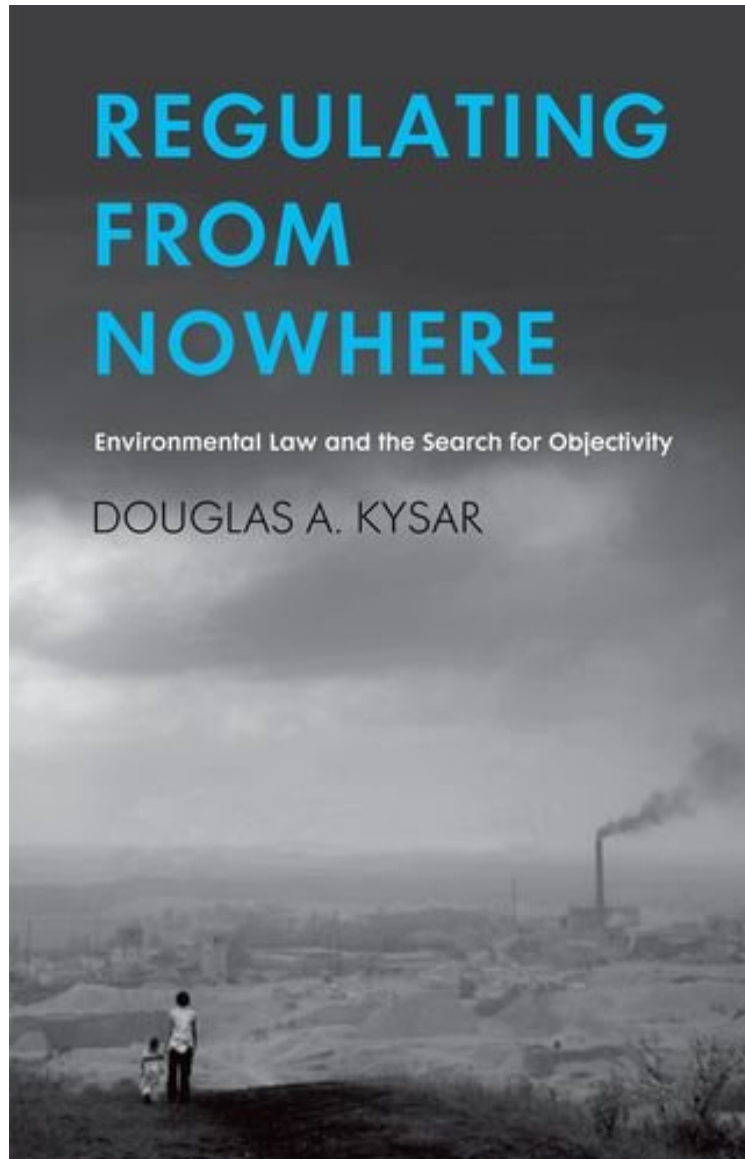


[Read now] Regulating from Nowhere: Environmental Law and the Search for Objectivity

Regulating from Nowhere: Environmental Law and the Search for Objectivity

Douglas A. Kysar

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Douglas A. Kysar : Regulating from Nowhere: Environmental Law and the Search for Objectivity before purchasing it in order to gage whether or not it would be worth my time, and all praised Regulating from Nowhere: Environmental Law and the Search for Objectivity:

13 of 13 people found the following review helpful. Excellent defense of politics and ethics vs. mainstream

economics By A. J. Sutter It's been a while since I had the pleasure of writing so many check marks in the margins of a book. This one presents an acute critique of cost-benefit analysis (CBA) and a principled argument for the restoration of the precautionary principle (PP) to its rightful place in American environmental law. But it also makes a powerful, more general case for the importance of the political and ethical, in opposition to the pseudo-"objective" economic trend that has been taking over government and American legal thinking generally in recent decades. And it achieves these by blending theory and concrete application, or, as the author (DK) puts it, "moving from the most abstract of continental theorizing to the most mundane of bureaucratic fish-counting" (@204). The continental theorizing of most importance here is the ethical theory of the French philosopher Talmud scholar, Emmanuel Levinas. He pointed out that the recognition of the "other" is the foundation of all ethics, starting from something so basic as "Thou shalt not kill." His version of ethics is thus "agent-relative," in which reasons are based on the identity of the agent, i.e. on who you are, and on a respect for the subjectivity of the person (or creature, as DK would have it) you're facing. Champions of CBA such as Cass Sunstein, formerly a law professor at U. of Chicago and now on leave from Harvard to serve in the Obama Administration, instead promote a more "agent-neutral" position claimed by utilitarianism, where reasons are based on abstract ideas of rightness or goodness (e.g., utility maximization). They ridicule the PP as inconsistent and an obstacle to progress, preferring Sunstein's mantra that "everything will depend on what the facts show and on the costs and benefits of alternative policies." But DK shows how this in effect claims that the state "has no meaningful agency, intention or limit." (@63-64.) Moreover, a "just the facts" or maximizing approach isn't sufficient to explain why that approach is ethically the right one to take. In contrast, the PP's openness is its strength. It "remind[s] the political community that it is a distinctive actor within history," the way that the Hippocratic Oath reminds a physician of his or her special role. Contrary to Sunstein al.s' jibes, the PP isn't intended to serve literally as a program of action any more than is the Hippocratic principle "First, do no harm" (otherwise doctors would never stick needles into people or cut them open). Rather, both are "reminder[s] of a responsibility that cannot be shed, ethics that cannot be systematized." (@252-253.) Plus, by forcing a collective political confrontation with our own "fallibility and finitude," the PP also has an expressive force: while "trade-offs may in some sense be inevitable, as the economist reminds us," the PP reminds us that they "are *regrettably*" inevitable (@20.) On a practical note, DK shows how the PP is *already* embodied in the great environmental statutes enacted by Congress, such as the Clean Air Act and Clean Water Act -- it's not some aspirational, utopian proposal. CBA has made its inroads by undermining Congressional intention during the regulatory process (the very process over which Sunstein is now "czar," BTW). One interesting and sad lesson of the book is that Democratic advisers -- including Sunstein and William Nordhaus (who advised Jimmy Carter) -- can be just as awful for environmental regulation as the more obvious Dick Cheney co. Since a "look inside" isn't available, here's a brief summary of the contents: Part 1 of the book is a rather philosophical discussion contrasting agent-relative and agent-neutral approaches to normative ethics, and their analogues in political theory: roughly, communitarianism and libertarianism. Part 2 of the book offers a more practically-focused critique of inconsistencies in application of CBA, such as in connection with the construction of levees in New Orleans. DK also highlights some of the silly and appalling conclusions to which the logic of CBA can lead, e.g., how a policy advocated by Sunstein would lead to valuing the lives of members of certain racial minorities lower than lives of other people (@114f). And he includes a powerful condemnation of "Pareto optimality" (and, by extension, CBA) as justifying the social status quo, regardless of distributive inequality. Part 3 argues that environmental law can't ignore other nations, other generations or other forms of life (including those obtained by genetic engineering). It includes an excellent discussion of the intergenerational discounting used in economic analyses of climate change. Part 4 opens with a practical application of Levinasian ethics to Harvard economist Robert Stavins's 2002 attack on proposed EPA regulations for cooling water intake structures. It concludes with a discussion of the constitutional status of environmental protection, and a deliberately provocative proposal for an "Environmental Possibilities Act," included as an Appendix. I especially appreciated DK's resort to European philosophy, something American social scientists rarely make -- least of all in the legal academy, which today is dominated by Chicago-style "law and economics". DK is also going against the academy's grain in his attack on the welfare economics mentality. This is isomorphic in many ways to an attack on the defects of neoclassical economics overall, though DK rarely makes such an explicitly broad attack. The gist of many of DK's arguments, especially about Pareto optimality and distributive issues, will therefore be familiar if you've done some reading in heterodox economics. DK also makes a neat point when he mentions that Teddy Roosevelt used a utilitarian argument for preferring future generations to our own -- in contrast to the utilitarian discounting of future lives recommended by mainstream economics today. TR's point was that future people way outnumber us, so their interests should prevail. An analogous flip (though not mentioned in the book) could be made regarding CBA in the context of innovation. Per Sunstein, innovation should go forward unless its costs are shown to outweigh its potential benefits; but nothing inherent in CBA prevents the burden of proof from running in the opposite direction (proving benefits will outweigh potential costs). While DK writes in a dense style intended for an academic readership, by academic standards he often does so with deep feeling. (There's a one-line paragraph "Voil " @ 193, though, the point of which utterly escaped me.) As for the content, my points of difference were few. DK's criticism of the "environmental Kuznets curve" was a bit restrained for my taste; and his

frequent references to "complex adaptive systems" rely unnecessarily on a very particular concept of complexity (namely, the point of view of the Santa Fe Institute). I was a little frustrated DK didn't mention Theodore Porter's "Trust in Numbers" (1996), which shows that CBA was invented during the 1930s *for the specific purpose* of replacing a more open political process with a behind-closed-doors one: seems to me as if it could have added firepower to DK's critique. My biggest disagreements were with DK's endorsing some ideas of Herman Daly, concerning faith in tradable permit schemes (@246), and in the possibility of achieving some sort of equilibrium in resource use (@241). The latter is impracticable because we lack sufficient a priori knowledge to know all the resources, including environmental "services", we're using when we use them (the "Big Yellow Taxi" problem). This is all small stuff. I reserve somewhat more criticism for the publisher. The price is high enough for a hardcover book, though YUP seems not to have published a hardcover version. Yet YUP also was too stingy with pages to include a bibliography. The index is sometimes keyed to the footnotes, but inconsistently so (and DK's reference to Robert Solow, whose apparent absence had shocked me when I first opened the book, is indexed as "Snow, Robert"): another economy, perhaps? I wish YUP's own cost-benefit analysis had had a different outcome. Especially, I hope the high price doesn't make YUP's apparent expectation of a limited readership for this book a self-fulfilling prophecy, because the book deserves a wide one.

Drawing insight from a diverse array of sources including moral philosophy, political theory, cognitive psychology, ecology, and science and technology studies Douglas Kysar offers a new theoretical basis for understanding environmental law and policy. He exposes a critical flaw in the dominant policy paradigm of risk assessment and cost-benefit analysis, which asks policymakers to, in essence, regulate from nowhere. As Kysar shows, such an objectivist stance fails to adequately motivate ethical engagement with the most pressing and challenging aspects of environmental law and policy, which concern how we relate to future generations, foreign nations, and other forms of life. Indeed, world governments struggle to address climate change and other pressing environmental issues in large part because dominant methods of policy analysis obscure the central reasons for acting to ensure environmental sustainability. To compensate for these shortcomings, Kysar first offers a novel defense of the precautionary principle and other commonly misunderstood features of environmental law and policy. He then concludes by advocating a movement toward environmental constitutionalism in which the ability of life to flourish is always regarded as a luxury we can afford.

Regulating from Nowhere is a bold, intriguing, innovative, and beautifully written work. It is extremely well thought out and makes an exceedingly important and original contribution to the field. No other work takes on the problems and issues surrounding environmental regulation with such a deep and sophisticated knowledge and understanding of the ideas of philosophy and political theory. Amy Sinden, Associate Professor, Temple University Beasley School of Law