Panel I: Liberty, Property, and Environmental Ethics

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I must confess that I come to the podium with a sense that I should offer some rebuttal to earlier remarks rather than submitting my own views on liberty, property, and environmental ethics. I brought some formal written remarks for today and you are more than welcome to look at them later, because I do not think I am going to get to them.

In listening to our previous speakers, I couldn't help but think of that Far Side cartoon with the two deer in the forest looking at these hunters talking around a fire, and one deer is saying to the other, "I think they are talking about us." (Laughter.) When Professor Rothman was speaking, I found myself strangely identifying with the deer in that cartoon.

I would, therefore, like to begin with a few thoughts on the comments that have already been made and, thereby, violate every agreement that I made in coming here to speak with you today. I would like first to address former Attorney General Meese's comments with regard to environmental crime.¹ I did not expect to speak on that subject, but what the hell.

The discussion of environmental crime in the last few months has been super heated and, as Dick Stewart and others in this city are aware, there are many casualties littering the ground. Listening to the comments of former Attorney General Meese and Professor Rothman, it is clear that this field is an increasing fixation of many conservative politicians, academics, and most recently, newspaper editors. There has been much heat and little light generated in this area. The editors of the Wall Street Journal, for example, have taken particular pleasure in calling me and other advocates of increased enforcement a litany of alarming names ranging from "environmental terrorists" to "torquemadas in training," to my favorite "environmentally correct voices" that President Clinton should not listen to. If anything, they have a gift for the gab.

To be honest, I am a little confused about some things with regard to the Federalist Society. I am actually confused about a lot of things with regard to the Federalist Society, not the least of which is why I was invited to speak here. (Laughter.) I am a little confused about the general reaction of this and other organizations to environmental crime. I am particularly confused about the feelings towards environmentalism as a concept. I am just going to comment on that, and what the hell, and we will see how far it goes. Feel free to interrupt me, I am used to it in law school anyway.

The strange thing about environmental crime is how past administrations that were committed to fighting crime with every ounce of energy in our body politic, and every penny in our public coffers, would somehow single out one form of crime as unworthy of enforcement. For some reason, the culpability of criminal conduct is lessened in the eyes of many when the vehicle for crime is the environment. I do not understand it. Many of these environmental crimes involve "knowing endangerment" provisions that involve serious bodily injury or death. These are real crimes committed by real criminals. The mens rea or criminal mind is the same; only the method is different. I do not understand how this remarkable metamorphosis can take place in the minds of many. Criminals who openly flaunt the law and injure other individuals are somehow transformed into personifications of American entrepreneurship and individualism. Prosecutors who attempt to enforce criminal laws aggressively become torquemadas and eco-terrorists. The editors of the Wall Street Journal and others have made virtual poster children out of convicted felons like John Pozsgai and Bill Ellen. While many have attempted to build a certain mythology around them, these people did not go to jail because they innocently threw a little top soil on a wetland. These people went to jail because the law told them not to do something and they did it anyway. These individuals violated federal laws, cease and desist orders, and even direct court orders. They thought that criminal law applied to other people. They were wrong and so are those people who find their behavior excusable. These are not people that I would normally have rushed to adopt as ideological brethren.

There are clearly philosophical and legal issues to resolve in this area. The Federalist Society should play a constructive role in framing that debate without the extreme vitriolic attacks common in the past. As a law professor, for example, I am bothered about the criminalization of certain areas of law. This question and other questions will not

be resolved while conservative organizations continue to deny the very notion of environmental crime.

If there is to be a reasoned dialogue, we must all first recognize that these are crimes. This is clearly a step that the *Wall Street Journal* editors and some conservative leaders are not willing to take. I advise you to take this step so that we can all move on to participate in this important debate. Otherwise, it is odd for conservative organizations to single out this one area of crime for special dispensation. It is odd and it is highly suspicious.

Ironically, when the first editorial ran on environmental crime in the *Wall Street Journal*, editors expressed concern that if this "new movement" were allowed to grow unimpeded we would see executives go to jail. Now, I have to tell you that I would be pretty damn ashamed to make that a defense in my case. Do not argue that you are afraid of executives going to jail. Argue that you are afraid of innocent executives going to jail.

The other thing that I find odd about this campaign is the persistent suggestion that environmental crimes are new. It seems that at every conference where I speak I am preceded by someone who says that there is a new cancer growing on the American body politic, and that is environmental crime. Environmental crime is not new. It is not a new movement at all. Environmental crimes have existed in this country since the eighteenth century. If you go back to England, we have had environmental criminal laws since the fourteenth century. In 1307, the Crown actually put a man to death for violating the Smoke Abatement Law. Now rest assured, I mention this not by way of a contemporary model for the Sentencing Commission, but as an example of the historical efforts to combat this special form of crime.

Environmental crime is not a new movement, but it is a growing movement. It is a growing movement because environmental crimes tend to increase during times of economic "downturns," to use the operative phrase. It is growing because the American public has become aware of a dangerous double standard in our system of justice. Crime committed under the guise of enterprise has taken on a protected, even noble, quality in our system.

Now I expect that I have already ignited a powder keg beneath me and, before I go any further, I want you to know that I have told my students where I can be found. (Laughter.) So if I do not go back to the law school by a certain time, this place will be filled with cops. (Laughter.)

Before I relinquish the podium I want to express a few other things that concern me. And to give it a name, Professor Rothman concerns me. (Laughter.) I think that Professor Rothman's presenta-
tion was refreshingly frank and if nothing else I do respect that quality, particularly in the Beltway.

But I wonder just how one defines an environmentalist, because I get the distinct feeling that you are all here on some sort of bizarre Beltway safari looking for this elusive creature in the hopes that you can knock him out and then follow him on his breeding and migration patterns. (Laughter.) So let me save you some trouble and just tell you what an environmentalist is, since I suppose I am one of these creatures. According to Professor Rothman and others, environmentalists can be reduced to a very simple phrase; they are elitist, countermajoritarian scum.

Professor Rothman: I never said scum. (Laughter.)
Professor Turley: I am sure I will win you all over by the end and have you singing, "You can win with Ho Chi Minh." (Laughter.)

I often warn my students that environmentalists like myself can easily be attacked as elitist, countermajoritarian scum. The fact is that, on occasion, environmentalists do not want to do what is difficult—deal with the masses. They come directly to the Beltway, as do a few other parts of the political spectrum, and try to change America from here. I do not agree with that. If there is a failing in the environmental movement, it has been a periodic failure to talk directly to the people that we are trying to regulate. I think it is a mistake because it undermines our credibility.

But putting aside that critique—my Cultural Revolution confession—I want to talk about what environmentalism should be. In my view, environmentalism should be on the top of all of your lists as a priority for modern federalists. I would think that with James Madison staring down, you would work diligently to develop environmental values that are based on individualism and self-sufficiency. In case you are wondering, I, and I alone, speak for James Madison. (Laughter.)

As modern federalists, you should be concerned about factions. You should be concerned about Beltway operators. You should be concerned about the ways in which open and deliberative process is frustrated. In this town, individuals make a great deal of money scuttling majoritarian legislation for narrow interests. This should be a fundamental concern for anyone who adheres to the writings of James Madison. Federalist No. 10 warns the American people of factions adverse to the permanent and aggregate interests of the community. Environmental regulation is primarily motivated by aggregate interests and most often frustrated by the concentrated interests in our society.

3. The Federalist No. 10 (James Madison).
As someone who continues to work with Capitol Hill and with the U.S. Sentencing Commission, I can tell you that the concentrated groups working in this city are highly effective and many, if not most, are industry groups. This is not to say that environmentalists do not have their support organizations, because they certainly do. But the greatest danger to a Madisonian system lies with concentrated interests that place distributed costs on society. This problem was demonstrated in work by Mancur Olson, James Wilson, Michael Hayes and most recently Bill Eskridge. Small, concentrated interests have stronger incentives and more efficient methods for lobbying legislation on environmental regulation than large, diffuse environmental organizations. As we consider environmental regulation and its failings in some areas, we should be cognizant of these legislative shortcomings.

The purpose of environmental regulation is the protection of private property rights. Environmentalism, therefore, is not only compatible, it is essential to private property rights. I agree with Bob Ellickson that private rights are the key to environmental regulation and that, whenever possible, we should rely on market forces as opposed to command-and-control regulation. The tragedy of the commons is a concept that has great contemporary meaning for our society. It has been proven over and over again that when private property interests are introduced, environmental values will often develop where opportunistic behavior once prevailed. Adopting market approaches for environmental regulation, however, must be done with consideration of two central issues: cost externalization and market failure.

Cost externalization should be an overriding concern for any environmental policy, whether driven by market or regulatory forces. Any rational actor will attempt to externalize costs of production whenever possible. Today the most common form of cost externalization is pollution. Allowing such cost externalization is like a hidden tax on society without any formal debate or decision by the public. Not only is it wrong to force others to bear the costs of your production, it is inefficient for society artificially to sustain businesses that could not survive if they were forced to internalize their true costs.


Consider a large air pollution case. Assume that you have a company producing a product at a profit of one million dollars per year, but producing ten million dollars in damages. In a perfect market, the Coase Theorem would suggest that the pollution will be abated regardless of who has the entitlement. The more valuable resource or activity will prevail. Even if the company has an entitlement to pollute, those injured by the pollution would organize to pay the company to abate at some cost above one million dollars and below ten million. As Coase demonstrated, however, such exchanges would only occur in a perfect market, and often additional costs interfere with such efficient adjustments. For example, assume that the ten million dollars of pollution is spread over ten million people, who suffer one dollar worth of damages each. In such a case, you would not have an efficient market response. None of those people have an incentive to spend money to avoid one dollar of loss, or if they do, they will run out of incentive fairly quickly. Thus, they will not organize in any Coasean ideal.

What you have is a distributed group that is not going to join together to lobby for change, or to offer bribes—to use the economic term—to change market behavior. In the perfect market, you can often have exchanges, like Coase's cattle and crops example, in which such a bribe would be given. But due to the dispersion of harm, this is not going to happen in the air pollution case. High informational costs exacerbate this problem.

Now I see a hand in the audience. I am going to break my earlier promise. I am on a roll now. I will promise to get back to you. I am really enjoying this podium and you will have to find three big guys to pull me away from it. (Laughter.)

Fighting cost externalization should be a fundamental goal of our legislation and litigation in the environmental area. If there is a way for legislation to assist the market, it is to force people to internalize the cost of their pollution. To me that is the best justification for legislation. Environmental regulation happens to be one area in which there is a high degree of cost externalization.

The problems associated with externalizing costs will become more acute as populations rise. Yet, there is little heard from conservative circles about these problems. One would think that the mere suggestion that individuals are being asked to bear costs involuntarily would lead to an outcry, particularly in this audience. I would think that there can be nothing worse to many people in this room than an uncompensated transfer of risk or wealth. It is not fair or

7. Id. at 2-6.
efficient to let one company or one individual force others to bear part of its cost of production. When the government attempts such transfers, we call it a taking. Many in this audience have spent their professional and academic careers fighting such takings. While private takings are more common and insidious, they rarely inspire the same level of concern. Nevertheless, it is highly damaging for a society to allow rampant cost externalization when the benefiting companies could not remain solvent if they were forced to bear their own costs of production. Put another way, these companies are producing a product that would not otherwise be valued above the cost of production if externalities were fully internalized in the cost of the product.

The second issue that we must address in any use of market approaches is the problem of market failure. I often use the term market failure with some reservation. Conceptually, it is difficult to say that a market can fail. A market does not truly fail; it merely responds predictably to adverse conditions. When the term market failure is used in public policy, it is often used to mean that it fails to do something in a reasonable period of time or for a particular purpose. For example, it is probably true that, left to its own devices, a perfect market would slowly squeeze out racism. Eventually, racist businesses would be forced from a competitive market due to the added tax that their preference places on their operation. This result, however, will occur, if at all, at a glacial pace for public policy.

It is highly popular to talk about market forces without speaking of the limitations of market approaches. The Coase Theorem is a favorite device for introducing market approaches into regulatory schemes. As an aside, it was interesting when Coase suggested to a large group of law and economics professors that none of them seemed to get his theorem right.

Once again, please rest assured that I, and I alone, speak for Ronald Coase. (Laughter.)

Any suggested use of market forces must recognize, as Coase did, that there is no perfect market. As a matter of public policy, you must deal with markets when they are not perfect and when they are operating inefficiently over the long run. Market approaches alone are likely to fail when there are high transaction and information costs. It just so happens that in the environmental area there are typically very high transactional and information barriers. When a market will not suffice to achieve the wealth maximization goals of a society, legislation is needed. This is why we have environmental regulation and this should be the guiding principle for all such regulation.

8. *Id.* at 15.
Speaking of informational problems, by the way, I agree with Professor Rothman, there is a lot of bad science out there. But I have to tell you that I did not come away thinking that the problem was entirely the fault of environmentalists.

Now I want to end by reemphasizing that cost internalization as an objective for environmental law is not at odds with private property rights. There has been a lot of discussion about wealth maximization in the academic and political world. We are supposed to maximize wealth if we want to come to a utilitarian ideal. There is also an argument for social wealth maximization. There is a sort of false dichotomy that is portrayed between the two. Professor Gary Lawson at Northwestern did a fine piece on this subject.

The question, therefore, is not whether to protect individual property rights, but rather, whose interests are to be protected. Social wealth maximization is achieved by regulation designed to increase the wealth of all the individuals in society. My formal comments addressed this, as well as other points, and I would be more than willing to share them with you.

Let me conclude by saying that I do not think that it is to the advantage of this organization to adopt the most radical approach to environmental regulation. I say that not to encourage you to become more effective. God knows I do not need that.

I think there are some inherent contradictions in your approach towards environmental law and your more general philosophical underpinnings. James Madison developed a uniquely American system of democracy to reach majoritarian compromise among otherwise disparate factional groups. More than any other, this Madisonian value should produce some introspection on all sides of this current debate. Environmentalism is not a conspiracy for wealth redistribution, nor is it a substitution for democratic values. I do not say this with scorn in my voice, because God knows on my side of the aisle that we have enough contradictions to keep us busy for twenty years of self-examination. But I do not think contradiction is healthy for any organization. I think the Federalist Society has a number of very good things to contribute to this debate. I think the Federalist Society does itself a disservice at times when it adopts somewhat extreme positions.

I am going to stop there and quickly go to my seat and put the table between me and the rest of you. (Laughter.)