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Panel I: Liberty, Property, and Environmental Ethics

Robert C. Ellickson, Second Panelist*

I have made myself a pest at Federalist Society conferences by asserting that, while the Society places the silhouette of James Madison on its banner, it neglects a fundamental principle that Madison embraced. My claim is that the Society is not as truly "federalist" as it should be. I must be doing this in an amicable way, because the Society keeps inviting me back. (Laughter.) Federalist Society proceedings too often presume that our nation has but one important government, the one here in Washington D.C. This is, of course, the Beltway Syndrome, a disease apparently powerful enough to have infected the Federalists.

I myself am a student of local land use regulation, a system that involves approximately a quarter of a million municipal legislators and staff. These regulations, in many respects, are the nation's most basic form of environmental control. I predict that this regulatory system will receive little or no mention during this conference. We will instead mostly talk about federal judicial decisions, federal environmental statutes, federal agencies, and so on. If we do proceed in this fashion, I ask you to ponder whether this conference will have been faithful to the principles of the host organization.

Thankfully, I do detect signs that the Society is beginning to break the grip of the Beltway Syndrome. At many past Federalist conferences, only federal judges have spoken. At this conference, a state-court judge (Justice Stanley Mosk of California) will appear. Another ray of progress is the designation that the Society has given Dixie Lee Ray on the printed program. She is identified not by her Beltway affiliation (ex-head of the Nuclear Regulatory Commission), but rather as a former Governor of Washington State. If I were a generous person, I would credit Gene Meyer and his staff for these steps toward Madisonianism. Since I am not, I will attribute all the progress to my peskiness at prior Federalist Society conferences. (Laughter.) In truth, it is possible that my anti-Washington attitude is entirely self-serving. I know relatively little—compared say to my fellow panelist Dick Stewart—about federal environmental statutes.

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I will focus my remarks on the final two subjects in this panel's topic: property and environmental ethics. I suspect that few people respond warmly to both of these terms. If one asks listeners to react to the phrases "environmental ethics" and "private property," most will respond that one phrase is appealing while the other repels—although they will divide sharply on which does which. The popular view is that property and the environment are enemies—pitted in a Manichean struggle between good and evil. Briefly, my thesis today is that we should reject this conception. We do not face a stark choice between private property and environmental ethics. If we focus on technical issues of institutional design, we can succeed in reconciling the two.

Political activists of all stripes find it useful to cast their opponents as devil figures. Devil figures help a group recruit members, raise money, and keep up morale. For instance, environmentalists are tempted to portray defenders of property rights as barbaric, materialistic, and unfeeling. This helps keep the motor of the environmental movement running. Conversely, property rights activists are prone to depict environmentalists as naive treehuggers who will sacrifice everything for the spotted owl. This vision helps keep property rights activists enthused and their coffers full.

I know many lawyers involved on all sides of environmental issues. Not one of them fits either of these stereotypes. Because lawyers are inevitably immersed in worldly complications, members of our profession tend to harbor rather more complex views on issues than nonlawyers do.

I will talk first about how the most fervent environmentalists (presumably not lawyers) might misrepresent the views of private property advocates. As examples of private property proponents, I've chosen Richard Epstein, the well-known dynamo at the University of Chicago Law School, and Bernard Siegan, who was Ed Meese's colleague at the University of San Diego Law School. Within the legal academy, there have been no more forceful advocates for private property rights, no more forceful skeptics of regulation.

Do Epstein and Siegan believe that property rights are absolute? Do they believe that principles of individualism dictate that landowners be unrestricted in their use of land? Not at all. Richard Epstein, for example, has written extensively and approvingly on nuisance law, the common law method of land use regulation.¹ He has also argued

that legislation regulating nuisances does not effect an unconstitutional taking of property.\(^2\)

Bernard Siegan is rightly acclaimed for his pathbreaking study of Houston, the largest U.S. city without zoning.\(^3\) Siegan applauds Houston's disinclination to zone, in large part because he has a high regard for the efficacy of private covenants used there. Notice, however, that covenants are themselves a method of land use regulation, albeit one established by contract. Thus, Siegan can hardly be described as an unalloyed opponent of constraints on an owner's liberty to use his land.

In sum, neither Epstein nor Siegan—widely regarded as the staunchest defenders of private property—are blanket opponents of land use regulation. Instead, they simply prefer certain kinds of regulations, in particular, controls that are created apart from the legislative process. At the core, they have strong beliefs about the relative competence of institutions, and they are willing to give wide regulatory latitude to the institutions they trust most: markets and common law courts.

For those of you interested in data, as I hope most of you are, I should mention that Janet Spreyer has done an empirical study of house prices in the Houston area.\(^4\) After controlling for other differences, Spreyer found that covenants and zoning were independently and equally capable of boosting home values over the values that would prevail if nuisance law were a homeowner's only form of legal protection. Her findings support Siegan's assertion that covenants, where they exist, can be as effective as zoning. But Spreyer's results also bolster a broader conclusion—which I think neither Epstein nor Siegan would dispute—that appropriately tailored regulations can enhance property values. Environmental regulation is not invariably an enemy of private property.

I myself share Epstein and Siegan's general skepticism of the relative competence of legislative and bureaucratic processes. My skepticism was deepened by my experience of living in the San Francisco Bay Area for eight years. The system of public land use regulation there has spun out of control with large-lot zoning, growth controls, elaborate planning requirements, environmental impacts reports, excessive subdivision exactions, and on and on. In general, this elephantine system harms housing consumers (particularly the younger

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consumers), creates grave inequities, and massively wastes both land and human energy.

So, I largely agree with Epstein's and Siegan's view that many public land use regulations should be eliminated. On the other hand, both those scholars go on to urge federal judges vigorously to engage in judicial review of the constitutionality of state and local land use measures. On this issue, I part company with Epstein and Siegan. I am generally dubious of judicial activism and particularly skeptical that the federal judiciary is the best institution to regulate the conduct of local government.

Having asserted that staunch environmentalists have a myopic view of private property activists, I now turn to the converse inquiry, the image of environmentalists in the eyes of property rights stalwarts.

Professor Rothman has described his findings regarding environmentalists' beliefs. He asserts that many use environmentalism as a foil for the cause of socialism and other radical policies entirely inimical to a market economy. I can think of some environmentalists—Barry Commoner, for example—who nicely fit Professor Rothman's description. But most do not. I cannot recall any environmentally inclined colleague or student who would advocate government acquisition of major industries.

As I see it, environmentalists have two core beliefs that set them apart. First, they tend to embrace a particular ethical position, one elaborated over the years by Aldo Leopold, Christopher Stone, Peter Singer, and others. This ethic holds that humans should expand their circle of empathy to encompass certain animals, plants, habitats, and so forth. I do not doubt that environmental activists go far beyond the sensibilities of average Americans in this respect. To embrace this ethic, however, does not in itself make one a socialist.

Second, most environmental activists have far more faith in the relative competence of government regulators than the average American has. Asked whether the future of the nation's resources would be more safely placed in the hands of a GS-15 working for EPA or in the hands of a vice president of a forest products company, most environmentalists would unblinkingly choose the GS-15. I suspect that most members of the Federalist Society have a different assessment of relative competence and would make the opposite choice.

6. See Epstein, supra note 2, at 263-73; Bernard H. Siegan, Land Use Without Zoning 221-23 (1972).
But I repeat that to favor big government, as most environmentalists do, is not necessarily to favor socialism.

I myself rarely share environmentalists' views about relative institutional competence. I regard their outlook as a throwback to quaint notions of scientific government that surfaced in the early part of this century. This ideology sometimes spawns inane policies, such as the statutes in California and New York that require the preparation of bullet-proof environmental impact reports for major private land development projects. These statutes mainly function as wasteful jobs programs for environmentalists and lawyers, and as vehicles that enable youthful Luddites to impose their beliefs on the rest of society.

In the final portion of my remarks, I will strive to reconcile the institution of private property with environmental ethics. I aspire to function as a peacemaker in what I regard as an overly ideological war.

First, I urge environmentalists to exalt, not decry, the institution of private property. There is now a worldwide consensus that private property, the linchpin of a market economy, fosters prosperity. Recent newspaper reports indicate that even Fidel Castro, one of the last holdouts, has come to recognize the virtues of capitalism. (Laughter.) And prosperity serves the environmentalists' cause. In economic lingo, environmental quality is a "superior good." Wealthier people desire more environmental quality than do poorer people who are struggling simply to survive. We are in the midst of negotiating the NAFTA treaty with Mexico. Those negotiations have highlighted that Mexico, like most nations less developed than ours, has far lower environmental standards than we do.

Largely on account of our relative prosperity, the United States is a world leader in environmental quality. Much of the wealth created here during the 1970's and 1980's was funneled into environmental protection, and with considerable success. The air in our cities is cleaner. Aquatic life has returned to Lake Erie and the New York harbor. Environmentalists should embrace private property because it generated the wealth that enabled this level of environmental quality.

In particular, the institution of private real property brilliantly serves the environmentalists' cause. First, common ownership of land tends to lead to waste. Common pastures tend to be overgrazed and common forests overcut. When the Great Plains was an open frontier, the buffalo were nearly exterminated. Today, buffalo are multiplying apace on private ranches in the West. Private ownership generally leads to better care of the Earth's treasures.

In addition, the basic form of private property in land—the fee simple absolute—is our society's central conservation policy. The fee simple confers unending ownership on a mortal, prompting him to adopt an infinite planning horizon. A fee owner's current land use decision that would diminish the utility of his land after his death is capitalized negatively into a lower current land value. The fee simple thereby harnesses human selfishness to the benefit of future generations.

Much of the land in the Western United States is managed by federal agencies, particularly the U.S. Forest Service and the Bureau of Land Management. Because I am skeptical of government's relative competence, I urge the Federal Government to consider re-adopting the nation's land policy of the nineteenth century, a presumption that federal lands should be transferred to private ownership.

Some federal lands undeniably contain unique resources that private owners might decide to destroy irreversibly. These unusual federal holdings should be retained in the public domain. But why should the Federal Government still own sixty-one percent of Idaho and forty-five percent of California? Environmentalists should not be blind to the advantages of significantly reducing these percentages. The privatization of federal holdings would result in less abuse, such as overgrazing.

Environmentalists who reflexively oppose all efforts to privatize federal lands risk earning Professor Rothman's "socialist" label. I urge them to focus on environmental outcomes, not on maximizing the role of government.

In turn, I urge private property advocates to reckon with Epstein and Siegan's willingness to stomach land use regulations in some contexts. If environmentalists eventually concede some benefits of private property, and property advocates concede a niche for regulation, what is now an implacable battle can be transformed into technical discussions of the merits of various institutional mechanisms. If issues were approached in this less heated way, participants should be able to reconcile environmental ethics with the institution of private property. If the Israelis and the Palestinians can find common ground, as recent newspaper reports suggest, perhaps others can as well.