

# PRIVPROP, REGPROP, AND BEYOND

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The title of this panel—"Regulation and Property: Allies or Enemies?"—captures the Janus-faced quality of regulation. On the one hand, regulation can be looked upon as a means of protecting traditional personal and property interests that are inadequately protected by the common law because of institutional problems created primarily by industrialization. On the other hand, regulation can be an exploitative tool used by organized political interests to enrich themselves at others' expense and undermine private property.

Under industrialization, our common-law system of private remedies may fail to protect property and personal interests from infringement.<sup>1</sup> Widespread pollution is a good example. Because of small stakes and collective action problems, there are great difficulties in using the courts to deal with problems such as acid rain. Another example is product safety. Lack of access to market information may produce inadequate consumer demand for product safety. Tort liability for defective products is a potential solution, but a decentralized case-by-case system of "regulation by juries" is a clumsy process.

To help solve these problems, we have developed centralized regulatory schemes, starting with food and drugs and moving to other product areas, such as automobiles. In the past twenty years, the focus has been environmental, health, and safety regulation.<sup>2</sup> Many of these programs helped protect personal and property interests from infringement.

We, however, also know that regulation can be a means by which economic and ideological factions use the coercive power of government to infringe, without compensation, traditional personal and property interests. At the same time, regulation often undermines the virtues of innovation, diversity,

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1. See Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982); S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* (1979).

2. As the pollution example illustrates, implementing environmental regulatory schemes involves federal, state, and local governments. Environmental regulation is therefore far more complex than zoning, which is often a standard model for criticizing regulation.

and free choice that are associated with decentralized market-based property systems.<sup>3</sup> These abuses are well chronicled in public-choice-oriented studies that are emerging in the literature, especially in the pollution area. Most notable are the Ackerman and Hassler studies of coal-fired power plant regulation<sup>4</sup> and Bob Crandall's studies of federal air pollution control standards.<sup>5</sup>

I take strong exception to Jim Krier's radical agnosticism, which seems to say we cannot evaluate whether particular regulatory programs are abuses or not.<sup>6</sup> If we followed his logic, we would be unable to choose between a Soviet-style system of central planning and a market-based economy because there are just too many factors to evaluate. The truth is pretty plain that there are clear instances of abuse by over-reliance on centralized command and control regulation, especially where it concerns the values we hold dear: liberty, diversity, and free choice.

These public-choice-oriented studies also should remind us that regulation is itself a property-rights system. According to Bob Ellickson, property is a form of regulation.<sup>7</sup> By the same token, regulation is a form of property. Regulatory systems create endowments, not just for bureaucrats, but for those regulated. As Professor Rabkin pointed out, they even create endowments for advocacy groups who have enforcement rights under those systems, insofar as those groups can use the rights to raise money from contributors, or cash in the right to enforcement and obtain from a polluter a contribution to the group or to a project that it favors.<sup>8</sup> As regulatory systems mature, these endowments acquire considerable weight. They do not have all of the characteristics of traditional property rights. For example, these endowments are generally not alienable.

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3. See Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 *YALE L.J.* 1537 (1983); Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 *CALIF. L. REV.* 1256 (1981).

4. B. ACKERMAN & K. HASSLER, *CLEAN COAL/DIRTY AIR* (1981); Ackerman and Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 *YALE L.J.* 1466 (1980).

5. R. CRANDALL, *REGULATING THE AUTOMOBILE* (1986); R. CRANDALL & L. LAVE, *THE SCIENTIFIC BASIS OF HEALTH AND SAFETY REGULATION* (1981).

6. See Krier, *The (Unlikely) Death of Property*, 13 *HARV. J.L. & PUB. POL'Y* 75, 81-82 (1990).

7. See Ellickson, *Three Systems of Land-Use Control*, 13 *HARV. J.L. & PUB. POL'Y* 67, 68 (1990).

8. See Rabkin, *Private Property And Public Office*, 13 *HARV. J.L. & PUB. POL'Y* 54, 58 (1990).

But as a practical matter they make it difficult to change regulatory systems once created because of the factions that have interests in this neo-feudal system.

Therefore, we may say that regulation has spawned a new form of property, a "regprop," which may be contrasted with the "privprop" created by private law, litigation, and courts. The interaction between these two systems of property, which I think deserves continuing and urgent study, is simply another expression of our mixed economy. There may be believers in dialectic who would say that the interplay between these two systems will have a happy result, but I take it there are not many of that faith here today.

What is the answer? It is tempting to say, "Let's sweep it away. Look at the jurisprudential wasteland of the Federal Register that creates this 'regprop.' Let's sweep it away through deregulation." I think there is much to be said in many areas for deregulation, but in the urgent matters of product safety, environmental pollution, and others, pervasive failures exist in the common law that prevent us from pretending that it can handle the entire task. It can succeed in many areas of "economic regulation," but it cannot in many areas of "social regulation."

Another approach would be to rely on the courts to invalidate regulatory abuses as unconstitutional takings. In this task I wish Gale Norton<sup>9</sup> and her colleagues well. I find myself agreeing with Charles Fried<sup>10</sup> that, at least until four Richard Epsteins are appointed to the Supreme Court, there is not going to be enough purchase in constitutional litigation to do more than chip away at the edges of the problem. In the meantime, our response has to be largely through political effort.

What sort of political effort? The question posed by the title assumes that we really only have two options here: either command and control regulation or common-law property systems. The title ignores the possibility of intermediate or hybrid alternatives—the deliberate creation of new systems of property that can overcome common-law failure while avoiding many of the characteristic abuses of centralized command and control regulation.

I wish I had a catchy name for this hybrid property, but I do

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9. See Norton, *Takings Analysis of Regulations*, 13 HARV. J.L. & PUB. POL'Y 84 (1990).

10. See Fried, *Protecting Property—Law and Politics*, 13 HARV. J.L. & PUB. POL'Y 44 (1990).

not. I would have liked to call it "New Property," but that was preempted twenty years ago by Charles Reich.<sup>11</sup> Let me give some examples anyway.

Transferability of regulatory rights is something we have already started. Transfer of broadcast licenses<sup>12</sup> and the bubble and emissions trading systems under the Clean Air Act<sup>13</sup> are examples of how, even in a regulatory system, you can get some efficiency and diversity gains simply by making alienable the property rights created by regulation.

A further step is to create at the outset a brand new form of property rights to harmonize social objectives and private incentives. A good example is transferable pollution permits. Under such a scheme, you decide how much pollution you are going to allow in, for example, an air or water basin. For political reasons, you probably grandfather the existing regulated industries and hand out permits equal to their pollution. Then if you want to reduce pollution, those rights are amortized over time. These permits would be of limited duration, and eventually the government would auction them off. If polluters are going to use the commons for dumping residuals, they ought to pay for the privilege.

Another example of this approach would be a refundable deposit system for hazardous waste. When a waste generator creates hazardous waste, he has to pay a deposit to the government, which he gets back when he proves he has disposed of or treated the waste properly. You create a new property right—a right to a deposit refund that goes with the waste and that could be transferred by contract to third persons who are in the business of efficiently dealing with waste. The burden then shifts from the government to the person who wants the

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11. See Reich, *The New Property*, 73 YALE L.J. 733 (1964).

12. See 47 U.S.C. §§ 309(a), 310(d) (authorizing FCC to approve broadcast license transfers); *FCC v. WNCN Listeners' Guild*, 450 U.S. 582, 585-86, 594 (1981) (upholding FCC policy to encourage use of "market forces" in license transfer policy).

13. The "bubble" policy under the Clean Air Act refers to the definition of a "stationary source" for new construction permits in nonattainment areas. See 40 C.F.R. 51.18(j)(1)(i) and (ii) (defining "stationary source"); 42 U.S.C. § 7502(b)(6) (requiring permits for new construction of stationary sources); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (upholding EPA's bubble policy). Leaded gasoline manufacturers also are regulated under a Clean Air Act trading system in which they may "bank" the reductions in lead content they achieve below the mandated standard and sell their resulting credits to other manufacturers. See 40 C.F.R. 80.20(e). The future Clean Air Act, now being debated in Congress, may also contain types of trading programs for ozone emissions from mobile sources and for emissions contributing to acid depositions.

refund to prove that the waste has been disposed of properly. Midnight dumpers would go out of business because it would no longer be profitable.

A third example would be increased reliance on hazard disclosure to develop improved markets in safety. The Occupational Safety and Health Administration's (OSHA) hazard-labeling program has been a success, unlike much of OSHA's command and control regulation.<sup>14</sup> It has increased worker awareness of risk, and workers have demanded higher compensating wage differentials for taking on riskier activities.<sup>15</sup> Thus, government steps to ensure that information is provided can enhance the efficiency of existing markets. I think this approach could be generalized through national hazard-warning guidelines that would inform workers and consumers of relative hazard levels, much like the standardized signs used by ski resorts to inform skiers of the relative difficulty of slopes. Adherence to these guidelines could be enforced through the tort system. Employees would have a more valuable property right in their labor—a greater awareness of the risks they face—and consumers a more informed right to spend their income on products having known characteristics.

These new hybrid or augmented forms of property achieve overall social objectives that cannot be achieved by the common law, while avoiding the characteristic abuses of command and control regulation. Of course, they are not a panacea. Proponents of regulation may fear that they will fail to achieve their objectives, and critics may feel that they will be exploited by rent-seekers. Also, the adoption of these new approaches faces political obstacles posed by the neo-feudal property rights we have created in our existing regulatory schemes. Bureaucrats, the regulated industry, environmental groups, and other advocacy groups earning their livelihood through administrative and enforcement law are going to oppose the creation of these new systems. Academics and policy analysts advocating their use are not going to prevail just because facts and logic are strongly on their side.

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14. See Sand, *OSHA Attempts to Change Its Image and Its Inspection Priorities*, 7 EMPLOYEE REL. L.J. 663 (1982); Manuele, *Why OSHA May Be Obsolete*, N.Y. Times, Jan. 4, 1981, at F2, col. 5; *OSHA May Not Force 'Risk Free' Workplace*, L.A. Daily Journal, July 4, 1980, at 1, col. 6.

15. See generally Drapkin, *The Right to Refuse Hazardous Work After Whirlpool*, 4 INDUS. REL. L.J. 29 (1980).

What is going to sweep away these neo-feudal property rights in command and control regulation? Two generative forces are going to do the job. One is the political limit on higher federal taxes.<sup>16</sup> Command and control regulation is expensive for the government, and the budget situation is going to place real limits on government's capacity to continue to operate this clumsy, Soviet-style approach to producing cleaner air or safer products. Moreover, some of these new property rights, such as transferable pollution permits, can actually generate appropriate revenues for the government from, for example, those who dump wastes in the commons. The other force driving toward these alternative systems is international—the growth of integrated international markets. We in the United States can no longer afford a clumsy system of central planning through regulation that stands out in such stark contrast with the rest of the free world, which is able to achieve its regulatory goals through means other than trial by legal combat.

These two factors—budget deficits and international competitiveness—are the forces that we have to rely upon. We must use them in a Judo-like way to sweep away the “regprop” and have the party of liberty embrace new approaches to achieving important goals of personal and property security that can no longer be left entirely to the common law.

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16. See Fried, *supra* note 10, at 44, 46-47.