

FREE MARKET ENVIRONMENTALISM: WONDER DRUG OR SNAKE OIL?

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*Free Market Environmentalism*¹ is one of a series of studies published by the Pacific Research Institute for Public Policy. The Institute describes itself as dedicated to exploring long-term solutions to difficult issues of public policy,² but it might be more accurately described as exploring non-governmental solutions to difficult issues. *Free Market Environmentalism's* non-governmental solution to environmental problems is to create or assign well-defined property rights in the various natural resources, and then to let the free market solve the problems.

The promise of new solutions to old or new environmental problems is enough to excite economists, lawyers, and policy analysts of all stripes. Such a promise might entice them to read *Free Market Environmentalism*. If so, they will be sorely disappointed, because it provides no new solutions. Worse yet, the book is positively harmful, because, to the extent it has impact, it will stand as an obstacle, not only to finding new and effective solutions to environmental problems generally, but to furthering market solutions where they might be effective.

As Peter Menell convincingly demonstrates,³ *Free Market Environmentalism*, if it were in your local bookstore, would be racked under "Fantasy and Science Fiction." From its utterly simplistic explanation of human motivation to its religious faith in scientific discoveries, the book utterly fails to convince. Those who have studied the tort liability system even a little will be shocked at Anderson and Leal's naive belief that traditional tort and contract law will provide effective and efficient enforcement of the newly identified property rights.

My favorite absurdity is the statement: "In the case of automobile emissions. . . , the property rights approach is quite simple: privatize congested highways."⁴ Anderson and Leal

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

2. *Id.* at 193.

3. Peter S. Menell, *Institutional Fantasylands: From Scientific Management to Free Market Environmentalism*, 15 HARV. J.L. & PUB. POL'Y 489 (1992).

4. ANDERSON & LEAL, *supra* note 1, at 165.

imagine that “[w]ith the privatization of highways and strict liability rules, the owner of the highway has an incentive to reduce emissions. . . .”⁵ This is La-La land. Who is going to sue for damages under this strict liability regime? The class of all persons in the greater metropolitan area? What damages are we talking about? The increased risk of lung cancer, medical monitoring, the aesthetic harm of smog, the harm of having to remain indoors on a smog alert day? And what about causation? How can one prove that the particular smog alert day or the level of ozone and carbon monoxide in the ambient air is traceable to *this* privatized highway as opposed to someone else’s privatized highway as opposed to the remaining public roads — not to mention airplanes, ships, and stationary sources? Could it be that because neither Anderson nor Leal are lawyers they simply don’t understand the tort liability system?

There is no one left, if there ever was such a person, who believes that simple command-and-control regulation is always the best solution to environmental problems. The theoretical value of private rights and market approaches has long been recognized; there is nothing new in Anderson and Leal’s basic concept. Professor Krier’s original casebook, *Environmental Law and Policy*, contained a healthy dose of market system ideas.⁶ In the 1970s, the Environmental Protection Agency (EPA) instituted its offset program in non-attainment areas under the Clean Air Act, by which polluters could essentially buy pollution rights from other polluters and use them to permit their own pollution or “bank” them for future use.⁷ Today the task is not to decry traditional regulation generally, but to identify which environmental problems can be best tackled by market system approaches and to develop the particular market systems appropriate for those problems. *Free Market Environmentalism*’s near total failure to face up to this task is deeply disappointing.

Unfortunately, Anderson and Leal’s book not only fails to accomplish what one might hope, but it also is actually harmful in two ways. First, it is demagoguery, disguised as analysis. As such, it will be used to further the political agenda of those its arguments help. Second, its demagoguery will make it even

5. *Id.*

6. See JAMES E. KRIER, ENVIRONMENTAL LAW AND POLICY 422-42 (1971).

7. See 41 Fed. Reg. 55,525 (1976) (interpretive rule initiating the offset program).

harder to persuade skeptics to use markets to further environmental goals in appropriate situations. Thus, the book will stand as an obstacle to finding new and effective solutions to environmental problems. The demagoguery of *Free Market Environmentalism* is most evident in the book's principal literary convention: justifying its position on the evil of the alternative. Without counting the pages, I am confident that as much of the book is spent cataloging the evils of government intervention as making the positive case for market mechanisms. This attack would not be necessary to justify solutions that really are more efficient and environmentally protective; it is necessary only because the message of this book is as much the evil of government as it is the benefits of the market. Thus, *Free Market Environmentalism* scapegoats its opposition rather than systematically analyzing the use of property rights and market mechanisms to solve environmental problems.

The demagoguery of the book is also evident in its refusal to find any difficulties in using property rights and market mechanisms to solve environmental problems. As Professor Menell points out, the only difficulties the authors acknowledge are minor stumbling blocks of temporarily limited technological advancement.⁸ They identify *no* inherent obstacles to market solutions for *any* environmental problems. Market solutions cannot be justified simply by pointing at particular government interventions and screaming that the devil has appeared. To make the case for property rights and markets, one must address the circumstances where property rights and markets have failed, not just the circumstances where government has failed. One must address Love Canal, the strip mining excesses in Appalachia, the unrestrained clear-cutting of private forest land—all of which occurred within a regime of clear property rights. One must discuss what features of a private market pose difficulties.

Moreover, the book largely ignores distributional problems of a private market system. Who gets property rights and on what basis? If they are put up for auction, then the rich literally inherit the earth. Anderson and Leal at one point address the question of whether environmental groups can compete with corporations in bidding for leases on public lands by stating

8. Menell, *supra* note 3, at 502; see also James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL'Y 325 (1992).

that the thirteen largest environmental groups "are not necessarily poor," because together they have revenues of over \$400 million per year.⁹ This almost proves the converse of the point Anderson and Leal are trying to make. Considering that just two oil companies, Exxon and Mobil, together make more than that *every day*¹⁰ puts into perspective the relative capacity of organized environmental groups to compete with industry where money counts.

Finally, Anderson and Leal deviate from their task of finding new solutions to environmental problems by casting doubt on the reality or seriousness of some of the problems. For example, according to Anderson and Leal, "there is little evidence that acid rain is causing widespread problems."¹¹ Indeed, from *Free Market Environmentalism* one would have no idea why the Clean Air Act Amendments of 1990 were able to garner both Republican and Democratic support for a program to attack acid rain.¹² The answer is simply that the overwhelming weight of scientific evidence, generated by governments, international agencies, and private groups, is that acid rain is a major cause of lake and stream acidification, forest death, and reduced agricultural yields.¹³ Similarly, global warming is introduced in a subchapter entitled, "Global Warming or A Lot of Hot Air?"¹⁴ Anderson and Leal suggest the latter because "[a]lthough none of the global calamities predicted over the years have ever happened, such predictions continue to survive in the political arena because they give politicians and bureaucrats power over human activity."¹⁵ Those who warn about global warming are thereafter called "Chicken Little" by Anderson and Leal.¹⁶

The likely effect of all this demagoguery is two-fold. First, industry and political groups predictably will cite *Free Market*

9. ANDERSON & LEAL, *supra* note 1, at 94.

10. In 1990 Exxon Corporation had gross revenues from sales of \$115,794,000,000. Mobil Corporation had 1990 sales of \$64,472,000,000. Disclosure Online Database (1991), available in LEXIS, COMPNY Library, DISCLO File. This translates into approximately \$493 million a day.

11. ANDERSON & LEAL, *supra* note 1, at 158.

12. The final bill reported by the conference committee was approved by the House of Representatives on October 26, 1990, by a margin of 401 to 25. 136 CONG. REC. H12,911, H12,943 (daily ed. Oct. 26, 1990). The Senate passed the bill on October 27, 1990, by 89 to 10. 136 CONG. REC. S17,429 (daily ed. Oct. 27, 1990).

13. For a comprehensive examination of scientific data on the effects of acid rain, see Marilynne K. Roberts, *Acid Rain Regulation*, 8 VA. J. NAT. RESOURCES L. 1 (1989).

14. ANDERSON & LEAL, *supra* note 1, at 159.

15. *Id.* at 161 (citation omitted).

16. *Id.* at 161, 163.

Environmentalism whenever it is in their interest to oppose government regulation. Ironically, the same groups will cite conservative Peter Huber's growing body of literature on the faults of the tort system in dealing with risk and injury.¹⁷ Second, environmental groups and the political groups that support them will view private market approaches to environmental problems as ideologically biased and suspect.

This second effect is the greatest disservice of this book. While today even the "environmentally correct," whom Professor Huffman describes,¹⁸ recognize the need for innovative solutions, which may include market mechanisms, they have come to this position reluctantly. The environmental movement did not find its origins in a love of corporations and the free market. That major corporations and their trade groups have been nay-sayers with respect to environmental considerations has only reinforced environmentalists' antipathy toward them.

Undeniably, many of the evils identified by environmentalists are the direct result of unregulated economic activity. There are, of course, economic explanations for this result, and these explanations may illuminate why command-and-control regulation might not be the best policy response. To many environmentalists and environmental groups, however, the free market itself seems to be the evil. But just as Anderson and Leal's horror stories about government regulation are not proof that government regulation is always evil, so also are environmentalists' horror stories about the free market not proof that the market is evil. The tragedy is that ideological biases blind these potential allies and make them adversaries.

Free Market Environmentalism will not build bridges between environmentalists and free marketeers; it will not reassure environmentalists that private market approaches may better protect environmental values. It will, instead, be perceived as additional evidence that market systems are just a way for business to minimize costs and delay protection of the environment. This is a shame, because I am convinced that market systems would in many situations have all the beneficial effects Anderson and Leal expect. For example, the case for a free

17. See, e.g., PETER W. HUBER, *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* (1991); PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988).

18. James L. Huffman, *Protecting the Environment from Orthodox Environmentalism*, 15 HARV. J.L. & PUB. POL'Y 349 (1992).

market in water rights seems persuasive, until one reads further and discovers Anderson and Leal make the same claims and arguments for clearly distinguishable situations.

The failure of *Free Market Environmentalism* to make its case effectively for areas where property rights and markets may work lies in failing to identify those factors or circumstances that facilitate market systems, and instead suggesting that they are equally beneficial everywhere. That failure casts doubt on the entire enterprise. Anderson and Leal's inability to accept limitations on their libertarian premise results in total avoidance of perhaps the most fundamental issue facing environmentalism today—the need for biodiversity. While utilitarian arguments exist to support increased biodiversity, the basic issue is moral. The question is not whether on utilitarian grounds we need to preserve species and ecosystems, but whether it is simply immoral to destroy species and ecosystems even when it is in our objective interest to do so.

The simplistic *Free Market Environmentalism* response is that environmental groups can band together and purchase sufficient land to protect species and ecosystems. This is fantasy, of course, but the deeper issue is whether that solution, even if realistic, is responsive to the problem. To those who believe abortion is fundamentally immoral, it would be no response to say that they should band together to pay women not to have abortions. The underlying problem to both groups is a society that holds immoral views, and the only real solution is to change that morality. This is not an area where private rights and markets are likely to be very effective. This is an area of moral education, and law and politics are the battleground upon which our moral battles take place.

In sum, *Free Market Environmentalism* is no more than another diatribe against government regulation with a hackneyed libertarian philosopher's stone as a solution. As such, it identifies property rights and market approaches with anti-environmental ideology, alienates the very constituency that most needs convincing, and disserves the goal of rational environmental problem-solving. It is definitely snake oil.