FINAL ADDRESS:

RIGHTS AND REALISM—MAKING THE CONSTITUTION WORK

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It is a great pleasure for me to be here and to join you at this symposium. I have certainly enjoyed, as I know you have, the excellent presentations. I recognize that after a long day of intellectual activity, I am all that stands between you and the hospitality room. I will try, therefore, to live up to that responsibility with regard to the length of my remarks.

It has been my privilege to know the people involved with the Federalist Society and to participate in some of the Society's activities over the past several years. I know of no other group that has grown as rapidly or that has produced the same quality of accomplishments. The success of the Federalist Society is because of its talented leadership and because the intellectual content of the Society has provided a continuing challenge to people concerned about current events and interested in the law as a profession. These people realize that the law is part of a greater universe and that what happens in public policy is important to the future of our constitutional republic, and that we as lawyers are uniquely situated to make a contribution.

One of the values of the Federalist Society is that it continually calls upon us to look back at first principles and to apply those constitutional principles to contemporary situations. Fidelity to the Constitution requires no less. It is interesting that one of my favorite justices of the Supreme Court, Joseph Story, talked about this idea:

> The sacred rights of property are to be guarded at every point. I call them sacred, because, if they are unprotected, all other rights become worthless or visionary. What is personal liberty, if it does not draw after it the right to enjoy the fruits of our own industry? What is political liberty, if it imparts only perpetual poverty to us and all our posterity? What is

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> the privilege of a vote, if the majority of the hour may sweep away the earnings of our whole lives, to gratify the rapacity of the indolent, the cunning, or the profligate, who are borne into power upon the tide of a temporary popularity?[1]

The words of 1829 sound somewhat prescient in view of the discussions we have been having here. One-hundred-sixty years after Justice Story's remarks, protecting property from the ravages of contemporary politics remains both an important issue and a difficult challenge.

In this symposium, we have had scholarly definitions of concepts and controversies, various prescriptions for dealing with problems, and identification of some matters that, at the conclusion of the conference, still remain unresolved. As we leave, what should we do with the wisdom and enthusiasm that is the natural product of such a worthwhile conference?

I will discuss briefly the "beyond" aspect of our theme with regard to four elements. First, I would like to echo something Charles Fried mentioned: Political activity and the results of the political process are critical to achieving the policy successes necessary to protect constitutional principles.[2] It is important to recognize that intellectual effort, along with legal and judicial successes, must be complemented by favorable political treatment. Political success is necessary if we are going to protect the Constitution in the long run. I suspect that the courts will go only so far in protecting constitutional principles, particularly those principles that concern contests between the political branches of government. The courts may ultimately say that these interbranch contests are political issues that should be determined by the public. In *Garcia v. San Antonio Metropolitan Transit Authority*,[3] the Court concluded that such "political issues" must be resolved outside the courts. If the Court's conclusion is correct, the subject of politics must be put on a plane parallel with the legal and judicial activities in which we engage. I recognize that politics per se is not the objective of this organization, but certainly it is something that

1. Story, *Value and Importance of Legal Studies*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 519 (1852). Joseph Story was elected Dane Professor of Law in Harvard University on June, 12, 1829, and gave this address on August 25, 1829, at his inauguration.

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

3. 469 U.S. 528 (1985) (Congress not barred by Tenth Amendment from regulating wages of state employees).

has to be taken into account and perhaps may be a stimulus to individual participation in the responsibilities of citizenry. In any event, it is important to recognize that the legal system alone cannot, without some regard for the political system, furnish adequate protection for constitutional principles.

Second, I will consider the role of the executive branch, how it has and how it can, to a greater extent, make an important contribution to the protection of property as a concept. In 1987, we saw an excellent example of the translation of judicial success, with regard to constitutional principles, into executive action. The *Nollan*[4] and *First English Evangelical Lutheran Church*[5] cases, which have been discussed at-length in this symposium, reinvigorated the Takings Clause.[6] Equally important, in my opinion, was the executive branch's response to those cases, referred to earlier by Gale Norton.[7] The administrative agencies and the executive branch took steps to implement those cases in ways that would hold true to the spirit of the decisions.

After some careful work by persons in the Department of Justice, President Reagan promulgated Executive Order 12,630.[8] The Order authorized the Justice Department to create guidelines to help the departments and agencies implement the Court's decisions and the Order itself.[9] The administration and the Justice Department provided leadership in teaching the

4. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (finding the conditioning of the issuance of a building permit on transfer of an easement constituted a taking requiring compensation).

5. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1986) (landowner whose property has been "taken" by a land-use regulation is entitled to compensation, regardless of the temporary nature of the regulation).

6. *See* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

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

8. Exec. Order No. 12,630, 3 C.F.R. 554 (1988), *reprinted in* 5 U.S.C. § 601 app. at 141-43 (Supp. V 1987). Section 1(c) of the order states:

> The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action.

9. Exec. Order 12,630, § 1, 3 C.F.R. 554, 555 (1988), *reprinted in* 5 U.S.C. § 601 app. at 141-43 (Supp. V 1987), further states:

> In furtherance of the purpose of this Order, the Attorney General shall, consistent with the principles stated herein and in consultation with the Executive departments and agencies, promulgate Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order.

agencies both the doctrine behind the regulations as well as how to implement them.

In many ways, President Reagan's Executive Order is a codification of the principles of good government. For example, it not only requires consideration of the takings implications and the potential costs of the actions that might be contemplated, but it also requires that governmental actions genuinely address the problems at issue and do so effectively.[10] In other words, the Executive Order requires some basis for an action that might affect people's property; this requirement prevents the government from taking actions that impose burdens disproportionate to the potential benefits. The Order also requires that the time to make a determination be kept to a minimum, particularly if a direct interference with the use of private property is involved.[11] By following these principles, not only will the cost that the government must pay under *First English Evangelical Lutheran Church* be reduced, but also the interference with the individual will be reduced. Even more important than the cost savings will be the fact that the objectives of fairness and justice are promoted.

The benefits are two-fold: First, the Executive Order protects the rights of ordinary citizens to own and use their property with a minimum of interference. Second, it provides protection for the public fisc—in terms of the amount of potential liability for takings. The Order is an example of what we have talked about at this symposium. It assumed a responsibility on the part of the executive branch, separate from any potential judicial action, to protect and implement the Constitution.

I gave a speech at Tulane University in October 1986[12] that aroused a good deal of comment because I had the audacity to

10. Section 5(b) of Exec. Order 12,630, 3 C.F.R. 554, 558 (1988), *reprinted in* 5 U.S.C. § 601 app. at 143 (Supp. V 1987), states:

> Executive departments and agencies shall, to the extent permitted by law, identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any .... Significant takings implications should also be identified and discussed in notices to the Congress, stating the departments' and agencies' conclusions on the takings issues.

11. Section 4(c) of Exec. Order 12,630, 3 C.F.R. 554, 557 (1988), *reprinted in* 5 U.S.C. § 601 app. at 142 (Supp. V 1987), states, "When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary."

12. Address by Edwin Meese III, Tulane University (Oct. 21, 1986).

say what I am sure is taught to first-year students in every law school: The decisions of the Supreme Court are not "the supreme law of the land." They are, indeed, the law of the land, but the supreme law of the land is defined in the Constitution, the document that apparently is too seldom read by some scholars. In any event, the point I was making was that there is as much responsibility on the executive and the legislative branches to enforce and protect the Constitution as on the judiciary. That is why I hope the new administration, as part of its development of its policies and priorities, will look for new opportunities to contribute to this effort. Certainly, the whole area of regulatory reform is ripe for this type of protection.

Third, it is critical that we use the best thinking in and out of government to anticipate coming challenges affecting property rights. Some problems for the environment, such as medical waste on our shorelines, the ozone layer, and acid rain, are not only difficulties to be resolved, but also are opportunities for more creative thinking about how government at all levels can respond to needs while causing the least interference with property rights. Such topics cry out for innovative approaches. Richard Stewart suggested that if there had been a more enlightened view of the Radio Act of 1927,[13] and if some alternatives had been tried, we might have a different communications policy.[14] Certainly, it is highly desirable that state governments are playing a larger role in solving these problems. For example, with a new burst of energy from the Commission on Uniform State Laws, the states themselves are combining to work on parallel approaches that would make federal action unnecessary. It would be a welcome change to see local governments become the primary locus of environmental protection responsibility. Private arrangements may prove to be the most effective, but the private arrangements have not even been approached yet.

Not many people are aware that Heathrow, the principal airport in London, is now a private corporation. As far as I have seen in my trips to London, the improvements are remarkable and there has been no decline in service. These are the kinds of

13. Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927), *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102 (1934).

14. *See* Stewart, *Privprop, Regprop, and Beyond*, 13 HARV. J. L. & PUB. POL'Y 91, 94 n.12 (1990).

ideas that need consideration as alternatives to the traditional pattern of federal government regulation of any new development in environmental protection. We have to recognize the problems inherent in regulation by the federal government. Once new organizations are created to pass and enforce regulations, or new powers are given to existing organizations, it is only natural that they will follow up what they deem is their responsibility. They will find new ways to regulate and new ways to interfere with property, and this regulation often continues long after the original problem has been solved. I hope, therefore, we can utilize the suggestions made during this symposium to find alternatives, so that we can overcome the usual fact of bureaucratic life. Assessing costs, as under Executive Order 12,630, may temper regulatory zeal, but I favor methods of solving the problem that do not create new federal bureaucracies.

Fourth, it is important to mobilize to a greater extent the legal profession in support of protecting property rights. How do we get *Nollan*,[15] *First English Evangelical Lutheran Church*,[16] and cases like them? How do the cases get started? Most victims of overregulation, or improper regulation, or economic deprivation as a part of regulation, are unable to handle the cost of this kind of litigation. That is where, certainly in *Nollan* and cases like it, public-interest law firms have been very important, often bringing suits and then pursuing them through appellate litigation.

The number of public interest law firms willing to take on constitutional challenges to protect property rights are relatively few and have less resources than their opponents. This lack of resources is why it is important to support and expand the existing organizations. We need to develop common strategies and combine activities so that these firms can increasingly handle not only cases at the federal level, but also cases before state trial, appellate, and supreme courts. One further step that I advocate, particularly with this group, is to enlist to a much greater extent the private bar. For example, a major law firm in Washington, D.C., has allowed one of its partners, as a pro bono dedication of the firm's resources, to participate with a public-interest law firm in pursuing a case which is going

15. 483 U.S. 825 (1987).
16. 482 U.S. 304 (1986).

before one of the state supreme courts. Unfortunately, such opportunities have been few and far between, but they ought to be expanded.

For many years, large law firms and even small law firms have allowed liberal lawyers, both partners and associates, to participate in pro bono activities. It seems to me that there can be no better pro bono activity than protecting rights guaranteed under the Constitution. Increasing the resources dedicated to protecting constitutional rights at the trial-court level is important because the Supreme Court opinions often require implementation in the trial courts. This notion of pro bono work is also important because often it is the initial litigation, dealing with the people who have the initial problems, that requires the expertise found in the private law firms; and expertise is necessary to start the case on its way through the courts. I was pleased to find that the Federalist Society is providing leadership in this field—a pro bono resource bank is being organized.

These are a few ideas of how to take the concepts discussed at this symposium and turn them into reality, and how to build on the collective wisdom that has characterized this excellent conference. If we are diligent in the cause of using the talents and the professional attributes of the lawyers gathered here, and others throughout the country, then our success and our activities in this cause will be following the admonition of Justice Story when he said, "The fundamental maxims of a free government seem to require[ ] that the rights of personal liberty and private property should be held sacred."[17]

17. Wilkinson v. Leland, 27 U.S. 627, 657 (1829).