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Panel IV: Culpability, Restitution, and the Environment: The Vitality of Common Law Rules

Daniel A. Farber, Third Panelist*

I seem to have ended up at the end of the batting order for this conference. One disadvantage of that position is that you can get preempted by other speakers, which I think essentially happened to my original remarks about Daubert.1 The advantage, however, is that you get to hear everybody else speak first and then comment on the whole proceeding. That is the tack I am going to take.

One of the things that I found most striking about this entire conference was the basic lack of fireworks. The panelists, and especially those from the law school setting, were not really throwing many grenades at each other. In fact, it struck me that there was a very strong element of consensus. It is extraordinary that people with very different political beliefs, such as Bob Ellickson, Cass Sunstein, and Chris Stone, agree on some basic points about how to think about environmental problems. They may not agree on the conclusions, but they do on the basic method.

One major point of agreement is that you have to make tradeoffs between environmental benefits and costs. That is not controversial. A second point is that often the real question is comparative institutional competence. All institutions have their flaws. Which institution would be the least worst among the various choices? Third, there is probably a consensus among environmental law scholars that market incentives are worth a try. You do not hear many legal scholars attacking marketable permits as immoral. Command-and-control regulation still has some support, but most people agree that it has gotten very complex and expensive and, consequently, that it needs some rethinking. Along those same lines, I think everybody agrees that CERCLA2 has been a very expensive failure. That is a lot of common ground.

Judge Posner is fond of commenting that legal scholars do not have a real common paradigm—legal scholarship today is a “weak

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field” compared to economics. That may be true in some areas. In constitutional law, I doubt you would find this kind of consensus. But in environmental law, we do have the same kind of consensus as economists have. Economists have very bitter disputes with each other, but they all talk the same language, and they all acknowledge the same general sources of information and reason. Therefore, the debates tend not to be quite so spectacular. There are people who have very different ideas about how people adjust their savings plans when the government runs a deficit. Well, that is important, but it is not like the difference between Frank Easterbrook and Catherine MacKinnon in the realm of pornography.

In some areas, there is less consensus, but the discussion only touched on those areas occasionally. The disputed questions relate to goal-setting rather than implementation; until now, I have mostly been talking about implementation issues. I think there are two areas of strong disagreement, although even here the disagreement is bounded. The first question is risk aversion. If we have uncertainty, how much should we be willing to pay for insurance against the possibility of disaster? People simply have different attitudes on that question. Some people are highly risk averse; others are less so. A second question, which came up in passing a couple of times, involves non-commodity values—the value that people place on the existence of redwoods or whales. How much weight should those values be given in the analysis? Interestingly enough, there are disputes among economists on the related question of whether “option values” should be part of a cost-benefit analysis.

In short, I was somewhat surprised by the amount of methodological consensus among the panelists, which I hadn’t been expecting. I had expected to see a consensus among the audience, so that wasn’t a surprise. That consensus was generally hostile to contemporary environmental law, which is a common attitude among political conservatives.

On further reflection, I’m not at all sure that such a consensus among conservatives ought to exist or that this hostility is really consistent with the fundamental tenets of the Federalist Society. Of course, the Federalist Society is not a monolith. It might be more accurate to say that at least portions of this anti-environmentalist stance seem to conflict with some important strains of thought within the Federalist Society.

One incongruity involves Huber’s view that the courts have shown a great lack of competence in dealing with scientific issues.3

They have been misled by junk science. They do not know what they are doing. I suspect almost everyone in the audience agrees with that. If Huber is right, that conclusion should cause some really serious pause to libertarians. It means that the common law system of torts cannot effectively protect a very basic aspect of human liberty: bodily integrity. Apparently, we need regulatory agencies to do the job. It seems to me that, if I were a libertarian, I would find that very problematic.

Another area of tension appeared during Susan Rose-Ackerman’s talk\(^4\) and, maybe even more, in the discussion afterwards. There was a very clear feeling in this room at various points that Congress has gone crazy. Legislatures, we are told, have made policy judgments that are insane. Federal judges ought to do something about it. Judges ought to use the Takings Clause. Judges ought to review agency actions more carefully. As Dr. Greve put it, maybe the entire Federal Government has gone insane.\(^5\) In a group that lists Judge Bork as a cochair, this basic doubt about the democratic process—and what looks to be a desire for federal judges to set things straight—perhaps ought to give the Federalist Society some pause.

The discussion of Lujan\(^6\) also seemed troubling, given the Federalist Society’s basic aversion to judicial “creativity” in constitutional interpretation. We have had a lot of discussions of standing in policy terms, but what about Justice Scalia’s methodology? He construes Article III on the basis of seemingly unrelated language in Article II, draws some quick structural conclusions about the role of the federal courts, and strikes down an act of Congress. Any discussion of original intent is noticeably absent, an omission that also ought to trouble a group that counts Judge Bork among its pantheon. Even on policy grounds, it’s not clear to me that members of this group should favor a narrow definition of standing. The effect of narrowing standing is to make it more difficult to challenge the legality of executive action. For the libertarians among you—and more generally, for those who share the view of the Framers about the dangers of unchecked power—it should be far from obvious that a contraction of standing is desirable.

It seems to me that “conservative environmentalism” should not be considered an oxymoron. On the contrary, I would argue that a


rigidly anti-environmentalist position ought to be at least equally suspect among conservatives. It would be a fair enough response to say that I lack standing to lecture the members of this group about the mandates of conservatism. But sometimes the view of the “person from Pluto”\(^7\) can provide a useful perspective. In any event, I appreciate the opportunity of addressing you today.

Thank you.

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7. Nonexistent successor to the “man from Mars.”