

ENVIRONMENTAL PERSPECTIVES: MOVING TOWARD A MARKET-ORIENTED MIDDLE GROUND

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Environmental law is dominated by the orthodox environmentalist perspective. The orthodox perspective often treats the minority views expressed in this article as anti-environmental. Nothing could be farther from the truth, but there is little subtlety or nuance in environmental politics. Though the situation is somewhat better in the legal academy, there is still a long way to go before reasoned discussion is more common than political advocacy. An article on this topic entitled "Protecting the Environment from Orthodox Environmentalism" was published several years ago in this journal.¹ The theme was that orthodox environmentalism made it difficult to evaluate the consequences of the first decades of modern environmental regulation, and it marginalized alternative approaches to accomplishing environmental protection. The orthodoxy may have broken down in small ways over the past fifteen years, but for the most part, mainstream environmentalists consider markets the enemy of the environment. There is a parallel orthodoxy among hardcore free-marketeers who insist that markets will solve every social and environmental problem. It is largely an ideologically polarized debate with no middle ground. This article proposes a middle ground that is substantially to the right of the midpoint between the two extremes.

I. THE ORTHODOX ENVIRONMENTALIST POSITION

The orthodox environmentalist position presumes that markets are at the root of the problem. That is, most environmental problems are the result of our capitalist free-market economy.² Those who subscribe to this position find the suggestion that market mechanisms

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1. James L. Huffman, 15 HARV. J.L. & PUB. POL'Y 349 (1992).

2. See, e.g., CHRISTOPHER MANES, GREEN RAGE: RADICAL ENVIRONMENTALISM AND THE UNMAKING OF CIVILIZATION (1990).

may improve the environment counterintuitive.

The orthodox environmentalist position resists recognizing a middle ground in four ways. First, it underestimates the impact that government has had on environmental degradation during the last few decades. This is especially evident in western states where, on average, the federal government is in the business of managing half of the land.³ Though orthodox environmentalists in the West are concerned about the poor environmental conditions of those lands, they seldom attribute those conditions to the inherent shortcomings and limitations of public management.⁴

Second, some orthodox environmentalists consider the subject a moral issue. They believe that markets and the alteration of “natural” environmental conditions are immoral. In addition, orthodox environmentalists often argue that government action is necessary to account for the needs and rights of future generations.⁵ Centralized control, however, is not the only way to account for the future. Market participants, whether they recognize it or not, know how to discount future uses to present value. Although their time frame may be only a few decades, this is much better than the time frame of most political decisions.

Third, some in the orthodox environmentalist camp are concerned about non-human entities. They call for biocentric thinking,⁶ which requires one to think as if he were not a human. This is impossible to do, and anyone who claims to be able to decipher what it is that trees, rocks, and creatures really want out of life should be viewed with skepticism. Lastly, orthodox environmentalists, like most other public policy advocates, have an abiding faith in their unique ability to articulate and advance the “public interest,” which they assume to somehow be different from an aggregation of individual interests.⁷ This contributes to an uncompromising posture set against using market tools to find solutions to environmental problems.

3. PUB. LAND L. REV. COMM'N, ONE THIRD OF THE NATION'S LAND (1970).

4. See, e.g., Michael C. Blumm, *Public Choice and the Public Law: Why “Multiple Use” Failed*, 18 HARV. ENVTL. L. REV. 405 (1994).

5. See, e.g., EUGENE C. HARGROVE, FOUNDATIONS OF ENVIRONMENTAL ETHICS (1989).

6. See, e.g., WILD EARTH: WILD IDEAS FOR A WORLD OUT OF BALANCE (Tom Butler ed., 2002).

7. See, e.g., Jacqueline P. Hand, *Protecting the Seventh Generation*, MICH. B.J., July 2004, at 28.

II. THE HARDCORE FREE-MARKET POSITION

Hardcore free-marketeers constitute the other ideological extreme that conspires to make serious environmental policy discussion difficult. They too can find no middle ground that they will accept. Their position is entrenched in the belief that all public actions involve rent seeking,⁸ a notion that perhaps has some truth. Free-marketeers contend that it is no coincidence that the private interests of environmentalists are generally the same as what those environmentalists claim to be in the public interest. The hardcore free-market position is also rooted in the belief that efficiency ought to be the goal of public policy.⁹ Many, of course, disagree with that. Some, including many advocates of what has come to be called environmental justice, would prefer something less than maximum net social welfare in exchange for greater equality in the distribution of wealth and resources.

Hardcore free-marketeers do not view things like tradable emission permits as market solutions because the market has not truly allocated the resource. A regulatory process has made the resource allocation decision, and markets are used to pursue the regulatory goals in a more cost-efficient manner. These types of solutions are worthwhile and worth advocating, but if one wants to be principled about it, they are not market solutions in the pure sense of the word.

III. MARKET AND LEGAL SYSTEM FAILURES: A NEED FOR A MIDDLE GROUND

The protestations of the extremists to the contrary, neither side can correct certain failures that harm the environment. Orthodox environmentalists use market failure theory to show that the free-marketeer position is flawed, whereas free-marketeers point out that orthodox environmentalists cannot prevent various failures of the legal system.

Market failure theory has been helpful in thinking about environmental problems. High transaction costs, free riders, and similar difficulties have become central to the analysis of many environmental problems. Where there are market failures there is an argument to be made—and frequently it is made—for some form of

8. See, e.g., Fred L. Smith, Jr., *The Market and Nature*, 43 FREEMAN: IDEAS ON LIBERTY 350 (1993).

9. For a discussion on efficiency as the goal of public policy, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3-17 (3d ed. 1986).

public regulation to correct for those failures.¹⁰

But some supposed market failures are more accurately viewed as legal system failures. Legal system failures, which often have symptoms similar to those of market failures, occur when we fail to provide the legal infrastructure necessary for markets to function.¹¹ The definition of property rights, for example, is critical. At times we lack the technical capacity or understanding to define and enforce property rights, but as P.J. Hill and Terry Anderson demonstrated in a 1977 article,¹² new technology can make property rights workable where they once were not. For example, barbed wire made it economically feasible to fence large tracts of grazing land. Previously, livestock grazed on commons, and property rights were enforced by the largely ineffective method of branding.

Often the legal system failure has nothing to do with a lack of technology or understanding, rather a property rights regime that has been manipulated and constrained to produce a non-market based distribution of benefits. For example, most western states made it impossible to own water for instream, nonconsumptive uses, which had the effect of removing from the market those willing to pay for stream flow protection.¹³ There has been some change in the water law of many states, but water markets are still distorted by legal constraints on use and transfer.¹⁴ Regulation is one way to attempt to overcome these limits on the market, but a more market-oriented property rights regime is often a more effective solution.

In addition to these legal system failures, there are true market failures that warrant regulatory intervention. In some situations we lack the knowledge or technology to create a system of enforceable rights.¹⁵ In the case of trans-boundary environmental problems, interstate or international politics may prevent the creation and enforcement of the property and contract rights necessary to a functioning market. In both types of situations, regulation may approximate the efficient allocation that would result from a

10. See, e.g., MICHAEL FAURE & GÖRAN SKOGH, *THE ECONOMIC ANALYSIS OF ENVIRONMENTAL POLICY AND LAW: AN INTRODUCTION* 126-39 (2003).

11. See, e.g., James L. Huffman, *The Public Interest in Private Property Rights*, 50 OKLA. L. REV. 377, 384-85 (1997).

12. P.J. Hill, *From Free Grass to Fences: The Transformation of the Commons of the American West*, with Terry L. Anderson in *MANAGING THE COMMONS* (Garrett Hardin & John Baden eds., 1977).

13. See, e.g., *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d 629 (Colo. 1954).

14. See, e.g., Act of Mar. 5, 2002, ch. 94, 2002 N.M. Laws 385.

15. See Hill, *supra* note 12.

functioning market. But it is important to recognize that these technological and political shortcomings are remediable through non-regulatory means. It is also important to understand the difference between regulations designed to make markets work better, and regulations that abandon markets in favor of political allocation of scarce resources. The former retains efficiency as a goal, while the latter adopts whatever goal those in power may choose.

IV. THE MIDDLE GROUND: USING THE MARKET TO COMPLEMENT REGULATION

The use of market mechanisms like tradable emission permits is a clear compromise in which the underlying allocation decision is made politically. If one assumes, as seems likely for the foreseeable future, that politics will continue to have this role, there is little reason not to embrace market tools that will help to achieve political goals in a more cost-effective way. The use of market mechanisms, even where they are compromised according to strict market theory, makes sense for several reasons. Markets are more flexible than the political process. They respond more quickly to change, and usually generate better information because participants have direct incentives to obtain good information about the effects of their actions. Markets also create incentives that guide decision-making that has an impact on the environment.¹⁶

As indicated above, embracing the free-market position implies embracing a particular conception of what constitutes optimality. That is, to argue that the current condition of the environment is socially suboptimal, one must offer some standard of optimality upon which the comparison is based. Arguments focusing on externalities assume that efficiency is that standard of optimality. To the extent that arguments about externalities are widely used to justify regulatory intervention, efficiency becomes the accepted objective of environmental policy.¹⁷

There are, of course, other arguments based on different ideas of optimality. It is plausible to say that the condition of the environment a century ago was optimal given the standards of the time. What is waste today was not waste one hundred years ago under different circumstances with different value systems. It is also plausible to

16. See TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* 1-11 (1991).

17. *PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION* (Paul R. Portney & Robert N. Stavins eds., 2000).

assert that the optimal environment is one that most resembles the state of the earth at some date in the past. But such claims must be justified to the broader society, and their implications for resource allocation institutions explained and implemented.

V. CONCLUSION

A useful way to think about markets, property rights and private decision-making, recognizing that all of this takes place in the context of a public institutional framework, is from the perspective of our federal system, broadly conceived.

Europeans use the term subsidiarity to describe their approach to federal government.¹⁸ The basic idea of subsidiarity is that decisions should be made at the lowest level of government that can effectively solve the particular problem at issue.¹⁹ Ironically, the European Union has steadily become more centralized since the inception of the European Common Market, a trend that belies a true commitment to subsidiarity. If we think about environmental management as a resource allocation problem, we can perceive the advantages of decentralization that follow from the principle of subsidiarity.

The first challenge is to determine what institutional arrangements to use for the allocation of scarce environmental resources. These decisions can be made globally, through bilateral or multilateral arrangements between countries, nationally, at the state level, by interstate agreement, and by local governments. Resort to any one of the governmental alternatives involves the use of certain means to aggregate individual choices, and along with them, certain constraints on those who are allowed to participate in the decision-making. Alternatively, when decisions are made privately, the market aggregates individual choices.

Government officials and those who lobby them look to the public interest to justify their positions and decisions. But the public interest is, at best, an aggregation of individual interests. As in the market place, the individual's capacity to influence the outcome of resource

18. Article 3b of the Maastricht Treaty (1992) establishes the role of subsidiarity in European Community governance:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Treaty on European Union, July 29, 1992, art. 3b, 31 I.L.M. 253.

19. See Gideon Rachman, *A Divided Union*, THE ECONOMIST, Sept. 25, 2004, at 3.

allocations varies widely and depends heavily on the institutional structure in place. Even those who assert that a public interest exists independent of individual interests will not claim that individual preferences are irrelevant. Individuals will have more influence and be more accepting of the decisions taken under a default regime of decentralization.

The most decentralized approach is the market. It is not a panacea for environmental policy, but it warrants more attention than it has received over the recent decades of modern environmental politics.

