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Book Review

Environmental Law and the Loss of Paradise

OLIVER A. HOUCK, *TAKING BACK EDEN: EIGHT ENVIRONMENTAL CASES THAT CHANGED THE WORLD*. Island Press, 2009. Pp. 256. $35.00.

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This Book Review explores the central idea "now traveling the planet," "that ordinary people have the right to go to court to defend their environment." It examines Professor Oliver Houck's new book recounting eight cases from eight countries where attorneys went to court to protect irreplaceable landscapes and preserve national treasures. The Review examines four central features of Houck's book tied to international and environmental scholarship. The first is the metaphor of Eden that both names the book and provides an ethical core for each of the legal battles Houck recounts. Second is the importance of democracy in providing political context and tactical opportunities in environmental cases. Houck shows us environmental citizen suits at work not only in countries historically associated with popular democracy but also in the far less democratically-fertile political contexts of post-colonial India, post-Soviet Russia, post-Marcos Philippines, post-Pinochet Chile and post-

* Associate Professor of Law, Indiana University School of Law – Indianapolis. MSt, Oxford University; LL.M., Columbia University; JD, Boston University. Oliver Houck is a good friend and former colleague of mine, and several of the cases discussed in his book, *Taking Back Eden*, were brought by friends. This book review is thus not a neutral critique or an appraisal without perspective. It is, instead, a study of the issues Professor Houck raises and their implications for transnational law and the environment. I would like to thank my research assistants Kelly Poole and Janelle Killies, and librarian Steve Miller, for their research and editorial support. I am also greatly indebted to the editors of the *Columbia Journal of Transnational Law* for their insights and attention to detail.

imperial Japan. The third feature is the idea that sustainable development, a touchstone of public international law, has important limits. At a time when policymakers are preoccupied with the size of footprints (carbon footprints, water footprints, development footprints), Houck argues for no footprints at all. The final feature is the book's description of international law being made through transboundary networks and epistemic communities. While Houck does not explicitly tie his work to the growing literature about the nature of international lawmaking and transboundary legal process, he contributes case studies that help to ground that literature. The Review concludes that, as moral allegory, the collection of stories is appropriately named for Eden. Yet the book's stories emphasize struggle rather than loss. Houck reinforces through the cases what he proffers in the title: law (as an instrument) is not about losing paradise; it is about taking it back.

INTRODUCTION

As British Petroleum's Gulf Coast blowout at the Deepwater Horizon platform attests, natural resource development—when you look into it closely—is not a pretty thing.[1] There was something surreal about the Deepwater Horizon video streamed on the Internet through the summer of 2010. For those in the oil's path, it was like being steered into an accident against their will. For policymakers, it was like being steered into a conversation about the dangers of an addiction that few are willing or able to do anything about.[2]

BP Deepwater Horizon was, at the least, a reminder of the potential destruction of development. In every suburban parking lot, every country road and every car on a highway are the seeds of this destruction. The demand for oil—just as the demand for water, electricity, timber and other natural resources—is met through the development of those resources. And that development exacts a toll, whether by accident or design. The toll is easy to rationalize and to overlook. It is easy, in the terms of law and economics, to externalize or discount, but events like the BP Gulf blowout force a conversation about internalizing development costs and maybe, sometimes, avoiding them altogether.

The history of environmental policy shows that without these reminders (a burning Cuyahoga River; an oil-soaked Prince William Sound; a cluster of illnesses along a cancer corridor) many would continue to discount, or simply deny, the cost of natural resource development. Environmental talk abounds in the face of a well-publicized disaster, and BP Deepwater Horizon was no exception. Gulf-state governors whose political veins pulse with oil learned to pronounce words like "ecosystem" and "bioremediation" while cameras panned to the dark sheen on fishing grounds and tar balls on tourist beaches.[3] "Community livelihood" takes on new meaning

1. This paraphrases Joseph Conrad's observation that "[t]he conquest of the earth . . . is not a pretty thing when you look into it too much." JOSEPH CONRAD, THE HEART OF DARKNESS 7–8 (Modern Library ed. 1999).

2. George W. Bush, for example, whose vocational history and administrative priorities often concerned oil, admitted in his 2006 State of the Union Address that "America is addicted to oil," Michael Kranish, *Bush Calls for US to Cut Oil Reliance*, BOS. GLOBE, Feb. 1, 2006 at A1, yet even this admission was insufficient motive for action.

3. Some, of course, remained unrepentant. Mississippi Governor Hayley Barbour was quoted on June 6, 2010 (well after the scope of the spill had been understood as catastrophic and before the flow had been abated), as saying "the worst thing for us has been how our tourist season has been hurt by the misperception of what is going on down here. The Mississippi Gulf Coast is beautiful. As I tell people, the coast is clear. Come on down."

during environmental events because broader definitions of community and deeper understandings of livelihood come into focus—but this opportunity for inquiry is brief and the lessons always short term. In between disasters, and out of the media spotlight, ecosystems and communities lose ground in popular discourse.

During most times, ecosystems and communities have limited recourse to stand up to development. They cannot rely on well-meaning journalists or vote-seeking officials, or the attention-grabbing headlines that destruction invites. They rely instead on legal tools like citizen suits and doctrines like standing and public trust. They rely on environmental law and environmental advocates. Professor Oliver A. Houck's new book, *Taking Back Eden: Eight Environmental Cases That Changed the World*,[4] is a collection of short stories about those advocates. He traces their efforts to develop and deploy environmental law through citizen suits in eight countries over the past forty-five years.

Houck recounts cases from Canada, Chile, Greece, India, Japan, the Philippines, Russia and the United States, where environmental lawyers, and sometimes judges and government officials, became advocates for rivers and forests and the communities closely connected to them. The advocates fought for irreplaceable landscapes—described as "sacred places,"[5] "religious ecosystems"[6] or simply "the Garden."[7] These are, with one exception, wild places that have seen limited, almost reverential, human intrusion. That exception is India's Taj Mahal, which is mystical if not wild, and still begs for the protection afforded natural and national treasures. As Houck explains, "[y]ou lose the Taj, you do not get anything like it back again."[8]

Fox News Sunday (Fox News television broadcast June 6, 2010), (transcript available at http://www.foxnews.com/story/0,2933,594096,00.html).

4. OLIVER A. HOUCK, TAKING BACK EDEN: EIGHT ENVIRONMENTAL CASES THAT CHANGED THE WORLD (2009). Professor Houck directs the program in Environmental and Energy Law at Tulane Law School that he has built over the past thirty years. He is widely recognized as an important environmental law scholar, and he has helped pioneer the field in the United States. From 2001 to 2006, the Author of this review worked closely with Professor Houck as part of the Law School's program when he directed the Tulane Institute for Environmental Law and Policy (now the Tulane Institute on Water Resources Law and Policy).

5. *Id.* at 39.

6. *Id.* at 67.

7. *Id.* at 9.

8. *Id.* at 107.

While most of *Taking Back Eden*'s advocates represented organizations or communities,[9] there is little doubt that the real concern, for both lawyer and client, was always the place. The fight was really about protecting some part of nature—a river, a forest or a landscape—representing a remnant of paradise.

In the telling of these cases, Houck makes important contributions to both international and environmental legal scholarship. This review discusses those contributions to four areas: environmental ethics; democracy and the role of the courts; international sustainable development; and transboundary legal process. It also offers a few thoughts on the pedagogical value of the book's style and stories.

Part I reviews the book's eight cases that illustrate the central idea, "now traveling the planet," "that ordinary people have the right to go to court to defend their environment."[10] There is no attempt to restate the cases in this piece; rather, the review offers highlights to facilitate the analysis that follows.

Part II examines four central features of the book tied to environmental and international scholarship. The first is the metaphor of Eden that both names the book and provides an ethical core for each of the legal battles Houck recounts. In a day when economic analysis has increasingly colonized the theoretical discourse of environmental law, Houck reminds us of universal ethical values that drive much of the labor, and much of the jurisprudence, in the field.

The second feature is the importance of democracy in providing political context and tactical opportunities in environmental cases. Those familiar with the role of citizen suits in the United States may take the essentially democratic nature of this legal mechanism for granted. But Houck shows us the mechanism at work not only in countries historically associated with popular democracy (Canada, Greece and the United States), but also in the far less democratically-fertile political contexts of post-colonial India, post-Soviet Russia, post-Marcos Philippines, post-Pinochet Chile and post-imperial Japan. In the book, and in this Review, the concern is with broader mechanisms of popular democracy, such as public access to information and access to justice, rather than the operation of electoral systems. In a sense, the cases are about emerging democracy as much as environmental jurisprudence. It is clear the two are linked.

9. There were two notable exceptions. M.C. Mehta, who brought the Taj Mahal case and other environmental claims to India's Supreme Court, sued in his own name. *Id.* at 89–108. Tony Oposa, who brought the deforestation case to the Philippines Supreme Court, sued in the name of his children and his as-yet unborn children. *Id.* at 43–58.

10. *Id.* (Island Press Publisher's synopsis on book jacket).

The third feature is the idea that sustainable development, a touchstone of public international law, has important limits. Houck comes through as a sustainability skeptic. For him, development decisions are not about balance or harmony[11] but about tradeoffs, and some trades are simply not worth making. At a time when policymakers are preoccupied with the size of footprints (carbon footprints, water footprints, development footprints), Houck argues for no footprints at all.

The final feature is the book's description of international law being made through transboundary networks and epistemic communities. While Houck does not explicitly tie his work to the growing literature about the nature of international lawmaking and transboundary legal process, he contributes case studies that help to ground that literature.

Having examined these four features, Part III of this Review turns to the ways in which the book can serve as a guide for those who study and teach environmental law and legal advocacy, whether domestic or international. *Taking Back Eden* has pedagogical value both in the style of its storytelling and in the lessons that the heroes, and the villains, learn in each of the cases. The book would be equally at home in courses on international law and environmental law as well as legal theory, legal advocacy or environmental ethics.

I. NOTES FROM EDEN

A. Storm King

Taking Back Eden opens with the story of Consolidated Edison's effort to build a massive power plant on Storm King Mountain along the Hudson River in the 1960s.[12] Houck describes how Storm King looked, felt and smelled at the moment of European encounter:

> . . . guarding the entrance to the Hudson Highlands and one of the most spectacular vistas in the world. Here the river twists through a series of wide gorges flanked by bluffs and ridges that turn green in summer

11. Although definitions of "sustainable development" vary widely, the Rio Declaration Principle One speaks directly of people living "in harmony with nature," United Nations Conference on Environment and Development, Rio de Janiero, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, princ. 1, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992), and many include balance as a key element.

12. HOUCK, *supra* note 4, at 7–21.

> and gold and red with fall, backed by rolling country as far as the eye can see.[13]

He quotes an early European visitor seeing Storm King for the first time: "I could have fallen on my knees and worshipped—I could have committed any extravagance that ecstasy could suggest."[14]

The narrative then shifts from celebrating this landscape to describing a development plan that would leave it scarred. Houck details rising public opposition to the power plant that spawned new environmental organizations,[15] new strategic alliances and new legal tactics. Through a multi-year legal battle, Houck tells us how the Storm King litigation "opened the way for citizen standing,"[16] and "defined a new strategy that used litigation—as had the civil rights movement—as part of a larger education and political process."[17] Challenged on their basic right to be heard, the court granted standing because the plaintiffs' "activities and conduct" had shown that they had a "special interest" in Storm King even though they claimed no financial stake in the outcome.[18] This finding allowed the plaintiffs to continue the fight through years of alternating progress and setbacks, with the case finally settling with Consolidated Edison surrendering its license and donating the property for public use.[19]

In the years since Storm King, standing to challenge agency decisions affecting the environment has been crucial for countless citizen groups, as the question of standing has become a central feature of environmental litigation in the United States. Yet Houck suggests "the most unmeasurable impact of the litigation was psycholog-

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13. *Id.* at 8.

14. *Id* at 8–9 (quoting FRANCIS F. DUNWELL, THE HUDSON RIVER HIGHLANDS 52 (1991)).

15. The controversy sparked formation of the Scenic Hudson Preservation Conference, *id.* at 10, whose founders later started The Natural Resources Defense Council (NRDC), *id.* at 20. NRDC now claims over 1.3 million members and 350 "lawyers, scientists and other professionals." *Who We Are*, NATURAL RESOURCES DEFENSE COUNCIL, http://www.nrdc.org/about/ (last visited Feb. 14, 2011). Another conservation group, the Hudson River Fisherman's Association, HOUCK, *supra* note 4, at 14, joined the fight, and later created the Hudson Riverkeeper organization, *id.* at 20, which has been a water advocate for the Hudson for over 40 years. The Hudson Riverkeeper helped spur a broader movement of river and waterway advocates and later co-founded the Waterkeeper Alliance, with almost 200 "patrolling rivers, lakes, and coastal waterways on six continents." *History of the Waterkeeper Movement*, WATERKEEPER ALLIANCE, http://www.waterkeeper.org/ht/d/sp/i/188/pid/188 (last visited Feb. 14, 2011).

16. HOUCK, *supra* note 4, at 19.

17. *Id.* at 20.

18. *Id.* at 16.

19. *Id.* at 19.

ical. Passions as strong as fishing and as elusive as scenic beauty were given legal protection, side by side with the nation's commerce. . . . The environment, as a matter of law, mattered."[20]

B. Nikko Taro

The next case, half a world away, challenged a proposal to build a highway through cypress groves surrounding the Toshogu Shrine honoring three of Japan's most prominent historical figures. On the grounds stands a giant cedar named the Taro Cedar (in Japanese, Nikko Taro) that "has been there for six hundred years."[21] Houck admits that the proposal made economic sense,[22] but it also threatened deeply held cultural values:

> Shinto shrines . . . are way stations for the deities themselves, who . . . are not above paying a visit to the people at these select locations. . . . These are not sacred buildings; they are sacred places in a long tradition only recently abandoned by Western civilization.[23]

The highway proposal exposed competing cultural values. On one side were the interests of "the Japanese Construction State,"[24] and on the other side were Shinto beliefs about "the role of nature as the 'manifestation of divine power.'"[25] As in the Storm King case, powerful economic and political forces allied behind the proposed development. As Houck puts it, "No one said no to the Japanese Ministry of Construction. Indeed, nobody said no to the Japanese Ministry of Anything."[26] But the cultural value of the shrine also proved powerful. Faced with this dissonance, the court ultimately enjoined the highway construction, finding that "the benefits of the preservation of the cultural value of the area" had not been sufficiently considered in the highway approval process, and that they should instead "be given the highest importance."[27] That was 1964. It was, as Houck put it, a

20. *Id.* at 20.

21. *Id.* at 26.

22. *Id.* at 29.

23. *Id.* at 26.

24. *Id.* at 30 (citing ALEX KERR, DOGS AND DEMONS: TALES FROM THE DARK SIDE OF JAPAN (2001)).

25. *Id.* at 27.

26. *Id.* at 24.

27. *Id.* at 37 (quoting Toshogu Shrine Religious Org. v. Minister of Constr., 710 HANREI JIHO 23, para. 2 (Tokyo High Court, July 13, 1973)).

"prenatal moment in public environmental law."[28] And yet the highest court in a country with great respect for obedience and bureaucracy stopped the Japanese "construction state" with legal standards largely of the court's own design.[29] "To those who care about the sanctity of sacred places," Houck concludes, "it was a triumph."[30]

C. Minors Oposa

Houck's next case study is set in the Philippines, and again he provides a sense of history, culture and even the mythology of the place.[31] The book highlights the Philippines's recent political history, tracing the capricious environmental policies of President Ferdinand Marcos (who was more a totalitarian than democratic leader[32]) and the introduction of new institutional mechanisms by his successor, Corazon Aquino. It also introduces an attorney who rises to the challenge of opposing state-supported development; this time in a repressive and often violent state. Tony Oposa was a young Filipino lawyer who had been drifting a bit in his career path when he decided to study overseas. He returned home to find "an entire history collapsing" and saw that "[a] very special universe of humans, plants, and animals was on the brink" because of unrestrained logging.[33] Oposa's career became a cause. He responded by founding the Philippine Ecological Network and began pressing the Department of Environment and Natural Resources to reform national forest policy.[34] He found early allies, but when the Department's discretion to act seemed exhausted, Oposa sued—and he did so in a manner that would spark the imagination of environmental litigators and law students around the world.[35] Oposa sought standing on behalf of his children and also on behalf of his children yet to be born.[36] Reason-

28. *Id.* at 38.

29. *Id.* at 39.

30. *Id.*

31. *Id.* at 45.

32. *Id.* at 46; RAYMOND BONNER, WALTZING WITH A DICTATOR: THE MARCOSES AND THE MAKING OF AMERICAN POLICY 3 (Vintage Books, 1988) (1987); STERLING SEAGRAVE, THE MARCOS DYNASTY 14–15, 377–420 (1988) (detailing some of the acts of political corruption that characterized the Marcos regime); *see also* In Re Estate of Ferdinand E. Marcos Human Rights Litigation, 910 F. Supp. 1460 (D. Haw. 1995) at 1462–63 (describing repressive aspects of Marcos regime during martial law from 1972 to 1986) .

33. HOUCK, *supra* note 4, at 49.

34. *Id.* at 49–50.

35. *Id.* at 51–52.

36. *Id.* at 52.

ing that deforestation would cause harm well into the future, Oposa gave life to the idea of "intergenerational equity" that had emerged as an argument for environmental protection among international scholars and diplomats.[37] *Minors Oposa v. Factoran* is now a chief case in international and comparative environmental law, in part because Oposa innovated, and in part because he won. The Supreme Court of the Philippines found that Oposa's children, born and unborn, had standing to protect the country's forests. The court also affirmed a substantive right to protection—a sort of "ecological right to self-defense" in Houck's words.[38] The court went on to hold that the timber concessions granted by the government were not binding contracts "but rather licenses that were capable of being withdrawn for the public welfare."[39] "The decision," Houck reports, "was a bombshell."[40] Logging concessions were withdrawn and abandoned at such a pace that the one hundred and forty-two concessions that existed when Oposa first took up the issue had shrunk to three by 2006.[41]

D. The Great Whale

In the following chapter, the book describes the shifting fortunes of indigenous peoples in Canada fighting the development of hydroelectric dams along rivers running through their traditional lands. Houck details disputes over the Rafferty Dam in Saskatchewan and the Oldman River Dam in Alberta—a "religious ecosystem"[42] that "[t]o the oncoming whites" was not more than "a 'water resource.'"[43] These legal battles, which began in the 1970s, helped to define the authority of Environment Canada (the country's chief environmental regulatory agency) to oversee provincial projects despite a highly decentralized constitutional model.[44] The cases culminated

37. EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (INNOVATION IN INTERNATIONAL LAW) (1989); Robert M. Solow, *On the Intergenerational Allocation of Natural Resources*, 88 SCANDINAVIAN J. ECON. 141 (1986).

38. HOUCK, *supra* note 4, at 53.

39. *Id.*

40. *Id.*

41. *Id.* at 55.

42. *Id.* at 67 (citing JACK GLENN, ONCE UPON AN OLDMAN: SPECIAL INTEREST POLITICS AND THE OLDMAN RIVER DAM 207 (1999)).

43. *Id.*

44. *Id.* at 63–65.

in the 1990s with an effort to stop a Hydro-Quebec project on Quebec's Great Whale River as part of a broader plan that "would consume twenty wild rivers and cover an area the size of France."[45] Hydro-Quebec's plan would also supply power to large parts of eastern Canada and the northeastern United States. The Cree opposed the Great Whale project, and a federal court agreed that the project must undergo environmental review.[46] But Hydro-Quebec appeared poised to ignore the court's order and move forward—abetted by Quebec's provincial energy minister who threatened "that the province would 'never submit' to Ottawa's procedure."[47] Facing these political obstacles despite their legal victories, project opponents turned to Hydro-Quebec's potential customers in the United States and urged them to reject the project's "environmental and cultural destruction."[48] These customers, including the New York Power Authority, responded to the transnational media campaign by canceling orders[49] worth tens of millions of dollars. Compounding these developments, a parallel Cree suit produced a finding by Canada's Supreme Court that the project would need approval from the National Energy Board, which would apply a broad "public interest" standard.[50] Canada's Energy Board determined that its review would cover not just transmission lines but also "future construction of production facilities."[51] After this broader scope was challenged and upheld, in another appeal that reached Canada's Supreme Court, Hydro-Quebec was free to move forward, but at even greater risk.[52] The reviews of Hydro-Quebec's project, when completed, showed that the company's "hastily assembled environmental assessment did not comply with federal guidelines."[53] Hydro-Quebec had reached the end of its rope. Faced with losing key customers, mounting public opposition and determined advocates who were effectively using the courts to mandate increased scrutiny of its project, Hydro-Quebec abandoned the Great Whale in 1994.[54]

45. *Id.* at 73.
46. *Id.* at 81.
47. *Id.* at 82.
48. *Id.* at 82–83.
49. *Id.* at 83.
50. *Id.* at 84.
51. *Id.*
52. *Id*. at 85.
53. *Id.*
54. *Id.*

E. The Taj Mahal

Houck next tells the story of India's pioneering environmental lawyer, M.C. Mehta, and his work to save the country's most renowned cultural icon, the Taj Mahal. Mehta is a creative and active environmental advocate who has repeatedly brought environmental cases to India's Supreme Court under a constitutional framework that grants original jurisdiction for cases of first impression on matters of "fundamental rights."[55] Mehta is credited with introducing the principle of strict liability in environmental cases in India, advancing the idea of public trust and persuading India's Supreme Court to require that children be educated about the need for environmental protection through documentaries and public service broadcasts.[56] A more active court, and a more active constitutional litigator, would be hard to imagine. Houck focuses on Mehta's suits to protect the Ganges River and the Taj Mahal, "both sacred places"[57] and both threatened by industrial byproducts (the Ganges from water discharges and the Taj from air emissions). In both cases the odds of overcoming the combined industrial, economic and political power of the industries at fault would seem hopelessly long. "At one point," Houck notes "there were more than twelve hundred lawyers for the defense. The only petitioner was Mehta."[58] But Mehta spent hundreds of hours gathering facts and presented mountains of data to the court. He supplemented his factual case with a moral admonition to the court "that as judges they might have legal duties but as citizens of India they had a higher duties [sic] to protect the environment and the lives of the people."[59] The court agreed and held that the "primary duty" of the government and its Ministry of Environment was to "'safeguard' the monument."[60] The court ordered state agencies to design and implement a regulatory framework and ordered the offending facilities to close until the agency could step in. The court recognized the importance of the enterprises that were causing the pollution, in this case tanneries, but sided with Mehta: "We are conscious . . . that the closure of tanneries may bring unemployment, loss of revenue but the life, health and ecology have greater importance."[61]

55. *Id.* at 96.

56. *Id.* at 107.

57. *Id.* at 100.

58. *Id.* at 101.

59. *Id.* at 99.

60. *Id.* at 104 (citing Mehta v. Union of India, A.I.R. 1997 S.C. 723 (India)).

61. *Id.* at 102 (citing Mehta v. Union of India, A.I.R. 1988 S.C. 530 (India)).

F. Lenin's Trees

The fate of Russian forests after the Soviet Union's dissolution is the next case that the book addresses. We meet Vera Mischenko, who in 1991 co-founded Ecojuris, the first environmental law organization in the new Russia.[62] Houck conveys the cultural importance of the Russian forests by telling of Lenin's decree to preserve Moscow's "last remaining stock" of trees despite the need for fuel wood in the winter of 1919: "a Valley Forge moment for the Russian Revolution."[63] "Lenin's Trees" were again protected during World War II despite pressure for resources during "one of the most wasting wars in human history."[64] During the Soviet era the timber industry was revered as a means to advance "the goal of building socialism,"[65] but Lenin's Trees survived. After the collapse of the Soviet Union, pressure on the forests continued, and a plan was hatched to transfer Moscow's forest reserves from public protection status so they could be harvested.[66] Mischenko and Ecojuris fought the move, using citizen suit and environmental assessment provisions of a new framework environmental law to challenge the transfer and harvesting plan. Their complaint, filed on behalf of "all current and future generation[s] of Russian citizens,"[67] failed on twelve of thirteen counts, but succeeded in its central challenge to the transfer. The court found that the plaintiffs' constitutional rights to a "favorable environment" had been violated and that "the government had neglected its duty to consult with the public before acting."[68] From this early victory, Houck traces the "*Perils of Pauline* saga" of Russia's evolving Forest Code "with monthly twists and reversals of fortune, and no end in sight."[69] He notes the emergence of Vladimir Putin[70] and acknowledges that, despite Ecojuris's successes, "the odds of winning an environmental issue within Russia have become increas-

62. *Id.* at 117.

63. *Id.* at 114.

64. *Id.* at 115.

65. *Id.* at 114 (citing V.O. Klyuchevsky, *The Course of Russian History*, *in* WORKS IN 9 VOLUMES 1, 10 (1987) (cited in V.K. TEPLYAKOV, ET AL., A HISTORY OF RUSSIAN FORESTRY AND ITS LEADERS 11 (1998))).

66. *Id.* at 115, 118.

67. *Id.* at 122 (citing Vera Mischenko & Erika Rosenthal, *Citizen Environmental Enforcement in Russia: The First Successful Nation-Wide Case*, *in* FIFTH INT'L CONF. ON ENVTL. COMPLIANCE AND ENFORCEMENT 419, 419–21 (1998)).

68. *Id.* at 123.

69. *Id.* at 125.

70. *Id.* at 124–27.

ingly long."[71] The pressure on Russian forests continues, in a political environment where power seems to matter much more than law, but Houck notes that "the forest cases are [still] there . . . the seeds of live trees."[72]

G. The Acheloos River

Houck next describes the struggle over Greece's longest river, the Acheloos, and a proposed "massive transfer of water from a poor region on the other side of the Pindos Mountains to the east and Thessaly, where the money lies."[73] The water was to be used for agriculture "to rescue the Thessaly plain," but it was also presented as an electric power project "in order to qualify for [European] Community funding."[74] The dual purposes of power and irrigation, Houck explains, "drank from the same glass,"[75] and thus each seemed to defeat the other, but the project was challenged from the beginning. It failed to get a "good report card" on economic viability from independent analysts, and that should have meant the death of the Acheloos River transfer, but Thessaly's agriculture industry and the Greek government pushed for the project nonetheless.[76] Project opponents appealed to the Greek Council of State (the country's supreme administrative court) Section V (dedicated to environmental cases).[77] Enter, as in most of the book's stories, another hero. "A remarkable person," Houck says, "at the right place and time."[78] Michael Decleris, who was educated in his home country of Greece, and later in London and New Haven, was a member of the Council and headed Section V.[79] His problem, again as in most of the book's stories, was that "he did not have much law to apply."[80] A provision in the Greek Constitution "stated opaquely that environmental protection was an 'obligation of the state,' and that the government should take 'special measures' to conserve it."[81] But "[t]here was nothing

71. *Id.* at 127.
72. *Id.* at 128.
73. *Id.* at 132.
74. *Id.* at 135.
75. *Id.*
76. *Id.* at 135–36.
77. *Id.* at 141.
78. *Id.* at 140.
79. *Id.* at 140–41.
80. *Id.* at 141.
81. *Id.* (citing 1975 SYNTAGMA [SYN.] [CONSTITUTION] 2:24(1) (Greece)).

about citizen lawsuits, impact assessment, or sustainability. So Section V invented them."[82] This story features many of the same twists and turns—advances and setbacks—that mark the other cases in the book, but differs because Greece embraces certain environmental principles as a member of the European Community. European environmental directives introduced additional substantive rules and additional levels of appeal as the case made its way to the European Commission and the European Court of Justice.[83] This additional oversight certainly slowed the project (as Houck notes, one man's red tape may be another man's only hope),[84] but whether it will stop or change the project remained an open question. As the book went to press, Houck could only report that the Acheloos "remained contested in three separate venues."[85] And, he notes, as the appeals wound their way through their various forums, "the Acheloos project . . . stood impatient in the wings, pawing the floor, ready to go forward."[86] Following the book's publication, the Greek Council of State issued an order suspending the project in February 2010[87] and rejected an appeal of that decision in early March 2011.[88]

H. The Trillium Case

The book closes with a Seattle entrepreneur's efforts to harvest a rare tree in a rare forest in Tierra del Fuego, Chile: "an isolated dab at the foot of the continent and a dragon at the gate to the Pacific Ocean."[89] The forest had been spared until the late twentieth century because it was remote, inaccessible and even hostile. As the book notes, "[t]here were few souls worth converting and no gold. Nothing here to claim the European Heart."[90] Unlike the preceding cases, this one offers antihero rather than hero, David Syre, who thought he could "improve the environment" by clear cutting the

82. *Id.*

83. *Id.* at 146.

84. *Id.*

85. *Id.*

86. *Id.* at 146–47.

87. "Court Suspends Acheloos Works," EKATHIMERINI.COM, Feb. 11, 2010, http://archive.ekathimerini.com/4dcgi/_w_articles_politics_2_11/02/2010_114822.

88. "Court Keeps Acheloos River Diversion on Hold: Council of State Rejects Infrastructure Ministry's Appeal Against Previous Ruling," EKATHIMERINI.COM, Mar. 2, 2011, http://www.ekathimerini.com/4dcgi/_w_articles_wsite1_1_02/03/2011_380861.

89. HOUCK, *supra* note 4, at 152.

90. *Id.*

"over mature" trees of Tierra del Fuego.[91] Syre launched his venture through his Seattle-based company, Trillium, at a time when Chile's "civil society was in an uncertain thaw" following the regime of Augusto Pinochet.[92] Houck describes how a newly-formed national environmental commission, CONAMA, orphaned a newborn environmental impact law by failing to write implementing regulations.[93] Even though no regulations mandated it, Trillium "voluntarily" submitted to environmental review.[94] When the review was criticized by the technical committee in CONAMA's regional office (no forest inventory; no data on tree growth, rates or cycles; no data on extraction impacts) the project nevertheless got a green light.[95] But a citizen suit followed,[96] and the Chilean Supreme Court found that CONAMA's approval was illegal. "CONAMA had never issued [environmental impact] regulations, ergo no review based on them took place, so the review that did take place was unlawful."[97] CONAMA then issued the regulations with lightning speed, and Trillium got its approval under the new rules. But this time the approval came with "no fewer than one hundred conditions on the project" including the requirement that Trillium post an "ecological insurance" bond.[98] Although a Supreme Court challenge to the new approval failed, the delay, the public scrutiny and the new conditions took

91. *Id.* at 154 (citing Wayne Crosby, The Challenge of Developing Sustainability in Tierra del Fuego: Environmental Contestation of the Río Condor River Project in Chile 55 (Spring 2006) (unpublished M.A. thesis, Simon Fraser University) (on file with author) (quoting David Syre)).

92. *Id.* at 158.

93. *Id.* at 158–59.

94. *Id.* at 159.

95. *Id.* at 162.

96. *Id.* at 164. The suit was based on a provision in Chile's constitution guaranteeing a "healthy environment," and the plaintiffs used a jurisdictional mechanism called an *amparo*. Houck tells us it "works like a habeas corpus," *id.* at 163, but one might also see it as akin to a writ of mandamus.

97. *Id.* at 164. The Court also affirmed the right of citizens' groups to sue for environmental matters and held that Chile's constitutional guarantee of a right to a healthy environment required "'the maintenance of the original condition of natural resources,' reduced only by 'a minimum of human intrusion.'" *Id.* at 164 (citing Corte Suprema de Justicia [C.S.J.] [Supreme Court], 19 marzo 1997, "Trillium Case," Rol de la causa: 2.732-96, *available at* http://www.elaw.org/node/1310).

98. *Id.* at 166 (citing Wayne Crosby, The Challenge of Developing Sustainability in Tierra del Fuego: Environmental Contestation of the Río Condor River Project in Chile 80–81, 103–05 (Spring 2006) (unpublished M.A. thesis, Simon Fraser University) (on file with author); Memorandum from Bernardo Reyes, Dir. Of Ecological Econ. Program, Inst. for Political Ecology, Trillium: Lessons Learned from a Conflict over Patagonian Forests in Southern Chile 8, 10–11 (on file with Oliver A. Houck).

their toll. Trillium's project finance debt was acquired by Goldman Sachs, and Trillium relinquished the property to extinguish the debt.[99] Goldman transferred the property to its charitable trust, which in turn transferred it to a nonprofit organization to operate as a natural reserve.[100]

II. WHAT EDEN TEACHES

A. An Environmental Ethic

Taking Back Eden gives us, perhaps above all else, an environmental ethic that transcends national and cultural boundaries. Houck does not explicitly enter the ethical debate over development and the value of nature. Instead he offers the modern equivalent of epic poems that instruct through story. Houck gives us heroes who teach as they encounter and overcome obstacles in their journeys. He reveals the value of his subject as he narrates the legal machinations of those working to protect it.

Eden is the central metaphor for the book, and it grounds each of the stories in a prelapsarian paradise. Within this metaphorical Eden, economic analysis comes up short in calculating the "existence value" of nature unreduced to lumber, highways or megawatts. Here, nature is inherently valuable—a core feature of common origin. The loss of Eden is a loss beyond calculation.

Houck's cases feature natural places with cultural or spiritual significance. Describing the first European contact with the Hudson Valley (the location of Storm King Mountain), Houck explains, "they were not merely seeing the Garden, they were *in* the Garden."[101] He describes Shinto shrines (threatened in Nikko Taro) not merely as religious buildings, but as "sacred places."[102] Oldman River, one of the Canadian rivers at issue in the Great Whale chapter is, to indigenous peoples, a "religious ecosystem" not simply a "water resource."[103] Houck tells us "[t]o the Peigan Lonefighters and to Friends of the Oldman River these cases were like defending Eden from an invader

99. *Id.* at 169.

100. *Id.* at 170.

101. *Id.*, at 9. The Bible actually refers to a "garden *in* Eden," *Genesis* 2:8 ("and the Lord God planted a garden in Eden, in the east; and there he put the man whom he had formed"), but Eden and the garden are often considered synonymous.

102. HOUCK, *supra* note 4, at 26.

103. *Id.* at 67 (citing JACK GLENN, ONCE UPON AN OLDMAN: SPECIAL INTEREST POLITICS AND THE OLDMAN RIVER DAM 207 (1999)).

who is bent on ignoring them, funneling public money to supporters, and breaking the law. An invader who doesn't understand them at all."[104]

Houck describes the Ganges River and the Taj Mahal as "sacred places."[105] The Taj is "indescribably beautiful" and "eternal,"[106] the Ganges, a "holy river" portrayed in Hindu legend as a "goddess"[107]—its use as a repository for industrial wastes, a "sacrilege."[108] Explaining the importance of Lenin's Trees, Houck tells us that forests provide a "tap root . . . for all of Russian culture."[109] In telling the story of the Acheloos River in Greece, Houck opens with the myth of the Acheloos River God whose love was lost to rival Hercules.[110] The Philippine forests under assault in the Minors Oposa case, we are told, were the home of the Philippine monkey-eating eagle whose mythical struggle with the sky gave birth to the Philippine archipelago.[111] The only case in which Houck does not directly tie the natural area under assault to longstanding cultural or spiritual traditions and beliefs is the Trillium case in Chile. Yet he opens that chapter by describing the encounters with the landscape and its inhabitants by two heroes of European exploration—Magellan and Darwin[112]—and later refers to the "priceless and irreplaceable ecosystem, a 'cold jungle' at the bottom of the world."[113]

Highlighting the cultural and spiritual value of the places at the center of each story is significant. It presents an argument about the ethical core of environmental cases that is too often marginalized. Here are multiple examples of an environmental ethic rooted in human experience across cultures. These claims parallel the work of Aldo Leopold in placing nature and natural places at the center of an environmental analysis.[114] Leopold offered a "land ethic" that

104. *Id.* at 69.

105. *Id.* at 100.

106. *Id.* at 91.

107. *Id.* at 100.

108. *Id.*

109. *Id.* at 112.

110. *Id.* at 131–32.

111. *Id.* at 45.

112. *Id.* at 151–52.

113. *Id.* at 161 (citing TED Case Studies: Chilean Forest Preservation and the Project River Condor, *available at* http://www.american.edu/TED/childewd.htm (referencing the subarctic climates of the temperate rainforests)).

114. *See generally* ALDO LEOPOLD, A SAND COUNTY ALMANAC (Oxford Univ. Press ed. 1987) (1949).

"changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it."[115] Leopold's 1949 classic *A Sand County Almanac* is a touchstone for environmental ethics and finds its way into the opening chapter of many core textbooks in Environmental Law.[116]

Yet Houck is more accessible than Leopold because *Taking Back Eden* offers examples of applied ethics where nature sometimes wins and sometimes loses, whether humans are "members" of it or not. Not all the "citizens" of the "land-community" possess the same values, and Houck shows us that development is a contest among those with competing values. Houck may also be more relevant for a law school classroom than Leopold because *Taking Back Eden* tells us not only about an environmental ethic, but also about an ethic of defending the environment.

Houck universalizes environmental ethics, and defense ethics, by giving us advocates from around the world who take a common stand. How fully their values are embraced by law varies, of course, in each of the cases recounted. Some courts are more willing than others to adopt the language of the sacred. But even those judges who hewed narrowly to a secular standard for protecting nature (in most cases, some form of "public interest") could not have failed to see how preserving historical, cultural and spiritual landscapes advanced deeper values.[117] Perhaps the "public interest" is a meaningful stand-in for environmental ethics after all.

By talking deliberately of Eden, Houck also offers an alternative to the economic analysis that has become a common framework for environmental legal analysis.[118] A chief problem with viewing environmental challenges through an economic lens is that cost/benefit analysis predictably discounts environmental values and treats environmental risks as remote and uncertain. Economists seek to account for these challenges through concepts such as "existence

115. *Id.* at 204.

116. *See, e.g.*, CRAIG N. JOHNSTON, ET AL., LEGAL PROTECTION OF THE ENVIRONMENT 31–33 (3d ed. 2010); ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 10, 39–40 (6th ed. 2009).

117. *See, e.g.*, *supra* discussion Parts I.A and I.C.

118. To some extent economics has even become a dominant point of reference in the environmental field. One prominent new environmental law text, for example, opens with a section on "Economic Perspective on Environmental Degradation," which is followed by a section on "Non-Economic Perspectives on Environmental Degradation." RICHARD REVESZ, ENVIRONMENTAL LAW AND POLICY 5, 20 (2009).

value," "option value" and "hedonic pricing."[119] But putting a price on nature relies on inapt use-based proxies. Ecosystems and wild places with inestimable significance cannot be meaningfully credited in economic terms for their intrinsic value. Instead, these places are wedged into economic analysis by valuing "ecosystem services" or "ecosystem goods,"[120] or by acknowledging (but not fully ledgering) existence, option or hedonic value. These are laudable efforts to frame environmental concerns within an economic paradigm, but they still depend upon that economic paradigm to recognize environmental values that cannot be understood in economic terms.[121]

In 2001, a group of experts met in Panama City to support the process of evaluating and "reforming" the mining code of Panama.[122] The process required the expert group to consult with *campesino* (poor rural) and indigenous communities on whose lands lay important gold and other mineral deposits.[123] During one particularly animated consultation with several dozen members of the Kuna community,[124] a *cacique* (chief) spoke to the delegation in *Dulegaya* (his native tongue) about incorporating rights of consultation and compensation into the new mining code. Although the delegation had to wait for translation, first to Spanish then to English, the *cacique's* meaning was clear without interpretation. "I am a shaman. I rely on the forest like a pharmacy to provide the medicine I use to heal my people. How will you compensate us when mining destroys my medicine? How will I heal my people?" He continued, pushing five fingers repeatedly toward his heart, "The gold lives *here*. How will you compensate us for taking *this*?"[125]

119. *See* DANIEL H. COLE & PETER Z. GROSSMAN, PRINCIPLES OF LAW AND ECONOMICS 324–25 (2005) (discussing hedonic pricing); David A. Dana, *Existence Value and Federal Preservation Regulation*, 28 HARV. ENVTL. L. REV. 343, 347–53 (2004) (discussing existence value and option value); Jonathan Silberman, et al., *Estimating Existence Value for Users and Nonusers of New Jersey Beaches*, 68 LAND ECON. 225 (1991) (discussing the distinction between existence and option values).

120. *See generally, e.g.*, James E. Salzman, *Valuing Ecosystem Services*, 24 ECOLOGY L.Q. 887 (1997).

121. COLE & GROSSMAN, *supra* note 119, at 324–25.

122. The Author of this Review was part of that expert group.

123. The new code was supposed to provide for these communities to participate in future decisions about mining concessions and to receive a share of the proceeds of any such concessions.

124. The Kuna are an indigenous people living in politically autonomous *comarcas*, or reservations, in Panama.

125. Statement of Kuna Cacique to Expert Panel, Consultation on Revisions to Mining Code, Panama City, Panama, 2002 (notes on file with author).

The importance of *Taking Back Eden*, among other things, is that it cautions us not to label the *cacique's* concern as a hedonic value. It does not tell the reader to ask "how much?" and it offers no formula for valuation. The book counsels instead to stay out of the shaman's heart and out of his forest. Houck offers an ethical framework—not an economic framework—within which to wrestle with the environmental challenges of development. It is a framework that, since Leopold's groundbreaking work in 1949, has received too little attention in law.

The environmental ethic that runs through Houck's book is thus an important counterweight to the economics of environmental policy that occupies much of the field. "Religious ecosystem[s],"[126] "sacred places,"[127] cultural "tap roots"[128] and "entire histor[ies]"[129] are not so easily ciphered. In a sense, Houck has reasserted an environmental ethic in an age of environmental economics. He reminds us that values are deeper than pockets.

B. Democracy and the Courts

Taking Back Eden also affirms the importance of democratic tools, and a democratic framework, in protecting the environment. Its cases affirm the utility of key aspects of participatory democracy—access to information, access to justice and an engaged public. While some recent scholarship has questioned this utility,[130] Houck's case studies show that democratic systems are important enablers of environmental protection and that the citizen suit—a basic tool for

126. HOUCK, *supra* note 4, at 67 (citing JACK GLENN, ONCE UPON AN OLDMAN: SPECIAL INTEREST POLITICS AND THE OLDMAN RIVER DAM 207 (1999)).

127. *Id.* at 26.

128. *Id.* at 112.

129. *Id.* at 49.

130. *See generally, e.g.*, Quan Li & Rafael Reuveny, *The Effects of Liberalism on the Terrestrial Environment*, 24 CONFLICT MGMT. AND PEACE SCI. 219, 230–34 (2007) (reporting data suggesting that a rise in democracy increases the rate of deforestation while reducing the rate of land degradation); Margrethe Winslow, *Is Democracy Good for the Environment?*, 48 J. ENVTL. PLAN. & MGMT. 771 (2005); Mark Andrew Kelso, Democracy and Environmental Protection: Exploring Possible Links, (Mar. 17, 2006) (unpublished manuscript) (paper presented at the annual meeting of the Western Political Science Association, Albuquerque, N.M.), *available at* http://www.allacademic.com/meta/p97302_index.html (concluding that political democracy does decrease particulate emissions, but both deforestation and carbon dioxide emissions increase with greater civil liberties).

access to justice—can be effective across a range of institutions and cultures.

Several of his cases emerge in new or tentative democracies, and it is clear that they were products of the new institutions and social energy that accompanied democratic reform. Lenin's Trees were protected in post-Soviet Russia against a backdrop of legal and institutional reforms that created tentative new paths for democratic participation. This included a path for the first post-glasnost environmental citizen's group to join the chair of the Russian Parliament's Environment Committee in suing for the protection of old-growth forests. The Trillium case emerges in post-Pinochet Chile[131] at a time when civil society was flourishing and political protest no longer carried the threat of execution or disappearance. *Minors Oposa* took place in a Philippines no longer under the yoke of Ferdinand Marcos.[132] Even the Canadian Great Whale case tells us something about the importance of democratic institutions to environmentally-sound outcomes. Though Canada is a democracy in name and spirit, the treatment of its indigenous peoples (the protagonists in the case were Cree) has not always been consistent with democratic principles.[133] The admonition of a Quebec provincial official about the

131. At least Pinochet had, by the time the case arose, relinquished the presidency. He remained an at-large senator and a powerful force among the military establishment.

132. *See* In re Estate of Marcos Human Rights Litigation, 910 F.Supp. 1460, 1462–63 (D. Haw. 1995) (describing political suppression and torture methods of the "Marcos regime" following the imposition of martial law in 1972); U.S. NAT'L SEC. COUNCIL, NATIONAL SECURITY DECISION DIRECTIVE NO. 215, THE PHILIPPINES (1986), *available at* http://www.fas.org/irp/offdocs/nsdd/nsdd-215.htm (explaining that "[m]ajor elements of the Philippine military now join with a substantial portion of the middle class, the Catholic Church and the business community in opposition to the rule of President Marcos. The mandate lost by the seriously flawed election is now complicated by the threat of violence and massive bloodshed."); Seth Mydans, *Philippine Leaders Celebrate Freedom to Squabble*, N.Y. TIMES, Feb. 26, 1996, at A3 (describing celebrations at the tenth anniversary of the "popular uprising" that deposed Marcos); Alfred McCoy, Dark Legacy: Human Rights Under The Marcos Regime (Sept. 20, 1999) (paper delivered at the Conference on Memory, Truth-Telling and the Pursuit of Justice: The Legacies of the Marcos Dictatorship, Ateneo de Manila University, Quezcon City, Manila, Philippines), *available at* http://www.hartford-hwp.com/archives/54a/062.html (describing extra-judicial killings, disappearances and other human rights violations under Marcos).

133. *See* GOV'T OF CANADA, REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES pt. 2, ch. 13 (1999), *available at* http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html (characterizing the "prevailing assumptions underlying Canadian policy with regard to Aboriginal peoples" as "rooted in . . . assumptions about the lesser place of Aboriginal peoples in Canada"). At the time the Report was delivered to Canada's Parliament, a reporter noted it concluded that Canada's indigenous "policies for the last 150 years had been a shameful failure." Anthony DePalma, *Panel Details How Canada Failed Tribes*, N.Y. TIMES, Nov. 22, 1996, at 6, *available at* http://www.nytimes.com/1996/11/22/world/panel-details-how-canada-failed-

treatment of Cree land and resource rights is telling: "conquerors are not courteous."[134] Yet the ability of the Cree to petition national courts in opposition to a planned hydro project was essential.

Houck is clear about the importance of democracy when recounting the Russian case study. "Is it possible," he asks, "to have environmental protection without the free-for-all of Western democracy?" "[T]o date," he concludes, "the answer seems otherwise. Western notions of environmental protection depend on citizen participation, opposition, demonstrations, referendums, and lawsuits to defend against government complicity and to advance the ball."[135]

Each of the cases in *Taking Back Eden* speaks to the importance of democratic processes and institutions in environmental matters, and Houck's catalogue of democratic tools is expansive, from street theater and engaging the press to legislative reform and litigation. But the role of the citizen suit—the central thesis of the book—is pivotal. Legislative and regulatory frameworks, even constitutional mandates, lie dormant without standing to sue for redress and without lawyers willing to take up the cause.

Houck's notion of democracy is not passive. He shows us that litigation is essential in defending and refining public environmental interests. International environmental NGOs call it "access to justice."[136] Houck calls it the ability of "the very people who were protesting pollution to take their government to court"[137] and "the ability of citizens to sue for the public good."[138] By any name, it has become an important tool of environmental protection, and it has exercised an important institution of the democratic state.

Taking Back Eden reminds us that when environmental citizen suits were born in the United States in the 1960s, the alternative forum was the streets. It recalls that a move by the U.S. Secretary of the Treasury to revoke the tax exempt status of groups that brought

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tribes.html. *See also generally* Jessica Shadian, *In Search of an Identity Canada Looks North; Indigenous Group and Ethnic Identity*, 37 AM. REV. CAN. STUDIES 323 (2007) (discussing historical marginalization of Inuit people).

134. HOUCK, *supra* note 4, at 80 (citing SEAN MCCUTCHEON, ELECTRIC RIVERS: THE STORY OF THE JAMES BAY PROJECT 42 (1991)).

135. *Id.* at 123.

136. *See, e.g.*, WORLD RESOURCES INSTITUTE, ASSESSING ACCESS TO INFORMATION, PARTICIPATION, AND JUSTICE FOR THE ENVIRONMENT: A GUIDE (Elena Petkova & Gloria Bruce, eds., 2003), *available at* http://www.wri.org/publication/assessing-access-information-participation-and-justice-environment; *see also Rio Declaration* 10, *supra* note 11, at princ. 10.

137. HOUCK, *supra* note 4, at 2.

138. *Id.* at 3.

environmental suits was challenged in part because the courts were seen as a better alternative to "tearing things down."[139]

At a time when some political and academic narratives paint judicial action as "activist" or even "undemocratic,"[140] it is important to recall that access to justice, and active courts, are fundamental pillars of democracy. Each of the cases in the book reinforces this idea. The book also offers concrete examples to inform the occasional debate over the environmental value of democracy. While some have argued that democracy might be bad for the environment,[141] Houck's eight cases are evidence to the contrary.

C. Sustainable Development

Sustainable development has gained substantial currency in recent decades as a public policy principle, a focus of international agreements and a polestar for many international environmental institutions. The concept was defined early on by the Brundtland Commission as a "process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations."[142] Sustainability was later embraced as an integral part of the outcomes of the United Nations Conference on Environment and Development in Rio in 1992.[143] Principle One of the Rio Declaration, for example, states that "[h]uman beings are at the center of concerns for sustainable development. They are entitled to a healthy

139. *Id.* at 3 (quoting Senator Jacob Javits (NY)).

140. Senator Jeff Sessions, for example, complained during the confirmation hearings for Justice Kagan that she had worked for "well-known liberal activist" judges (Judge Abner Mikva and Justice Thurgood Marshall). Sessions charged that "these judges don't deny activism; they advocate it. And they openly oppose the idea of a judge as a neutral umpire." *Opening Statement of Sen. Sessions at the Nomination Hearing of Elena Kagan Before the Senate Judiciary Comm.* 111th Cong. (2010), *available at* http://www.mainjustice.com/2010/06/28/ranking-member-jeff-sessions-r-ala-opening-statement-on-kagan/. *See also* Timothy Sandefur, *The Wolves and the Sheep of Constitutional Law: A Review Essay on Kermit Roosevelt's The Myth of Judicial Activism*, 23 J. L. & POL. 1 (2007) (reviewing one among many recent books on the scope of the judicial role and providing "an overview of the contemporary 'judicial activism' debate").

141. *See, e.g.*, Quan Li & Rafael Reuveny, *Democracy and Environmental Degradation*, 50 INT'L STUD. Q. 935 (2006). *See also* sources cited, *supra* note 130.

142. Rep. of the World Comm'n on Env't and Dev., Rnd Sess, Aug. 4, 1987, U.N. Doc. A/42/427 Annex, *available at* http://www.un-documents.net/ocf-02.htm#I.

143. *Rio Declaration*, *supra* note 11.

and productive life in harmony with nature."[144] Principle Four ties the idea of sustainable development explicitly to the environment: "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[145] Although sustainability has subsequently been seen as relevant for a broad range of social concerns,[146] environmental issues have remained core to the idea of sustainable development.

Yet Houck appears openly skeptical of the idea of sustainability. He does not argue that sustainability gets in the way of the progress of market economies (a persistent critique),[147] but instead warns that sustainability has its limits and that there are some places where *any* development is anathema. Houck acknowledges that "sustainability is a legal norm,"[148] but at times it is impossible to apply. Rio Principle One calls for "life in harmony with nature" yet discord often overwhelms equilibrium. The obvious tension in the idea of sustainable development is the need to balance the drive for present material progress with sufficient parsimony to conserve resources for fu-

144. *Id.* princ. 1. *See also id.* princs. 4, 5, 7, 8, 9, 12, 20, 21, 22, 24 and 27.

145. *Id.* princ. 4.

146. At the 2002 World Summit on Sustainable Development in Johannesburg, South Africa, for example, the Political Declaration committed participants to "building a humane, equitable and caring global society, cognizant of the need for human dignity for all," and included provisions dealing with children, poverty, shelter, food security, and a wide range of issues. World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26 – Sept. 4, 2002, *Johannesburg Declaration on Sustainable Development*, U.N. Doc. A/CONF.199/20, ¶ 2 (2002). The Johannesburg Declaration pledged to "fight against worldwide conditions that pose severe threats to the sustainable development of our people, which include: chronic hunger; malnutrition; foreign occupation; armed conflict; illicit drug problems; organized crime; corruption; natural disasters; illicit arms trafficking; trafficking in persons; terrorism; intolerance and incitement to racial, ethnic, religious and other hatreds; xenophobia; and endemic, communicable and chronic diseases, in particular HIV/AIDS, malaria and tuberculosis." *Id.* at ¶ 19. These are important goals, but arguably they represent significant movement from basic notions of environmental sustainability.

147. *See, e.g.*, Daniel Bonevac, *Is Sustainability Sustainable?*, 28 ACAD. QUESTIONS 84 (2010); Christopher N. Osher, *Bike Agenda Spins Cities Toward U.N. Control, Maes Warns*, DENVER POST (Aug. 4, 2010), *available at* http://www.denverpost.com/election2010/ci_15673894 (describing Republican gubernatorial candidate Dan Maes's claim that Denver's membership in an organization promoting sustainable development "could threaten our personal freedom"); Tim Williams, *Sustainable Development: Key Concepts and Questions*, (Research Paper for the Library of Parliament, Can.) (Jan. 12, 2005) ("A few believe that [sustainable development] is a socialist plot designed to bring market economies to their knees . . . ."), *available at* http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/PRB-e/PRB0455-e.pdf ("A few believe that [sustainable development] is a socialist plot designed to bring market economies to their knees . . . .").

148. HOUCK, *supra* note 4, at 147.

future progress. There is also some inherent challenge in defining "progress" in the first place. One person's hotel-lined-beach-resort-as-paradise is abhorrent to another who values a natural coastal system.

Once the road to paradise is paved, a fundamental change is wrought. Intrusion begets more intrusion, and that presents its own dilemma. "In the real world," Houck cautions, "the concept of sustainability has a very hard time holding the line."[149] But even that first pavestone may be more than some natural systems should bear. Houck makes the case—and this seems at the core of his skepticism—that some places must be off limits to development as we know it. The book is a defense of wild places—not places devoid of humans (necessarily), but places where humans are superfluous at best. Modern development would change the fundamental landscape. Development in those places is not a slippery slope; it is a precipice. They must remain wild to remain at all.

D. Transboundary Legal Process

Taking Back Eden also contributes to a growing literature on the nature of international law and the importance of transboundary networks in shaping and enforcing law. Led by scholars such as Harold Koh, transboundary legal process theorists posit that international law is more than a construct dependent on the open consent of nation states. It is often, instead, the product of a dynamic interplay of domestic experience and international interests promoted by transboundary constituencies that import and adapt ideas across boundaries.[150] Experience and experimentation in domestic and international arenas inform and shape new legal rules in a mutually-reinforcing phenomenon.

Networks of state and non-state actors drive this phenomenon. Peter Haas, for example, has described epistemic communities of scientific and policy experts that worked to address problems such as the transboundary pollution of the Mediterranean Sea[151] and

149. *Id.* at 173.

150. *See* Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 183–86 (1996) (discussing transnational legal process as the "theory and practice of how public and private actors . . . interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law").

151. *See* Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 INT'L ORG. 377, 384–87 (1989). The term "epistemic communities" was earlier offered by John Ruggie to describe the communities that form

threats to the ozone layer.[152] Haas argues that these communities act as "channels through which new ideas circulate from societies to governments as well as from country to country."[153] Margaret Keck and Kathryn Sikkink have detailed how non-state actors work through transnational advocacy networks that "interact with each other, with states, and with international organizations" to "change the behavior of states and international organizations."[154] Robert Keohane and Joseph Nye describe "transgovernmental" activity "among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments."[155] Anne-Marie Slaughter has detailed how these "[n]etworks of government officials—police investigators, financial regulators, even judges and legislators—increasingly exchange information and coordinate activity to . . . address common problems on a global scale."[156]

Houck contributes to this literature by providing case studies of environmental law transiting borders. His examples include what many see as the beginning of modern international environmental law, the 1972 Stockholm Conference. From Stockholm emerged a seminal declaration of a right to a healthy environment.[157] The Stockholm Declaration states, "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being."[158]

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around common policy ideas. *See* John Gerard Ruggie, *International Responses to Technology: Concepts and Trends*, 29 INT'L ORG. 557, 569–70 (1975) (analogizing to what Michele Foucault referred to as "'*epistemes*,' through which the political relationships" acted out on the international stage "are visualized").

152. *See* Peter M. Haas, *Banning Chlorofluorocarbons: Epistemic Community Efforts To Protect Stratospheric Ozone*, 46 INT'L ORG. 187, 189–96 (1992).

153. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 27 (1992); *see also* Emanuel Adler & Peter M. Haas, *Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program*, 46 INT'L ORG. 367, 370–71 (1992) (describing the instrumental value of epistemic communities when promoting greater international coordination and greater affinity between the values and practices of states and the policies advanced through international regimes and institutions).

154. MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS 1–2 (1998).

155. Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 WORLD POL. 39, 43 (1974).

156. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 1 (2004).

157. HOUCK, *supra* note 4, at 163.

158. United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Stockholm Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, princ. 1 (June 16, 1972).

Houck reminds us that the conference and the declaration followed influential publications by Rachel Carson and Jacques Cousteau.[159] He also tells us Cousteau quit the French delegation to Stockholm and led a "countersummit" that "treat[ed] each issue the day before it would be taken up by the official event," thereby influencing the meeting discussions and outcome.[160] Houck's source: a conversation with Cousteau in New Orleans in 1983.[161] Houck argues that the meeting of non-state actors led by Cousteau planted seeds for some of the more far reaching aspects of the Stockholm Declaration, including the "fundamental right" to a healthy environment.[162]

These seeds from Stockholm led to constitutional provisions safeguarding the right to a healthy environment in some state constitutions that were written post-Stockholm, including in Chile. These constitutional provisions, in turn, informed the outcomes in cases like Trillium.

Trillium is just one demonstration of the idea that international law is both shaped and reinforced by transboundary networks of environmental experts and activists. In the Acheloos case, environmental impact assessment, central to the case outcome in Greece, had been "traveling the world,"[163] and was thus a feature of both domestic and EU law. More recently, the International Court of Justice has acknowledged that a requirement of environmental impact assessment is part of "general international law" because it has become so widely embraced by states.[164]

The Japanese court in the Nikko Taro case took note of U.S., British and German decisions when reaching its own conclusion. Canada's Great Whale case was sparked in part by a desire to transmit electric power across the international border into the United

159. HOUCK, *supra* note 4, at 163.

160. *Id.*

161. *Id.* at 224.

162. *Id.* at 163.

163. *Id.* at 138.

164. The International Court of Justice has affirmed that the need for environmental impact assessment has become a principle of international law, at least where transboundary resources are at stake. Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 135, (Apr. 20), *available at* http://www.icj-cij.org/docket/files/135/15877.pdf. The court refers to EIA as "a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource." *Id.* ¶ 204.

States, and the project died at least in part because resistance grew on the U.S. side of the border and U.S. customers ultimately balked. Environmental concerns transited the border when those who protested the Canadian project from within the United States complained of "exporting environmental and cultural destruction to the taiga" and warned that purchasing Hydro-Quebec's energy would make New York an "accomplice to a crime."[165]

Houck calls it "convergent evolution,"[166] although it might also be described as co-evolution.[167] International legal scholars would call it evidence of "transboundary legal process" helping to frame and shape international law.

Finally, the book shows that key actors were often themselves part of the informal transboundary networks, the "epistemic communities," which transboundary scholars see as central to the development of international law. The lead counsel in the cases Houck details not only interacted with (and presumably exchanged ideas with) lawyers from other countries, but several of Houck's protagonists also received formal legal training outside of their home countries. Oposa took a scholarship to study in Norway and returned with the idea that environmental protection did not concern just him and his children, but also children to come;[168] Decleris received a J.S.D. from Yale;[169] and Mischenko received training in the United States

165. HOUCK, *supra* note 4, at 83 (quoting Sam Howe Verhovek, *Power Struggle*, N. Y. TIMES, Jan. 12, 1992, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E0CE2DE1F3FF931A25752C0A964958260&pagewanted=2).

166. *Id.* at 39.

167. While the distinction is somewhat semantic, convergent evolution is the independent acquisition of comparable characteristics in different species that result from similar ecological conditions. KLAUS IMMELMANN & COLIN BEER, A DICTIONARY OF ETHOLOGY, 59–60 (1989). Houck is right that there is a convergence of tactics and procedural tools to protect environmental values, but here, the transboundary exchange of ideas and the action of networks suggest that the process is more one of coevolution (complementary adaptations in species that are interdependent or "interact closely with one another" and benefit from a continuing association). THE AMERICAN HERITAGE SCIENCE DICTIONARY 130 (2005). *See also* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 358 (4th ed. 2000); OXFORD DICTIONARY OF SCIENCE 176 (5th ed. 2005); WEBSTER'S NEW WORLD DICTIONARY OF SCIENCE 144 (1998). Just as interaction is an important adaptation trigger in biology, interaction is an important mechanism for informing lawmaking in transboundary legal process.

168. HOUCK, *supra* note 4, at 49. Oposa later received an LL.M. at Harvard where he no doubt inspired further thinking and future imitation from his classmates from the United States and abroad. He was elected to be his class commencement speaker. Personal conversation with Oposa (1997).

169. HOUCK, *supra* note 4, at 140.

through a fellowship.[170] This exchange helped to plant and to nurture the ideas that they later brought home and applied in their legal arguments.

III. STYLE AND PEDAGOGY

Beyond its substantive contributions to international and comparative scholarship, *Taking Back Eden* tells us something about legal advocacy. Houck's writing style is an example for future advocates hoping to engage their audience by making their clients and their cause compelling and accessible. In the story of Lenin's Trees, for example, the reader must recognize the value of the forest historically and culturally in order to understand the insult of a planned timber concession. So Houck tells of the trees' preservation in the winter of 1919: "The pressure to cut them down was enormous. It would save lives. It might save the Revolution. Lenin forbade the cut."[171] To make the moment even more tangible for a U.S. audience, Houck calls it "a Valley Forge moment for the Russian Revolution."[172] This historical allusion offers the reader images of starving, freezing troops defending the fate of a nation. Even to those with little knowledge of the Russian experience, the idea of a "Valley Forge moment" is palpable. Would the reader have sacrificed trees to save the Patriots, to save George Washington and to save America? You bet. But in Houck's story, not these trees. They were that special.

Houck emphasizes the reputation and ability of the lawyer representing the plaintiffs in Storm King Mountain: "the case would ride in on a lion."[173] He describes the efficiency of the Japanese construction state: a "tight concert of industry and government."[174] He describes a tepid final report on the proposed hydro project on the Acheloos prepared by a contractor that was given access to incomplete data by government proponents: it "read like an excuse for bad homework" and "ended with a cold embrace."[175]

Taking Back Eden underscores not only the importance of language to the legal advocate but also the importance of consequences to the environmental advocate. Throughout the book, Houck

170. *Id.* at 117.

171. *Id.* at 114.

172. *Id.*

173. *Id.* at 14.

174. *Id.* at 33.

175. *Id.* at 136.

explains the impact of the development projects that his protagonists challenge. He describes, for example, the inefficiency of the irrigation system used in Greek agriculture[176] and the problem with sustaining a harvest of the Lenga tree that was sought after in Chile.[177] And while Houck's principal concern is with nature, he demonstrates his understanding of the connection between environmental problems and human wellbeing when he tells us that the loss of timber on Philippine hillsides meant that, following a 1991 tropical storm, "thousands died. In 1999, another heavy rainstorm hit a denuded hillside and did exactly the same thing. In 2006, it happened yet again. Hundreds more died."[178] These are practical examples of advocacy that connects cause and effect. It reminds an audience of the stakes just as a lawyer must remind a tribunal. By explaining the technical details, and sometimes the science of the project and its impact (evaporation loss, pesticide loads, nutrient cycles), the costs of development become clear and the goal of sustainability becomes more cognizable. By explaining the human consequences of environmental degradation, the goal of environmental law becomes more immediate.

Houck also uses humor and irony to good effect, sometimes with participants' words and sometimes with his own. He quotes Quebec provincial leader Robert Bourassa dismissing the treatment of local Cree communities by proponents of a hydro project—perhaps dismissing the Cree themselves: "conquerors are not courteous."[179] He introduces the Acheloos case with a story from Greek mythology that tells of Acheloos's (the god of rivers) encounter with Hercules, "the celebrated hero and sociopath."[180] Houck highlights the reluctance of Canada's chief federal environmental authority to halt Hydro Quebec's development plans by telling us Environment Canada was "dragged into the Great Whale [case] with its heel marks all the way down the aisle."[181] He also summarizes several hundred years of colonial conquest with mocking efficiency— explaining that Tierra del Fuego had avoided development of any kind until the late twentieth century because "[t]here were few souls worth converting and no gold. Nothing here to claim the European Heart."[182]

176. *Id.*

177. *Id.* at 160.

178. *Id.* at 54.

179. *Id.* at 80.

180. *Id.* at 131.

181. *Id.* at 81.

182. *Id.* at 152.

Thus the book is, in addition to stories about good advocacy, an example of good advocacy. Readers can learn from both the journey and the vehicle.

IV. CONCLUSION

Taking Back Eden might leave some readers discouraged by the inexorable tide of development and the inevitable forfeiture of paradise. The failings are all too human; the consequences too well known. As moral allegory, the collection of stories is appropriately named for Eden.

Yet the book's stories emphasize struggle, not defeat. Houck reinforces through the cases what he proffers in the title: this is not about losing; it is about taking back. Creative and persistent advocacy is rewarded where access to justice is possible. Common legal tools are evolving across national boundaries to defend universal values. Wild places and cultural treasures have advocates who are able to stand against political tides and market forces. Eden need not be lost.