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BOOK REVIEW

FOUNDATIONS OF ENVIRONMENTAL LAW AND POLICY.

WRITTEN BY RICHARD L. REVEZS.¹

NEW YORK: OXFORD UNIVERSITY PRESS. 1997. PP. 334.

A year ago, I thought I had made a mistake. My impulsiveness occasionally gets me into trouble, and this time I felt sure that joining the editorial staff of the *SOUTH CAROLINA ENVIRONMENTAL LAW JOURNAL* with only a budding knowledge of environmental law and policy was a step beyond my stride. I had experience with toxic tort cases the previous summer: Did the catch-all phrase "environmental law" encompass cases involving exposure to polychlorinated biphenyls (PCBs) and benzene? And what about federal regulation of environmental agencies like the EPA? How *does* Congress determine what environmental concerns should be regulated, anyway?

My anxieties would have subsided much earlier if I had read *FOUNDATIONS OF ENVIRONMENTAL LAW AND POLICY*,² a compilation of papers by various scholars with commentary by Professor Richard L. Revesz. In *FOUNDATIONS*, Professor Revesz divides a number of environmental issues into individual chapters, each one having articles or excerpts to illustrate arguments on both sides of the issue. He has tightly organized this compilation to expose the reader to a variety of philosophies, thus allowing the reader to draw her own conclusions from the information in the selections.

I. Theoretical Foundations

The first six chapters of *FOUNDATIONS* explore various theoretical foundations of environmental law and policy, including both economic and noneconomic views regarding environmental degradation, risk assessment and management, distributional consequences of environmental regulation, and regulatory implementation. "The Economic Perspective on Environmental Degradation" introduces the normative goal of environmental regulation through two papers³ that illustrate policy concerns with colorful economic scenarios. Like the herders in the "open pasture" scenario, who "has an incentive to add cattle. . . [but] render[s] the land unproductive as a result of

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² RICHARD L. REVEZS, *FOUNDATIONS OF ENVIRONMENTAL LAW AND POLICY* (1997) [hereinafter *FOUNDATIONS*].

³ Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243 (1968), reprinted in *FOUNDATIONS*, *supra* note 2, at 5; Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960), reprinted in *FOUNDATIONS*, *supra* note 2, at 8.

overgrazing,"⁴ polluters may profit at their environment's expense. In similar fashion, "Noneconomic Perspectives on Environmental Degradation" juxtaposes competing nonquantitative paradigms, which Revesz categorizes as "human-centered works" and "nature-centered works."⁵ In essence, however, "human-centered works" are anthropocentric standards by which one can order one's environment, and "nature-centered works" are those standards promoting a broader, biocentric equilibrium of rights.

The tension between these struggling paradigms typifies Professor Revesz's presentation, which serves as the grain of salt to be considered when weighing the conflicting environmental policies thrown upon the reader.⁶ This tension, however, also leads to the question: How do these conflicts resolve into regulatory standards? "The Scientific Predicate for Environmental Regulation: Risk Assessment" distinguishes risk assessment from risk management⁷ by focusing on hazard identification, dose-response evaluation, exposure assessment, risk characterization,⁸ and case studies that illustrate these procedures.⁹ An excerpt by Justice Stephen Breyer compares the general public's method of assessing environmental risk to the more objective approach of toxicologists, and then explores the various considerations justifying each.¹⁰ After determining which risks are acceptable, risk management regulates those risks worthy of attention.¹¹ During this decision-making process, legislatures weigh a number of competing factors grounded largely in economic justifications.¹²

⁴ FOUNDATIONS, *supra* note 2, at 4.

⁵ FOUNDATIONS, *supra* note 2, at 18.

⁶ Of course, Professor Revesz does not leave the reader without standards by which to evaluate these competing views. For example, in resolving conflicts between human-centered works and nature-centered works, five principles may be considered: (1) the principle of self-defense, which is justified when human life is threatened; (2) the principle of proportionality, which prioritizes interests according to their necessity; (3) the principle of minimum wrong; (4) the principle of distributive justice, under which good is maximized for all necessary interests; and (5) the principle of restitutive justice, which rehabilitates any distributional wrong suffered when prioritizing interests. See PAUL W. TAYLOR, *RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS* (1986), *excerpted in* FOUNDATIONS, *supra* note 2, at 29.

⁷ William D. Ruckelshaus, *Risk, Science, and Democracy*, ISSUES SCI. & TECH. Spring 1985, at 19, *reprinted in* FOUNDATIONS, *supra* note 2, at 48.

⁸ Alon Rosenthal et al., *Legislating Acceptable Cancer Risk from Exposure to Toxic Chemicals*, 19 *ECOL. L.Q.* 269 (1992), *reprinted in* FOUNDATIONS, *supra* note 2, at 52.

⁹ JOHN D. GRAHAM ET AL., *IN SEARCH OF SAFETY: CHEMICALS AND CANCER RISK* (1988), *excerpted in* FOUNDATIONS, *supra* note 2, at 58.

¹⁰ STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993), *excerpted in* FOUNDATIONS, *supra* note 2, at 65.

¹¹ BARUCH FISCHHOFF, *ACCEPTABLE RISK* (1981), *excerpted in* FOUNDATIONS, *supra* note 2, at 80.

¹² LESTER B. LAVE, *THE STRATEGY OF SOCIAL REGULATION: DECISION*

These justifications, especially those related to cost-benefit analysis, pervade the issue of distribution. In "Distributional Consequences of Environmental Policy," Professor Revesz analyzes policies that maximize "net benefits across the whole population [but] might nonetheless impose significant net costs on a subset of this population."¹³ For example, Robert Bullard's article advocates the "environmental justice movement," which argues that disparities in regional environmental quality correspond directly to racial demography.¹⁴ But do interracial tensions really cause these disparities? Vicki Been answers in the negative, proposing that the inequalities are due instead to market dynamics.¹⁵ She then construes the ambiguous concept of "fairness" as one relative to distributional patterns, cost-internalization, and process.¹⁶ Henry Peskin's case study of the Clean Air Act reinforces Been's conclusions by countering the environmental justice movement's assumption that each individual in a region shares the benefits of environmental regulation equally with the region's other inhabitants.¹⁷

Professor Revesz concludes the first section of *FOUNDATIONS* with a sequence of articles¹⁸ that addresses the regulatory tools available to amend any inequities that might exist.

FRAMEWORKS FOR POLICY (1981), *excerpted in FOUNDATIONS, supra note 2, at 84.*

¹³ *FOUNDATIONS, supra note 2, at 102.*

¹⁴ ROBERT D. BULLARD, *CONFRONTING OF ENVIRONMENTAL RACISM: VOICES FROM GRASSROOTS* (1993), *excerpted in FOUNDATIONS, supra note 2, at 104.*

¹⁵ Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?* 103 *YALE L.J.* 1383 (1994), *reprinted in FOUNDATIONS, supra note 2, at 107.*

¹⁶ Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 *CORNELL L. REV.* 1001 (1993), *reprinted in FOUNDATIONS, supra note 2, at 112.*

¹⁷ Henry Peskin, *Environmental Policy and the Distribution of Benefits and Costs*, in *CURRENT ISSUES IN ENVIRONMENTAL POLICY* (Paul R. Portney ed., 1978), *reprinted in FOUNDATIONS, supra note 2, at 117.*

¹⁸ Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 *STAN. L. REV.* 1333 (1985), *reprinted in FOUNDATIONS, supra note 2, at 133*; WILLIAM J. BAUMOL & WALLACE E. OATES, *THE THEORY OF ENVIRONMENTAL POLICY* (1988), *excerpted in FOUNDATIONS, supra note 2, at 139*; PETER BOHM, *DEPOSIT-REFUND SYSTEMS: THEORY AND APPLICATIONS TO ENVIRONMENTAL, CONSERVATION, AND CONSUMER POLICY* (1981), *reprinted in FOUNDATIONS, supra note 2, at 141*; Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 *J. LEGAL STUD.* 357 (1984), *reprinted in FOUNDATIONS, supra note 2 at 144*; WESLEY A. MAGAT & W. KIP VISCUSI, *INFORMATIONAL APPROACHES TO REGULATION* (1992), *excerpted in FOUNDATIONS, supra note 2, at 149.*

II. Political Dimensions

FOUNDATIONS next examines the impact of federalism and public choice upon environmental policy. In "Federalism and Environmental Regulation", Richard Stewart advocates increased state regulation of the environment for reasons that revolve around economic unattractiveness, using the "tragedy of the commons" scenario¹⁹ encountered earlier.²⁰ First, Stewart considers arguments in support of centralized environmental regulation, but then counters with rationales for decentralization.²¹ Professor Revesz summarizes these rationales, stating that:

[f]irst, with respect to some regulatory activities, there may be diseconomies of scale. Second, centralized decision making impairs self-determination. Third, the costs of environmental regulation may be distributed in a regressive manner; this regressive manner may be particularly offensive if it is not the product of local mechanisms.²²

Revesz then counters Stewart's thesis, arguing that decentralization encourages states to underregulate in order to foster an attractive economy, which inevitably impairs other decentralized regulatory activity in areas such as safety and social welfare.²³

To the contrary, common sense dictates that environmental legislation is not so much the indigenous product of governmental say-so as it is a reflection of societal pressure upon legislatures. In "Environmental Law and Public Choice," environmental regulation is construed as a function of pressure by powerful lobbies.²⁴ An article by E. Donald Eliot, Bruce A. Ackerman, and John C. Millian traces the Clean Air Act's passage under this hypothesis and argues that the Act's passage would not have occurred but for Senator Edmund Muskie's threat to raise environmental issues in the 1972 Presidential election.²⁵ Then-President Richard M. Nixon responsively

¹⁹ Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977), reprinted in *FOUNDATIONS*, *supra* note 2, at 163.

²⁰ See Hardin, *supra* note 3, at 1243.

²¹ Stewart, *supra* note 19, at 1196.

²² *FOUNDATIONS*, *supra* note 2, at 161.

²³ Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992), reprinted in *FOUNDATIONS*, *supra* note 2, at 169.

²⁴ *FOUNDATIONS*, *supra* note 2, at 183.

²⁵ E. Donald Eliot et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985), reprinted in *FOUNDATIONS*, *supra* note 2, at 186.

elevated environmental issues in the federal agenda, which spawned the Clean Air Act.²⁶ Ackerman and William T. Hassler evaluate the 1977 amendments to the Clean Air Act with reference to the lobbying efforts of the high-sulfur coal industry, proposing that the amendment's emission requirements actually *increased* air pollution.²⁷ Similarly, B. Peter Pashigian contends that the Prevention of Significant Deterioration program of the 1977 amendments was opposed by regions with high air quality because the program inhibited economic growth.²⁸ But is economic prosperity always the prime mover behind environmental regulation? If not, Michael Maloney and Robert McCormick suggest that it is at least a primary factor, showing that environmental regulation increases the stock prices of native industries subject to the regulation.²⁹ Professor Revesz concludes his examination of the public's role in environmental legislation with an article by Daniel Farber, who argues that only politicians' ambitious exploitation of the public demand fuels environmental legislation.³⁰

III. Case Studies

Two case studies illustrate issues in environmental regulation through the Clean Air Act and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). "Control of Air Pollution" traces the history of the Clean Air Act and its amendments in 1977 and 1990 and attempts to answer two important questions: What are the compliance requirements for areas with air quality better than the nationally uniform concentration of pollutants, which is prescribed by the Clean Air Act? And, what happens if these uniform standards are not met?³¹ James Krier's article, however, challenges the assumption that uniform standards are desirable in the first place. Instead, he argues that the costs and benefits of pollution vary from region to region and that the standards should reflect this variance.³² George Eads analyzes the significance of costs, criticizing judicial decisions that prohibit the EPA

²⁶ *Id.*

²⁷ BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR (1981), *excerpted in* FOUNDATIONS, *supra* note 2, at 193.

²⁸ B. Peter Pashigian, *Environmental Regulation: Whose Self-Interests Are Being Protected?* 23 ECON. INQUIRY 551 (1985), *reprinted in* FOUNDATIONS, *supra* note 2, at 201.

²⁹ Michael T. Maloney & Robert E. McCormick, *A Positive Theory of Environmental Quality Regulation*, 25 J.L. & ECON. 99 (1982), *reprinted in* FOUNDATIONS, *supra* note 2, at 205.

³⁰ Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59 (1992), *reprinted in* FOUNDATIONS, *supra* note 2, at 210.

³¹ FOUNDATIONS, *supra* note 2, at 223-224.

³² James E. Krier, *The Irrational National Air Quality Standards: Macro- and Micro-Mistakes*, 22 UCLA L. REV. 323 (1974), *reprinted in* FOUNDATIONS, *supra* note 2, at 226.

from considering compliance costs in setting uniform standards.³³ Indeed, because the normative goal of environmental regulation should be to reduce, if not eliminate, pollution, any costs incurred in perfecting this goal should be factored into the regulatory equation. Craig Oren discusses these methods of reduction, which he coins "control-compelling" and "site shifting," involved in reducing pollution, analyzing the regulatory and redistributive aspects of the Clean Air Act's Prevention of Significant Deterioration program.³⁴

Likewise, "Liability for the Cleanup of Hazardous Waste Sites" examines the impact of CERCLA, which has been criticized for its breadth of liability and for high cleanup costs.³⁵ Professor Revesz and Richard Stewart introduce CERCLA with an overview of its liability, taxing provisions, and procedural requirements.³⁶ The success of CERCLA's risk deterrence is directly related to the future uses of polluted land.³⁷ Revesz and Lewis Kornhauser conclude by weighing the pros and cons both of joint and several liability and of nonjoint liability, which, in the context of CERCLA, is complicated by the lapse of time between pollution and cleanup and by the disappearance of potentially liable parties.³⁸

IV. Environmental Law in an International Community

Of course, environmental issues do not arise only within our national boundaries. One nation's environmental policies can affect another's environment and economy,³⁹ therefore elevating the importance of regulating the environment while

³³ George Eads, *The Confusion of Goals and Instruments: The Explicit Consideration of Cost in Setting National Ambient Air Quality Standards*, in *TO BREATHE FREELY: RISK, CONSENT, AND AIR* (Mary Gibson ed., 1985), reprinted in *FOUNDATIONS*, *supra* note 2, at 231.

³⁴ Craig N. Oren, *Prevention of Significant Deterioration: Control-Compelling Versus Site-Shifting*, 74 *IOWA L. REV.* 1 (1988), reprinted in *FOUNDATIONS*, *supra* note 2, at 236.

³⁵ *FOUNDATIONS*, *supra* note 2, at 247.

³⁶ Richard L. Revesz & Richard B. Stewart, *The Superfund Debate*, in *ANALYZING SUPERFUND: ECONOMICS, SCIENCE, AND LAW* (Richard L. Revesz & Richard B. Stewart eds., 1995) [hereinafter *ANALYZING SUPERFUND*], excerpted in *FOUNDATIONS*, *supra* note 2, at 249.

³⁷ James T. Hamilton & W. Kip Viscusi, *The Magnitude and Policy Implications of Health Risks from Hazardous Waste Sites*, in *ANALYZING SUPERFUND*, *supra* note 36, excerpted in *FOUNDATIONS*, *supra* note 2, at 256.

³⁸ Lewis A. Kornhauser & Richard L. Revesz, *Evaluating the Effects of Alternative Superfund Liability Rules*, in *ANALYZING SUPERFUND*, *supra* note 36, reprinted in *FOUNDATIONS*, *supra* note 2, at 264.

³⁹ Professor Stewart argues that a nation's environmental policies affect another's by spillover of pollution, exploitation of resources, increased future cost due to nonuse of resources, and economic competition due to lesser regulatory prohibitions. See Richard B. Stew-

considering foreign interests.

In "Environmental Regulation and International Trade," Professor Revesz explores the environment's commercial implications. For example, environmental issues played an important role in the debate surrounding the General Agreement on Tariffs and Trade (GATT), and they are playing an equally significant role in the passage of the World Trade Organization, GATT's imminent successor.⁴⁰ And more recently, the United States debated several environmental policies before ratifying the North American Free Trade Agreement.⁴¹ With these implications in mind, Howard Chang criticizes the decision of a GATT panel, which applied GATT's favored "carrots only" policy.⁴² Chang argues that in contrast of offering "carrots," or economic incentives for compliance with environmental regulations, trade sanctions deter overuse more effectively.⁴³

"International Environmental Law" concludes FOUNDATIONS and begins by exploring the concept of "sustainable development." Edith Brown Weiss equates sustainable development with intergenerational equity, characterized by preservation, prevention, and conservation.⁴⁴ Alternatively, Robert Solow defines it mathematically by subtracting the value of expended nonrenewable resources and environmental assets from nation's economic activity.⁴⁵ Solow argues that the concept involves each generation's using its nonrenewable and environmental resources to ensure future generations with a similar standard of living.⁴⁶ However, valuation always presents itself problematically in deciding whether one generation's standard of living is comparable to another's, especially without a central government to facilitate international agreement⁴⁷ and with a vast disparity in the wealth of different na-

art, *International Trade and Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329 (1992), reprinted in FOUNDATIONS, *supra* note 2, at 281.

⁴⁰ FOUNDATIONS, *supra* note 2, at 279.

⁴¹ *Id.*

⁴² Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131 (1995), reprinted in FOUNDATIONS, *supra* note 2, at 289.

⁴³ *Id.* See also, KRIER, *supra* note 32. Cf., Jagdish Bhagwati & T.N. Srinivasan, *Trade and the Environment: Does Environmental Diversity Detract from the Case for Free Trade?* in JAGDISH N. BHAGWATI & ROBERT E. HUDEC, FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? (1996), reprinted in FOUNDATIONS, *supra* note 2, at 295.

⁴⁴ Edith Brown Weiss, *Intergenerational Equity: A Legal Framework for Global Environmental Change*, in EDITH BROWN WEISS, ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS (Edith Brown Weiss ed., 1991), reprinted in FOUNDATIONS, *supra* note 2, at 309.

⁴⁵ Robert Solow, *An Almost Practical Step Toward Sustainability*, 19 RESOURCES POL'Y 162 (1993), reprinted in FOUNDATIONS, *supra* note 2, at 312.

⁴⁶ *Id.*

⁴⁷ Oran R. Young, *The Politics of International Regime Formation: Managing Natural Resources and the Environment*, 43 INT'L ORG. 349 (1989), reprinted in FOUNDATIONS,

tions.⁴⁸

In conclusion, *FOUNDATIONS* mediates contrasting viewpoints of various facets of environmental policy and law. It does not help the reader to learn substantive aspects of environmental regulation, but rather provides a model for analyzing environmental laws and their justifications.

Vernon Sumwalt

supra note 2, at 315.

⁴⁸ Henry Shue, *Subsistence Emissions and Luxury Emissions*, 15 *LAW & POL'Y* 39 (1993), reprinted in *FOUNDATIONS*, *supra* note 2, at 322.