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# Boldly Precautionary: Douglas Kysar's *Regulating from Nowhere*

A Book Review by Daniel Mandel of *Regulating from Nowhere: Environmental Law and the Search for Objectivity* by Douglas Kysar (Yale University Press 2010).

## INTRODUCTION

The opening words of the National Environmental Policy Act of 1969 seem to establish strikingly unequivocal goals: to “encourage productive and enjoyable harmony between man and his environment” and “to promote efforts which will prevent or eliminate damage to the environment.”<sup>1</sup> Read plainly, the National Environmental Policy Act and other landmark environmental legislation of the 1960s and 1970s do not abide partial efforts or marginal tinkering.<sup>2</sup> They instead set out an ambitious, if unattainable, environmental vision for America.

Fast-forward to 2009, and the terrain has shifted dramatically. In an executive order appended to the National Environmental Policy Act preamble, President Barack Obama declared that, in order to achieve the nation’s environmental goals, federal agencies “shall prioritize actions based on a full accounting of both economic and social benefits and costs . . . extending or expanding projects that have net benefits, and reassessing or discontinuing under-performing projects.”<sup>3</sup> Gone is the idealistically absolutist stance of 1969. Technocratic efficiency, in the form of cost-benefit analysis, is now the order of the day. Once dreamers, our political leaders have become bean counters. That shift, according to Yale Law School professor Douglas A. Kysar, lies at the heart of America’s failure to construct a meaningful environmental agenda.

In *Regulating from Nowhere: Environmental Law and the Search for Objectivity*, Professor Kysar systematically critiques the ascendancy of cost-benefit analysis and other tools of economic reform in environmental law.<sup>4</sup>

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1. 42 U.S.C. § 4321 (2006).
2. See, e.g., Endangered Species Act of 1973, 16 U.S.C. § 1531(c)(1) (2006) (“[A]ll federal departments and agencies shall seek to conserve endangered species and threatened species.”).
3. Exec. Order No. 13,514, 74 Fed. Reg. 52,117, 52,117 (Oct. 5, 2009), *reprinted in* 42 U.S.C.A. § 4321 (West 2009).
4. DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* 1–2, 10 (2010).

Cost-benefit analysis is a tool for evaluating policy proposals, in which the total expected costs of a proposed policy (including opportunity costs) are weighed against the total expected benefits in order to choose the best net outcome.<sup>5</sup> Professor Kysar rejects the “familiar script” of current American environmental law in which “our early, ‘excessive’ efforts” have yielded to the “basic superiority of the economic approach.”<sup>6</sup> In place of the utilitarian logic of cost-benefit analysis, Professor Kysar seeks to re-illuminate the “forgotten wisdom” of the supposedly discredited precautionary principle—environmental law’s traditional ethical heuristic, embodied in the National Environmental Policy Act preamble, which directs policymakers to regulate in proportion to perceived threats to human health or the environment, regardless of a full showing of empirical cause-and-effect relationships.<sup>7</sup> Professor Kysar criticizes how cost-benefit analysis has been applied in practice, using several case studies to expose its methodological weaknesses, intellectual over-confidence, and systematic underestimation of the benefits of environmental protection.<sup>8</sup>

However, Professor Kysar does not stop at this post hoc critique; he also carefully reveals the unstable theoretical underpinnings of the economic approach to environmental law. In its unyielding drive for empiricism and objectivity, Professor Kysar argues, the economic reform agenda denies policymakers and the polity any sense of agency and responsibility and thus lacks the capacity to motivate peremptory, normative environmental goals.<sup>9</sup> *Regulating from Nowhere* argues compellingly that, however weakly cost-benefit analysis and other tools of economic reform provide answers to the “how?” of environmental law, such tools are fatally silent on the question of “why?”<sup>10</sup>

#### I. COST-BENEFIT ANALYSIS IN PRACTICE: KATRINA AS CASE STUDY

Woven throughout *Regulating from Nowhere* are descriptions of instances where a utilitarian, cost-benefit approach to regulation produced inadequate policy outcomes. In his most dramatic indictment of the use of cost-benefit analysis (CBA) in practice, Professor Kysar shows how the U.S. Army Corps of Engineers’ use of analytic models such as the “standard project hurricane” (SPH), which attempted to quantify the risk of natural disaster and set an

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5. See David L. Weimer, *Cost-benefit Analysis*, NEW PALGRAVE DICTIONARY OF ECON. ONLINE (2008), [http://www.dictionarofeconomics.com/article?id=pde2008\\_C000397](http://www.dictionarofeconomics.com/article?id=pde2008_C000397).

6. KYSAR, *supra* note 4, at 1–2, 10.

7. *Id.* at 2, 9; see, e.g., United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, ¶ 15, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (Aug. 12, 1992). (“Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”).

8. See, e.g., KYSAR, *supra* note 4, at 204–28 (discussing the controversy over how best to regulate large U.S. power plants’ withdrawal of cooling water from nearby waterways).

9. *Id.* at 14.

10. See *id.* at 3.

“optimum” level of protection, ultimately led to defense systems that proved disastrously inadequate during Hurricane Katrina.<sup>11</sup> Using a relatively small sample size—a fifty-seven year record of hurricanes in the Gulf of Mexico—the Army Corps predicted future storm behavior, assuming that storm intensity would follow a normal distribution.<sup>12</sup> Compounding this limited data set, the Army Corps set the SPH standard at the predicted one hundred-year low for central pressure.<sup>13</sup> Nothing in the model demanded that the Army Corps choose this one hundred-year standard; indeed, later revisions to the SPH admitted that the decision was essentially arbitrary from a technical standpoint.<sup>14</sup> The “optimum” level of storm protection, supposedly grounded in empirical climate science, was actually influenced by economic efficiency considerations that the Army Corps never acknowledged or built into the SPH model itself.<sup>15</sup> Rather than recognize the inherently uncertain threats posed by natural disasters, the Army Corps crudely attempted to quantify the economic risk of a major storm, focusing on the benefits accruing from the protection of real and personal property and completely excluding lost human lives from the equation.<sup>16</sup> “Because they could not measure what is important,” Professor Kysar writes, “they made important what they could measure.”<sup>17</sup> Consequently, the opaque, highly technical SPH greatly undersold the case for storm protection compared to the simpler return-period approach, in which systems are designed to protect against the worst storm that can be expected over a specified period of time.<sup>18</sup>

The thousands of lives lost as a result of Hurricane Katrina<sup>19</sup> laid bare the SPH model’s folly and reawakened policymakers’ precautionary instincts.<sup>20</sup> In the wake of the disaster, an Interagency Performance Evaluation Task Force<sup>21</sup> acknowledged flaws in the SPH model and urged policymakers to adopt a goal

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11. *Id.* at 75.

12. *Id.* at 77–78.

13. *Id.* at 80–81. Central pressure corresponds inversely with storm intensity. *Id.*

14. *Id.* at 83.

15. *Id.*

16. *Id.* at 87.

17. *Id.* at 88.

18. *Id.* at 89. As an example of this more conventional, publicly accessible approach, Professor Kysar offers the Netherlands’ ten-thousand-year storm protection system: initiated in response to a devastating 1953 storm, it is a “collective project that has become nothing less than a part of the Dutch ‘national identity.’” *Id.*

19. According to the State of Louisiana’s official statistics, Hurricane Katrina resulted in the deaths of 1464 people. Some unofficial counts put the death toll around 1800, while John Mutter, a professor at Columbia University, put the total above 3500, basing the number on “personal testimonials and public records of those killed in Katrina.” Lisa Olsen, *Who Died in Hurricane Katrina?*, HOUS. CHRON. (Aug. 31, 2010, 6:11 PM), <http://www.chron.com/disp/story.mpl/nation/7177268.html>.

20. KYSAR, *supra* note 4, at 88–89.

21. Convened by the Chief of the Army Corps to evaluate the performance of the New Orleans hurricane and flood protection system, engineers and scientists from federal, state, and local government agencies, academia, and private industry comprised the task force. Press Release, U.S. Army Corps of Engineers, Interagency Performance Evaluation Task Force Panel Members (Jan. 10, 2006), <http://www.usace.army.mil/CECW/Documents/cecwe/ipet/IPET-Panel-HQ-NR-revised.pdf>.

of resilience, defined as “the ability to withstand, without catastrophic failure, forces and conditions beyond those intended or assumed in the design.”<sup>22</sup> The preliminary progress report submitted by President Obama’s Interagency Climate Change Adaptation Task Force in October 2010 also nodded toward the precautionary principle, citing building community resilience to climate change as a federal policy goal.<sup>23</sup> But as Professor Kysar noted at a recent panel discussion about his book, despite this moment of candor and humility, the climate change task force still came up with “a number”—a uniform, federal social cost of carbon that will be used to quantify the benefits of policies intended to curb climate change.<sup>24</sup> Kysar did not specifically address the empirical soundness of the government’s latest CBA: the problem is not that any one CBA is bad, he went on to say; rather, he has never seen a good CBA.<sup>25</sup> This core argument, that CBA and other tools of economic reform are fundamentally defective, motivates Kysar’s desire to move the precautionary principle—currently peripheral if acknowledged at all—back to the center of American environmental law.<sup>26</sup>

## II. ECONOMIC REFORM’S UNSTABLE UNDERPINNINGS

Professor Kysar’s philosophical critique of the economic reform agenda begins at the level of individual ethics. He sets up a spectrum of different ethical systems arranged according to the individual agent’s “thickness” or “thinness” within each system,<sup>27</sup> arguing that deontological (rules-based) ethics imagine a “thicker,” more agent-relative individual than utilitarian (consequentialist) ethics.<sup>28</sup> Because utilitarianism seeks to maximize the well being of all, it asks the individual actor to remain neutral, denying the actor any sense of agency or discretion.<sup>29</sup> Although this objective stance might produce better outcomes in particular circumstances, such a “thin” conception of

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22. KYSAR, *supra* note 4, at 89 (quoting U.S. ARMY CORPS OF ENG’RS, PERFORMANCE EVALUATION OF THE NEW ORLEANS AND SOUTHEAST LOUISIANA HURRICANE PROTECTION SYSTEM, DRAFT FINAL REPORT OF THE INTERAGENCY PERFORMANCE EVALUATION TASK FORCE, VOLUME I: EXECUTIVE SUMMARY AND OVERVIEW I-72 (2007)).

23. WHITE HOUSE COUNCIL ON ENVTL. QUALITY, PROGRESS REPORT OF THE INTERAGENCY CLIMATE CHANGE ADAPTATION TASK FORCE: RECOMMENDED ACTIONS IN SUPPORT OF A NATIONAL CLIMATE CHANGE ADAPTATION POLICY 11 (2010).

24. Douglas A. Kysar, Remarks at the American Constitution Society Panel: Regulating From Nowhere (Nov. 4, 2010), *available at* <http://www.acslaw.org/news/video/regulating-from-nowhere-environmental-law-and-the-search-for-objectivity>.

25. *Id.*

26. *See* KYSAR, *supra* note 4, at 19–20.

27. “Thickness” is understood as the extent to which an individual’s subjective beliefs and judgments are permitted to enter into that person’s ethical decision making. *Id.* at 41–42.

28. *Id.* at 41–44. As an example of deontological ethics, Kysar offers the act/omission distinction, which differentiates between actively causing an outcome and merely allowing it to happen. *Id.* at 26. The act/omission distinction finds its expression in imperative moral heuristics such as the precautionary principle and the Hippocratic Oath (“First, *do no harm.*”). *Id.*

29. *Id.* at 41–44.

subjective responsibility is problematic when adopted generally.<sup>30</sup> Once we adopt the impartial “view from nowhere” that utilitarianism requires of us, we forget why we felt obliged to behave ethically in the first place: “We no longer remember why our behavior matters,” Professor Kysar reasons, “because we no longer have a mechanism for ascribing that behavior peculiarly to us.”<sup>31</sup>

Moving from individual to collective ethics—as expressed in policy and politics—Kysar sees the deontological-utilitarian divide as underlying the debate over the direction of environmental law.<sup>32</sup> Economic reformers seek to push the law in a more utilitarian direction, taking greater account of opportunity costs and making decisions based on a supposedly empirical assessment of the consequences of various policy alternatives, such that “[e]verything depends on what the facts turn out to be.”<sup>33</sup> By contrast, the more deontological precautionary approach sees tragic tradeoffs rather than opportunity costs, and acknowledges a sense of shared duty and self-awareness that precedes any particular set of facts.<sup>34</sup> Because the coolly objective “cost-benefit state” toward which the economic reformers strive rejects any notion of collective agency, such a state cannot account for how it will maintain commitment to its goal of welfare maximization.<sup>35</sup> CBA and other tools of economic reform, although potentially useful for prescriptive advice in particular situations, fall short in achieving the more general task of helping to “underwrite the sense of normativity that causes agents to want to be moral at all.”<sup>36</sup> Precisely because of its prevailing neutrality and empiricism, the utilitarian ethic of CBA is unsuitable for motivating the major cooperative undertakings that will be required to deal with an amorphous and indeterminate problem like global climate change.

In particular, Professor Kysar argues that the CBA-driven approach fails to deal adequately with three categories of interest holders who do not have “full membership in the cost-benefit community”: other states, other generations, and other species.<sup>37</sup> With regard to other states, the logic of economic reform has transformed international environmental policymaking from a forum for discussion and influence into a zone of instrumentalist competition.<sup>38</sup> Whereas the United States once saw itself as a leader and example-setter on the international stage, now it does not want to forgo

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30. *Id.* at 45.

31. *Id.*

32. *Id.* at 47.

33. *Id.* at 56–58 (quoting Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 734 (2005)).

34. *Id.* at 58, 64.

35. *Id.* at 56.

36. *Id.* at 61.

37. *Id.* at 18–19.

38. *Id.* at 127.

bargaining power or sacrifice economic competitiveness.<sup>39</sup> Moreover, the utilitarian logic regards other nations as empirical givens and not as subjects with their own agency and responsibility.<sup>40</sup> In place of this “essentially hostile and noncommunicative game of chicken,” Professor Kysar seeks a “thicker,” more socialized international legal order in which the national political community more readily perceives itself as a subject that is responsible to and dependent upon other nations.<sup>41</sup>

Professor Kysar also criticizes CBA’s treatment of future generations, particularly its use of exponential discounting<sup>42</sup> to account for future costs and benefits.<sup>43</sup> Once again, he shows how the conventional precautionary approach to environmental law dealt with the problem of future generations more honestly and directly through overriding principles such as conservation and stewardship.<sup>44</sup> However, in its relentless effort at quantification and optimization, CBA uses discounting to attempt to efficiently compare present value and future value. In effect, this effort at normalization over time treats present and future generations inequitably, sanctions myopia, and underestimates the likely impact of our current behavior. As Professor Kysar notes, such “temporal feudalism” mistakenly renders future generations essentially incomprehensible.<sup>45</sup> Instead of discounting away the consequences of present actions, Professor Kysar proposes a reinvigorated “ethic of futurity” that more directly recognizes our intergenerational connectedness and responsibility.<sup>46</sup>

Finally, Professor Kysar confronts the most unknowable environmental interest-holder of all: other forms of life. Interestingly, he notes that many utilitarians, including Jeremy Bentham, have had high regard for animal welfare and the “rights of nature.”<sup>47</sup> The relevant question for inclusion in the utilitarian community of concern is, “[c]an they suffer?”<sup>48</sup> However, the utilitarianism of contemporary CBA rejects such an inclusive conception of welfare in favor of more rigidly economic, and thus exclusively human, notions of value. The expansive reach of our causal agency is obscured by the self-rationalizing categorical distinctions we draw between humans and other

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39. *Id.* at 132, 141. In defending *Massachusetts v. EPA*, in which the Supreme Court held that the EPA has the authority to regulate greenhouse gas emissions under the Clean Air Act, the government argued that unilateral action by the United States “might hamper the President’s ability to persuade key developing nations to reduce emissions.” *Massachusetts v. EPA*, 549 U.S. 497, 497 (2007).

40. KYSAR, *supra* note 4, at 146.

41. *Id.* at 143, 148.

42. Discounting addresses the problem of measuring well-being over time by setting a rate at which an increment of value today depreciates in value tomorrow. *See id.* at 157.

43. *Id.* at 157–58.

44. *Id.* at 152.

45. *Id.* at 173.

46. *Id.* at 152, 175.

47. *Id.* at 183.

48. *Id.* Indeed, Peter Singer advanced this essentially utilitarian argument in his seminal work, *Animal Liberation*. *Id.* at 184 (citing PETER SINGER, *ANIMAL LIBERATION* (1975)).

species.<sup>49</sup> In order to encounter other forms of life honestly, Professor Kysar argues, we must first “step back” and “reawaken a primordial sense of awe and incomprehension regarding the other’s being.”<sup>50</sup> Rather than attempt to assign value, we should embrace the indeterminacy that is characteristic of flourishing life.<sup>51</sup>

### III. “FAIL BETTER”: REFRAMING THE PRECAUTIONARY PRINCIPLE

Drawing on a wide array of sources, from court opinions to Continental philosophy, *Regulating from Nowhere* meticulously exposes the flaws in the dominant paradigm of environmental law. In addition to its practical shortcomings, Professor Kysar shows how CBA breaks down on a deeper, theoretical level. By denying any notion of collective agency, CBA fails to motivate political action or engage with the “others”—other states, other generations, and other species—that must bear the consequences of environmental degradation. In what effectively amounts to “ever-more-refined tinkering,” CBA normalizes the status quo distribution of rights and resources and curtails the transformative potential of law.<sup>52</sup>

Noting that “it takes a theory to beat a theory,” Kysar does not stop at revealing the economic reform agenda’s flaws.<sup>53</sup> Instead, he brings environmental law full-circle to the precautionary principle, sketching out an incremental, pragmatic approach to environmental constitutionalism that he believes might yet live up to the radical shift in understanding envisioned by environmental law’s early, daring proponents.<sup>54</sup> Rather than accept certain environmental harms as the inevitable price of efficiency, Kysar seeks an ethic that acknowledges the “tragic, lamentable consequences of human fallibility and finitude,” treats our environmental others equitably, and always admonishes us to “fail better.”<sup>55</sup> He closes the book with a model statute, the Environmental Possibilities Act, which would institutionalize the forgotten precautionary wisdoms of humility and self-awareness by preventing the use of CBA to fully satisfy the requirements of any environmental law.<sup>56</sup>

### CONCLUSION

Written passionately, and moving deftly between high theory and low politics (while studiously avoiding partisan rancor), *Regulating from Nowhere* gets at the heart of what is wrong with environmental law today and why the

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49. *Id.* at 191.

50. *Id.* at 194–95.

51. *Id.*

52. *Id.* at 238.

53. *Id.* at 2.

54. *Id.* at 231.

55. *Id.* at 20, 245.

56. *Id.* at 233, 250.

United States has reached a seemingly insurmountable impasse on major problems like climate change. Although dismayed by the pervasiveness of the economic reform agenda in contemporary policymaking, Kysar ultimately leaves the reader hopeful about the potential of U.S. environmental law. We need not move mountains to save the planet; instead, we must get past a narrow “accounting . . . of benefits and costs,”<sup>57</sup> acknowledge our collective responsibility, and get to work on fulfilling the transformative vision of “productive and enjoyable harmony between man and his environment”<sup>58</sup> that underlies the landmark laws already in place.

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57. Exec. Order No. 13,514, 74 Fed. Reg. 52,117, 52,117 (Oct. 5, 2009), *reprinted in* 42 U.S.C.A. § 4321 (West 2009).

58. 42 U.S.C. § 4321 (2006).

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