.

[84]P Sabin 'Environmental law and the end of the New Deal order' (2015) 33(4) Law and History Review 965, at 969–970.

[85]Bates, above n 70, p 3.

[86]Ibid, p 10.

[87]Sax, above n 60.

[88]Ibid, p xvii.

[89]See for example Williams, above n 72, p 9.

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'oversight of environmental decision-making'. The English, New Zealand and Australian textbooks mentioned in this section emphasise the importance of lawyers taking responsibility for environmental quality by ensuring that the environmental legislation is enforced appropriately.[90] While such action is presented in their books as depoliticised, historian Sabin suggests that the preparedness of US lawyers to challenge administrative environmental decision-making, brought about the new liberal political order described above.[91]

(b) Type 2: citizen action

(i) The environment and environmental law

The second type, 'citizen action', refers to the way that small and large groups of people sought to bring to the fore environmentalist concerns through a number of campaigns, gaining impetus and momentum in the 1960s.[92] The idea of the environment in this type equates to the way that citizens accepted the scientist's survivalist agenda and applied it to their local communities. It is a fluid concept which changes depending on the issues of concern. The term 'environmental law' is used in these books as a convenient descriptor of laws that a citizen might use to advance their cause, rather than a legal concept or category. Here law is conceptualised instrumentally, as a means to help citizens create and enforce stronger environmental protections.

This type is most strongly exhibited in books written by academics outside of the legal academy and those published in conjunction with an environmental organisation.[93] The strongest example is the first Canadian book by David Estrin and John Swaigen, both lawyers at the Canadian Environmental Law Association (CELA).[94] It was funded by the Donner Canadian Foundation,[95] a progressive family foundation established to assist with solving critical world problems and published by the Canadian Environmental Law Research Foundation. The type is also present in an Australian and some of the American books.[96]

Estrin and Swaigen's goals were to equip citizens, or at least committed environmentalists, with the knowledge to challenge government decisions in the courts, raise objections to the way they have been left out of environmental decisions and protest the inadequacies of existing laws. The introduction and the organisational design of the book treat the idea of the environment as a series of current problems – 'pollution problems' – to be solved through public action in the courts and through agitating for law reform. Environmental law is treated as an exercise in identifying or creating rights, or other legal tools, that can be readily used and enforced by citizens to improve environmental protection. The book advocates for changes to Ontario's environmental statutes to accommodate greater citizen engagement and enforcement, and the foreword, written by a barrister, lends support to the CELA's call for an environmental Bill of Rights.[97] It also includes very explicit critique of government

[90]Bates, above n 70, pp 4–5; Williams, above n 72, pp 6–13. Ball and Bell and Fisher each devote a chapter of their textbooks to 'the enforcement of environmental law': Ball and Bell, above n 64; Fisher above n 71.

[91]P Sabin *Public Citizens, The Attack on Big Government and the Remaking of American Liberalism* (New York: WW Norton, 2021); Sabin, above n 84.

[92]Richardson, for example, suggests that 1967 marked the onset of these campaigns in Australia: Richardson, above n 23, pp 33, 93.

[93]For example Landau and Rheingold, both practising lawyers rather than academics, published with Friends of the Earth: NJ Landau and PD Rheingold *The Environmental Law Handbook: The Legal Remedies in Existence Now to Stop Government and Industry from Destroying our Environment* (New York: Ballantine Books, 1971); Farrier, above n 72, published for the Environmental Law Association of NSW.

[94]The Associate Editors were also part of the environmental law movement in Canada, with James Woodford a former Executive Director of the Federation of Ontario Naturalists and author of two activist books, and Mary Anne Carswell an administrative director of CELA.

[95]The Donner Canadian Foundation website is available at https://donner.ca/our-story/.

[96]Farrier, above n 72; Landau and Rheingold, above n 93; Brecher and Nestle, above n 69; VJ Yannacone et al *Environmental Rights and Remedies* (New York: Lawyers Co-operative Pub Co, 1972).

[97]D Estrin and J Swaigen (eds) *Environment on Trial: A Citizen's Guide to Ontario Environmental Law* (Toronto: Canadian Environmental Law Association and Canadian Environmental Law Research Foundation, 1974) p xvii.

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agencies, painting a picture of government failure. Government agencies, the authors write, are 'neither independent nor effective'.[98] Here too, Joseph Sax's work is a clear influence.[99] Describing the work as a handbook signalled that it is a work of practical instruction for citizen advocacy, encouraging them to embark on both challenges to existing law, advocacy for law reform and action to scrutinise administrative environmental decision-making.

(ii) Environmental law experts

As noted earlier, the 'citizen action' type is not about creating a new band of environmental law experts. The foundational ideas under this type therefore are unlikely to revolutionise legal practice in the same way that the idea of the environment transformed the sciences. Instead, the primary goal is to empower citizens by providing them with accessible explanations of law and its processes. If lawyers have a role, it is to educate and empower citizens so that the reliance on lawyers, and the associated costs, is reduced. The logic, presumably, was that empowering citizens to take legal action without the presence of lawyers would make it possible for more citizens and groups to seek legal redress.

The US books which exhibited aspects of this type, however, were different in that they placed emphasis on the role of lawyers in advancing the cause of environmental law. In the first chapter of the US equivalent to Estrin and Swaigen, by lawyers Norman Landau and Paul Rheingold, the authors envisage citizens working with lawyers, listing by name environmental organisations and lawyers who can lend support to such actions.[100] This sits in contrast to the introduction of the book, where well known public interest lawyer Ralph Nadar cautions readers to be suspicious of lawyers' conservative inclinations and economic imperatives.[101] Other US textbooks serve as guides for lawyers representing environmental groups. For example, Victor Yannacone and Bernard Davison, write '[o]ne of the principal duties of the environmental advocate is presenting environmental science in a readily comprehensive manner' and suggest that DDT litigation has shown 'that the courtroom can be a proper forum for the resolution of scientific controversy'.[102] In these books lawyers are charged with bringing the policy and scientific debates into the courtroom to restore environmental quality.

(iii) Politics and political ideology

This type sits within the same legal liberal paradigm we described in our explanation of the first type. While the Canadian book goes the furthest in advocating for law reform based on movement goals, suggesting that Ontario needs an environmental Bill of Rights, their reform proposals remain located within a legal liberal paradigm. They want better laws and more court challenges, not to overturn or rework existing political systems and processes.

(c) Type 3: national politics

(i) The environment

The third type, 'national politics', refers to how the idea of the environment was elevated to a subject of national politics and political debate. This type draws on how the idea of the environment was being conceptualised in these debates, often concentrating on aspects of the debate that pique the author's interests and concerns. The organisational schemes of the textbooks suggest that pollution was perceived as the most pressing of all environmental issues (Appendix B and Graphs 1 and 2). How the idea of the environment is presented depends on how public figures, often politicians but also experts, present the scientist's survivalist agenda and elevate particular environmental issues.

[98]Ibid, p 8.
[99]Sax, above n 60.
[100]Landau and Rheingold, above n 93, pp 14–16.
[101]Ibid, pp 1–2.
[102]Yannacone et al, above n 96, p vi.

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Consistent with Warde, Robin and Sörlin's thesis, the idea of the environment is grounded in future problems, in particular the risk that the earth will no longer be habitable for humans.[103] Where definitions of the environment are provided, the textbooks may quote from ecologists.[104] The treatment of the environment as a problem to be solved by experts is reflected in the organisational schemes of the books, with a large proportion of the headings devoted to environmental problems (see Appendix B and Graphs 1 and 2).

This type is best represented in several of the US textbooks. The first textbooks, published in the US in 1970, coincided with President Richard Nixon's State of the Union message where he described 1970 as 'an environment year'.[105] Several of the early US authors quote from his address as evidence of the relevance and need for environmental law textbooks, with Sloan suggesting that the 'year 1970 marked the first year of what is likely to be characterized by historians as the Decade of the Environment'.[106]

(ii) Environmental law and environmental law experts

The authors of the books contributing to this type envisage that lawyers will sit alongside the scientists and the politicians to shape political and legal responses to the environment. In these books environmental law is presented as a purposive activity,[107] directed towards promoting environmental quality or providing solutions to environmental problems drawing on a range of disciplinary knowledge. Whether or not environmental law is a legal category seems irrelevant. The field already has status given the importance of the topic in national politics. The textbook writers base the importance of their work on the public zeitgeist which points to critical problems facing humanity, rather than the mere existence of new laws. As with type 1, the books best representing this type also point to the tremendous growth in the number of environmental law statutes as necessitating a concentration on environmental law. However, they approach environmental law as policy scientists. Their concern is not to provide distillations or interpretations of the legislation, but instead to track current and future national policy debates; to identify the threats to the environment of greatest concern (or of greatest interest to the authors); and to consider how law and other bodies of knowledge and expertise may contribute solutions to these problems.

The textbooks most strongly exhibiting this type are cases and materials books written for US law students. As the market for student environmental law textbooks was much smaller in the other countries, due to fewer law schools and law students and fewer offerings of environmental law as a subject, it was only in the US that a large number of environmental law books were written wholly for law students. The ability of some US authors to focus exclusively on the classroom meant that their books could be fashioned to cater for an idealised law student. This law student was often imagined to be a member of the elite, a future leader, either working in government roles or holding a position with influence over those in power.

Unlike the Australian, English and New Zealand books, these US books were not written for use by typical environmental lawyers, most of whom concentrated on planning law. These books did not equip their students with sufficient knowledge of planning law to become planning lawyers, with most of the US student books excluding this topic altogether (see Appendix B and Graph 2).[108]

[103]See for example Brecher and Nestle, above n 69, introduction.

[104]Ibid, p 2. Of all the textbooks studied, the Canadian book by Franson and Lucas devotes the greatest amount of space to an explanation of the environment grounded in science. See RT Franson and AR Lucas *Environmental Law Commentary and Case Digests* (Scarborough: Butterworths, 1978) pp 201–204.

[105]Brecher and Nestle, above n 69, preface.

[106]IJ Sloan *Environment and the Law* (New York: Oceana Publications, 1971) p vii. See also Brecher and Nestle, above n 69, preface.

[107]In this way it is similar to the concept of law associated with the Legal Process School. See S Bartie *Free Hands and Minds* (Oxford: Hart Publishing, 2019) p 57; C Barzun 'The forgotten foundations of Hart and Sacks' (2013) 99 Virginia Law Review 1; N Duxbury *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1995) p 233.

[108]Writing in 1978, US legal academic Arnold W Reitze Jr observed 'The subject of land use … seems to have become more securely established as a discrete entity and is being largely ignored in much of the environmental law literature': AW Reitze 'Book review: Environmental Law by William H Rodgers' (1978) 9(4) Texas Tech Law Review 1247, at 1249.

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This fits with a tradition of the elite US law schools pitching their curriculum to the upper echelons of the profession.[109] A good early example is the textbook by Harvard law professors Louis Jaffe and Laurance Tribe, who concentrated their cases and materials around the environmental problems of air pollution, water quality management and carcinogens as a way to 'expose the characteristic structures of environmental problems, as a way of providing techniques for their analysis and suggesting strategies for their solution'.[110] Jaffe and Tribe's status as public law professors from one of the most elite institutions no doubt fuelled this particular conception of environmental law. The materials included in these books ranged from economic arguments, ecological literature and political papers on topics such as the population debate.[111] None of the books in other countries addressed this topic. Several of the US books also gave particular weight to economics, prompting one book reviewer to complain that 'a disproportionate amount of high-powered law academic energy is being poured into the study of law and economics' and that in 'such an atmosphere, it is perhaps inevitable that environmental issues too should be approached primarily from a law and economics perspective'.[112]

(iii) Politics and political ideology

Consistent with the scientists, the books contributing to this type communicate the idea that the environment is free from political ideology, and do not side with a particular political party.

(d) Type 4: new label – old law

The fourth type, 'new label – old law', ignores the reception of the idea of the environment into law by suggesting that the term 'environmental law' merely grouped together new and old laws on existing legal topics. The term 'environmental law', then, is a neat descriptor of all laws regulating conservation, land development, wildlife etc, irrespective of whether they emerged before or after the idea of the environment was introduced into law. In other words, the idea of the environment and environmental law is banal, at least in the context of law. This type rejects the proposition that the idea of the environment, introduced in the late 1960s and 1970s, changed the social, political, intellectual, cultural or organisational aspects of law. The focus is on the substantive law rather than the new descriptor or idea. This type therefore shapes the idea of the environment by divorcing it from the meaning given to it by scientists and picked up by politicians in public debates. The idea of organising or defining law around the masthead of 'environmental law' or 'environmental lawyer' here seems either unnecessary or only necessary due to the increase in the number of laws that might fit under this label. As noted above, this approach avoids the myth of suggesting that laws about the natural and urban world are of recent origin and encourages engagement with the history of law, rather than focusing on recent incarnations. It also tends to neglect the organisational and imaginative significance of the idea of the environment within law.

This type is most prevalent in the first English book by David Hughes. This book stood out among those we studied in that it argued against the idea that environmental law was or might become a new and distinctive legal category. Hughes writes that there has been a long lineage of laws relating the environment which suggests that it cannot be a category:

> Increasing environmental consciousness over the last 15 years should not blind us to the fact that there have been laws concerning the environment for centuries. Indeed, it is because the law has

[109] Anders Walker, for example, explains that criminal law professor Herbert Wechsler wrote his textbook in a way that encouraged his students at an elite law school to be policy makers rather than lowly criminal lawyers: A Walker 'The anti-case method: Herbert Wechsler and the political history of the criminal law course' (2009) 7(1) Ohio State Journal of Criminal Law 217, at 217–218.

[110] LL Jaffe and LH Tribe *Environmental Protection* (Chicago: Bracton Press, 1971) preface.

[111] On population see eg E Hanks et al *Cases and Materials on Environmental Law and Policy* (Minnesota: West Publishing Co, 1974) ch 2.

[112] TJ Graff 'Environmental Law and Policy. By Richard B. Stewart and James E. Krier' (Book Review) (1979) 93(1) Harvard Law Review 282, at 289.

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> been developing for so long that 'environmental law' *is not a coherent, logical body of principles and rules*. What we have is a number of *diverse laws relating to* the environment.[113]

Hughes seems steeped in the old English common law mindset and shows clear fidelity to the common law.[114]

Other authors organised some of the content of their books around existing branches of law. However, this was not a prominent organising scheme, suggesting that most authors viewed environmental law as more than 'an amalgamation and application of' law, principles and policies from other standard law courses.[115]

4. Findings

(a) Creating new legal meanings – the first type 'new legislation'

Our study suggests that legal scholars contributed new authoritative meaning to the idea of the environment when they selected, synthesised and amalgamated legislation to determine the meaning of both the 'environment' and 'environmental law' (the first type, 'new legislation'). This exercise also created a new branch of environmental experts. The technical and supplementary nature of their undertakings, drawing meaning from statutes rather than devising new meanings through engagement with policy makers or scientists, distinguish them from other environmental experts. It also has the tendency to render their contributions invisible. Rather than solvers of environmental problems, lawyers are cast as interpreters of the government's response to problems, and facilitators of challenges to government decision-making. Unlike the scientists, they speak for the rule of law in its various versions and revisions, rather than the environment.

The foundational ideas contributed by the other types do not have the same potential to add new 'legal' meanings to the idea of the environment. The ideas within the second type ('citizen action') may give lawyers the power to decide which citizen concerns should take precedence, but it does not add a further analytical component. The ideas in the third type ('national politics') are more about making space at the table for lawyers to contribute to policy making and translate into law the policy goals they consider possess the greatest worth. It brought the survivalist agenda firmly into law and conceptualised lawyers as problem solvers, alongside the scientists, economists and politicians.

(b) Local rather than global

An important finding concerns the way that all the types facilitated a local rather than global focus, which was at odds with the way that scientists conceived of the idea of the environment. As Warde, Robin and Sörlin explain, the idea of the environment led scientists to dramatically increase the scale of their work and facilitated collaborations with scientists from across the globe, connecting local environmental concerns with the planetary whole.[116] The survivalist agenda was a global agenda.

With one exception,[117] in the textbooks we studied the foundational ideas were not obviously or directly influenced by global perspectives or by international environmental law, which was engaging in the early 1970s. For example, the idea of the environment in the first ideal type was influenced by international conceptions only where local laws drew from these conceptions. There are a range of factors which might explain this local focus, including the nature of legal and academic culture at the time, the desire of textbook writers to be obviously and practically relevant within their

[113]D Hughes *Environmental Law* (London: Butterworths, 1986) p 3 (emphasis added).

[114]Ibid. See for example ch 2, 'The contribution of the common law'.

[115]NW Hines 'Book review: Cases and Materials on Environmental Law and Policy by Eva H Hanks, A Dan Tarlock and John L Hanks' (1975) 50(3) Indiana Law Journal 612, at 614.

[116]Warde et al, above n 1, pp 17–18.

[117]One exception from our study is Jaffe and Tribe, above n 110.

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jurisdictions and the complexity of comparing and considering the policies and legislation across multiple jurisdictions with different legal systems.

The concentration on local laws and political systems within the environmental law textbooks raises questions over whether early conceptions of the environment and environmental law reduced the transformative and protective potential of both these ideas. Did the local focus weaken and/or delay the potential for environmental lawyers and environmental law scholars to collaborate across the globe and therefore limit the scale of environmental law?

(c) Different origin stories – Australia, Canada, England, New Zealand and the US

We began this study expecting that the textbooks in Australia, Canada, England, and New Zealand would follow a template created in the US. To an extent, they did. With the exception of the Australian books, most of the textbooks devoted a large amount of their organisational design to environmental problems. And the particular problems identified point to shared concerns (see Appendix B). However, as noted above, many of the US textbooks were in the mould of the third type, whereas in other countries this type was not as prevalent. Instead, the Australian books most strongly reflected the first type, the Canadian the second, and the first English book the fourth. This points to the existence of different origin stories in each country, with the legal cultures of each country encouraging different ways of practising and developing environmental law.

These insights are important to studies in both national and transnational environmental law. For example, Fisher has written, 'the legal culture of the US, Australia, Singapore, and Canada have given rise to fundamentally different environmental regimes, even if the same regulatory concepts are being deployed', and has pointed to the importance that transnational environmental law scholars engage with the 'finer details of legal culture'.[118] The differences in origin stories suggested in this paper can help legal scholars to better understand some of these finer details.

(d) Ideal types as a reflexive tool

We anticipate that over time additional types have been added to the four we identify above, and these are worth studying. While requiring further investigation, we also detect from current practices that these four types have continued relevance and traction within the academy and legal practice. Considering how the thinking, choices and values of environmental lawyers approximate to old or new ideal types can serve as an important reflexive and analytical device.

Such exercises raise questions that may help in any assessment of the contribution of lawyers to environmental protection and the amelioration of climate change. For example, what has been the consequence of the first three types being based in a liberal concept of law and lawyering? The prominence of this concept is not unusual given that it was arguably the dominant legal concept in the 1970s and 1980s in all of the countries studied.[119] Histories of Australian environmental movements suggest that their strategies and ideologies were also more liberal than radical in nature.[120] However, environmental law emerged in law and in the legal academy at a time when critical legal studies was attracting bright young academic minds in all five countries. One might have expected some of these minds to pair their critical interests with their interest in the environment. None of the textbook

[118]See E Fisher 'The rise of transnational environmental law and the expertise of environmental lawyers' (2012) 1(1) Transnational Environmental Law 43, at 48–49.

[119]For an extensive historical treatment of legal liberalism in the US see L Kalman *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996).

[120]As Hutton and Connors explain in their history of environmental movements in Australia, 'a distinguishing feature of post-1960s Western social movements has been their rejection of revolutionary aims'. Movement actors 'interpret their actions as attempts to renew a democratic political culture and to reintroduce the normative dimension of social action into political life. This is the meaning of self-limiting radicalism': D Hutton and L Connors *A History of the Australian Environment Movement* (Melbourne: Cambridge University Press, 1999) p 7.

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authors presented as critical legal scholars. While under the third type there was scope for socio-legal approaches, the textbooks, aligning with the Legal Process School, fell squarely within the dominant liberal legal tradition of the time, rather than the radical branches of the socio-legal school. Under this type scholars did not draw from, or create, empirical studies of law but rather drew from external bodies of knowledge, most obviously the sciences, to consider how law might best respond to environmental harms. The only books that conceptualised environmental law in wholly instrumental terms were written by lawyers who were not academics, which suggests that within the academy authors wished to align the new category – environmental law – with mainstream legal scholarship and legal thought. The mainstream liberal leanings of the early textbook authors are also evident in the lack of engagement with First Nations laws and cultures.

It is worth considering how radical, critical or socio-legal dimensions may have changed ideas about the environment and environmental law, facilitating greater scrutiny of legal and political institutions and the underlying norms shaping the body of environmental law. Did the legal liberal lens limit the legal tools at the disposal of citizens and movement actors and their capacity to make choices about the best course of action?

Conclusion

The ways that the early environmental law textbook authors adopted three distinct but overlapping types – 'new legislation', 'citizen action', 'national politics' – contributed to the organisational and imaginative power of the idea of the environment within the context of law. As authoritative translators of the meaning and nature of environmental law, the authors' contributions also had the potential to create new, or reinforce existing, ideas about the environment. The fourth type, 'new label – old law', on the other hand, tended to limit the law's potential to add new meaning to the idea of the environment or bring about change within the legal profession and legal academy. The idea of the environment was treated as little more than a helpful organisational device. Understanding the way that lawyers and legal scholars have made certain choices and engaged in these translation exercises is important to understanding, and accounting for, the relationship between law and environmental protection. We believe that this study is an important early contribution to this historical accounting process, and one which raises questions about the choices and values of environmental law experts today.

Appendix A: list of textbooks

United States

OS Gray *Cases and Materials on Environmental Law* (Washington: The Bureau of National Affairs, 1970)

JJ Brecher and ME Nestle *Environmental Law Handbook* (Berkeley: California Continuing Education of the Bar, 1970)

FP Grad *Environmental Law: Sources and Problems* (New York: Matthew Bender, 1971)

LL Jaffe and LH Tribe *Environmental Protection* (Chicago: The Bracton Press, 1971)

JE Krier *Environmental Law and Policy: Readings, Materials and Notes on Air Pollution and Related Problems* (Indianapolis: The Bobbs-Merrill Company, 1971)

CJ Meyer and AD Tarlock *Selected Legal and Economic Aspects of Environmental Protection* (New York: Foundation Press, 1971)

IJ Sloan *Environment and the Law* (New York: Oceana Publications, 1971)

NJ Landau and PD Rheingold *The Environmental Law Handbook: The Legal Remedies in Existence Now to Stop Government and Industry from Destroying Our Environment* (New York: Ballantine Books, 1971)

AW Reitze Jr *Environmental Law* (Washington: North American International, 1972)

VJ Yannacone, BS Cohen, SG Davison *Environmental Rights and Remedies* (New York: Lawyers Co-operative Pub Co, 1972)

EW Tucker *Text-Cases-Problems on Legal Regulation of the Environment* (Minnesota: West Publishing Co, 1972)

EH Hanks, AD Tarlock and JL Hanks *Environmental Law and Policy: Cases and Materials* (Minnesota: West Publishing Co, 1974)

Canada

D Estrin and J Swaigen (eds) *Environment on Trial: A Citizen's Guide to Ontario Environmental Law* (Toronto: Canadian Environmental Law Research Foundation, 1974)

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RT Franson and AR Lucas *Environmental Law Commentary and Case Digests* (Scarborough: Butterworths, 1978)

New Zealand

DAR Williams *Environmental Law in New Zealand* (Wellington: Butterworths, 1980)

Australia

DE Fisher *Environmental Law in Australia: An Introduction* (St Lucia: University of Queensland Press, 1980)

GM Bates *Environmental Law in Australia* (Sydney: Butterworths, 1983)

D Farrier *Environmental Law Handbook: Planning and Land Use in New South Wales* (Sydney: Redfern Legal Centre Publishing, 1988)

England

D Hughes *Environmental Law* (London: Butterworths, 1986)

S Ball and S Bell *Environmental Law: The Law and Policy Relating to the* Protection *of the Environment* (London: Blackstone Press Ltd, 1991)

Second editions

OS Gray *Environmental Law: Cases and Materials* (Washington: The Bureau of National Affairs, 2nd edn, 1973)

D Estrin, J Swaigen and MA Carswell *Environment on Trial: A Handbook of Ontario Environmental Law* (Toronto: Canadian Environmental Law Research Foundation, 2nd edn, 1978)

GM Bates *Environmental Law in Australia* (Sydney: Butterworths, 2nd edn, 1987)

Appendix B: common types of environmental issues in early environmental law textbooks

The most common environmental problems (activity or contaminant to be controlled) headings in the early textbooks:

1. Pollution, water pollution, air pollution
2. Waste (management)
3. Noise (pollution)
4. Herbicides and pesticides
5. Oil and hazardous materials

The most common natural features (targets) headings in the early textbooks:

1. Water
2. Public lands
3. Rivers, wetlands, and/or coastal areas
4. Wildlife
5. The sea/oceans and seabed
6. Heritage or historical sites, including Aboriginal heritage
7. Air or atmosphere
8. Forests, native plants, trees
9. National parks

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