A PROSPECTIVE LOOK AT PROPERTY RIGHTS

Shelley Ross Saxer[*] *and Carol M. Rose*[**]

This collection of articles was first presented at the 2013 Association of American Law Schools Joint Program of the Property Section and Natural Resources and Energy Law Section. It represents several views about how the relationship between the environment and property rights may develop, and how some of the biggest issues we will face may alter property rights, as we currently understand them.

Professor Maxine Burkett in her article, *Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change*,[1] examines the need to use liability rules in addition to property rules to address the negligent acts of local governments in preparing or failing to prepare for climate change, particularly in the areas most sensitive to climate-change impacts. With such rules, cities could insure against potential liability by engaging in adaptive management and scenario planning, among other emerging planning practices to reduce climate-change-related damage to person and property. Addressing local governments' ability and willingness to adapt to climate change will allow for better preparation for and perhaps mitigation of dangerous climate change.

Professor Steven J. Eagle argues, in *A Prospective Look at Property Rights and Environmental Regulation*,[2] that state and local regulation, particularly when addressing climate-change issues, will impinge on traditional understandings of property rights. For example, property rights may be threatened by government use of mechanisms such as Transferable Development Rights. These implicitly compensate owners whose rights are limited in one locale by giving them development rights in recipient areas in excess of those enjoyed by existing landowners. The effect is that rights to more intensive development in the recipient areas, determined to be both valuable and in the public interest, are transferred from existing owners to others to whom government is obligated. Professor Eagle underscores the importance of refraining from carrying out governmental goals by redefining and redistributing private property, because private property serves an important function in protecting liberty. In light of this concern, and by contrast to the reshuffling of private rights, he views a carbon tax as having

---

[*] Professor of Law, Pepperdine University School of Law.

[**] Ashby Lohse Chair Professor of Water and Natural Resources Law, University of Arizona James E. Rogers College of Law; and G.B. Tweedy Professor of Law and Organization, Yale Law School (emer.).

1 20 GEO. MASON L. REV. 775 (2013).

2 20 GEO. MASON L. REV. 725 (2013).

the potential to address climate change, while permitting owners to take price signals into account so as to best preserve and utilize private-property rights.

As a panelist, Professor John Echeverria addressed how cert petitions to the U.S. Supreme Court in takings cases may influence the direction of the Court's thinking on the Takings Clause of the Fifth Amendment. He observed that in the three cases pending before the Court this term, as with the overwhelming majority of other takings cases the Court has heard over the last decade, the property owners lost in the lower courts and successfully urged the Court to review the cases. The skewed nature of the pool of takings cases before the Court may create a one-sided impression on the Court about the nature of the takings debate in the country and also threatens to bias the outcome of the Court's decisions in favor of property-owner claimants. Echeverria concluded that law school clinics might have a role to play in representing local governments before the Supreme Court to ensure that their point of view on property-rights cases is better represented.

Professor Timothy M. Mulvaney suggests in his article, *Foreground Principles*,[3] that a strong "normative preference for . . . the common law" in takings jurisprudence "has resulted in strained judicial construction of common law principles to both reject and support regulatory takings challenges."[4] According to Mulvaney, judicial focus on analogizing challenged regulations to what are, at times, antiquated background common law rules can come at the expense of a more direct and transparent consideration of what is in the foreground: the public and private interests in property, safety, and the environment implicated by the challenged regulations in the modern setting within which those regulations are adopted. While he does not offer specifics of a new approach to reviewing takings claims, Mulvaney does encourage a more context-based mode of analysis that deemphasizes the common law and centers on fairness.

In *Property Rights and Modern Energy*,[5] Professor Troy A. Rule takes a look at property rights in relation to new energy development. Rule asserts that property laws must be capable of adapting to technological innovation if such laws are to adequately serve their purposes over time. However, he suggests "that the most equitable and efficient adjustments to property-rights regimes are those that *respect* rather than *disregard* property owners' existing entitlements."[6] Professor Rule notes that an approach of replacing property-rule protection with liability-rule protection in certain narrow situations can be a useful way of promoting sustainable energy practices while at the same time respecting existing property interests. For example, a landowner who installs solar panels on her property, but who

---

3 20 GEO. MASON L. REV. 837 (2013).

4 *Id.* at 866.

5 20 GEO. MASON L. REV. 803 (2013).

6 *Id.* at 805.

cannot negotiate solar-access easements with a neighbor, could use a state law to compel the neighbor to sell her a reasonably priced easement. In Professor Rule's view, the use of liability rules rather than property rules, as described by Guido Calabresi and A. Douglas Melamed in their landmark article on that topic,[7] provides a way to balance the need for new energy development and existing property entitlements.

Together these articles highlight the ways in which our traditional views of property are struggling under the weight of environmental pressures in general and climate change in particular. These major issues will alter property rights, but what will these alterations entail? Can our legal doctrines cope with these alterations? Will there be an expansion of already existing rights, or a contraction of those rights, or something altogether different? Several approaches have been discussed in the articles that follow. We see that the authors' ideas overlap in part but also generate lively disagreements. These points of convergence and divergence are illustrated in the discussions of supplanting property rules with liability rules; they appear as well in potential dissonance between proposals that would reduce reliance on common law rules and other proposals that would maintain private-property interests to protect liberty, incentivize action, and encourage new energy development.

One issue running through these articles is the impact of technology on environmental concerns. Although Professors Mulvaney and Rule discuss the technological context of property rights and rules, most of the articles do not explicitly raise the impact of technology on property. We see, however, that technology plays a critical role in the relationship between the environment and property rights. Intellectual property rights for innovations and inventions represent the good news about technology, leveraging property concepts to assist technology to advance productivity, wealth, and lifestyle improvements. But the bad news about technology is often seen in environmental law, where lawmakers focus on the otherwise-unexamined external effects of new technologies, as in the cases of water, air, and land pollution brought about by technological advances in manufacturing or resource exploitation. Our legal institutions need to harness technology to address diffuse environmental harms, just as much as they have enabled technology to advance concentrated industrial growth. In order to make technology effective to these healing ends, we need to make technological inventiveness for environmental purposes profitable—and that usually means linking inventiveness, including environmental inventiveness, to protected property interests.

Obviously, another major issue that connects these papers is the challenge of climate change. Legal doctrines must be able to cope with climate change both through adaptation and mitigation, but these approaches di-

---

[7] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

verge in several respects. Among other things, adaptation strategies are apt to be localized, and they may present opportunities for relatively quick action at the local level. Mitigation, on the other hand, is more likely to involve large-scale collective action and may require more complex and time-consuming negotiations over such matters as the imposition of a carbon tax, as envisioned by Professor Eagle. Although not addressed by any of the articles here, we note that another mixed and very poignant issue in climate change is the relationship between poverty and the environment: the poor are often victims of environmental degradation, but they may also be perpetrators of degradation, depleting or polluting commonly held or open-access natural resources in the absence of other sources of livelihood.

Given the enormity of climate-change issues, neither technological externalities nor poverty-related claims of commons access may be solvable by the usual legislative processes of "muddling through"—taking one path of least resistance after another. We must instead use both common law and regulation in focused ways, to promote concepts of ownership that encourage investment, innovation, and prudent use of resources. Our plans to address climate change are dependent upon using property concepts—among other things, to make sure that money can be made with new technologies that address environmental concerns, and to make sure as well that currently impoverished populations can make economic gains by sustainable management of environmental resources.

Both Professor Rule and Professor Eagle focus on the need to maintain private-property interests. Professor Eagle proposes that we must do this by preserving traditional property rights definitions. Professor Rule and Professor Burkett seek to accomplish this end by using liability rules, rather than property rules, so that people are incentivized "to do the right thing" when it comes to planning for climate change and promoting new energy development. Professor Mulvaney seeks to lead us away from the common law, which may no longer address our current economic, social, environmental, technological, and political environment. As to more sweeping measures like carbon taxes, it is of course possible that over the short run, the collective action needed to enact such measures may no longer be politically possible. But as an alternative, we can refine property rights by allowing common law approaches—such as nuisance and the public trust—to evolve and to respond effectively to issues of long time periods and large spaces.

To this end, we may need to start with very basic steps, and to pay attention to proposals like those of panelist Professor Echeverria, who advocates for "on-the-ground" action by clinics to bring actions to the courts. Such actions can begin the process by which the states, the legal community, and the general public reimagine property rights as critically important instruments for the sustainable management of our national and global resources.