Book Review

Breen, O. B., Dunn, A. and Sidel, M. *Regulatory Waves: Comparative Perspectives on State Regulation and Self-Regulation Policies in the Nonprofit Sector*. Cambridge University Press, 2017.

Reviewed by **Cassady V. Brewer**, Georgia State University College of Law, PO Box 4037, Atlanta, GA, 30302, USA, E-mail: cbrewer@gsu.edu

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From the U.S. tax-centric standpoint of this reviewer, it is self-evident that federal government-sponsored regulation of the nonprofit sector comes in waves. For instance, the *Tariff Act of 1894* was the first federal legislation granting special tax status to specific nonprofit organizations in the U.S.¹ It exempted charitable organizations from a two percent tax on corporate income enacted at the time. The next wave was the *Revenue Act of 1909* followed closely by the *Revenue Acts of 1913, 1917, and 1918*.² These revenue acts formed the modern-day basis of the U.S. federal income tax treatment of charitable nonprofits: prohibiting private inurement in exchange for exemption from tax and deductions for contributions. Thereafter, major U.S. tax legislation applicable to nonprofits was enacted in response to perceived abuses. For example, the *Revenue Act of 1950* created the “unrelated business income tax” applicable to nonprofits engaged in certain commercial activities competitive with for-profit organizations.³ Twenty-nine years later, the *Tax Reform Act of 1969* established a special tax regime applicable to a newly-defined category of nonprofits, private foundations.⁴ The new regime was designed to punish private foundations engaging in self-dealing, unreasonable accumulations, and other behaviors deemed contrary to the public interest. Finally, the *Pension Protection Act* passed in 2006 introduced new rules intended to curb perceived abuses by donor-advised funds, which had been growing exponentially during the years prior to 2006.⁵

¹ Arnsberger, P., Ludlum, M., Riley, M., and Stanton, M., *A History of the Tax-Exempt Sector: An SOI Perspective*, Statistics of Income Bulletin at p. 106 (Winter 2008) available at <https://www.irs.gov/pub/irs-soi/tehhistory.pdf>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

Less clear, however, is whether U.S. state-level nonprofit regulation proceeds in waves. In fact, from this casual observer's viewpoint, the adoption of U.S. state-level regulation regarding nonprofits compares more to tides than waves. For instance, original and revised versions of model nonprofit corporation acts made their way steadily across the 50 states since 1952 when the American Bar Association first drafted the statute.⁶ Similarly, spanning decades instead of years, state-sponsored charitable fundraising legislation,⁷ endowment investment and spending rules,⁸ and cause-marketing registration requirements⁹ gradually have been enacted across most of the 50 states. Thus, rather than being attributable to any external factors, it is logical to conclude that U.S. state-level regulation of nonprofits is due to the U.S. federalist system.

Perhaps clearer—at least to this reader—is the genesis of self-regulation within the U.S. nonprofit sector. Like U.S. federal government-sponsored regulation, waves of nonprofit self-regulation often follow scandal. For instance, the public's focus on generally isolated cases of abuse and mismanagement (such as lavish compensation arrangements, blatant lack of transparency and accountability, self-dealing transactions, or charitable contribution scams)¹⁰ typically lead nonprofits to introspection and adoption of remedial measures.¹¹

But what about the causal relationship, if any, between waves of federal- or state-sponsored regulation and self-regulation in the nonprofit sector? Do the waves correspond or does one follow the other? Does one recede while the other is prominent? Or do the waves coincide? What can we learn from jurisdictions other than the U.S.? Can we detect a pattern that predicts the what, why, where, when, who, and how of state-regulation and self-regulation in the nonprofit sector?

The book, *REGULATORY WAVES: COMPARATIVE PERSPECTIVES ON STATE REGULATIONS AND SELF-REGULATION POLICIES IN THE NONPROFIT SECTOR*, edited by Breen, Dunn & Sidel, takes on the ambitious goal of discerning the relationship, if any, between government-regulation and self-regulation in the nonprofit sector. The three

⁶ Marilyn E. Phelan, 1 *NONPROFIT ORGANIZATIONS: LAW AND TAXATION* § 1:11 (2d ed. 2019).

⁷ See National Association of State Charity Officials, *State Charity Registration Provisions*, May 15, 2020, available at <https://www.nasconet.org/wp-content/uploads/2020/05/NASCO-State-Charities-Registration-Survey-5.15.20-.pdf>.

⁸ See Uniform Laws Commission, *Prudent Management of Institutional Funds Act*, last visited June 10, 2020, available at <https://www.uniformlaws.org/committees/community-home?CommunityKey=043b9067-bc2c-46b7-8436-07c9054064a3>.

⁹ American Bar Association, Section of Antitrust Law, *ADVERTISING CLAIM SUBSTANTIATION HANDBOOK* Ch. IX Part C Section 1 (2017–18).

¹⁰ For a list of examples, see Sidel, *The Guardians Guarding Themselves: A Comparative Perspective on Nonprofit Self-Regulation*, 80 *Kent L. Rev.* 803 at 804–805 (2005).

¹¹ *Id.*

expert scholar-editors, aided by nine other accomplished scholar-authors, study regulatory trends in 16 different jurisdictions across the world.¹² According to editors Breen, Dunn & Sidel, the book examines both government- and self-regulation of nonprofits across multiple countries to identify “the contributing factors that might cause a state to switch between one form of regulatory regime (for example, statutory regulation) and another (for instance, self-regulation or co-regulation), or to combine them.”¹³ Breen, Dunn & Sidel write that this dynamic, if it exists, has never been addressed by scholars. The title of the book derives from the image of waves (regulatory trends) in the ocean (the nonprofit sector) that are independent yet derive from the same body of water and affect each other.

The book’s “wave” metaphor is compelling, but as the reader eventually discovers, it is inapt. The book concludes:

In sum, an analysis of the foregoing country case studies in this book, and in particular the interactions between statutory and self-regulation in each, leads us to conclude that these studies do not support the argument that statutory and self-regulation follow a predictable pattern or arise necessarily in causally related cycles (although there is some evidence that the gaps created by repressive, ineffective, or nonexistent statutory regulation can have a direct impact on the emergence of nonprofit self-regulatory initiatives).¹⁴

The failure of the book’s central metaphor left this reader feeling a bit “lost at sea” rather than informed about government- and self-regulation in the nonprofit sector. Nonetheless, there is no doubt that the book provides a comprehensive, in-depth examination of government- and self-regulatory trends in 15 of the 16 jurisdictions.¹⁵ Moreover, it is as important to “know what you don’t know” when studying a subject as it is to find an answer. This book presents a convincing argument that government-sponsored and self-regulation in the nonprofit sector are not causally related, at least not directly.

Although not supporting the conclusion that there is a predictable causal relationship between government- and self-regulation, the book identifies several important themes of which only a few are mentioned here. For instance, the country studies indicate that the relationship between the government and the nonprofit sector is more relevant in determining regulatory patterns than state-led versus self-regulatory waves. Another theme evidenced by the studies is that the

12 Australia, China, Brazil, Ecuador, England and Wales, Ethiopia, Ireland, Israel, Kenya, Malawi, Mexico, Tanzania, Uganda, Scotland, United States, and Vietnam.

13 REGULATORY WAVES p. 1.

14 REGULATORY WAVES p. 239.

15 The chapter on the United States, which concerns charitable fundraising legislation across the fifty states, is described by the editors as merely a “micro example” of the potential relationship between state-regulation and self-regulation in the nonprofit sector.

strictness of a country's statutory regulation of its nonprofit sector can be a motivating factor toward self-regulation in the sector. In contrast, nonprofit self-regulatory initiatives within most countries generally do not lead to or influence state regulation; however, there are notable exceptions. Specifically, Britain offers an example of self-regulation of fundraising forestalling state regulation, thereby benefiting the nonprofit sector. Australia offers an example of well-intentioned self-regulation leading to protracted deferral of state regulation, which harmed the nonprofit sector in the long-term.

As noted above, although this reader was left mildly disappointed by the book's conclusion, the work's utility and value within the field of nonprofit studies is apparent. Scholars and students interested in regulatory trends in the nonprofit sector will find the book to be a tremendous one-stop resource. Legislators and policymakers also will find the book informative regarding government- and self-regulatory schemes that worked (or didn't). Likewise, nonprofits will find examples of self-regulatory initiatives that benefitted the sector or that ultimately failed. In short, add this book to your research list if you wish to delve into a thorough comparative analysis of nonprofit regulatory trends across multiple countries.