

C O M M E N T S

Environmental Law Goes Global: *Taking Back Eden: Eight Environmental Cases That Changed the World*, by Oliver A. Houck

by Robert V. Percival

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Environmentalists in the United States have ample reason to be disheartened by the events of the past year, including the Gulf oil spill, record temperatures, and elections that swept scores of climate change deniers into Congress. But they can take some solace from the continuing vitality of global concern for the environment as illustrated by Oliver Houck's inspirational book, *Taking Back Eden: Eight Environmental Cases That Changed the World*.¹ In this book, Houck tells the stories of courageous citizens in eight countries who took legal action to defend the environment.

Beginning with the landmark Storm King case in the United States during the late 1960s, Houck examines how citizen enforcement of environmental law has become a global phenomenon even in countries with very different legal and political traditions. The book focuses on environmental lawsuits brought in Canada, Chile, Greece, India, Japan, the Philippines, Russia, and the United States. Houck uses these cases to trace the importance of citizen suits as catalysts for environmental reform throughout the world. He tells fascinating stories about citizens determined to use the legal system to force change, in places and at times when environmental law was either nonexistent or rarely enforced.

Houck, a law professor at Tulane University, is a truly gifted writer, a rarity among legal academics. What Stanford's Lawrence Friedman did for American legal history, Houck accomplishes for environmental law: captivating the reader with stories about legal change. In less talented hands, even efforts to stop mindless destruction of ecosystems can get buried in dry legalese, but in Houck's hands, they are compelling tales about charismatic people and the extraordinary places they seek to defend—New York's Hudson Highlands, giant cedar trees at a sacred shrine in

Japan, the Taj Mahal, ancient forests in Chile, the Philippines, and Russia, and great rivers in Canada and Greece. Houck makes the cases come alive by taking the reader outside of the courtroom and exploring the larger forces that shape the outcomes of the battles he chronicles.

To be sure, Houck has not authored a romantic paean to citizen suits that suggests they are easy to win or the sole answer to the globe's burgeoning environmental problems. He emphasizes that environmental plaintiffs do not always win in court and, even when they do, a favorable judicial decision rarely is the last word. Legal battles can go on for decades, and citizen plaintiffs lack the resources that companies can spend on lawyers. Many legal victories are procedural and short-lived, as determined industrial interests find ways around legal roadblocks. Houck concludes: "When Kermit the Frog observed that it was not easy being green, he surely had environmental litigation in mind."

Houck explains how the lawsuits spawned by the disputes he examines helped shape the development of environmental law. The Storm King battle helped launch the Natural Resources Defense Council (NRDC) and the Hudson Riverkeeper, which have played major roles in the development of public interest environmental law. Indigenous tribes suing to stop dam projects in Canada established an important legal building block for assertion of federal authority to protect Canada's environment. Antonio Oposa's crusade to protect Philippine rainforests won a rare, and now oft-cited, judicial endorsement of standing on behalf of future generations. Some legal victories have more long-lasting effects than others. To protect ancient trees at the Nikko Toshogu shrine, the Tokyo High Court invented a seemingly powerful new legal vehicle enabling the shrine to challenge a highway project, but Japanese courts routinely spurned subsequent environmental plaintiffs who sought to use it. Although the Chilean Supreme Court's Trillium decision opened the door for citizens to

1. OLIVER HOUCK, *TAKING BACK EDEN: EIGHT ENVIRONMENTAL CASES THAT CHANGED THE WORLD* (Island Press 2009).

challenge development projects, plaintiffs passing through that door rarely prevailed in Chilean courts until recently.

One of the great virtues of this book is that it emphasizes the many nonlegal (economic, political, cultural) forces that influence the outcome of environmental disputes in different countries. Houck affords equal time to outside-the-courtroom strategies to influence public opinion. A particularly effective protest he describes involved members of the Inuit and Cree Tribes paddling a flotilla of canoes from James Bay to Manhattan to convince New York officials to cancel a power purchase agreement with Canadian dam builders. Houck also alludes to growing global collaboration among nongovernmental organizations (NGOs), as illustrated when Chilean environmentalists partnered with an American NGO to publicize environmental violations by a U.S. company seeking to log an ancient forest in Tierra del Fuego.

At the core of Houck's analysis is what he describes as an American "idea so simple and compelling that it can be squelched for awhile but not forever." That is the principle that "[o]rdinary citizens can, through legal process, make their governments protect the environment when that may be the last thing their governments want to do." Houck notes that this is still a revolutionary concept in most parts of the world. I can attest to this. Three years ago, I taught Environmental Law at the China University of Political Science and Law (CUPL) in Beijing. I presented my class with a just-issued U.S. federal court decision limiting the U.S. Navy's testing of sonar in order to protect marine mammals. The Chinese students were visibly astonished that in the United States an environmental group could sue the most powerful military in the world and win, and that the Navy would have to comply with the court's injunction. Although I cautioned the students that the injunction could be overturned on appeal, which it ultimately was, the very fact that the case could be brought told them more than I ever could about how seriously the United States has embraced the concepts of an independent judiciary and the rule of law.

China has not yet developed an independent judiciary or a strong tradition of respect for the rule of law. But this has not stopped Chinese environmentalists from seeking to use law to redress that country's horrendous environmental problems. Prof. Wang Canfa from CUPL runs a public interest environmental organization called the Center for Legal Assistance to Pollution Victims (CLAPV). Founded in 1999, the group established a hotline to field complaints about environmental problems from Chinese citizens. Professor Wang's group has filed many lawsuits seeking redress for the most egregious of these complaints despite the absence of citizen suit provisions in China's environmental laws. The Chinese judiciary is subject to the Communist Party's control, and politically sensitive cases routinely are rebuffed. Although Professor Wang loses the

majority of his cases, he has chalked up some important legal victories, as China's leaders now recognize the importance of redressing the country's immense environmental problems. Several Chinese provinces recently have established specialized environmental courts, and in December 2010 the All China Environment Federation, a group of environmental lawyers, won an important test case to shut down a polluting paper mill in Guiyan, the capital of Guizhou province.

To Professor Wang and other environmental advocates in developing countries, the U.S. legal system remains the envy of the world, because it has embraced the concept of citizen suits for more than four decades. Thus, it is particularly curious that environmental citizen suits currently are under fire in the United States, as Houck notes in his concluding chapter. Their opponents are business interests who do not enjoy being defendants in citizen enforcement actions and conservatives on the U.S. Supreme Court who advocate restrictive doctrines of standing. As Houck notes, the very businesses who decry citizen suits are themselves prolific litigants when it comes to challenging permit limits or newly issued environmental regulations. Yet, they condemn lawsuits when citizens seek to enforce the law against them.

This was well illustrated last spring when the Maryland Environmental Law Clinic represented citizen groups in bringing an important enforcement action in federal court against Perdue Farms, Inc., for polluting the Chesapeake Bay through mismanagement of its chicken manure. The company's response was to lobby the Maryland General Assembly to cut off the clinic's funding in an effort to pressure the clinic to drop the lawsuits. I could not help but think that this was the American equivalent to Chinese justice where political pressure can be used to get lawsuits dismissed. Fortunately, the national legal community rallied behind Maryland's clinic, and the General Assembly ultimately rejected efforts to slash the clinic's funding. Tulane's Environmental Law Clinic did not fare as well several years ago after it brought litigation that upset that state's chemical industry. Even though Tulane is a private school, the Louisiana Supreme Court, at the behest of the industry, changed its student practice rules to restrict the clinic's ability to represent clients.

Taking Back Eden documents how the immense surge in public concern for the environment is touching every corner of the globe. Countries are upgrading their environmental standards and borrowing regulatory innovations, even from other nations with very different legal and political traditions. Traditional distinctions between domestic and international law and private and public law are beginning to blur, as national environmental laws converge and businesses, NGOs, and regulators increasingly collaborate on projects to improve environmental performance. The result is the emergence of what I have called a kind of "global environmental law" that has important

implications for how we train the next generation of environmental lawyers.²

Surprising legal developments are occurring, even in countries whose legal systems long have eschewed litigation. As Houck reports, Japanese courts did not use the Nikko Taro decision to embrace environmental concerns. However, Japanese tort law recently has evolved in creative ways to provide compensation to victims of environmental pollution. In 2009, a Japanese court approved a plan to require auto manufacturers and government entities to compensate asthmatics and other victims of pollution from mobile sources. When other branches of government abdicate their responsibilities to protect the environment, activist courts in Argentina and India have intervened to order government action to clean up air and water pollution. Chile's new, more conservative government has surprised many environmentalists by accelerating the expansion of power for the country's new Ministry of Environment, which will become the nation's largest government agency.

As environmental law has "gone global," U.S. NGOs are expanding their international presence. The NRDC has an office in Beijing that is doing some of the most creative work to strengthen environmental law in the country that now has the most impact on the planet's environment. In May 2008, China's Open Information Act became effective—a Chinese version of the U.S. Freedom of Information Act. The Chinese law is nearly identical to the U.S. law, except for an additional exemption for documents whose release might interfere with "social stability." The NRDC has cosponsored conferences with local Environmental Protection Boards to educate Chinese NGOs and environmental journalists on how to use the law. The NRDC subsequently launched a creative disclosure project that rates Chinese officials in different cities on how well they have implemented the new law. Called the Pollution Information Transparency Index (PITI), the NRDC index has become almost as influential as the *U.S. News & World Report* ratings of American universities. Chinese officials now frequently contact the NRDC to find out how they can improve their ratings.

The NRDC collaborates on the PITI project with Chinese environmentalist Ma Jun, who directs a Chinese NGO, the Institute of Public and Environmental Affairs (IPE). When I met Ma Jun in China in December 2009, he revealed that his career had been profoundly affected by my environmental law casebook's description of the U.S. Toxics Release Inventory. Inspired that the U.S. government was requiring corporations to disclose estimates of their annual environmental emissions, he created a website to publicize information on environmental emissions by companies operating in China. Whenever his emissions data are updated, it creates a stir in the Chinese media. The IPE also is working with a coalition of 36 Chinese NGOs to publicize environmental and occupational health concerns arising in the Chinese supply chains used by 29 multinational informational technology companies.

These are only a few of the many creative ways in which environmental NGOs throughout the world are pushing to improve environmental conditions and to protect public health and safety. With the growth of global NGO networks, companies no longer can expect to escape scrutiny for operations that cause harm in remote parts of the globe. Houck's book demonstrates why citizen suit provisions are an essential legal tool to empower victims of environmental harm. But they are only one building block in the rich and evolving mixture of strategies civil society is using to hold businesses and governments accountable.

Oliver Houck is a national treasure – an inspired scholar and a gifted writer who can translate complex environmental controversies into terms anyone easily can grasp. At a time when fossil fuel industries are using junk science and economic fear-mongering to oppose sensible responses to climate change, the world needs more Oliver Houcks. As his splendid book demonstrates, opponents of environmental protection are swimming against an increasingly powerful global tide. Thus, doctors treating environmentalists for bouts of depression over recent political developments in the United States should follow a simple prescription: take two aspirin and read *Taking Back Eden*.

2. See Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 *ECOLOGY L.Q.* 615 (2009).