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Land Ownership and Environmental Regulation

James L. Huffman*

INTRODUCTION

Advocates of environmental protection have encountered various obstacles over the last thirty years of rapidly expanding government regulation—most significantly, the technical and scientific challenges of detecting and controlling environmental harms. But even if we could know for certain which environmental risks we faced, and even if we possessed the knowledge and expertise to reduce or eliminate those risks, environmental protection would still face significant political and legal hurdles.

The political impediments are little different from those faced by the advocates of any public policy. Competing interests disagree about the nature and magnitude of the problem, deny its existence, or have different opinions about social priorities. The legal barriers are not unrelated to science and politics, given that most legal change requires political action of some sort. But one legal institution has been of particular concern for proponents of environmental regulation—private property. Private property has been perceived as an obstacle to environmental protection in two respects. First, there are practical difficulties in managing environmental problems, the vast majority of which are not confined to distinct parcels of land. Second, there are constitutional constraints on government actions that take private property without just compensation.1 These property-related constraints have elicited extensive discussion and debate over the last three

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decades of environmental regulation. More often than not, both obstacles have been exaggerated and misconceived to the ultimate detriment of environmental protection. The incentives for wise resource management that arise from private rights in a market economy have been underestimated, often because we mistake legal failure for market failure. Further, the constraints of constitutional guarantees of property rights have been exaggerated, although the enforcement of such guarantees, contrary to conventional assumptions, will often benefit the environment.

The central theme of this panel is unusual in that it proposes to examine the relationship between land ownership and environmental regulation without the explicit assumption that private land ownership is a problem. For many, that orthodox assumption is implicit, but I will show that we need not begin from the premise that private land ownership is invariably, or even usually, a problem for environmental protection. But before doing so, we should consider the orthodox view of the relationship between private land ownership and environmental regulation.

According to the orthodox view, the question whether land ownership influences the level at which environmental regulation should take place implies that land ownership and environmental regulation are discrete functions, in which the nature of the former impacts the latter. Under this approach, we might reflect on how land ownership influences the choices we make in pursuing environmental regulation through the various levels of government in the American federal system. Does the existence of land ownership argue for local, state, regional, national, or even international regulation? Perhaps the answer depends upon the particular environmental problem we are addressing and the existing regime of land ownership. Or perhaps we


3. The term "legal failure" is used here to describe circumstances where the absence of market transactions, with resultant external costs, can be remedied by refinements in the system of private rights. This is distinguished from market failures which arise in circumstances where we are unable to design a private rights system applicable to the resource being allocated. Because technology is central to our ability to create secure and enforceable private rights, this is not a static distinction. Thus what was once a market failure, according to this distinction, may become a legal failure. Finally, it is assumed that economic efficiency will be among our objectives and that, absent inconsistent and overriding objectives, we will prefer, therefore, to repair the legal system rather than to regulate in the name of market failure.
should conclude that all environmental regulation is best pursued at a particular level of government without regard to the circumstances of land ownership.

Framing the issue in this orthodox way treats private land ownership as an independent variable with which environmental regulators must cope. Viewed from this perspective, land ownership is a fact of life, but not inevitable. If we determine that land ownership forces us to regulate at an otherwise less than optimal level of government, we might conclude that land ownership is an obstacle to environmental regulation and, therefore, should be eliminated or restricted as part of our environmental protection strategy.

For example, it is plausible that our analysis might proceed as follows. In most states, most land is owned privately. Because property law is, for the most part, state law, we must look to the states for environmental regulation where private property is affected. Because most environmental problems are not confined to individual parcels, nor even to individual states, environmental regulation is less effective at the state level. Thus, under this orthodox view, environmental protection will benefit from the elimination or restriction of private property rights so that national or even international regulation can be undertaken effectively.

The issue should be reframed. Specifically, private ownership of land is not just a fact of life with which environmental regulators must cope. It is, like regulation, an institution for the allocation of scarce resources. We can usefully understand private ownership to be the least centralized approach to resource allocation on a scale of increasing centralization from individual action through local, state, and national to international government. Viewed in this way, private ownership is an alternative among various institutional arrangements for allocating scarce resources, rather than an unfortunate obstacle to effective environmental protection.

This understanding of the relationship between land ownership and environmental regulation at differing levels of govern-

4. Even in the public lands states of the West, there are only a handful of states (Alaska, Idaho, Nevada, Oregon, and Utah) in which the federal government possesses more than half of the land. GEORGE C. COGGINS AND CHARLES WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 13 (2nd ed., 1987).

5. While Professor Freyfogle's assertion that property rights are defined by all manner of law and custom at all levels of government, see Eric T. Freyfogle, The Particulars of Owing, 25 ECOLOGY L.Q. 574, is not inaccurate, particularly in a practical sense, the foundation of property law remains state law.
ment will sound a dissonant note in the environmental protection movement, which has long advocated increasingly centralized regulatory corrections for the environmental depredations of property owners and other private actors. The following sections analyze a few of the flawed assumptions that provide the basis for increased environmental regulation under the orthodox view.

I. OWNERSHIP AS EXPLOITATION—REGULATION AS INTERNALIZATION

One of the theoretical underpinnings of the modern era of environmental regulation is the cost internalization model. This model proceeds from the reality of pervasive private transactions, including exchanges of interests in land, and the belief that most environmental problems are the external costs that result from market failure. The analysis has been so often repeated that it is like a familiar tune, the chorus of which begins with private decisionmakers who transact with each other, without taking account of the interests of third parties. These third-party interests are not considered because they are dispersed among many individuals who are precluded from participating in the market by the high costs of transacting. It is the role of government to intervene, not on behalf of these third parties, but in the public interest. The resulting regulations will result in that allocation of resources that a perfect market would have delivered.

While not every advocate of environmental regulation embraces the underlying goal of economic efficiency upon which this analysis is based, some notion of market failure is common to most arguments for regulation. Even those with ideological objections to individual wealth accumulation, consumerism, or any human impact on the natural environment will embrace a market failure analysis, albeit with different notions of failure. Whatever one's standard for market failure, the common theme is that private ownership exists to permit particular individuals to possess and use resources. This implies exclusion, self-interest, and no concern for the interests of third parties or of

6. See Albert Gore, Jr., Earth in The Balance: Ecology And The Human Spirit (1992). There has been, in recent years, something of a minor trend to decentralization (or what has come to be called devolution in this unfortunate era of unfortunate expressions), as evidenced by some of the presentations at this symposium. As Professor Coggins makes clear in his contribution to this volume, however, not everyone endorses this trend. See George C. Coggins, Regulating Federal Natural Resources, 25 Ecology L.Q. 602.

the community.

The call for regulation that inevitably follows from this market failure analysis can be problematic in two respects. First, property rights have never existed without at least some regard for the interests of neighbors or of the broader community. The recognition and enforcement of these limits is a central business of property lawyers. Second, government intervention in response to claims of injury, without regard to the existing distribution of property rights, will be counter-productive to the extent that rights holders have diminished certainty about the scope and content of their rights.

The bundle of sticks that constitute the complex of property rights with respect to any particular parcel of land invariably includes easements, constraints of public and private nuisance, and other legal manifestations of the rights of others or of the community. But this does not mean that everyone displeased with a particular land use decision has a legal right to demand government intervention. Where injury occurs or benefit is denied to third parties with no claim of legal right, there is no legal remedy, even though efficiency analysis may call for a reallocation to eliminate the harm or provide the benefit.

The market failure model has led to a presumption that external costs, whether coincident with invasions of legal right or mere impacts on any party claiming an interest (what have come to be called stakeholders), should be internalized without regard to existing distributions of rights. But where a cost internalizing regulation has the effect of redistributing rights, it may have negative efficiency consequences that more than offset the efficiency gains sought by the regulation. When this happens, the rationale for regulation is defeated. It might have been better initially to allocate rights differently from an efficiency perspective.8 But we cannot embrace a regulatory system that reassigns rights every time a utilitarian calculus determines that the net social welfare would be improved by a reassignment without abandoning the private rights system on which the market depends.

8. "Since transactions are not costless, efficiency is promoted by assigning the legal right to the party who would buy it... if it were assigned initially to the other party." Richard A Posner, Economic Analysis of Law 45 (3rd ed. 1985).

As a practical matter it is accurate to say that regulation has the effect of shifting rights from the property owner to the beneficiaries of the regulation. But because the decisionmaking power rests with the regulator, it is better described in legal terms as a shift of right from the property owner to the regulator, with a windfall to the beneficiaries.
Except for those willing to justify environmental regulation on the basis of moral claims, advocates of environmental protection nevertheless appeal to this cost internalization rationale for regulation. We often fail to recognize the essential role of private rights in achieving the very efficiency that cost internalization is supposed to serve. This failure reflects the assumption that private rights are about private possession and use and nothing more.

It is one thing to regulate on the basis that violations of existing rights are occurring without remedy because of the transaction costs of pursuing that remedy. Justice, if not efficiency, will be served by such regulations. It is a different matter altogether to regulate on the utilitarian ground that economic efficiency justifies the internalization of costs without regard to existing property rights. In this instance, neither justice nor efficiency will be served.

Ownership of land and the regulation of the environmental impacts of the use of land are only alternative institutional arrangements for the allocation of scarce resources. Where land is owned, its owner makes allocation decisions within the scope of that ownership. When new environmental regulations are imposed, they can be seen as either transferring a property right from the owner to the regulator, or asserting that the right has always been with the regulator. Some argue that there is no transfer of rights because private rights exist subject to the regulatory power of the state. But this would mean that, with respect to the regulated use, the private property owner is no different from any other “stakeholder” seeking to secure a personal interest through the political process.

Finally, the exercise of property rights and the imposition of a regulation are both assertions of legal authority to allocate scarce resources where the authority rests, ultimately, with one

9. This is the effect, and the appeal for most environmentalists, of the public trust doctrine, which insists that the private landowner never had a right to certain resource allocations in the first place. See James L. Huffman, Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work, 3 J. Land Use & Envtl. L. 171 (1987).

10. It is often insisted that property rights are held subject to the power of the state to regulate and that it is not, therefore, an infringement upon property rights for the regulatory regime to change over time. But to the extent that property rights are held subject to changing regulatory limits, they will be understood by property owners as something different from those rights, if any, which are secure and enforceable as much against state as against private infringement. Property rights held subject to changing regulatory limits will serve the goal of efficiency less as the discretion of the regulator increases. Where regulatory discretion is unbounded, there is no property right at all in relation to government.
decisionmaker or another.

II.
PUBLIC LAND OWNERSHIP—THE STATE AS PROPRIETOR

A second assumption that has contributed to the growth of centralized regulation at the expense of market allocation is that public land ownership is similar to private ownership, but different from government regulation. If we embrace this assumption, we obscure the distinct nature of public ownership in the guise of government as just another market participant. In fact, public ownership has little in common with private ownership and is fundamentally the same as government regulation.

Public land ownership has had significant impact on the environment, particularly in the West where the federal government owns approximately half of all land and a much larger portion of undeveloped lands. States own a smaller, but not insignificant, share of the land. For most of the last century, the mission of federal public lands ownership was conservation in the interest of wise use. Since the final decades of the nineteenth century, public ownership of lands has also been viewed as a means to preserve and protect the natural environment. Over the last three decades the mission has gradually shifted to environmental preservation, a shift that the Clinton Administration has sought to complete. Simultaneously, "wise use" has become shorthand for anti-environmentalism at its worst.

Throughout public lands history, there has been at least a pretense that public ownership is different from private ownership only in the identity of the owner. The public land manager is different from the private land manager only in the objectives sought to be accomplished. While the private landowner seeks to maximize production of marketable goods and services, the public land manager seeks to maximize benefits to the public. In the words of Gifford Pinchot, the founder of the Forest Service and an early leader in the effort to retain lands in public ownership, the public land manager's goal is to create "the greatest good for the greatest number over the longest time."

11. For a time, the United States Supreme Court endorsed this fiction in its market participant exception to the commerce clause limits on state imposed constraints on interstate markets. See Tribe, supra note 2, at 430-434. The Court seems to have realized the error in its thinking on this question.


14. It is generally believed that Pinchot wrote the language in a letter of instruc-
Ever since then, federal public lands managers have been trying to maximize for three or more variables simultaneously. It is a mission doomed to failure, but illustrative of the fundamental difference between public and private land ownership. A private landowner has only its own priorities to pursue, which makes management objectives easy to define. While there are circumstances where public landowners have well-defined missions, as with the state-held school trust lands, the public landowner is generally faced with the impossible task of serving a multitude of masters. Historically, federal public lands management has reflected the shifting influences of various commercial interests. More recently, the rise of the modern environmental movement has brought multiple use management followed by forest planning, both of which underscore the fundamentally political nature of public lands management.

The political nature of public lands management is little different from the political nature of government regulation. Public land managers seldom have clear and explicit management objectives. They must respond to many statutes and regulations that are the product of the ongoing efforts of competing interests to gain a share of the largess. Those same interests have sought to avoid bearing the costs of public resource management with the result that public land managers often face unclear and even perverse incentives. Where private resource managers will have incentives to minimize costs in order to maximize net benefits, the clearest objective for public resource managers is often to maximize budgets. The lesson to be learned is that public land ownership is more like government regulation than it is like private land ownership in terms of the factors that influence resource management decisions.

15. In most states the school trust lands are to be managed to provide maximum sustainable benefit to the public schools, which means that they must yield a financial return. See Jon A. Souder and Sally K. Fairfax, State Trust Lands 29-33 (1996). This has led to conflicts over the extent to which environmental regulations can limit the commercial use of these lands.

16. Professor Coggins agrees with my assertion that the federally owned lands are accurately described as "political lands." He states, however, that a frequently drawn corollary to that proposition is that "politics... is a positive evil to be avoided at all costs." In the materials for this conference, he describes this corollary, kindly without attributing it to me, as "hypocritical academism at its worst." George C. Coggins, "Devolution" in Federal Land Law: Abdication by Any Other Name, 3 Hastings W.-N.W. J. Env'tl. L. & P. 211, 213 (1996). In light of this description of the corollary, I stick resolutely to the main proposition, and admit to nothing more.

Although the idea of government as proprietor is well established in various areas of the law, as evidenced by the recurrent distinction between governmental and proprietary functions, governments are inherently different from private enterprise. Governments have the overwhelming advantage of the taxing power for raising capital and the inherent authority of the sovereign to manipulate the rules that govern participation in the market. Not being subject to the same constraints as private market participants, government enterprises are qualitatively different.

The difference is politics. Debates over public lands policy are replete with appeals to scientific management and nonpartisan decisionmaking. But public ownership is preferred over private ownership precisely because the latter is not responsive to the public will. Public management is, by definition, political management, where politics, not economics, govern. In that sense, public ownership is fundamentally different from private ownership.

In another sense, public and private ownership are similar. The final outcome of resource management, whether public or private, is that individuals derive benefits and bear costs. Even though public resource management purports to serve the public interest, it is individuals who are the ultimate beneficiaries. The history of the federal public lands, from the dominance of the mineral, timber, and agricultural interests, right up to the emerging domination of environmental interests, proves the point. But unlike private resource management, there is often little connection between costs and benefits in public management.

III.
PRIVATE LANDS AND THE PUBLIC INTEREST

Most environmentalists treat private land ownership as an obstacle to the pursuit of the public interest in environmental protection. The property rights movement is viewed as anti-environmental and the Takings Clauses of the federal and state constitutions are seen as barriers to effective implementation of environmental laws.

While it is certainly true that private ownership of land permits individuals to pursue their self interest, it does not follow that there is an inherent conflict with the interests of the other

members of the community. To the contrary, a well designed system of private property will serve the public interest in many ways.

Private property is a reasonably good solution to the tragedy of the commons, particularly in the case of a resource like land. The clear definition and enforcement of rights provides the certainty necessary to investment in, and wise use of, land and other resources. As Judge Posner pointed out in the first edition of Economic Analysis of Law, if property rights are exclusive, transferable, and universal, markets will assure that resources are committed to their most valued uses. Few will disagree that the public interest is served by this efficient allocation of scarce resources. Market failures may justify regulatory measures, but such interventions are intended to secure the public interest by approximating what private transactions would produce in the absence of market failures.

Private rights and the markets they make possible are also important to the generation of wealth, which, in turn, is critical to public and private pursuit of the public interest in environmental protection and many other social goals. The public interest in a healthy and happy population is clearly served by a prosperous economy, as is the governmental provision of public benefits that are possible only if the citizenry have the wherewithal to pay taxes. The direct relationship between economic prosperity and public and private investment in environmental protection is widely evidenced in this country and abroad. It is not surprising that some of the worst environmental damage occurred in the former Soviet Union and its satellites. Nor is it surprising that most of these countries are struggling to create economies based upon private rights in the hope of producing the wealth necessary to serve the public interest.

Private ownership of land is not a guarantee of wise resource use, but its track record is far better than many environmentalists are willing to acknowledge. Even more important is the role of private property in producing the economic prosperity that has made possible the enormous advances in environmental protection in the United States over the last several decades.

CONCLUSION

Rather than ask how land ownership influences the level of government at which environmental regulation should take

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19. See Posner, Economic Analysis of Law, supra note 8, at 32. Since then, many others have repeated the sentiment in varying formulations.
place, we should ask how private land ownership can serve environmental protection instead of, or in conjunction with, regulation. Private ownership is the most decentralized form of resource management among a wide array of institutional alternatives for allocating scarce resources. Even if we assume that our only objective is environmental protection, private ownership will sometimes be the best alternative. And because we will always have multiple and often conflicting objectives, private ownership, in conjunction with private market transactions, will prove to be a particularly effective way of maximizing net social welfare while respecting the rights of individuals.

Throughout the modern era of environmental protection we have assumed that property rights are often an obstacle and that centralized government is usually better than decentralized government. We should abandon these assumptions and become more sophisticated and discriminating in our selection of resource allocation institutions. Centralized institutions may be optimal in some circumstances, but as a general rule we will find that decentralized institutions, particularly private property, will create the best incentives for environmental preservation.