

ENVIRONMENTAL REGULATION: AN EXAMINATION OF JOHN LOCKE'S ORDERED LIBERTY AND GOVERNMENT INTERVENTION

[Man] is willing to joyn in Society with others ... for the mutual Preservation of their Lives, Liberties and Estates, which I call by the general Name, Property.

The great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property.

—John Locke, *Two Treatises of Government*¹

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty & the pursuit of happiness: that to secure these rights, governments are instituted among men ...

—Thomas Jefferson, United States Declaration of Independence²

This article seeks to promote a dialogue on the role of environmental regulation based on the core principles of American democracy. By approaching what seem to be intractable differences between those who oppose all forms of regulation and those who would have government regulate every aspect of our environment in this light, we may arrive at a concept of the role of government that protects both the environment and liberty.

It is axiomatic in America that liberty is best protected by limited government. However, as the influence of the United States government has spread to most areas of public and private life, it seems that expe-

diency has overcome liberty. Many Americans perceive that an all-pervasive government is eroding individual freedom.³ Thus, those who oppose the expansion of governmental influence most effectively wield the rhetoric of liberty.

Nowhere is this more true than in the area of economic regulation where "the natural operation of the free market"⁴ remains the clarion call for Reagan era conservatives. The operation of market forces is subtle and difficult to discern in activities that affect our environment. Environmental damage is hard to quantify and assign to a specific individual or firm. While the market naturally imposes costs on firms for the new materials purchased for use in manufacturing, it does not naturally impose the costs associated with air or water pollution, the effects of which may be felt thousands of miles away. When subjected to environmental regulation by the government, an industry can cry foul because the nexus between costs to the environment and industrial activity is not readily apparent. Thus, it is easy for conservatives to characterize environmental regulation as overly burdensome by playing to Americans' unusual suspicion of intrusive government. In this vein, columnist George Will has included environmentalism in his depiction of a leftist agenda that "evolves over time but has one constant: the expansion of state direction over society, and the expansion of control of the regulating state by a clerisy claiming privileged insights into the unfolding future."⁵

This type of assertion, conjuring up images of failed Communist systems, leaves proponents of environmental regulation on the defensive in a society that is trumpeting the triumphs of its ideas in the Cold War. In one sense, this is deservedly so: just saying that some activity is bad for the environment should not be sufficient to force its regulation. On the other hand, by leaving America's national rhetoric to the opponents of environmental regulation, society fails to do justice to the legitimate values of the environmental movement—values which are wholly consistent with ordered liberty.

The ideas of John Locke, expounded in his *Two Treatises of Government*, are generally cited as the foundations of the American concept of ordered liberty and governmental responsibility.⁶ Thus, to locate envi-

ronmental regulation in the American political scheme, one must consider this source.

THE STATE OF NATURE AND THE DUTIES OF GOVERNMENT

Locke begins his argument in the *Two Treatises of Government* by examining the condition of humankind in a pre-societal state of nature. In this circumstance humankind is at liberty, but this liberty is circumscribed by the caveats that a person is "bound to preserve himself, and ... when his own Preservation comes not in competition ... to preserve the rest of Mankind."⁷ In other words, in the state of nature a person's duty is to herself and, as long as it does not jeopardize her own existence, to the rest of humankind. What is more, in the state of nature, each individual has the right of enforcement to the extent that it will deter violations of the rights to personal and species preservation.⁸

As an example of this right of enforcement, imagine a society in the state of nature. Two people are living near each other on a stream; one has an oil well. If the oil well owner releases oil into the stream, her neighbor will have the right to stop the pollution on two counts: first, the contamination of the source of drinking water threatens her own existence; second, the same contamination also jeopardizes the existence of other humans living downstream. Thus, environmental regulation of a personal sort is justified in the state of nature.

How does this justification effectuate itself in a society under a duly constituted government? In Locke's view, people would not enter into government if it were to their detriment, "[f]or no rational Creature can be supposed to change his condition with an intention to be worse."⁹ Therefore, government bears the same duties as the individual: the preservation of the self and of the species. It may not act contrary to those interests and its power "can never be supposed to extend farther than the common good."¹⁰ The only difference between the duties of a government and the duties of an individual lies in the order of their priority. Whereas an individual's duty is first to herself and then to the species, a government's duty is first to society as a whole and then to the people as individuals: "the first and fundamental natural law, which is to govern

even the Legislative itself, is the preservation of the Society, and (as far as will consist with the publick good) of every person in it."¹¹ Governments are formed by people to preserve their "Lives, Liberties and Estates," which Locke combines into the general category of "Property."¹²

PROPERTY AND GOVERNMENT REGULATION

The areas in which a government may act, consistent with its defined duties, depend on the definition of property. The basis of Locke's concept of property is the self. We all own our bodies and our abilities. It is only when one mingles his labor with resources that he may gain property external to himself.¹³ A farmer who cultivates land makes it his own just as someone who drills gains ownership of the oil. Locke, however, places limits on the extent of accumulation: "[a]s much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in."¹⁴ Thus, one violates natural law when one's accumulated property goes to waste. A thing of vast durability such as gold may be accumulated without violating natural law. In a pre-mercantile economy, when resources become scarce, people substitute durable items that have no direct value in terms of sustenance for perishable property gained through their labor. This scenario leads to the rise of money and trade.¹⁵

The concept that the wasting of property is a violation of natural law implies that one who earns property bears some responsibility for it. One who produces property need "only to look that he use [it] before [it] spoil[s]; else he took more than his share and robbed others."¹⁶ The robbing of others is an act against the common good, and therefore comes within the purview of government, which is charged with the protection of society at large.

Locke's definition of property and the responsibilities that stem from ownership have profound implications for environmental regulation. As illustrated above, government has the duty to protect property for the "publick good." Thus, government bears a positive duty to protect the basis of all property—the self—and consequently, to protect an individual's labor. Moreover, consistent with its primary duty to society at large,

government should act to prevent the wastage of property—a violation of natural law.

The application of the first point is obvious. If the activity of any member of society so harms the environment as to endanger the health—and thus the most fundamental property—of any other member, that activity is subject to regulation. Regulation stems not only from the concept of property, but also from the natural law right to self-preservation. Government bears a positive duty to protect its individual citizens—as long as that is consistent with the common good.

However, government's role in protecting the environment extends beyond protecting individual health. It must ensure that resources are not wasted through spoilage or mismanagement. If a member of society pollutes the environment despite the availability of preventative measures, he is wasting resources and robbing from society as a whole. Furthermore, Locke's doctrine implies that good resource management is incumbent on a producer. The wasteful use of resources robs society as much as allowing resources to spoil altogether. It is the duty of government to ensure that each member of society fulfills his obligation to use resources prudently in the development of his property.

The political argument regarding the responsible use of resources significantly parallels the economic concept of externality. An externality "is an effect of [a] firm's activities on people's well-being that is not taken into account through the normal operation of the [market]."¹⁷ When a firm produces an externality, neither the firm nor the consumers of its products bear the externality's cost; rather, it is born by society as a whole. Those who are responsible for the externality, the producer or the consumers who demand the product are, in effect, robbing society at large for their own short-term benefit.

It is here that government's duty to ensure the responsible use of resources comes into conflict with the argument of modern conservatives that, "the natural operation of the free market"¹⁸ will achieve the most efficient and hence responsible use of resources. In fact, the free market does not always promote the efficient use of

resources, particularly in environmental areas. The mismanager of resources imposes a cost on society because the market cannot internalize that cost. In the absence of regulation, society subsidizes the mismanager's waste of resources by allowing him lower direct costs that result in higher profits. Where resources, such as clean air or water, are not easily measured, the "free market" ensures that they will be used inefficiently to the short term benefit of those who mismanage those resources and to the long term detriment of society.

The "free market" argument finds its origins in the thought of Adam Smith. Smith's thought follows in the tradition of Locke and forms the cornerstone of the American economic system just as Locke's thought did for the political system.¹⁹ Smith asserted that, if society's members were left to their own self-interest, the "invisible hand" of the market would lead to increased wealth for all of society.²⁰ Yet Smith saw dangers from unbridled self-interest—especially from distinct classes of economic activity: "The interest of the dealers, however, in any particular branch of trade or manufactures, is always in some respects different from, and even opposite to, that of the publick."²¹ As did Locke, Smith recognized the duty of government to protect the common good as well as "the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it"²² By creating externalities, a member of society places the burden of his activity on society as a whole. Locke would call this theft, Smith injustice. By either name, its regulation is government's responsibility. By harming the environment, a member of society burdens us all with his actions. Only through regulation can the responsibility be placed on the proper shoulders.

CONCLUSIONS

In *Democracy in America*, Alexis de Tocqueville points out that in a democracy where government is essentially "humane and gentle" to its citizens,²³ members of society will tend to sacrifice their freedoms and allow government to take responsibility for them. If government tends to people's needs and ensures their happiness, a benevolent despotism will arise with the complete acquiescence of the people.²⁴ This tendency to tolerate government pa-

ternalism has manifested itself on both sides of the debate surrounding environmental regulation.

There can be no question that when the Founders of the United States constructed our government they meant for it to be limited. It was meant to protect, among other things, "life, liberty & the pursuit of happiness"—a clear embodiment of Locke's ideas on limited government.²⁵ Therefore, those who advocate an increased government role in any area must show that it falls within the legitimate powers of government. Much environmental regulation clearly meets this requirement. However, it is not a sufficient justification for regulation merely to say that an activity is bad for the environment. Environmentalists bear the burden of showing that a given problem is such that it cannot be rectified without some form of regulatory interference. To use government resources when they are not absolutely needed is as much a waste as pollution.

The opponents of environmental regulation, however, bear an even heavier burden of proof. In many cases, if not most, they attempt to impose upon society the bill for environmental abuse that is the fault of that part of society that they represent—a part that absorbs no direct cost. By avoiding regulation they abrogate responsibility for their actions to government. Yet ironically, if government accepts this responsibility, it is this same group that is most resistant to the taxation necessary to its fulfillment.

Intractable idealism on either side of the environmental debate will accomplish nothing. The government America's Founders built on John Locke's principles works only when competing interests are properly balanced.²⁶ Thus, groups wishing to affect government action must participate responsibly in the debate. Immoderation or exploitation on either side will open the door to tyranny: a demand for too much regulation risks de Tocqueville's paternalistic despotism, and too much exploitation risks the despotism of an increasingly uninhabitable world. All members of American society must remember their responsibility to protect humankind for, when we forget our responsibilities, we open the door to tyranny.

— Jonathan G. Lasley

1. John Locke, *Two Treatises of Government* II § 123-24, (Peter Laslett, ed) (Cambridge, 1988).
2. The Declaration of Independence (US1776).
3. See, for example, *Excerpts from the 1984 Republican Party Platform*, Daily Report for Executives (BNA) No 162 at X-1 (August 21, 1984), which states in pertinent part: "excessive regulation ... continues to stifle private initiatives, individual freedom, and State and local government autonomy."
4. See Barry Goldwater, *The Conscience of a Conservative* 42 (MacFadden, 1963) among others.
5. George F. Will, *Suddenly* 8 (Free Press, 1990).
6. See, for example, Robert A. Goldwin, *John Locke*, in Leo Straus & Joseph Cropsey, eds, *History of Political Philosophy* 510 (U Chicago, 3d ed 1987).
7. Locke, *Two Treatises of Government* II § 6 at 20-25 (cited in note 1).
8. *Id.*, II § 7.
9. *Id.*, II § 131 at 6-8. For the purposes of this argument, it will be assumed that any government stems from the consent of the governed in accordance with Locke's concepts.
10. *Id.*, II § 131 at 8-10 (italics removed).
11. *Id.*, II § 134 at 5-8 (italics removed). Locke recognized legislative power as the supreme power that could be delegated by the people.
12. *Id.*, II §§ 123-24.
13. *Id.*, II § 27.
14. *Id.*, II § 31 at 7-9.
15. *Id.*, II §§ 48-49.
16. *Id.*, II § 46 at 14-16.
17. Walter Nicholson, *Intermediate Microeconomics and its Application* 521 (Dryden, 4th ed 1987).
18. Goldwater, *Conscience of a Conservative* 42 (cited in note 4).

19. See Joseph Cropsey, *Adam Smith* in Straus & Cropsey, *History of Political Philosophy* at 635 (cited in note 6).
20. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* IV, ii at 456 (R.H. Campbell, A.S. Skinner & W.B. Todd, eds) (Clarendon Press, 1976).
21. *Id.*, I, ix at 267.
22. *Id.*, IV, ix at 687.
23. Alexis de Tocqueville, 2 *Democracy in America* 317 (Vintage, 1990).
24. *Id.* at 316-21.
25. The Declaration of Independence (US 1776).
26. See, for example, *Federalist* 35 (Hamilton) in Clinton Rossiter ed, *The Federalist Papers* 215-16 (Mentor, 1981).

