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THE PUBLIC INTEREST IN PRIVATE PROPERTY RIGHTS

JAMES L. HUFFMAN*

Notwithstanding a few recent victories in the courts and the emergence of a national, grassroots property rights movement, property rights advocates are on the defensive. It has been this way at least since the New Deal. Indeed, it probably has been this way for time immemorial. And it will always be thus, at least so long as private property survives. And private property will always survive, even if battered and scarred, because private property, in the most basic sense, is unavoidable.

I am, in a very real sense, the owner of this podium at the moment. My leasehold, so to speak, is of limited duration and presumably subject to termination by the moderator for good cause, but for now it is mine in the not insignificant sense that the right to speak has been assigned to me pursuant to a set of rules or customs which at least most of us have accepted. If speech is to have any value in a room full of people, it must be done pursuant to rules which permit one person to speak while others listen. The opportunity to speak in a room full of people, particularly a room full of lawyers and philosophers, is a scarce resource and, for better or worse, I am the owner of that resource for the next while.

The same might be said of the food that each of us will have for lunch today. Let us assume that our lunch will be served buffet style and thus will be the property of none of us or, if you prefer, of all of us when we arrive to fill our plates. But when I fill my plate, the custom in our society holds that it is mine. I have captured it, to draw an analogy to the law of ownership in wild game. And if you reject this assertion, which at least a few of you will because of my reference to what some consider the immoral concept of ownership of wild game, no one, I assume, will disagree that when I ingest the food from my plate, it has become indisputably mine.

I offer these homely examples to confirm that property, in the sense of entitlement to the exclusion of others, is inevitable, even if we insist that everything belongs to the community, to nature, to God or to no one. In the Soviet Union, where private property existed only in memories of a bourgeois past, everything that was produced and all of the services that were provided were ultimately of benefit to some and of no benefit to others. The beneficiaries were the owners, in the most meaningful sense of that term, of those goods and services; a fact to which those who did not benefit could offer persuasive testimony if not the evidence of personal deprivation. Not surprisingly those who benefitted most — the wealthiest property owners in the pragmatic sense in which I am using the term — were invariably those who purported to act for the community or who had ingratiated themselves to these public officials.

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And so it is with virtually everything which people value because one person's enjoyment of a scarce commodity or service is always dependent upon the exclusion or restraint of others. For example my enjoyment of the spectacular views of the Grand Canyon depends upon constraints on those who would pollute the air or construct buildings on the rim, and the extent of my enjoyment depends upon limiting the access of others whose desire to enjoy the view creates congestion and thus diminishes my enjoyment. We might say that the Grand Canyon belongs to all of us, but the truth is that those of us who value it for its scenic splendor take precedence over those who value it as a marvelous reservoir site. We nature buffs have, again in the pragmatic sense I have been using, a property interest, if we are willing to pay the entrance fee, while others are excluded from using the canyon for non-permitted purposes.

I imagine it will be objected that my last example is different since everyone owns the park for scenic purposes and no one owns it for precluded purposes, but that is not the case with many scenic places and will surely not always be the case with the Grand Canyon. The day has come in some of our parks and on many of our rivers when we choose to limit access even among those who seek only to enjoy nature's wonders. When I am precluded from floating down the Colorado River as it courses through the Grand Canyon because I have no permit, those who do have permits own the river at that time and for that purpose, and their enjoyment depends upon my exclusion. Even where it is true that everyone owns a resource for a particular purpose, it is an ownership of no significance to those who do not value the designated purpose.

So property in scarce resources is inevitable.¹ It would seem to be in the nature of things. That property is in the nature of things does not necessarily mean that it is a morally superior social custom or institution. But there is a persuasive moral case to be made for the legal recognition and protection of private property rights. John Locke wrote at length and with great insight on property as the fundamental among all of the natural rights.²

Why, then, are property rights advocates usually on the defensive? Because those who are excluded invariably outnumber those with the right to use or enjoy a particular resource. Property owners are thus easily cast as selfish individualists, while those who are excluded assume the comfortable mantle of the public interest in their efforts to influence the use of resources in which others possess property rights. The case for a public interest in the creation and protection of property rights is not easily made to those who anticipate that they will benefit from governments' interventions. The prospect of getting something for nothing is too much to resist for most self-interested advocates of the public interest.³

1. See James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 241, 270-72 (1994).

2. See JOHN LOCKE, *Of Property*, in TWO TREATISES OF GOVERNMENT 303, 303-31 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

3. The allure of government-provided benefits is all the stronger because the costs of specific government action are hidden in the citizens' general tax bills.

So the claims of private property owners are often seen as obstacles to the pursuit of the public interest. The debate tends to pit self-interest against the public interest. Never mind that those who advocate for a particular version of the public interest will usually benefit personally from its realization. This is not to say that public interest advocates do not sincerely believe that the objectives they champion are good for the public. But it is the rare individual who does not value personally the ends he or she urges as in the public interest. Defenders of private property rights, which by definition are personal as opposed to community rights, have nothing to stand upon but self-interest and abstract theories about efficient resource allocation.⁴ The natural rights defense of private property carries little weight in a society of moral relativism and constitutional balancing.⁵

In a political culture which values a simplistic notion of democracy over liberty,⁶ property rights advocates will never occupy the moral high ground. Property rights are expressions of liberty. Liberty is individual autonomy. Private property is therefore a constraint on the pursuit and realization of the public interest as defined in a majoritarian democracy. Indeed, a central purpose of the constitutional protection of private property is to constrain the majority in the use of its coercive powers to redistribute wealth.

While secure private property rights are critical to the efficient allocation of scarce resources and most of our regulations purport to improve upon those efficiencies by internalizing external costs,⁷ our public debates about private property are largely about the distribution of wealth — the distribution of the costs and benefits of using the planet's scarce resources.⁸ The most common objections to private property are that those who possess property rights are not deserving in some sense,⁹ and that market allocations of scarce resources have undesirable

4. The efficiency arguments have been widely propounded, *see, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 27-64 (2d ed. 1977), but often with little apparent influence on those who would prefer to redistribute the wealth inherent in existing property rights.

5. Although natural rights theory was widely accepted at the time of the adoption of the United States Constitution, it has been given little credence in modern America where morality is in the eye of the beholder and the Supreme Court has resorted to balancing as the measure of virtually every individual right.

6. Many, if not most, Americans have come to understand that democratic government is the underlying value of the Constitution. This perspective is reflected in an appeal to democracy whenever government action conflicts with claims of individual right. The Constitutional framers had a very different perspective on democratic government. For them it was the least worst form of government in a society where the promotion and protection of individual liberty was the motivating reason for the founding of governments. *See* MARTIN DIAMOND, *THE DECLARATION AND THE CONSTITUTION: LIBERTY, DEMOCRACY AND THE FOUNDERS OF THE AMERICAN CONSTITUTION* 39-55 (1976).

7. *See* James Buchanan & William Stubblebine, *Externality*, 29 *ECONOMICA* 371 (1962).

8. Standard economic analysis distinguishes between resource allocation, which has to do with the uses to which resources are put, and wealth distribution, which has to do with who bears the costs and realizes the benefits arising from particular resource allocations. The former can be evaluated in terms of efficiency, by which the economist means the maximization of net social welfare. The latter can be evaluated in terms of fairness, desert, justice and other such measures of relative wealth.

9. For example, it might be objected that the current assignments of property rights are the result of an illegal or otherwise objectionable initial distribution or subsequent acquisition of those rights.

wealth distribution consequences. Depending on one's standards of desert and desirability, these claims may be true, but they are not relevant to the economic efficiency of private property and markets.

Of course, if we do not care about efficient resource allocation, this aspect of my defense of private property is not persuasive. But if one believes the rhetoric of both political and academic debates about regulatory policy,¹⁰ it is clear that efficiency does matter and that the regulatory system is designed to improve efficiency by the internalization of costs.¹¹

Sometimes the regulatory system is used for the express purpose of redistributing wealth which can only be accomplished by transfers from some individuals to others. When those transfers impact on property rights, most will agree that the Fifth Amendment of the United States Constitution becomes relevant.¹² But most wealth transfers are accomplished inadvertently or under the guise of cost internalization.¹³ There is no principled reason to conclude that the 5th Amendment is less relevant under these circumstances.

From the very beginning of organized governments, wealth has been freely and often massively redistributed in the name of the public interest. In a world where democracy is the most treasured goal of political systems, wealth distribution will depend upon the distribution of political power. Even in an ideal democratic political system where every individual has equal influence, wealth will be regularly redistributed as different interests are able to achieve majority status. Markets will not work under these conditions unless private property exists in some form. To the extent that private property does exist, it necessarily functions as a restraint on the ability of the majority to redistribute wealth. The Fifth Amendment takings clause is a recognition of this fact.

The point of a private property system is to constrain the ability of individuals and governments to redistribute wealth. In this sense private property is a limit on the power of democratic government. From the perspective of natural rights, this limit on democratic power reflects the preexisting rights of individuals which exist independent from the will of government. From the perspective of legal positivism, this limit reflects a social preference for the efficiencies of free markets which are

10. For an in-depth analysis of one of the early policy debates over pollution, see JAMES E. KRIER & EDMOND URSIN, *POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION* 17-37 (1977).

11. The efficiency theory assumes that market participants bear the full costs of their activities. When those costs are "externalized" to third parties, there is a market failure in the sense that one of the assumed conditions of an efficient market is missing. In such cases, regulations may be designed to internalize the full costs to the decision maker.

12. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

13. Few, if any, regulations are without unintended consequences in the form of costs and benefits. For example, zoning regulations almost invariably have the effect of increasing the value of some properties and decreasing the value of others. This provides an incentive for property owners and others to seek influence over zoning decisions as a way of improving their personal situation. Because it is seldom acceptable to argue for public action to improve one's personal welfare, parties seeking such results will contend for that public policy situation most likely to improve their personal circumstances.

dependent upon secure and transferable private rights. But from the perspective of modern democrats (with a small d), private property is a limit on the realization of the fundamental value of majority rule, and the 5th Amendment's takings clause is an unfortunate obstacle to government's pursuit of the public interest.

The framers of the American Constitution understood both the natural rights and the positivist arguments for private property. They were well instructed in the natural rights philosophy of John Locke. They believed, as articulated in the Declaration of Independence, that individuals are endowed with inalienable rights. Their experience under the Articles of Confederation led them to insist upon the inclusion of a bill of rights in a new constitution,¹⁴ but a bill of rights which derived its content from the nature of things, not from the constitution, the democratic will or the government.¹⁵ Property was understood to be an inevitable consequence of human enterprise and a necessity for the fulfillment of human potential.

The framers of the Constitution also understood that without private property, the abundant resources of their continent would suffer the fate which Garret Hardin would, many years later, describe as the tragedy of the commons.¹⁶ Without secure and transferable property rights, resources would be allocated according to the whim of the self-interested thief or the well-intentioned representative of the democratic majority. In neither case would there exist the incentives requisite to wise use of scarce resources. The framers understood in their own way that a tragedy of the commons results from the individual's recognition that resources not consumed today will almost surely be consumed by someone else in the future.

But we have long since abandoned the framer's vision for our Constitution. What was once a libertarian constitution reliant on a carefully limited democracy as the least worst form of government¹⁷ has become a democratic constitution under which liberty claims are balanced against the will of the majority.¹⁸ Private property, though expressly guaranteed against public invasion in the Fifth Amendment, has, until recently, carried little weight on the Supreme Court's constitutional scales.¹⁹ The very idea of balancing condemns the private property

14. See generally WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953) (discussing the development of the Constitution).

15. This understanding is consistent with the original decision not to include a bill of rights in the proposed Constitution for fear that an attempt to enumerate individual rights would imply that other rights did not exist independent from the positive law of the Constitution.

16. See Garret Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

17. See DIAMOND, *supra* note 6, at 39-55.

18. For example, a claimant under the Fifth Amendment Takings Clause must demonstrate that regulation goes "too far" to prove a regulatory taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

19. From the *Pennsylvania Coal* decision in 1922 until its 1987 decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *First Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987), the Supreme Court had been witness to the gradual evisceration of the Takings Clause as a meaningful protection of property rights. Since 1987, the Supreme Court has decided a small handful of other cases favorable to the property owner. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

claimant or defender to urging that self-interest outweighs the public interest. The property owner can seldom occupy the moral high ground when the issue is framed in these terms.

Environmental regulation has brought the property rights issue to the forefront because of the pervasive if sometimes subtle effects of these regulations on ordinary people.²⁰ Grassroots property rights organizations have emerged across the country and have been able to influence the political debate at both the state and federal level.²¹ Combined with a few federal court decisions which have breathed new life into the Fifth Amendment Takings Clause,²² these developments have given hope to property rights advocates. Unfortunately, the irresistible temptations of expansive governmental powers lead to ever new burdens on property owners, while their arguments in defense of their constitutional rights are ever burdened with the badge of self-interest.

Because the Supreme Court's jurisprudence of balancing frames most liberty issues as individual rights claims versus the public interest, modern constitutional theory has lost sight of the important connection between vigorous protection of individual liberties and the pursuit of the public good. With the exception of First Amendment jurisprudence which has continued to recognize the importance of freedom of expression to the public dialogue of an effective democracy,²³ claims of constitutionally guaranteed liberty are understood to be limits on the pursuit of the public good and must therefore be overridden in certain circumstances.²⁴

It has all come down to the levels of scrutiny analysis which dominates much of today's constitutional jurisprudence.²⁵ Under this approach, the likelihood that a claim of constitutional right will succeed depends upon who is making the claim, the nature of the claim, and the nature of the interest asserted by the government.

20. Much of the direct impact of the New Deal regulations fell upon big business. This was also true of most early environmental regulation which was directed at air and water pollution. More recent environmental laws, particularly endangered species and wetlands regulations, have had significant impacts on individual property owners.

21. Property rights legislation has been introduced in virtually every state legislature and passed in several, usually in the form of some limits on regulation or guarantees of compensation. See HERTHA L. LUND, *PROPERTY RIGHTS LEGISLATION IN THE STATES: A REVIEW* (1995). Similar legislation was also part of the Republican "Contract with America", which was introduced in the 104th Congress.

22. In addition to the Supreme Court decisions in *Nollan* and *First Lutheran Church*, several decisions in the United States Court of Federal Claims and the Federal Circuit Court of Appeals have given property owners reason for optimism. See, e.g., *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Florida Rock Indus. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).

23. Justice Black stated that "there is practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

24. Justice Holmes stated that "[g]overnment could hardly go on if to some extent the values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

25. Level of scrutiny analysis had its origins in equal protection law. See Gerald Gunther, *The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-10 (1972). It has since been applied in numerous other areas of constitutional law to justify differential treatment of different rights claims.

Under this rubric, property rights claimants have not fared well because they can claim no special status on the basis of group membership,²⁶ their claim of right is "economic" and therefore of lesser significance,²⁷ and the government is invariably understood to be pursuing a social or economic purpose which calls for judicial deference.²⁸ That the public interest might be served by the protection of property rights is not a possibility within this analytical framework.

But secure and enforced property rights are important to the public interest. Indeed, without a system of clearly defined and transferable property rights, public welfare will suffer. Surely the time has passed when it can be claimed with credulity that public or common ownership of the means of production will necessarily serve the public interest.²⁹ The human and environmental tragedies of eastern Europe's experience with communism should not be dismissed as the consequences of corrupt political regimes. Although many, if not most, of the communist regimes were corrupt by western democratic standards, their failures (and their corruption) were ultimately rooted in the lack of adequate institutional arrangements for the efficient allocation of scarce resources.

Adequate institutional arrangements for allocating scarce resources must reflect the fundamental recognition that, in matters of human action, incentives matter. With this simple understanding, one can explain the failures and successes of most human institutions. Of course, failure and success are in the eye of the beholder, but, for the purposes of this conversation, I assume that success is to be measured with reference to the quality of the environment. For the sake of discussion, I will assume further that environmental quality can be assessed — that we will agree about when the environment is better and when it is worse.

The general presumption of modern environmental regulation is that market failures are the cause of most environmental harm.³⁰ Stated differently, the supposition is that private property and other forms of private economic rights are exercised by self-interested, even if well intentioned, individuals in ways which do not take account of most environmental consequences. In the innumerable private actions and interactions which constitute a market economy, individual actors do not consider the impacts for third parties. In the language of economics, private actors do not concern themselves with external costs because third parties are often not in

26. Since *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Supreme Court has favored "discrete and insular minorities" on the theory that they are unable to look after themselves in the political process. *Id.* at 152 n.4. Although owners of real estate (but not of property more broadly conceived) are a minority, it is mistakenly assumed that, as a group, they have greater rather than lesser political power because of their property-based wealth.

27. The dichotomy between economic and personal liberties has prevailed notwithstanding occasional objections. See, e.g., *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one.").

28. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1439-42 (2d ed. 1988).

29. However, we do remain committed to the federal ownership of one-third of the nations' land with vast expanses of western lands under the management of the Forest Service, the Bureau of Land Management and other federal agencies.

30. See James L. Huffman, *Protecting the Environment from Orthodox Environmentalism*, 15 HARV. J.L. & PUB. POL'Y 349, 362 (1992).

a position to bargain for cost internalization due to high transactions costs and inadequate information. Furthermore, markets are thought to be particularly detrimental to the environment because of their anthropocentricity.³¹

Because many of our environmental regulations are designed to overcome these alleged shortcomings of the market, it is important to assess the validity of the underlying assumption and the adequacy of the regulatory solutions. All of this is relevant to private property because the regulatory solutions necessarily have significant effects on the scope and value of property rights.

The assumption that market failure is the source of many environmental problems is accurate to an extent. It is certainly true, for example, that many forms of pollution constitute external costs which are not easily internalized given the existing distribution and definition of property rights. This pollution will sometimes have direct health effects on third parties, and will often have indirect effects for wildlife and ecosystems. In these circumstances, regulatory efforts to internalize the direct and indirect costs may be the best solution in terms of efficiency.

But many environmental regulations premised on market failure are really legal system failures in the sense that a refined property rights system will permit cost internalization through normal market processes. For example, much of what states and municipalities have sought to accomplish through land use regulation might be better achieved through clearer definition and enforcement of property rights including the traditional common law principles of trespass and nuisance — better in the sense that costs can be internalized without creating the uncertainties which are detrimental to productive and wise resource management by private property owners.

It has become accepted wisdom among most advocates of our existing environmental regulations,³² as well as among the authors of most environmental law casebooks,³³ that the common law remedies for external costs have been inadequate to cope with modern environmental problems. Trespass and nuisance are treated as quaint remnants of an innocent past. But the case for greater reliance on these common law remedies should not be so easily dismissed,³⁴ not least of all because of their flexibility in representing the constantly shifting values in our society and the ever changing understanding of the costs and benefits of human activities which impact on the environment. This is not to say that all external costs will be internalized if we take the law of trespass and nuisance seriously. High transactions costs will remain a deterrent, although the plaintiffs' bar has

31. See James L. Huffman, *Do Species and Nature Have Rights?*, 13 PUB. LAND L. REV. 51, 58 (1992) [hereinafter Huffman, *Do Species and Nature Have Rights?*].

32. See, e.g., FRANK GRAD ET AL., INJURIES AND DAMAGES FROM HAZARDOUS WASTES, S. REP. NO. 97-12 (1982).

33. This perspective, however, may be changing. "At the start of the environmental decade, common law actions basically were assigned an interstitial, transitional role in the grand strategy for legal protection of the environment. . . . Today, . . . this strategy is being reevaluated." FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 64 (1990).

34. See Bruce Yandle, *Escaping Environmental Feudalism*, 15 HARV. J.L. & PUB. POL'Y 517, 532-39 (1992).

demonstrated the power of the class action in other situations where unaggregated, individual harm is otherwise too small to justify market transactions or legal action.³⁵

But legal system failure results not only from the abandonment of the traditional common law rights of third parties, but also from a lack of creativity in the refinement of our private property system. Our reliance on regulation is rooted in part in the belief that some resources cannot be owned, as a practical matter,³⁶ and therefore will not be the subject of market transactions. But what can and cannot be owned is not unchanging. Our ability to create clear and enforceable property rights is largely a function of technology and our conceptual capacity. Terry Anderson and P.J. Hill demonstrated this in their study of nineteenth century property rights in cattle and grasslands.³⁷ We are witness to the same phenomenon today as we explore the use of bar codes in the marketing of highway usage and tracers in the tracking of pollution.

Perhaps a less futuristic example will better illustrate my point about legal system failures as distinct from market failures. Consider the case of water. In England and early American legal history, water use was allocated under the riparian water rights system which was concerned mainly with regulating access, flow and to some extent quality.³⁸ The settlement of the American West witnessed an innovation in water rights law in the form of the prior appropriation system which met the needs of miners and farmers in an arid geography.³⁹ Because these needs were met largely by the diversion of water, more recent advocates of instream flow maintenance for fish habitat and pollution control encountered a property rights system ill-suited to their objectives. The almost instinctual response was to reserve available flows from future appropriation and to impose regulations where streams were already fully appropriated. The alternative of permitting private ownership of instream water uses has been far slower in coming. Indeed, the general trend in western water law seems to favor public management over allocation through private market transactions,⁴⁰ notwithstanding innovations in technology which can facilitate the definition of clear and enforceable water rights.

When faced with resource allocations, including environmental impacts, which we do not like, why do we leap to regulation and public management as the solutions? I would posit two reasons. First, to the extent that we dislike the

35. Perhaps the most dramatic example of the power of the class action is the ongoing litigation against, and the various proposed settlements with, the tobacco companies.

36. Even if technology and human ingenuity make it possible to design effective property rights systems for things like air pollution and big game hunting, some will oppose the assignment of such rights on the grounds that it is immoral to recognize rights to pollute or ownership of animals.

37. See Terry Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163, 168-78 (1975).

38. See 2 WELLS A. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 1-43 (1974).

39. See 1 *id.* at 226-433.

40. See Charles F. Wilkinson, *Prior Appropriation 1848-1991*, 21 ENVTL. LAW v (1991) (In Memoriam section of issue number 3).

particular allocative result because we believe it is inefficient, by which I mean costs and benefits have not been internalized, we may assume that the only remedy is regulation or public management. Second, the objective may have nothing to do with efficient resource allocation and everything to do with redistributing wealth.

Often regulation will be undertaken in the name of correcting market failure, but the real objective will be wealth redistribution. Even where cost internalization is the initial motivating purpose, there will be wealth distribution consequences and powerful incentives for competing political interests to assure that those consequences are beneficial to their constituencies. Because the regulatory approach invites the politics of wealth redistribution (or special interest politics as it is commonly called today), and because wealth redistribution can have serious negative impacts on wealth generation, we should reassess the assumption that regulation and public management are the only solutions to market failure. Indeed, we should reassess the conclusion that market failure is the cause of every external cost.

As in the water rights example above, the exclusion of some interests from effective participation in the market results from a legal system failure in the sense that the excluded interests are denied the possibility to hold a property interest in their preferred use of scarce resources. Those who value the benefits of maintaining stream flows are precluded from acquiring and holding a property interest in stream flow preservation. Thus, they cannot acquire an irrigator's consumptive water right and choose to leave the formerly diverted water in the stream for the benefit of the fish. Unless the law of water rights is reformed to permit private acquisition of instream flow rights, those who value instream uses of water will have no alternative but to advocate regulation or public acquisition.

A second example of particular relevance in the West is the allocation to private interests of the grazing and timber resources of the federal public lands. The fact that these lands are owned by the public does not preclude reliance on the efficiencies of market allocation through the competitive sale or lease of private rights of use. Not surprisingly, those who would choose to purchase timber or lease grazing land for the purpose of leaving the trees or grass to Mother Nature's uses are precluded from the process. This is not surprising because these Forest Service and Bureau of Land Management processes are a small part of the much larger public lands management enterprise which is a classic example of resource allocation by the politics of wealth distribution.⁴¹

But why, you may ask, should we want to correct these legal system failures so that markets will be able to internalize more of the costs of private resource allocation decisions? Why not just rely on the regulatory system to internalize costs?

We should prefer refinement of the property rights system to reliance on regulation for the same reason that we should prefer, in general, markets to central planning. Markets are especially efficient allocators of resources because they permit individuals to act upon their individual preferences and to adjust those

41. See James L. Huffinan, *Public Lands Management in an Age of Deregulation and Privatization*, 10 PUB. LAND L. REV. 29, 49-53 (1989).

actions as circumstances and preferences shift over time. Central planning must rely on less direct means for determining individual preferences and has little flexibility as circumstances and preferences change over time.

Consider the example of instream flow protection. The failure to provide for instream water uses imposes costs on those who value such uses but are precluded from participating in the market because the law does not permit private acquisition of instream flow water rights. To internalize these costs by regulation, we must determine who values instream uses, how much they value those uses, and then devise a rule which will provide the amount of instream use that would have been acquired if it had been possible through private transactions.

The regulator is effectively seeking to mimic the market place. But why mimic the market place if market failures can be avoided by legal system corrections? If we believe that central planners can determine the optimal allocation of water as well as or better than a market allocation free of external costs, then we should be prepared to rely upon those planners for all of our scarce resource allocation. The recent experiences of several planned economies should dissuade us from this conclusion.

We also should be cautious about relying heavily on regulation to internalize costs because of the temptations of wealth redistribution through the regulatory process. Notwithstanding good intentions to internalize costs in the name of efficient resource allocation, opportunities for wealth redistribution abound. Regulation in the name of pollution control can easily become protectionist legislation for a particular industry or segment of industry. Regulation in the name of controlling urban sprawl can become the route to increased real estate values for owners of unrestricted property. The prospect that politics will turn cost internalization into wealth redistribution does not argue against regulation in every circumstance. But it does underscore the advantage of looking to improved rights definition as the better method of cost internalization.

Of course, advocates of environmental regulation may contend that their policy objectives have nothing to do with efficient resource allocation and cost internalization. They may be interested in the rights of future generations, or in the rights of other living organisms, or in the morality of human impact on natural ecosystems. What, if anything, will private property rights do to promote these visions of the public interest? Or are regulation and public management the only alternatives?

If our concern is for the rights of future generations, the challenge we face is not different in kind from that which confronts us in efficiently allocating scarce resources among the living. I assume that a concern for future generations is rooted in the belief that the unborn have equal rights with the living — equal in the sense of opportunity to achieve their human potential with the benefit of the earth's bounty. Future generations are disadvantaged by being absent and thus not party to the resource allocation decisions we make today. This is true whether resources are allocated through private actions and transactions in a market or through some form of public decision making. In either case the question is how will the rights and interests of future generations be best represented. While it is widely assumed and

asserted that future generations will only be represented through the political process, the evidence is not so clear.

Private actors do take account of future generations in important ways. Parents are concerned for their children and grandparents for their grandchildren. They conserve to assure opportunities for their progeny even unknown. But it is not only family ties which bind us to future generations. As resources become less abundant, individuals have growing incentives to conserve for unknown and unrelated future generations. The decision to use today or save for tomorrow depends upon an assessment of present and discounted future values. If the discounted future value of a resource is greater than its present value, it will be saved in anticipation of realizing that future value. And when the future arrives, it is not necessary to "use" the resource to realize its value. It can be sold or otherwise transferred to another individual who might also choose to conserve in anticipation of greater future benefits.

Even where the individual property owner chooses current use or consumption over conservation, it may well serve the interests of future generations who are the beneficiaries of all that the current generation reaps, whether costs or benefits. Throughout human history the quality of life and the scope of human opportunity have grown. Perhaps the latter day Malthusians will yet see their visions of catastrophe realized, but most of human history provides little support for their doomsday prophecies. What evidence there is for an approaching environmental apocalypse is more the product of central planning than it is of private market transactions. Eastern Europe offers the best (or should I say worst) examples, although the United States has its share of government subsidized and managed environmental catastrophes.

Regulation and public management often fail to consider the interests and rights of future generations because the unborn hold no sway in the political process. They do not vote nor do their future votes have any discounted present value.⁴² Living voters will bring their concern for their progeny to politics as well as to private decisions, but in a representative democracy they will have difficulty persuading their representatives to think beyond the next election. As those who invest in political campaigns will attest, political capital does not hold its value for long.

This is not to say that future generations will not value and appreciate what our governments do in their name today. They will, and they won't, depending upon how well we have anticipated their needs and values. But the political reality is that we will do little in the name of future generations which does not also serve the interests of current participants in the political process. It is often suggested that the early National Parks are evidence of what one generation can do for those who follow, but there is persuasive evidence that the economic interests of the railroads had as much to do with the creation of Yellowstone, Glacier, Yosemite, Rocky Mountain and other early parks as did any concern about posterity.⁴³ And creating

42. See PETER MENELL & RICHARD STEWART, ENVIRONMENTAL LAW AND POLICY 90 (1994).

43. See PAUL SCHULLERY, SEARCHING FOR YELLOWSTONE: ECOLOGY AND WONDER IN THE LAST WILDERNESS (1997).

the parks is only a small part of preserving them for future generations. The record of public management in our national parks, like on most of our public lands, has often failed from the perspective of later generations as evidenced by the many lawsuits and administrative challenges filed against the federal government by environmental groups.⁴⁴

It is clear that regulation and public management are not always preferable to private property in the allocation of scarce resources to the uses of future generations. It is equally clear that non-human organisms and ecosystems do not necessarily fare better under political management than under private control. The incentives faced by public and private managers are largely a function of institutional arrangements and are thus affected little by abstract statements of purpose. Like other appeals in the name of the public interest, assertions of non-human rights and of biocentric morality do little to influence the long term behavior of human decision makers, whether public or private. Non-human rights claims are dependent upon human representation and will therefore reflect the interests of self-appointed, human agents.⁴⁵ Policy prescriptions in the name of biocentric morality are an even more audacious effort to raise one's personal interests to a moral high ground.

Much more could be said about the last two bases for disfavoring property rights in the allocation of scarce resources. But suffice to say that human nature being what it is, our resource allocation institutions must be based upon an understanding of the basic premise that incentives matter. No amount of preaching or teaching will change this reality, so we should focus our attention on understanding the institutions we have and adjusting them to better deliver the results we desire.

The institution of private property rights gets the incentives right in the sense that it has the theoretical capacity to internalize all of the costs and benefits of resource use. While it is true that this theoretical capacity is never fully realized, we should not be too quick to abandon private property for a regulatory approach which all too often gets the incentives wrong. In our search for better institutional arrangements, ones which get the incentives right, we must avoid abandoning the good in search of the perfect.

Private property has resulted in resource allocations which are detrimental to the environment. So have public management and regulation. The question we should ask ourselves is which approach best serves the public interest in both resource allocation and wealth distribution. Private property is not the perfect solution, but it does permit markets to function effectively and it does protect existing distributions of wealth. Markets supported by a good property rights system are very effective at insuring that resources are allocated to their highest valued use. They do this by providing incentives for the generation of good information about alternative uses and about the consequences (both costs and benefits) of those uses.

44. For critical examinations of National Parks management, see generally ALSTON CHASE, *PLAYING GOD IN YELLOWSTONE* (1986), and KARL HESS, *ROCKY TIMES IN ROCKY MOUNTAIN NATIONAL PARK* (1993).

45. See Huffman, *Do Species and Nature Have Rights?*, *supra* note 31, at 75.

These allocational results are surely within anyone's definition of the public interest. All other things equal, is there anyone who would prefer inefficient allocation of scarce resources? Protection of existing distributions of legally acquired wealth must also come within most conceptions of the public interest. This is not to say that there is not a public interest in additional values, nor to deny that public management and regulation can also serve the public interest. Rather, my point is that there is a public interest in maintaining and improving a system of private property rights. It will promote efficient resource use; it will protect legal entitlements from arbitrary government interference; it will provide an essential foundation to the securing of all liberties. And, contrary to the assumption of most orthodox environmentalists, the public interest in a clean environment will often be best served by private management of scarce resources in a well designed system of private property rights.