

Legal Issues in Environmental History

New Jersey Institute of Technology, History 375

Tuesday and Thursday, 10:00-11:25 AM, Cullimore Hall Room 110

Instructor: Adam Wolkoff, J.D., Ph.D Candidate in History, Rutgers University

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Office Hours: Immediately after scheduled class sessions or by appointment

Prerequisites:

Hum 101, Hum 102 and one from among Hum 211, Hum 212, and Hist 213 or their equivalents R510:200 through 299 or R512:200 through 299 or their equivalents with a grade of C or better.

Course Description:

The vast body of statutes, regulations, and judicial decisions that make up environmental law barely existed fifty years ago. Yet customary practices of environmental management and protection preceded European settlement of the Americas. Using the rich history of the United States as a case study of a global process, this class explores two parallel and interlinked transformations: the rise of a capitalist consumer society and the movement from customary and local controls to state-enforced environmental law.

Course Learning Outcomes:

As participants in an advanced seminar, students will closely read a selection of primary and secondary sources on the history of environmental law and arrive in class prepared for discussion and debate. By the end of the course, students will:

- become familiar with the evolution of environmental regulation in the context of the social history of the United States;
- obtain exposure to legal reasoning and methods for reading cases and statutes;
- learn to think historically and write a research paper using primary and secondary sources;
- practice thinking on their feet and making oral presentations.

Required Purchases:

- Ted Steinberg, *Down to Earth: Nature's Role in American History*, **THIRD EDITION** (Oxford University Press, 2012), ISBN: 9780199797394.
- Jonathan R. Nash, *Essentials: Environmental Law and Policy* (Aspen Publishers/Wolters Kluwer Law & Business, 2010), ISBN: 9780735579668.
- One deck of ruled or unruled 3"x5" index cards.

Grading Rubric:

Participation (including class discussion, index cards, and in-class quizzes): 20%

Midterm Exam: 20%

Final Exam: 30%

Research Paper and Presentation: 30%

Attendance:

Attendance is mandatory. Students are allowed four absences, excused or unexcused, with each further unexcused absence resulting in a three percent reduction of the final grade. For example, a student with four excused absences and two unexcused absences would incur a six percent

reduction of his or her final grade. I will measure attendance by collecting an index card at the end of each class (see “Participation Grade,” below).

Recognized grounds for absence include illness requiring medical attention, curricular or extracurricular activities approved by the faculty, personal obligations claimed by the student and recognized as valid, recognized religious holidays, and severe inclement weather causing dangerous traveling conditions. Please speak to me as soon as possible about any absences you know of in advance. You may be required to provide evidence of the reason for your absence. Please arrange with a fellow student for class notes.

Students who miss eight or more sessions for any combination of excused and unexcused absences will not earn credit in this course. Such students should withdraw.

Persistent tardiness will lower your participation grade. In addition, students who arrive more than fifteen minutes late without a recognized excuse will be marked absent without excuse for the class period.

Class Preparation:

Like all history classes, this course requires significant reading and preparation. It is critical that you take the time to carefully read and take notes on the assigned textbooks and supplemental articles and cases, which will be posted online. Everyone reads at a different pace, but you should budget at least two to three hours to prepare for each class.

Good note taking is a skill worth practicing. Whether you are reading book chapter or a judicial decision, you should record and digest similar types of information:

- **Facts:** Who or what is the author’s subject? Where and when did the topic unfold?
- **Issue:** What is the main problem or problems that the author is discussing?
- **Thesis:** The author’s central argument. In case law, this is known as the court’s *holding*, meaning its rule of decision.
- **Rationale:** What evidence does the author or judge use to support his thesis or rule of decision? Does this evidence satisfy you?

Class Rules of Conduct:

Students must arrive on time and bring all assigned readings to class, along with a notebook, pen, and index card. **Laptops, cell phones, smart phones, tablets, and other electronics are not allowed** without my express permission, which will not be granted without a compelling reason.

Participation Grade:

During class, students will be evaluated in a number of ways. First, everyone is expected to participate in class discussion. This means asking and answering questions about the readings and debating relevant issues in a thoughtful and respectful manner. I will “cold call” students who do not voluntarily join the discussion. Students anxious about class discussion should speak with me early in the semester.

Second, I will collect an index card from each student at the end of class with a question or thought about the day’s readings and/or discussion. Please include your name and the date on the card. The card will not be graded, but counts toward participation and attendance.

Third, there will be unannounced quizzes during the semester. The purpose of these pop quizzes is to make sure you keep up with reading assignments and understand their main ideas. The quizzes will ask about key people, events, and concepts discussed in the readings for that day’s

class. Students who miss class because of an excused absence can make up a quiz during my office hours. If you miss a quiz because of an unexcused absence, you cannot make up the quiz, and it will count as a zero.

Academic Integrity:

Students must understand and agree to all NJIT policies regarding academic integrity before participating in this course. These rules are documented on the NJIT Academic Integrity website, <http://integrity.njit.edu/index.html>. The student honor code is available at <http://www.njit.edu/academics/pdf/academic-integrity-code.pdf>.

It is critical that you learn these rules, because the consequences of breaking them are severe. Basically, you commit misconduct if you represent another's work as your own. Most students know that they are cheating when they ask a friend to write (or significantly edit) their papers, cut-and-paste text from a website, hand-in a paper they find or purchase online, or look at another student's answers while taking a test. But many well-intentioned students do not realize that even borrowing information without properly attributing the source is also a breach of academic honesty.

All students are responsible for upholding the integrity of NJIT by reporting any violation of academic integrity to the Office of the Dean of Students. (<http://www.njit.edu/doss/>) The identity of the student filing the report remains anonymous.

Research Paper and In Class Presentation

Each student will design, research, and write an 8 to 10 page (double-spaced) historical case study focusing on the interplay between the law and the environment in the New York-New Jersey region. We will spend time at the beginning of the semester discussing possible topics and work together to create a research strategy for gathering the facts and interpreting the data. Students will submit hard copies of each assignment related to the research paper (ideas, outlines, drafts, etc.) as described on the course calendar. At the beginning of December, students will present their findings to the class in a 10 minute oral presentation.

Additional details about the research paper and presentation, including a grading rubric, will be provided during the semester.

Course Calendar (subject to modification):

September 3: Introduction

What is nature? How is it an actor in history?

- Steinberg: Prologue (pp. 3-7)

September 5: Theories of law and the environment

What is the law? Can multiple systems of law coexist?

What is property? How do we define and balance private and public property rights?

- Hendrik Hartog, "Pigs and Positivism," *Wisconsin Law Review* (1985)

September 10: Native Americans and the environment

How did Native Americans regulate the use of common resources? How did European settlers perceive and compete with their order?

- Steinberg: Chapter 1 (pp. 11-21)
- *Johnson v. M'Intosh* (US Supreme Court, 1823)

*Informal discussion of Research Paper topics

September 12: Appropriation, violence, and informal law

What environmental factors brought settlers and Indians into conflict? How were these problems negotiated?

- Steinberg: Chapter 2 (pp. 22-39)
- Virginia Anderson, “King Philip's Herds: Indians, Colonists, and the Problem of Livestock in Early New England,” *William & Mary Quarterly* (1994).

September 17: The war on the wilderness

How did law and custom shape the colonial encounter with nature? What ethics drove settlement?

- Steinberg: Chapter 3 (pp. 40-54)
- James Fenimore Cooper, *The Pioneers* (1823) (excerpt)
- *Jackson v. Brownson* (NY 1810)

***Submit two to three ideas (one or two sentences each) for Research Paper for today's class**

September 19: Instrumentalism and the politics of industrial development

What does it mean to turn nature into a commodity? What was law's role in this process?

- Steinberg: Chapter 4 (pp. 57-71)
- Carol Sheriff, *The Artificial River* (1996) (excerpt)

September 24: Commonwealth regulation and the city

How did local governments regulate property rights in the nineteenth century?

- William Novak, *The People's Welfare* (1993) (excerpt)
- Nuisance cases

September 26: Slavery, common rights, and the antebellum Southern environment

How did nature shape the rise of slavery? What was the South's “moral economy”?

- Steinberg: Chapter 5 (pp. 72-88)

***Finalize and submit topic for Research Paper with one paragraph description**

October 1: Extracting the New South

How did the laws of land and labor after the Civil War transform the Southern landscape? What happened to the commons?

- Steinberg: Chapter 7 (pp. 99-115)
- Sharecropping contract
- Report on Illegal Fishing on the Edisto River (South Carolina, 1888)

October 3: The Wild West?

What public policies drove settlement? How did settlers manage natural resources?

- Steinberg: Chapter 8 (pp. 116-135)
- Water rights cases

October 8: Conservation and its Discontents

“Utilitarianism,” “preservationism,” and their unintended consequences.

- Steinberg: Chapter 9 (pp. 136-154)
- *Ward v. Race Horse* (US Supreme Court, 1896)

October 10: Urban Reform in the Progressive Era

How did environmental law divide “urban” and “rural” spaces? What is garbage?

- Steinberg: Chapter 10 (pp. 155-169)

- Re-read Hartog, “Pigs and Positivism”

October 15: Modernizing American Agriculture

How did public policy encourage the rise of one-crop farming?

- Steinberg: Chapter 11 (pp. 173-186)

October 17: Midterm Exam

October 22: A New Deal for the Environment and the Administrative State

What was the environmental legacy of the New Deal? How would the Supreme Court’s “switch in time” of 1937 impact the future of environmental law? What new balance emerged between the executive, legislative, and judicial branches surrounding environmental regulation?

- *Wickard v. Filburn* (US Supreme Court, 1942)
- Nash: pp. 20-26, 35-40, and 45-50.

October 24: Suburbanization

What local and federal policies helped build the suburban nation?

- Steinberg: Chapter 13 (pp. 203-224)
- *Euclid v. Ambler* (US Supreme Court, 1926)

October 29: Birth of the Modern Environmental Movement

What inspired the movement? Who joined it? Why did the movement federalize?

- Steinberg: Chapter 14 (pp. 240-268)
- Elliott, et al, “Toward a Theory of Statutory Evolution” (excerpt)

October 31: Research and writing tutorial

At-home assignment: Draft an outline of the final research paper with a bibliography of sources and *bring to class today*.

November 5: The Clean Air Act

How has federalism shaped the regulation of air pollution?

- Nash: Chapter 3 (pp. 53-72)

November 7: No Class

At-home assignment: Draft at least three double-spaced pages of the final research paper and *bring to class on November 12*.

November 12: The Clean Water Act

How do the regulatory schemes of the Clean Air and Clean Water Acts compare? What might these similarities and differences tell us about American environmental law?

- Nash: Chapter 4 (pp. 75-93)

November 14: The ongoing role of the common law

What are the strengths and weakness of common law remedies in a world of complex causation?

- Nash: “The Common Law and Environmental Problems” (pp. 9-13)
- *Boomer et al. v. Atlantic Cement Company* (NY 1970)
- The Woburn Toxic Tort Case

November 19: Endangered Species Act

Who speaks for nature? How do we decide which species should be protected?

- Nash: Chapter 6 (pp. 117-126)
- Endangered Species Act cases

***Submit first draft of Research Paper**

November 21: Deindustrialization and Brownfield revitalization

How has environmental law responded to industrial pollution and the “rustbelt”?

- Nash: Chapter 5 (pp. 102-113)
- Chris Hedges and Joe Sacco, *Days of Destruction, Days of Revolt* (2012) (excerpt)

November 26: Takings and (un)natural disasters

When may governments take private property for the public welfare? How have land use policies controlled or potentially worsened natural disasters?

- Nash: “Eminent Domain and the Takings Clause” (pp. 41-45)
- *Pennsylvania Coal Company v. Mahon* (US Supreme Court, 1922)
- Beachfront preservation cases

November 28: Thanksgiving (No Class)

December 3: Deregulation and international law

The national and global race to the bottom: Can the market save us?

Steinberg: Chapter 16 (pp. 269-300)

***Research Paper due in class December 3**

December 5: In-class presentations

December 10: In-class presentations

December 12: Reading Day (No Class)

Final Exam: Date and Time to be announced