



## What's Wrong with Libertarian Environmentalism

Ed Dolan

November 10, 2020

In **an essay** in *Critical Review* a few years back, Jeffrey Friedman had a go at explaining what's wrong with libertarianism. His sixty-page argument can be summed up in a single sentence: "Philosophical libertarianism," he wrote, "founders on internal contradictions that render it unfit to make libertarians out of anyone who does not have strong consequentialist reasons for libertarian belief."

The conflict between the philosophical and consequentialist sides of libertarianism is nowhere more sharply on display than when applied to environmental issues. This commentary explores the dilemma of libertarian environmentalism and the ways—none of them entirely successful—in which its practitioners try to escape it.

### What kind of libertarianism?

The kind of libertarianism that Friedman had in mind is the orthodox version that finds its clearest expression in the works of Murray Rothbard. In his 1973 manifesto ***For a New Liberty***, Rothbard explains the essence of the doctrine:

**The libertarian creed rests upon one central axiom: that no man or group of men may aggress against the person or property of anyone else. This may be called the "nonaggression axiom." "Aggression" is defined as the initiation of the use or threat of physical violence against the person or property of anyone else.**

Rothbard's "nonaggression axiom" is now more commonly called the "nonaggression principle," often shortened to "the NAP." The NAP is an unequivocally *deontic* principle in that it defines actions as permitted or forbidden without reference to their consequences. Nonetheless, Rothbard wants to assure us that everything will work out for the best if we scrupulously adhere to the NAP. If we honor the non-aggression axiom, the result is a free market economy. And,

**it so happens that the free-market economy, and the specialization and division of labor it implies, is by far the most productive form of economy known to man, and has been responsible for industrialization and for the modern economy on which civilization has been built. This is a fortunate utilitarian result of the free market, but it is not, to the libertarian, the prime reason for his support of this system. That prime reason is moral and is rooted in the natural-rights defense of private property we have developed above. Even if a society of despotism and systematic invasion of rights could be shown to be more productive than what Adam Smith called "the system of natural liberty," the libertarian**

**would support this system. Fortunately, as in so many other areas, the utilitarian and the moral, natural rights and general prosperity, go hand in hand.**

Half a century later, the belief that free markets lead to prosperity remains strong among orthodox libertarians. “Freedom of exchange and market coordination provide the fuel for economic progress,” we read in the first paragraph of the website for the Cato Institute’s **Economic Freedom of the World** project. “Libertarians believe that people will be both freer and more prosperous if government intervention in people’s economic choices is minimized,” Writes David Boaz in a **2019 commentary** for the Cato Institute. “Advancing economic freedom is the imperative for dynamic economic expansion and true progress, no matter what a country’s current level of development may be,” we read in an introduction to the Heritage Foundation’s **2020 Index of Economic Freedom**.

With this in mind, then, let’s turn from libertarianism in the abstract to libertarian environmentalism.

### **Principles of environmental libertarianism**

Here is how Rothbard explains the principles of libertarian environmentalism in a section devoted to air pollution in *For a New Liberty*:

**The vital fact about air pollution is that the polluter sends unwanted and unbidden pollutants—from smoke to nuclear radiation to sulfur oxides—through the air and into the lungs of innocent victims, as well as onto their material property. All such emanations which injure person or property constitute aggression against the private property of the victims. Air pollution, after all, is just as much aggression as committing arson against another’s property or injuring him physically. Air pollution that injures others is aggression pure and simple.**

And what is the remedy?

**The remedy is simply for the courts to return to their function of defending person and property rights against invasion, and therefore to enjoin anyone from injecting pollutants into the air.**

Reduced to a syllogism, the orthodox libertarian doctrine is that *aggression is forbidden, pollution is aggression. Therefore, pollution is forbidden.*

This, like the rest of orthodox libertarianism, is a deontic doctrine .That is, a doctrine about the moral permissibility of certain actions, not their consequences. There is no balancing of interests here between the harm done to the victim and the benefit (in the form, say, of lower waste-disposal costs) received by the polluter. The only question before the court is whether an aggression occurred. If you accuse me of polluting your property, I might offer the defense that I did not do it, or that you cannot prove that I did it, or that what I did was so trivial that a reasonable person would not consider it an aggression at all. But if the court does not accept my contention that no aggression occurred, then I can, regardless of the balance of costs and benefits, properly be enjoined from continuing to pollute.

Rothbard is very clear about this. The courts must defend persons and their property against invasion and must therefore “enjoin anyone from injecting pollutants into the air.” As for concerns that such an injunctive remedy would be a brake on progress or would drive up costs, Rothbard replies,

**The argument that such an injunctive prohibition against pollution would add to the costs of industrial production is as reprehensible as the pre-Civil War argument that the abolition of slavery would add to the costs of growing cotton, and that therefore abolition, however morally correct, was “impractical.”**

That brings us to the central problem: Self-identified libertarians often stand in the front ranks of those who oppose regulatory limits on pollution or effective action against climate change. Yet, if they followed their professed moral beliefs to their logical conclusion, it seems they should instead be among the most zealous in campaigning against all pollution, and damn the cost. As philosopher **Matt Zwolinski** writes in a draft entry for the *Routledge Handbook of Environmental Ethics*:

**The libertarian commitment to property rights is so absolute, and so far-reaching in its implications, that it actually flips our initial worry about the doctrine on its head. Once we consider the full implications of respect for libertarian property rights, it is clear that the real problem with libertarianism isn’t that it’s not sensitive enough to environmental considerations, but that it is too sensitive by far.**

We see here the environmental manifestation of the clash between the philosophical and consequentialist sides of libertarianism described by Friedman. The philosophical libertarian says, “Pollution is aggression. No pollution!” But what is to be done when zealous enforcement of property rights threatens to undermine that other cherished doctrine, the belief that free markets promote prosperity?

### **Wriggling out from the libertarian dilemma**

I have identified five ways in which various writers try to resolve the tension between the deontic and consequentialist sides of libertarian environmentalism. One is to blame government failure, rather than market failure, for observed environmental problems. A second is to deny that the apparent victims of pollution are actually the owners of the property rights they claim to be violated. A third approach is to erect procedural barriers that make it impossible, in practice, for pollution victims to obtain redress for the harms they suffer. A fourth is to fall back on consequentialism. And a fifth is to argue the validity of the science behind the claim that harm has occurred. Here are some examples of each of the modes of escape.

***Blame the government.*** In a chapter contributed to, ***Economics and the Environment: A Reconciliation***, Walter Block explains several ways in which the government either causes pollution or short-circuits potential private remedies. At the top of the list, he points to the “The defanging of nuisance laws, to which property owners historically could appeal if they were polluted or in other ways interfered with.” Among the justification for the weakening of the common law regarding nuisances, he points to the doctrine that individuals cannot obtain relief

for nuisances caused by entities like railroads that operate under government license or for nuisances that are necessary concomitants of economic growth or progress.

As another example, the free market environmental organization **PERC** campaigns against what it sees as poor environmental stewardship on public lands. While not completely rejecting government ownership, PERC advocates market-oriented management techniques such as **charter forests**, **conservation leasing**, and “**pay-to-play**” fees for hikers and campers.

There is a valid point here. Making the government responsible for environmental protection is no guarantee that the environment will actually be protected. Government failure is a reality, and corruption of public institutions by private interests is a problem throughout the world. On the other hand, the alternative of leaving environmental protection to a set of common law courts acting under the common law doctrines of trespass and nuisance is not a sure guarantee of protection either, as the next mode of escape shows.

*Procedural barriers.* As we have seen, Murray Rothbard’s 1973 manifesto *For a New Liberty* identifies pollution as a violation of the non-aggression principle. Victims are offered remedies under the common law doctrines of trespass and nuisance. That would seem to make Rothbard a firm ally of environmentalists. However, in a more detailed **1982 paper**, Rothbard adds a number of procedural hurdles that effectively eviscerate tort law as a remedy to environmental harms:

- **In the case of pollutants like carbon dioxide or methane that are not detectable by human senses, plaintiffs must prove not just that an invasion has taken place, but that it has caused actual harm to the plaintiff.**
- **Plaintiffs must prove a strict causal connection between any harm they suffer and emissions from a specific source. For example, proving harm to crops from acid rain, in general, is not enough; the plaintiff would have to prove that the harm is caused by emissions from a specific power plant or steel mill against whom a tort action is undertaken.**
- **Joinder on either side of a pollution case is strictly limited. Each polluter must be sued individually unless it can be proved that several of them acted in concert. Rothbard also places strict limits on the ability of plaintiffs to join together in class actions.**
- **The burden of proof rests with plaintiffs, and proof must be beyond reasonable doubt, not merely by the preponderance of evidence.**

Rothbard acknowledges that these restrictions would make it next to impossible for pollution victims to prevail in court in many cases. But, he approvingly quotes a source saying that if there is any way out, “it must not come at the expense of throwing out proper standards of proof, and conferring unjust special privileges on plaintiffs and special burdens on defendants.”

*Argument from ownership.* In a **paper on the nonaggression principle**, Zwolinski notes that the NAP is not really a stand-alone principle since it presupposes a theory of property. For

example, in the simplest case, if you jump out from behind a bush and grab someone by the collar, it makes all the difference in the world whether you are a property owner apprehending a trespasser or a trespasser assaulting the property owner.

What is more, Zwolinski continues, a legal title registered with the state is not enough for a libertarian. What matters is who is *morally* entitled to claim ownership over what. For example, suppose that an authoritarian government conducted a program of ethnic cleansing and then distributed the property of the outcasts to cronies or to landless peasants of the favored ethnic group. In such a case, the new “owner,” title or no, would have no moral right to defend the property against trespass should the rightful owner return.

The question then becomes, how can one gain a morally legitimate title to real property? For Rothbard, that can happen either by purchase from a previous legitimate owner, or by Lockean homesteading – a process by which one “mixes one’s labor” with previously unowned property.

Although the term “homesteading” calls to mind the appropriation of unused land for farming or grazing purposes, Rothbard extends it to more subtle kinds of property rights. In his essay on air pollution, he writes:

**It should be clear that the same theory [i.e. homesteading] should apply to air pollution. If A is causing pollution of B’s air, and this can be proven beyond a reasonable doubt, then this is aggression and it should be enjoined and damages paid in accordance with strict liability, unless A had been there first and had already been polluting the air before B’s property was developed. For example, if a factory owned by A polluted originally unused property, up to a certain amount of pollutant X, then A can be said to have homesteaded a pollution easement of a certain degree and type.**

This approach makes a certain degree of sense in cases where the scope of the pollution is limited. For example, suppose I establish a pig farm in a sparsely populated area, where there is no one around to object to the aroma. Years later, you build a house on land that you buy from a nearby farmer. My first-in-time rights to raise smelly pigs are considered a reasonable common law defense (“**coming to the nuisance**”) against any nuisance suit that you might bring.

Can we stretch this defense to pollution on a larger scale, such global warming caused by carbon dioxide emissions? As far as I know, Rothbard, who died in 1995, never addressed that issue directly. In the years since, those who have applied a Rothbardian or a Lockean property-rights framework to climate change have come to differing conclusions. **Johnathan Adler** has argued that if property rights are to be taken seriously, legal action under tort law will not be enough. **Luc Bovens**, without specifically citing Rothbard, asserts that carbon emitters’ Lockean rights of first use should be given due consideration in setting climate policy. Still, he thinks the remedy should be sought through some form of emissions trading rather than through tort law. In **earlier writing**, I have reached similar conclusions. Hardcore Rothbardians remain unconvinced, however, as Block explains in **response** to one of my articles on the subject.

**Retreat to consequentialism.** Both Rothbard’s procedural restrictions on environmental tort suits and his doctrine of pollution homesteading are implicitly consequentialist. Both appear to stem

from the fear that making it too easy to enjoin environmental aggressions would impose costs on polluters and the consumers of their products that exceed the harm suffered by pollution victims. Other libertarian writers, however, embrace consequentialism more explicitly.

In fact, libertarian environmental consequentialism is far from uncommon, even in settings where pledges of allegiance to the NAP are otherwise *de rigueur*. For example, **Ryan McMaken**, a senior editor at the Mises Institute, frankly urges a cost-benefit approach as an antidote to what he sees as the extremism of those who warn of a climate apocalypse. Putting words in the mouths of climate activists, he has them asking, “what use is cost-benefit analysis when you’re faced with the apocalypse?” He answers, “In real life, where more rational heads—on occasion—prevail, the costs of any proposed government action must be considered against the costs of the alternatives.”

In another example, **Indur Goklany**, in a policy analysis for the Cato Institute, argues against aggressive climate action because “either focused adaptation or broad pursuit of sustainable development would provide far greater benefits than even the deepest mitigation—and at no greater cost than that of the barely effective Kyoto Protocol.” So it might. But, if anthropogenic emissions and the resulting sea level rise harm even a few people, such as those who live on low-lying Pacific islands, they constitute a violation of the NAP. That would be true even if there were positive *net* benefits for the world’s entire population in pursuing the “warmer but richer” strategy that Goklany advocates.

Even Block, usually a NAP hardliner, lapses into cost-benefit mode when it suits him. Writing of the Exxon Valdez disaster in *Economics and the Environment*, he says “The obtainable ideal is to reduce the incidence of disasters of this sort to optimal levels. ... It is not efficient to decrease oil spills to such a degree that this process actually costs more than it saves.” What happened to the Rothbardian dictum that holding down the cost of growing cotton is not an adequate defense of slavery?

***Argue the science.*** A final way to resolve the tension between the deontic and consequentialist sides of libertarian environmentalism, especially common in climate change, is to argue the science. If it can be shown that human activity is having no effect on the climate or that its effects are not harmful, then there is no tension to resolve. With that in mind, some free-market organizations have gone so far as to maintain full-time climate scientists on their staff. **Patrick J. Michaels**, a climatologist who serves as Director of the Center for the Study of Science at the Cato Institute, is an example.

In an **April 2020 analysis**, Michaels presents a scientific case for vacating the EPA’s 2009 “endangerment finding.” That finding, which determined that the buildup of greenhouse gases (GHGs) in the atmosphere endangers public health and welfare, was used during the Obama administration to support various regulations of emissions. Michaels’ reanalysis of the models and data used to support that finding concludes, instead, that increased GHG concentrations have a “negative cost,” that is, a net benefit, “under almost all modeled circumstances.”

Michaels makes three main points in his critique of the endangerment finding. First, he argues that widely used climate models, especially some of the 2000-vintage models used to support the

EPA's original finding, overstate the amount of warming that would occur from any given increase in GHG concentrations. Second, he argues that the EPA understates the beneficial effects of increased atmospheric carbon dioxide on plant growth, including rice, soybeans, and grassland. Third, he favors the use of a higher discount rate than that used by the EPA. A higher discount rate would mean giving higher weight to near-future benefits and near-term avoided costs of climate mitigation than to further-future harms from sea-level rise or droughts.

There is nothing wrong *per se* with arguing about climate science, which is, after all, not a monolith. The **widely quoted claim** that 97 percent of scientists agree about climate change pertains only to the low-threshold proposition that human activity is, to some degree, contributing to global warming. This question would be like asking economists whether they think prices contribute to some degree to consumer behavior. That leaves plenty of room for disagreement about the speed of change and its effects on specifics like crop yields, storm intensity, and sea-level rise. But libertarians, like anyone else, need to be careful.

For one thing, they need to guard against confirmation bias. Consider, for example, Michaels' analysis of the EPA's endangerment finding. Key parameters in his analysis – the sensitivity of climate to changes in GHG concentrations, the benefits of CO<sub>2</sub> for plant growth, and the appropriate discount rate – are all subject to uncertainty. Reputable, published, peer-reviewed research includes substantial ranges of values for each of them. Behind those key variables are other studies that give ranges of values for the inputs to the models from which estimates of the key variables are derived, and so on.

The suspicion of confirmation bias arises whenever a researcher consistently emphasizes values that lie near the convenient tail of each distribution: the high end or the low end of the distribution, whichever strengthens support for the desired conclusion. In judging whether confirmation bias is present, it is also fair for a reader to ask whether a given analyst's conclusions might be influenced by the source of funding for the research in question. Of course, the same cautions that apply to libertarians also apply to climate activists on the left or journalists who write about climate, none of whom are immune to confirmation bias.

Still, some objections to arguments from science apply more strongly to libertarians than to others. In particular, anything that science has to say about whether the costs of mitigating climate harms are greater or less than the benefits is irrelevant. For example, suppose Michaels is right that benefits from increased crop yields outweigh harm done by sea-level rise in the near term. Even so, flooded-out Pacific islanders would still have a valid case against Chinese rice farmers in a common-law court that operated under orthodox libertarian principles. Appealing to science is no excuse for letting consequentialism back in the window after having thrown it out the door.

## **Conclusions**

Libertarians can run from the dilemma they have constructed for themselves, but they can't hide. To stand firm in their commitment to the non-aggression principle, they would need to snuff out environmental externalities more aggressively than the most fervent Green New Dealers. They can legitimately blame some environmental destruction on the government. However, once they

have curbed those abuses (and more power to them), they still have to confront private pollution from steel mills, mines, agricultural pesticides, cars and many other sectors of the market economies they know and love.

Hiding behind legal formalisms like homesteading of pollution easements and strict rules for proof of causation amounts to preserving the letter of the NAP while abandoning its spirit. Retreating to cost-benefit analysis means discarding the distinctive deontic absolutes of libertarianism in favor of garden-variety utilitarianism. Scientific arguments are admissible as long as they are credible, but grasping at fringe theories just because they are convenient is not playing by the rules.

And where is a libertarian environmentalist to go, once the Rothbardian orthodoxy is revealed as untenable? The obvious fallback is a less dogmatic classical liberalism. The liberalism of, say, Friedrich Hayek. Hayek maintained a strong presumption in favor of free markets, but acknowledged that they do not offer the answer to every problem, including that of environmental externalities, and **expressed willingness** to consider alternatives.

In short, when faced with something like climate change, it is better to seek effective solutions, even solutions that call on help from the government, than to pretend that no problem exists.