Green Justice, The Environment and the Courts

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Green Justice, the Environment and the Courts
Thomas More Hoban and Richard Oliver Brooks.
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Environmental law teaching is uniquely challenging for legal educators. Students must master rapidly changing, complex statutory materials, the understanding of which requires some comprehension of principles of the common law, science, economics, and governmental relations. To be fully effective, environmental lawyers must be trained to be sensitive to such ethical questions as the responsibility of individuals and societies to the natural world; at the same time, they must be proficient in the skills necessary for preparation of a case for litigation. Pedagogical problems are compounded because environmental issues invariably involve a web of institutional actors—legislatures, agencies, courts, both federal and state, as well as public and private corporations and consumers. Competency in environmental law also demands examination of the interplay between these institutional actors because of its often crucial importance to environmental outcomes. For these reasons, environmental law teachers constantly face questions of emphasis. They often vacillate between focus on particular anti-pollution statutes and more general decisionmaking processes; between organizing a course in environmental law around important recurring themes like cost-benefit analysis or risk assessment, or instead, concentrating on litigation skills. As a practical matter, the precise contours of a course in environmental law may be shaped by recently enacted legislation or by an important decision making the choice of pedagogical methods and materials indeterminate for law schools courses in environmental law.

Green Justice is designed for a different audience, not law teachers and students, but for undergraduates studying environmental law and policy, as well as for non-law graduate students in planning or public administration courses. The authors have clearly and wisely chosen to emphasize fundamental policy questions using significant appellate judicial opinions as the means to their end. In making this choice, Hoban and Brooks rely on time-honored law school methodology, using cases to introduce the interrelationship of the legal system and the environment. They introduce the cases with well-written text presenting themes found in the opinions. Study questions follow the cases. These are intended to provoke thoughtful discussion of the principles in the cases. In addition, the book contains a brief, but useful chronology of cases, a glossary of terms, and an extensive bibliography.
While the cases are an excellent vehicle for meeting the authors’ primary purpose which is to focus students and teachers on the policy issues that underly decisions in individual environmental cases, the book falls short of its secondary goal, to expose the process by which environmental law decisions are reached so that students may see that the law is tentative and exploratory, the outcome of a non-expert judge’s struggle to accommodate often sharply competing values. The authors have unfortunately failed to fully exploit the principal value of the case method, which, when used well, encourages exploration of legal processes and methods of decisionmaking. To use a case to show how legal process shapes the substance of environmental law rules, students must be made to grapple with a judicial opinion on its own terms. The weakness of this book is that it does not make that demand upon its readers. Instead, its study questions distract the student from the case and force premature focus on broad policy issues. The questions too often simply present the fundamental policy question which induced the authors to select the case in the first place.

The very first case illustrates the problem. The authors have selected the case to disabuse students of the notion that environmental law consists of anti-pollution law. Cleverly, they use a case which involves a dispute between two Miami Beach hotels, one claiming that the other’s construction will cast a shadow over its adjoining pool area. The introductory text makes the point that pollution is in the eye of the beholder, that whether something is harmful is often a value judgement and not objective fact. The quarrel over a shadow is the vehicle for showing that pollution is a broad enough notion to encompass any activity that interferes with the desires of others, and is not limited to substance-emitting activities. The difficulty is that the case itself, *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, does not address those points. Rather, its concern is whether a right to the free flow of light has been recognized by prior judicial decision or by statute. The study questions might have been constructed to lead students from the holding of the case which is that no right exists to free flow of light, to the broad question which interests the authors, the nature of pollution, but they are not. Instead, the authors assert that the fundamental question posed by the Fontainebleau case is, what is a pollutant, a question which is in fact never addressed by the Court. They go on to raise interesting questions about the nature of pollution and when the legal system ought to intervene to prevent or compensate for harm. By starting with the policy instead of with the case on its own terms, the authors undermine their own stated goal which is to expose the processes by which environmental law decisions are made. Immediate focus on the underlying policy issue shortcircuits important questions about the legal system. Had the authors started with the holding
of the case and the court's reasoning, readers would have been encouraged to explore, for instance: how new rights are recognized by a common law judge, the relationship between statutory and judge-made law, the nature of the nuisance action, and that whether a right exists often involves a preliminary cost-benefit analysis.

The same weakness persists through the rest of the book. Another example: Scenic Hudson is the case selected by the authors to illustrate how bureaucracy is controlled in a democratic society. In the introductory text, the authors quite properly identify some of the issues facing the court in that case. Those issues involve standing of parties to intervene in administrative hearing, the obligation of an agency to seek out facts independent of those presented by the applicant for a license, and finally the extent to which an agency must weigh impacts on the environment in their decisionmaking. The difficulty is that the study questions start by identifying the fundamental question posed by the case to be whether the existence of an environmental bureaucracy is consistent with the goal of environmental protection. To reach that question requires a giant leap from the case. The authors fail to provide the necessary steps.

Notwithstanding the distracting study questions, this book has value for teaching undergraduate environmental policy. The fourteen cases selected by the authors present most of the important and fascinating questions of environmental law. Part Four, in particular, realizes both the primary and secondary purposes of the authors, the cases selected for that section shows the relationship between law and ideals. Since in most instances, the cases are about ideals, the policy focus of the study questions serves to enhance the readers understanding of the impact of the processes of legal decisionmaking on the substance of environmental law. If, when using this book, teachers are alert to the need for construction of additional study questions to accompany the cases in the earlier sections, so that its full potential is exploited. Green Justice is a valuable addition to pedagogical materials available for undergraduate teaching of environmental policy.

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