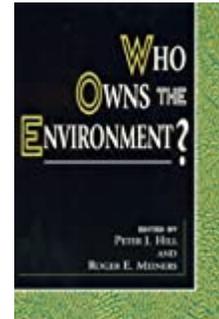




**Peter J. Hill, Roger E. Meiners, eds.** *Who Owns the Environment?* Lanham, Md. and Oxford, England: Rowman & Littlefield Publishers, 1998. xiv + 353 pp. \$41.95 (paper), ISBN 978-0-8476-9082-4; \$104.00 (cloth), ISBN 978-0-8476-9081-7.



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## **Put Your Money Where Your Mouth Is: Saving the Environment by Purchasing It**

This collection of essays throws down a challenge to society: if we really want to protect the natural world, we need to be ready to pay for it. Sponsored by PERC (the Political Economy Research Center), a group well-known for their support of extensive private ownership of natural resources, the essays in the volume address a diverse variety of environmental issues. The almost universal solution to environmental problems according to the collection is strong private property rights, rather than intrusive government regulation. The book stems from a meeting hosted by PERC in 1997, with several papers included that were not presented at the original conference. Although the methods used within the book vary, economics rather than history is the dominant approach. Nevertheless, the essays are presented in a largely non-technical, non-mathematical format that makes them accessible to scholars from many backgrounds, including the humanities. Anyone with an interest in property rights and environmental issues would benefit from reading this volume.

The essays cover a large subject area, indicating the

wide reach that property rights issues have in environmental policy. There are, as one might expect, some general essays by Louis De Alessi and others denouncing non-market solutions to public policy and pushing instead a “free-market environmentalism” agenda. Two pieces focus more specifically on criticizing economic techniques that have attained some popularity in environmental policy: Bruce Yandle discusses problems with Pigouvian pollution taxes, while Donald Boudreaux and Roger Meiners attack the contingent valuation method of measuring the existence value of various environmental assets such as wildlife or wilderness.[1]

One of the more interesting essays is Vernon L. Smith’s use of game theory and anthropology to explore whether humans are “born exchangers” for whom it is a natural tendency to create private property rights. Other selections address more specific policy applications, including Terry Anderson’s and Richard Epstein’s pieces on the protection of wildlife, William Carney’s argument in favor of privatizing U.S. public lands management, and Donald Leal’s survey of successful common property

regimes. It is especially refreshing to see a positive essay on common property as an institution capable of protecting natural resources in such a collection.[2]

The book has a number of positive things to offer scholars interested in environmental issues. In particular, there is a growing need to understand the relationship between property rights and environmental policy. Policies trying to solve environmental issues by creating new quasi-property rights in open-access resources are now an integral part of present and future policy discussions with respect to air pollution, water pollution, and global warming, to name just three issues.[3] Given this growing demand for property rights as a tool to address environmental concerns, understanding how such solutions could work is key. This volume provides ample information, both theoretical and empirical, on how those solutions might be formulated.

Epstein's essay on wildlife preservation, for example, is what might be called a free-market environmentalist attempt to reform the Endangered Species Act (ESA). Epstein recommends few coercive public restrictions on private landowners in developing their land, even if it is critical habitat for species listed under the ESA. Such development should only be prevented, argues Epstein, if the government is willing to pay the private owner for the resulting loss of value. Otherwise, the threat of regulation without compensation gives private landowners a perverse incentive to "shoot, shovel, and shut up" when they find an endangered species on their back forty (p. 234). Other writers in the volume join Epstein by espousing strong private ownership of public lands, wildlife, and pollution rights among other resources as the best environmental policy.

By emphasizing the importance of secure private property rights, many of the volume's authors beg a prior question—what power should private property include? Most of the writers in this collection appear to assume that the Anglo-American common law definition of ownership is the obvious choice for defining property rights. Unfortunately, few of them spend much time actively defending this view, or citing those who do. Epstein makes a modest argument for the common law notion later in his essay, arguing in Benthamite fashion that its rules are best because they promote the most "stable expectations between the parties" to any transaction (p. 238). Boudreaux and Meiners similarly conclude, without detailed explanation or citation, that "Experience has proven not only the workability of traditional common-law rules of property, contract, and tort, but their general

superiority to centrally designed law" (p. 173). De Alessi makes a similar point at the conclusion of his essay (p. 30).

Only Elizabeth Brubaker focuses significant research energy on this issue, arguing that the common law provides environmental protection that is far superior to modern regulatory regimes that weaken private ownership rights. Unfortunately, her evidence is drawn from a specific set of pollution cases and lacks reference to the wide range of regulatory efforts in the United States and elsewhere that have clearly resulted in cleaner air and water.[4] More generally, one cannot help but wonder upon reading her essay that if the common law is so adept at preventing pollution, why were nineteenth-century environmental and public health conditions during the Industrial Revolution (when common law remedies were the dominant environmental control) so abysmal? While her point that government regulation often works to the benefit of the regulated industry is well-taken, her defense of the common law vision of ownership as the environmentally preferable one is unconvincing.

It is also worth noting that there is a strong legal-philosophical tradition challenging the superiority of common law rights of ownership in favor of other approaches. Scholars as diverse as G. W. Hegel, Morris Cohen, and Joseph Sax (among many others) have made powerful arguments against the traditional conception of property as a bastion of private control subject only to minimal public requirements.[5] While authors in the PERC collection clearly would take issue with many of these arguments against the common law tradition, they fail to do so in much detail here. This omission is unfortunate, because it leaves those who might dispute their ideas precious little to argue against on a critical point of disagreement.

More generally, the devotion of the essays in question to strong property rights and Pareto-efficient policy solutions leads to several other conclusions or omissions that are troubling. Distributional issues, for example, are clearly secondary for these writers. Ironically, although the introduction of the volume emphasizes the distribution of property rights as a key question (p. xi), several essays in the collection assert that initial allocations of rights are unimportant (e.g. p. 137, p. 193). With the significant exception of Leal's essay, the term "common property" is still sometimes confused with open-access regimes that permit unlimited environmental degradation (e.g. p. 125). Discussions of the value of environmental protection are also entirely focused on value to

human beings-any sense of intrinsic value for wildlife or wilderness is largely dismissed. The private ownership of wildlife in South Africa, for example, managed purely for the desires of big game hunters, is highly praised in the essay by Terry Anderson. The question of whether such animals and their environments remain “wild” in any meaningful way does not worry Anderson (p. 260), but one wonders what authors such as Mark Sagoff would have to say about such an idea.[6]

The focus of the authors on strong private property solutions may cause some readers with different views to skip the volume entirely. This would be an unfortunate outcome, because the book contains ideas and concepts that are of great value even if one does not accept the entire package. For example, there is an ongoing point being made in the collection that environmental policy is inevitably about choosing between alternatives that have costs. As Richard Wagner succinctly puts it, “we can face these choices directly with reflection and choice, or we can let them face us through accident and force” (p. 320). In other words, a zero-emissions rule costs a great deal more than a low-emissions rule, and those interested in environmental politics would do well to bear those marginal tradeoffs in mind more frequently. Similarly, there is growing interest among public regulators and legislators in using incentive-based rules to achieve environmental improvement. One does not have to accept the devotion to a common law idea of private property presented in this volume in order to gain insights on these points and others.

Despite this fact, it appears that even some of the authors themselves in the PERC collection expect to win relatively few people over with their ideas. Epstein himself observes (in a question that could easily refer to the entire volume and not just his article) that “[t]he most difficult question to ask about this analysis is why it has proved so spectacularly unpersuasive to committed environmentalists” (p. 235). The answer, according to his thinking, is that environmentalists suspect the public is not interested in paying the large sums of money required to protect endangered species habitat, and therefore want to keep those costs “off budget” by putting them on private landowners instead (p. 236). His argument dismisses the alternative that landowners do not and should not own the right to eliminate at will the wildlife habitat they now own. By assuming, rather than arguing in detail, that alternative visions of ownership with weaker rights are inferior, Epstein tables what might be the most important question raised by the entire book - not “who owns the environment,” but rather

“what does it mean to own it?”

#### Notes

[1]. Contingent valuation (CV) is a relatively new method in economics in which the public is surveyed regarding how much they would be willing to pay to preserve a specific environmental resource. The results of these surveys are now used in public policy to try to quantify within a cost-benefit analysis some of the more intangible benefits of environmental laws. For one recent example of CV in action on an environmental issue, see John B. Loomis, *Integrated Public Lands Management* (New York: Columbia University Press, 1993).

[2]. Common property is often misunderstood. It is a collective, non-governmental method of managing natural resources. It is not the same thing as an “open-access” resource, in which there are no controls on use whatsoever. For numerous examples of successful common property systems, see Elinor Ostrom, *Governing the Commons* (Cambridge: Cambridge University Press, 1990).

[3]. The 1990 Clean Air Act Amendments created a large, property-based approach to controlling sulfur dioxide emissions that cause acid rain. See Dallas Burtraw and Byron Swift, “A New Standard of Performance: An Analysis of the Clean Air Act’s Acid Rain Program,” 26 *Environmental Law Reporter* 10411 (1996). For water pollution, see discussion in Jeremy B. Hockenstein, Robert N. Stavins, and Bradley W. Whitehead, “Crafting the Next Generation of Market-Based Environmental Tools,” 39 *Environment* 12 (1997), especially at 16. For global warming, there is high interest in trading rights to emit carbon dioxide under the Clean Development Mechanism and other titles of the Kyoto Protocol. A good introduction to this is Michael Grubb with Christiaan Vrolijk and Duncan Brack, *The Kyoto Protocol: A Guide and Assessment* (London: Earthscan Publications Ltd., 1999), at Chapter 7.

[4]. The reviewer is unaware, for example, of any analysis indicating that the United States’ air and water has become less clean in the thirty years since the passage of the Clean Air and Clean Water Acts in the early 1970s, both of which are prime examples of the regulatory regimes condemned by Brubaker and others in the volume.

[5]. Hegel’s views of private property are most clearly presented in his book *Philosophy of Right*, trans. T. M. Knox (Oxford: Oxford University Press, 1967). Progressive era legal scholar Morris Cohen speaks elo-

quently about a non-common law vision of ownership in his essay "Property and Sovereignty," among other places, which can be found in the collection *Law and the Social Order* (New York: Harcourt Brace and Co., 1933). Professor Sax has a number of writings about property, including "Property Rights and the Economy of Nature: Understanding *Lucas v. South Carolina Coastal Council*," 45 *Stanford Law Review* 1433 (1993).

[6]. Sagoff, for example, makes a brilliant and cre-

ative argument in favor of wilderness preservation that has little to do with contingent valuation or hunting rights. See Mark Sagoff, "On Preserving the Natural Environment," 84 *Yale Law Journal* 205 (1974).

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