

BOOK REVIEW

THE LEGAL LANDSCAPE – A REVIEW OF JOHN COPELAND NAGLE, *LAW’S ENVIRONMENT: HOW THE LAW SHAPES THE PLACES WE LIVE*

John Copeland Nagle, *Law’s Environment: How the Law Shapes the Places We Live* (Yale University Press, New Haven, CT 2010), 298 pp.

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Envision a geographic region, such as the Grand Canyon, Seattle, or the Great Salt Lake. Then, systematically analyze all the federal and state environmental laws, regulations, court and administrative agency decisions, as well as local regulations and ordinances that converge to make that place distinct. Continue this analysis far back in time to include international agreements, treaties, and accords, as well as environmental repercussions of human civilization. In one region, it is likely that over a dozen laws and a multitude of other conditions operate to make that region—with its character, allure, or charm—the place it is.

In *Law’s Environment: How the Law Shapes the Places We Live*, John Copeland Nagle reflects on unremarkable geographical lands impacted by major environmental legislation and considers the values implicit in environmental legislation.¹ Nagle’s thesis is that *multiple* environmental laws typically weave together to shape a region. In this text, the consequences of environmental legislation are examined by looking at the impact of the laws on the natural environment of five distinct places.

The prominence of storytelling is a theme throughout this text. In the “Introduction,” Nagle recalls the ways that stories about natural features

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1. JOHN COPELAND NAGLE, *LAW’S ENVIRONMENT: HOW THE LAW SHAPES THE PLACES WE LIVE* (2010).

such as those in Yosemite National Park, or catastrophes such as Love Canal, have brought environmental issues into the forefront of public consciousness.² Stories are useful to teach us about how a law operates, remind parties why laws exist in the first place, illustrate theoretical perspectives in scholarship, persuade tribunals, compel parties to act, and examine legal issues free from preconceived notions. To be sure, stories have moved legislators to enact major environmental legislation including the Endangered Species Act,³ the Clean Water Act,⁴ the Superfund Act (CERCLA),⁵ and countless others. Stories are also significant because they can illuminate “the role of law and what an examination of a specific place tells us about the law, those places, and the ongoing relationship between them.”⁶ Nagle situates the accounts in this text among other powerful narratives. For instance, Nagle’s chapter about the Susquehanna River follows earlier accounts which depict the history of the river,⁷ the communities through which the river flows,⁸ the impact of the Three Mile Island nuclear disaster,⁹ and geological and geographical features.¹⁰

This text is not a historical account of environmental law; rather it looks forward and reveals how laws actually function so as to impact the natural environment. Each chapter tells a story “about the role of law in shaping the environmental conditions in specific places.”¹¹ Nagle reminds readers that “environmental law has lost its sense of direction because it too often neglects the places that it is intended to govern.”¹² Intense focus on a particular landscape provides a novel approach and serves as a model for environmental policymakers as well as environmental scholars and activists.

Cultural values are another theme in this text, as certain values are implicit in legislation that protects one physical locale over another. Each

2. *Id.* at 2, 114.

3. Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2006).

4. Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006).

5. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2006).

6. NAGLE, *supra* note 1, at 3.

7. *Id.* at 147–48 (citing CHARLES WEATHER BUMP, *DOWN THE HISTORIC SUSQUEHANNA: A SUMMER’S JAUNT FROM OTEGO TO THE CHESAPEAKE* (1899); ZACHARIAH POULSON, JR., *A DESCRIPTION OF THE RIVER SUSQUEHANNA, WITH OBSERVATIONS ON THE PRESENT STATE OF ITS TRADE AND NAVIGATION, AND THEIR PRACTICABLE AND PROBABLE IMPROVEMENT* (1796)).

8. *Id.* (citing JACK BRUBAKER, *DOWN THE SUSQUEHANNA TO THE CHESAPEAKE* (2002)).

9. *Id.* (citing SUSAN STRANAHAN, *SUSQUEHANNA: THE RIVER OF DREAMS* (1993)).

10. *Id.* (citing CARL CARMER, *THE SUSQUEHANNA* (1955)).

11. NAGLE, *supra* note 1, at 4.

12. *Id.* at 5.

chapter emphasizes that the values underlying environmental laws are “elusive” and “conflicting.”¹³ The values are elusive because “[l]aws are based on how society values the natural environment, but the ways in which we value environments evolve and change over time.”¹⁴ Additionally, the values implicit in environmental legislation are subsumed by other more immediate needs, usually economic. Environmentalists, as well as law and policy makers, have failed to accurately persuade stakeholders of the need for environmental protection when the need is not obvious. Each region discussed by Nagle exemplifies that the human response to the environment changes over time and demonstrates the failure of lawmakers to explain why the environment is worth protecting. To be sure, the agencies, various levels of government, and private parties that oversee and implement legislation frequently possess dueling agendas.

More problematic are the other non-environmental laws which have environmental consequences. For instance, laws creating and facilitating transportation have significant environmental impact. In the case of Adak Island in Alaska, the railroad brought people to the island in the first place, and federal appropriations fund and subsidize programs that are critical to the island’s survival.

Of course, Nagle focuses on the laws: environmental laws in each region that have unexpected consequences, that are too rigid to change with social norms, and that fail to respond to or address an environmental catastrophe or latent problem. Nagle has selected five places where major environmental laws merge to dictate the natural environment of a specific place: Adak Island in Alaska; Colton, California; Theodore Roosevelt National Park in North Dakota; the Susquehanna River in Pennsylvania, New York, and Maryland; and Alamogordo, New Mexico. Environmental laws have had unintended consequences in each region profiled.

In the chapter titled, “The End of the Earth,” Nagle recounts how nearly a dozen environmental laws, international treaties, state regulations, common law property rules, and local ordinances have transformed the landscape and dominated the fate of Adak Island, the second largest of the Aleutian Islands in Alaska.¹⁵ With the Bering Sea to the north and Pacific Ocean to the south, Adak is the southernmost community in Alaska, sharing

13. *Id.* at 242–43.

14. *Id.*

15. Nagle observes that these laws reflect the “alphabet soup” of federal environmental legislation: ANCSA, ANILCA, BCRA, CERCLA, CERFA, CWA, ESA, FIFRA, NEPA, and SARA. Additionally, the Wilderness Act and the Reindeer Act of 1937 impact Adak Island. NAGLE, *supra* note 1, at 11.

the same latitude as Vancouver Island in Canada.¹⁶ Adak is a remote place, but its few occupants have shaped the Island's natural environment in significant ways.¹⁷ Since 1913, environmental laws have altered the landscape from a remote wildlife refuge to a United States naval base, and finally to a small community of native Alaskans pursuing the development of a sustainable fishery.¹⁸ Yet, complications endure because of unaddressed problems including contamination left by the naval base and invasive species.¹⁹

Next, Colton, California, an exurb of Los Angeles, reveals the "story of environmental law not working" against the backdrop of economic depression.²⁰ First, apple orchards became cement factories which, among other things, caused severe environmental contamination.²¹ Second, the Federal-Aid Highway Act of 1944 split up the city's commercial districts, eviscerated the downtown, and created air pollution.²² Finally, the Endangered Species Act derailed an economic development plan envisioned to encourage economic growth by protecting the Delhi Sands flower-loving fly.²³ The Endangered Species Act has also required the town to maintain a preserve for the fly, absorbing valuable land and municipal funds.²⁴ And as Nagle explains, the Endangered Species Act, along with the regulatory agency, Congress, and the courts that have interpreted the law, have become a rigid barrier and a formidable obstacle, preventing Colton's residents from using the region as they deem most appropriate.²⁵

National parks are a treasure, yet, in the third chapter, "Heaven or Hell?," Nagle reminds his readers that they are not without legislative complications and controversy because they are simultaneously property owned by the federal government and property located in a distinct community.²⁶ Theodore Roosevelt National Park memorializes the Badlands and Grasslands of North Dakota as a place to be preserved for

16. *Id.* at 12.

17. *Id.* at 11.

18. *Id.*

19. *Id.* at 39–40.

20. *Id.* at 50.

21. *See* *Hulbert v. Cal. Portland Cement Co.*, 118 P. 928, 930 (Cal. 1911). Recognized by the California Supreme Court as the first nuisance case, the court enjoined operation of the cement company because dust produced from the factory would have destroyed the orchards. The cement company subsequently purchased the property and continued operating. NAGLE, *supra* note 1, at 53.

22. NAGLE, *supra* note 1, at 60.

23. *Id.* at 73.

24. *Id.* at 72–74.

25. *Id.* at 63–87.

26. *Id.* at 98.

recreation, wildlife, and appreciation of the unique qualities of the landscape, while also embodying the conflicting values inherent in national parks as the places chosen for preservation and use by future generations.²⁷ Nagle offers an insightful approach to examining why this region has been deemed a national park by listing and critiquing the reasons offered by the Parks Service in its official park newspaper.²⁸ Additionally, Nagle explains the complexities of “the Laws of National Parks,” beginning with the Organic Act of 1916, which provided the rules for national park management and specified the fundamental purposes of a national park—conservation and enjoyment. Nagle also discusses the role of the Environmental Protection Act, the Clean Air Act, the Clean Water Act, the Migratory Bird Treaty Act, the Endangered Species Act, the National Historic Preservation Act, the Federal Noxious Weed Act of 1974, and the Farmland Protection Policy Act.²⁹

And the story of this national park continues outside of the protected, national parks lands. Management of the park’s game—bison, elk, big horn sheep, antelope, and deer—raises further legal challenges, such as which parties are responsible when these animals ignore the park’s boundaries and wander into the surrounding community. The Badlands outside of the national park are protected by their inclusion in an area surrounding the national park known as the Little Missouri National Grasslands, and “the remaining lands actually present legal and policy issues that are unique among the public lands.”³⁰ Nagle summarizes the problem in this way: “one federal law [which] gave the land to private individuals and another federal law [which] took it back, and the residents of the land today still begrudge the fact that they lost ‘their’ land.”³¹ The ambiguities of ownership of the lands have resulted in contemporary problems, including grazing rights disputes.³² Adding an additional legal dimension, an area within the National Grasslands has been identified as a “strategic energy resource” where more than four billion barrels of oil are now recoverable.³³

The Susquehanna River flows through lackluster cities and towns in New York, Pennsylvania, and Maryland before draining into the Chesapeake Bay, impacting and impacted by dozens of individuals,

27. *Id.* at 95.

28. *Id.* at 110–12.

29. *Id.* at 116.

30. *Id.* at 130.

31. *Id.* at 133.

32. *Id.* at 137.

33. *Id.* at 138.

industries, governments, and public and private entities.³⁴ In the fourth chapter Nagle describes management of the river in the context of events that have not been “happy ones” and environmental laws that have failed.³⁵ Central Pennsylvania’s coal mines have polluted the water, and the country’s largest nuclear power disaster occurred at Three Mile Island.³⁶ Management complications abound because local, state, and federal governments each exercise some authority and control over the river’s management.³⁷ Further complications flourish because of the persistent problem of flooding and governmental efforts to prevent flooding and mitigate disasters when they occur. Numerous dams—too many to count—also regulate the movement of the river.³⁸ Pollution is persistent. Pollution was caused foremost by untreated sewage, then by sulfuric acid and hazardous waste from coal mining, and early, unregulated industrial mills, tanneries, food production and other factories.³⁹ Efforts to clean up the river after the state legislature and courts permitted much of the pollution to continue by excluding coal mine drainage from the Pennsylvania Clean Stream Laws have been inadequate.⁴⁰ Nagle recounts the most disheartening source of pollution in the river and its unforeseen and unfortunate consequences: a Wilkes-Barre gas station owner permitted hazardous waste, including oil and cyanide, to be dumped into a bore hole previously used to ventilate coal mines.⁴¹ This waste eventually appeared in the river and required the EPA to clean up the millions of gallons that had been poured down the hole.⁴² When the EPA sought to recover the cleanup costs from companies responsible, all but one, Alcan Aluminum, agreed to pay the clean-up costs.⁴³ Alcan Aluminum argued that under CERCLA it did not bear full responsibility and eventually altered CERCLA jurisprudence.⁴⁴ To be sure, public attitudes, the availability of funds, and the multitude of governments involved will impact the future of this river.

The final chapter, which focuses on Alamogordo, New Mexico, home of the White Sands National Monument, echoes a theme throughout this

34. *Id.* at 144.

35. *Id.* at 148.

36. *Id.*

37. *Id.* at 193.

38. *Id.* at 163.

39. *Id.* at 176–86.

40. *Id.* at 179.

41. The text includes a photograph of the filled-in bore hole. *See id.* at 182.

42. *Id.* at 181.

43. *Id.* at 183.

44. *United States v. Alcan Aluminum Corp.*, 892 F. Supp. 648, 650 (M.D. Pa. 1995), *aff’d*, 96 F.3d 1434 (3d Cir. 1996), *cert denied*, 521 U.S. 1103 (1997).

text: “[S]carcity produces value [L]ike most other pollution claims, time and place transform an otherwise valuable substance into an unwanted pollutant in a valued environment.”⁴⁵ The White Sands National Monument preserves a white-sands desert and sand dunes. In this chapter, light from around the region is the pollutant, and residents of the city have worked to control it, perhaps to the detriment of economic growth and development in the area.⁴⁶ This chapter also highlights the conflicting values regarding which laws should affect and protect a place. Here, the White Sands National Monument is a contender for inclusion as a UNESCO World Heritage Site, but Alamogordo residents worry that such a designation would allow international law and international organizations to interfere with their ability to control the area.⁴⁷

In each of the five chapters, Nagle’s reader is reminded that the “[l]aw is a tool, but it is a tool that is often wielded by those who seek to achieve results that reach beyond the normative goals that the laws were originally designed to accomplish.”⁴⁸ This is an important adage for environmental policymakers to remember when focusing on an issue: that ignoring the place, no matter how insignificant or unremarkable, can have significant long-term consequences.

There are other lessons to be learned from the landscapes Nagle has highlighted. First, there is a need for increased flexibility in environmental legislation.⁴⁹ Second, individual institutions should be created to oversee laws and regulations from differing jurisdictions that impact a single area.⁵⁰ Third, there must be a greater effort to educate members of the public about environmental laws so that the law is not seen as “an obstacle to be circumvented.”⁵¹ Nagle notes that “further research into the actual functioning of the law will well serve anyone who is interested in pursuing a vision of the natural environment of specific places.”⁵² It is “the importance of place” that Nagle invites environmental researchers and

45. NAGLE, *supra* note 1, at 223.

46. *See id.* at 224–25 (discussing light ordinances).

47. Nagle observes that such fears and concerns—although paranoid and “reminiscent of the 1950s or akin to those who claim to see UFOs in nearby Roswell”—may have some basis in the law. *Id.* at 214–16 n.26.

48. *Id.* at 247.

49. *Id.* at 248.

50. *Id.* at 249.

51. *Id.* at 251.

52. *Id.*

scholars to keep in mind when determining whether environmental laws actually do what legislators actually intend.⁵³

The lessons embedded in this text make it required reading for environmental lawyers, policy makers, and law students. Moreover, rich details, case law developments, and legislative history are recounted in journalistic style, making this piece of legal scholarship read unlike traditional legal scholarship. The footnotes are a goldmine of legal authority. This text is versatile, for each chapter could be read on its own as a study of that region or as a study of the context in which a specific law operates. Likewise, this work as a whole or the chapters individually could supplement a traditional environmental law course book.

Indeed, Nagle has showed that environmental law “too often neglects the places that it is intended to govern.”⁵⁴ But this reader, who is not an environmental law expert, is left wondering whether and how major federal environmental legislation and litigation can ever work to achieve the intended results. An example of a place where environmental laws succeeded in achieving the desired purpose, harmonized with the local interests, or responded to historical ambiguities would complement the text. Likewise, an example illustrating some environmental law successes might also convey the lesson that Nagle is trying to teach: that flexibility, coordination among institutions from different jurisdictions, and education will impact a natural landscape, but not to its detriment. But in the end, this reader is persuaded that those who draft and interpret statutes, regulations, and judicial decisions should look more closely at, and tell better stories about, the neglected, uninviting areas, with their overlooked, historically complex, and unspectacular environmental problems.

53. *Id.*

54. *Id.* at 5.