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Our WORDS

Environmentalism Is Our Nature: Markets and Common Law

Markets and common law point the way

By Kent Lassman

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Introduction

The Pharos Foundation at Jesus College, a constituent college of the University of Oxford, invited me to speak at an on-campus forum in May. The topic was the intersection of law, economics, and the natural world. Any environmental policy discussion should begin with an acknowledgment that every individual cares for and is intrinsically linked to the natural world.

I also argued that we must advance a new model for how to develop our relationship with nature and the environment that includes an objective assessment of our laws and regulations: a free market environmentalism. And that we cannot be afraid to address the shortcomings of current approaches that fail to adapt to innovation and new information. This paper is adapted from my remarks which are found online and with additional examples and a discussion of how human nature is linked to environmentalism.

Pitfalls of environmental rulemaking

In liberal developed countries, the relationship between the natural world and society is regulated by statutory law, regulatory edicts, and government agencies that set standards for behavior, investigate potential violations of those standards, and sanction transgressions. It is highly reliant on coercive, top-down, expert agency rulemaking.

What it lacks is flexibility to adapt to new technologies, variable social preferences, and tools for dispute resolution. This form of regulatory approach presumes knowledge that could not possibly be assembled in one place. With a focus on rules and compliance, a statutory law approach misses out on the effects it has on the natural world and the people who inhabit that world.

The reliance on statutory law and administrative regulation lacks humility. It presumes to know how to make myriad trade-offs between our inconsistent preferences, or between habitat protection and development, economic development and pollution and many other questions. To have such capacity, to harness such knowledge would be truly awesome and to my mind, impossible to explain. And, therefore, impossible to act upon.

The Environmental Protection Agency (EPA) was established some 55 years ago. Today, this one agency is responsible for more than half of all regulatory costs imposed by our federal government.

Statutory laws and regulation

Statutory law is familiar to any student of government. It is the law codified by a legislature. It is accessible to all. It is binding on all and therefore anyone can bring a suit before a proper court. In America, some statutes even provide funding to organizations to monitor and subsequently sue polluters who fail to meet regulatory obligations. At the federal level, statutes are created by Congress and signed by the president.

The original and primary functions of statutory law are to limit the power of the executive or to create rules of general applicability – rules of the road for how we all get along. These rules are not typically based on property rights. Nor does statutory law typically provide compensation to parties who have been damaged by a wrongdoer.

The spirit of the law is animated by the heavy hand of regulation. Standard-setting and a subsequent focus on compliance to those standards is the habitat of the environmental regulator. Thus, we have standards for how much water can flow through our toilets and showerheads, limits on how much energy is consumed by household appliances, the fuel efficiency of cars and trucks, and prescriptions for the sources of fuel to create electricity.

If someone is harmed by the effects of this prescriptive regulatory control – from a mere inconvenience all the way to a prohibition on how one makes a living – the only recourse is to change the law. There is no way to make that person whole.

Needed: more natural solutions

Statutory law is divorced from nature. It keeps us focused on an ever-expanding rulebook prescribing how we interact with the natural world. The alternative must center human activity and place it within the natural world, not as something outside of nature that must be constantly steered. Solutions will not come from this or that regulatory regime. Solutions will come from the disciplined application of human ingenuity – from markets and technology.

We ought to have the humility to recognize that different people across the nation will have both differing information about how to address their local environmental challenges and differing preferences about how important those challenges are in light of other pressing concerns.

Applied to environmental challenges, common law precepts like nuisance, trespass, and riparian law which are the legal customs for waterways and their shores can be married to free market principles like property rights and prices.

When we do so, joining common law to free market principles, we place ourselves within a context where we can continue to learn and solve disputes as they arise without the need to foresee every outcome or consequence of regulation.

Common law, market solutions

The pairing of common law approaches with market principles, like property and prices, is far more flexible and adaptive. This approach makes room for learning and innovation compared to statutory law backed by administrative regulation.

My proposal is a combination that also is based in law, but an older form: common law. Therefore, it is more in tune with the natural world and technological progress, creating a harmony with people and the problems they actually face. As a result, it is ultimately more likely to lead to cleaner air and water, more species and habitat rehabilitation and protection, and both a healthy ethic of conservation and opportunities for appropriate preservation.

Until the 1970s, environmental regulation was the product of common law precepts such as trespass, nuisance, and riparian rights. Trespass and nuisance delineate rights for individuals when others' actions create negative outcomes, and riparian rights relate to waterways and their shores.

For example, a farmer owns land that includes a stream used to water his animals and irrigate his crops. An upstream factory pollutes and adversely affects both the animals and the crop. The farmer has a common law claim based on nuisance which is more and less understood as interference with another's right to use and enjoy their property.

Consider a 1918 case called *Meeks v. Wood*.[1] Two farmers had adjoining properties, and Chaney Meeks was unhappy with his neighbor Martin Wood who installed what is called "a barker." A barker is a whistle attached to the exhaust pipe of an engine used to pump oil from a well.

The court ruled for Martin Wood. On the surface, this looks like an inconsistency. The outcome went in favor of the person purportedly causing the harm to his nearby neighbor. But, given evidence presented at a court of law, there was no interference with the ordinary comforts of living. Thus, the barker was not a nuisance, and no liability attached to Wood.

In addition to solving discrete disputes, with each successive case and the presentation of evidence, would-be polluters also learn and anticipate what activities will bring liability to them. The effect is prophylactic – less pollution and more innovation in order to avoid this sort of common law tort.

Free market environmentalism

Free market environmentalism emphasizes the fundamentals of a market economy such as property rights, prices, and exchange. It is a substitute for traditional government regulation. The two approaches have the same goals but different institutions, decisionmakers, and rules of the road.

For an example of traditional regulation, we have national parks where we set aside wild places and preclude various types of development. Many states enjoy a network of regional parks managed by cities and counties as well as ready access to both state and national lands.

There is also a valuable tradition of private conservation in America. The most successful raptor preservation project in America, Hawk Mountain, Pennsylvania, is entirely private.[2] When it comes to private forest

[1] *Meeks v. Wood*, 118 N.E. 591,66 Ind. App. 594, (Indiana Appellate Court, 1918).
[2] "Raptor Conservation Studies," Hawk Mountain Sanctuary, accessed June 23, 2025, https://www.hawkmountain.org/conservation-science/active-research/raptor-conservation-studies.

management, objectives such as the health and vitality of the ecosystem – for the trees as well as all the associated flora and fauna – are balanced against the protection of private property and life, prevention of fire, and other uses including recreation.

These different modes of regulation – different policies adopted by different institutions or levels of government – provide something of a natural experiment.

With different institutions and different policies, we can see that our federal Department of Agriculture does better than our federal Department of Interior with forest management, most states do very well, and private landowners who have a real stake in the situation, like ranchers, tend to do the best of all.

Even marginal differences in the effectiveness of these different approaches to regulation really matter. Fire prevention is a fairly dramatic way to think about it.

Each year, Americans lose an average of 7 million acres to more than 60,000 different wildfires. If you care about life and property, about wildlife habitats, about massive amounts of carbon and particulate emissions, then you also care about wildfire.

Many believe that various governmental institutions must control the environment, or at least how we interact with the natural world. The alternative, they assume, is that without this government control through administrative regulation, people would simply destroy the environment. This is incorrect, but one can see how that view takes hold.

Fish, flesh, or free markets

Free market environmentalism shows us what can happen when private actors are faced with collective action problems, or bad outcomes due to the cumulative effects from individual incentives.

Nobel Prize winning economist Elinor Ostrom tackled this sort of environmental problem with her work on fisheries.[3] If a fishery is susceptible to overfishing and depletion, the incentive of any given fisherman is to take as big a catch as he can even to the point of investing in bigger boats or better storage to capture more of the resource before it is collected by the rest of the fleet.

Time and again, top-down regulations based on rigid rules or statutes, fail in these situations. However, Ostrom developed a theory that she called polycentric governance that both relies upon and creates cooperation and trust because it is rooted in human nature and it prizes transparency.

Her research highlights very successful environmental outcomes, which almost everyone says they prize, such as species protection against endangerment or extinction. It also produces good outcomes for the people involved like non-litigious dispute resolution and the promise that a way of life, a cherished profession like agriculture or farming, remains sustainable.

Her model looks like the following and it is a powerful framework for people everywhere.

1. Most importantly, there are involved local communities. Those closest to the environmental resources, are put in charge. They have the best sources of information, can see changes happening, good and bad, and have the strongest incentive to fix the problem. The result is better stewardship.

2. Next, there are also clearly defined boundaries. That means explicitly naming or licensing who has access to the resource and listing what activities are allowed or disallowed.

3. Polycentricism creates alignment between those who bear the cost of the regulatory scheme with those who have access to the benefits.

4. Next, there must be strong monitoring. Monitoring builds trust and stops cheating.

5. And finally, clearly recognized rights including both property rights and participation rights. The latter describe who is involved in the decision processes that lead to how the resource is managed or regulated.

These are all principles, with a slightly changed lexicon, of free market environmentalism. Clear boundaries and alignment of costs and benefits are economic ideas put into action.

Ostrom's polycentrism can be seen in other communities as well. Beginning in 1989, certain communities in Zimbabwe were designated CAMPFIRE communities. CAMPFIRE is a program that establishes ownership rights for wildlife within the local community.

Rather than hunting for their own uses, or ignoring the wildlife, Zimbabweans recognized that a much higher value to their community is available by partnering with a hunting outfitter, often from the United States, and using contracts. Therefore, wealthy outsiders can pay to trophy hunt.

The results of this program are undeniable. Not only did the CAMPFIRE communities prosper, increasing

[3] Elinor Ostrom, *Governing the Commons: The evolution of institutions for collective actions* (Cambridge, UK: Cambridge University Press, 1990), p. 144.

their incomes by 15 to 25 percent, but it provided a clear incentive to preserve these wild resources. In the first three decades of this program, elephant herds doubled in size. We might not like trophy hunting. But like the people in the local CAMPFIRE communities, we all value a healthy and growing elephant herd more.

Prosperity is not a global threat

For more difficult cases such as climate change, solutions will come through markets and technology. No regulation in the world transformed the horse and carriage into the automobile. Similarly, it was not regulation that led to the absolute reduction of carbon emissions in the United States.

From 1990 to 2022, the total CO2 emissions in America went down by three percent while both the economy and the population grew. Carbon dioxide emissions fell while the GDP increased almost fourfold.

What is more astonishing is that in 2007, or about halfway through that time period, emissions were more than 15 percent higher than the 1990 baseline.[4] That is to say that for 17 years, emissions went up and then for the next 15 years fell by about 2 percent per year. What happened? The economics of coal were overwhelmed by the flood of newly available, lower-emission natural gas. This was the result of technological innovation.

With private risk capital, horizontal drilling techniques and new fracturing technology upended all the trend lines for emissions. Energy got cheaper and the economy boomed.

The answer to our most challenging environmental issues is in the market. The people who risked their lives and fortunes on new drilling became fabulously wealthy, and along the way they made hundreds of millions of people much better off while we put less carbon dioxide into the atmosphere.

Conclusion

We ought to shift from reliance on one pairing of institutions – statutory law and administrative regulation – to another pairing: common law and free market environmentalism. Common law precepts paired with principles like property are the way forward. This approach is rooted in our human nature and importantly leaves the door open to discover solutions to the most difficult problems of the day.

With science, we test our theories against actual outcomes. Knowledge accumulates through time, and innovative ideas can come from any source. It is important for decisionmakers to admit as much, and to use the accumulation of information to inform better policy decisions and outcomes.

About the author

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[4] Environmental Protection Agency, *Climate Change Indicators*, last updated on March 26, 2025, https://www.epa.gov/climate-indicators/greenhouse-gases. The EPA has since deleted that page. Environmental Data and Governance Initiative, "EPA Scrubs Information About Climate Change Indicators and Impacts," December 10, 2025, https://envirodatagov.org/epa-scrubs-information-about-climate-change-indicators-and-impacts/.

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