

**PANEL III:
REGULATION AND PROPERTY—
ALLIES OR ENEMIES?***

**THREE SYSTEMS OF LAND-USE
CONTROL**

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A year ago, I spoke at a Federalist Society conference on “Constitutional Protections of Economic Liberty.”¹ On that occasion, I chastised the organizers for having fallen prey to the Beltway Syndrome.² This syndrome, which mainly afflicts residents of the Washington, D.C., area, is the tendency to exaggerate the importance of the federal government to folks in the hinterland. That conference had been proceeding mostly as if the United States Constitution were the only constitution we have. I pointed out that James Madison, whose silhouette graces the Federalist Society banner, would be shocked at the group’s snubbing of *state* constitutions. Because Federalists are committed to the decentralization of political power, I argued that they should pay more attention to subfederal law.

This Conference is an improvement on this score. Most property law is state, not federal, law. The Beltway Syndrome nevertheless subtly pervades these proceedings. The prior panel was entitled “Property and the Constitution,” as if there were only one constitution. All seven conference panelists known for their work in government have been or are employed by the *federal* government—four as judges and three as administrators (two in the Justice Department and one in the Interior Department). I suggest, only half jokingly, that the Federalist Society might consider moving its headquarters from its present location inside the Beltway to Peoria or Lubbock or some other city that is an antipode of Washington, D.C.

* This panel was introduced by Douglas H. Ginsburg, Judge, U.S. Court of Appeals for the D.C. Circuit.

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1. See Ellickson, *The Legal Dimensions of the Privatization Movement*, 12 GEO. MASON U.L. REV. 157 (1988).

2. See *id.* at 163-64.

I. AGENCY-ENFORCED PROPERTY, BLACKSTONIAN PROPERTY,
AND INFORMAL PROPERTY

My panel's topic is "Regulation and Property: Allies or Enemies?" This topic seems to throw red meat to libertarians, to whom "property" connotes what is good and "regulation," what is bad. What we ordinarily think of as private property, however, *is* a form of regulation. Consider rights in land, the resource that will be the focus of my remarks. I will refer to the system of land rights that prevailed before the rise of the regulatory state as "Blackstonian property." Suppose, contrary to fact, that this system operated as Blackstone implied it did in his most unrestrained passages.³ If so, a landowner would have an absolute power to exclude others and an absolute right to use his land as he wished. Is this a world without regulation? Not at all. Blackstonian property rests on, indeed consists of, a set of government regulations that prohibits outsiders from trespassing, encroaching, or otherwise interfering with a landowner's possession and use of land.

Blackstonian property does not *seem* "regulatory" because its maintenance does not depend on the actions of a specialized regulatory bureaucracy. For clarity, it may be useful to distinguish three general types of controls on behavior: (1) agency-enforced regulations, (2) Blackstonian property, and (3) informal norms. Each involves a different standard enforcer. Statism is at a peak when specialized government agencies draft and enforce regulations. Zoning, a topic taken up shortly, is almost entirely a system of "agency-enforced regulation." "Blackstonian property" is less statist than agency-enforced regulation because the rules against trespass, encroachment, and other interferences are enforced mainly through private civil actions, not state-conducted criminal prosecutions. Land-use controls arising out of covenants and nuisance doctrine—common-law devices that evolved to modify absolute Blackstonian land rights—are also privately enforced.

In some contexts, the common law authorized a landowner to exercise self-help. For example, a landowner was deemed privileged to use reasonable force to expel an unprivileged entrant.⁴ Self-help enforcement of legal rules is even more decen-

3. See, e.g., 1 W. BLACKSTONE, COMMENTARIES *134-35; 2 *id.* at *2-8; 3 *id.* at *209.

4. See W. PROSSER & W. KEETON, PROSSER & KEETON ON TORTS § 21 (5th ed. 1984).

tralized than private litigation because it relies on the muscles of persons other than government officers. A person can exercise self-help to enforce, not legal rules, but rather extralegal norms on the possession and use of resources. When this happens in a patterned way, "informal norms" create informal property rights.

Informal property plays a far larger role in our society than is usually appreciated. Land tenure systems can arise informally. For example, at crowded public playgrounds, elaborate informal property rights usually evolve to govern the use of basketball courts. Informal social forces, not state agents, have subdivided the rich lobster grounds off the coast of Maine.⁵ In ancient Iceland, possessors of land presumably relied mostly on threat of informal force to deter others from trespassing. The squatters who create shantytowns in Latin America set up informal land-tenure systems. That animals exhibit territoriality provides extrinsic evidence that functional land rights can arise without the involvement of a state.

To undertake a normative comparison of informal, Blackstonian, and agency-enforced controls, one must articulate one's values. An advocate of the utmost decentralization of power might conclude that informal norms are superior to a more formalized property system even when the latter would better help people coordinate their affairs. I generally adopt a utilitarian perspective when appraising the details of systems of social control. To a utilitarian, no particular form of control is invariably ideologically correct, and none is invariably an "enemy." Instead of making those sorts of broad categorical judgments, a utilitarian must analyze which system would best help people cooperate to mutual advantage in the context under examination. To be concrete, I will discuss in the balance of my remarks a specific problem: the coordination of neighboring land-use activities.⁶ In the United States, far more government officials are involved in the crafting of these regulations than of any other kind. Observers afflicted with the Beltway Syndrome might not know this because land-use regulation is largely the province of scattered state and local governments.

5. See J. ACHESON, *THE LOBSTER GANGS OF MAINE* 48-49, 73-77, 142-44 (1988).

6. Many of the issues to be discussed here are examined in greater depth in Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

II. ZONING OFFICIALS AND LANDOWNERS: ALLIES OR ENEMIES?

In 1900, there was no zoning in the United States. Today, some 10,000 localities employ zoning to regulate land uses, building bulks, lot sizes, and the like. A familiar Pigovian argument attempts to justify, on utilitarian grounds, this regulatory blossoming. According to the argument, when property is Blackstonian, externalities from land-use activities cause markets to fail because unregulated landowners ignore the costs and benefits of their activities to neighbors. In practice, say modern-day Pigovians, Coasean bargaining among neighboring landowners will rarely prevent this sort of failure. Many land uses affect the welfare of a large number of neighbors. However the common-law rights of landowners might be refined with nuisance law, these neighbors are simply too numerous to act collectively. Therefore, concludes the Pigovian argument, specialized government agencies should be created to regulate land use in the public interest. So conceived, this agency-enforced supplement to private property rights would prove to be a friend of private landowners.

Because zoning is so decentralized, generalizations about it are hazardous.⁷ Nevertheless, I am willing to assert that much of current zoning practice is not utilitarian. The Pigovian rationale for zoning has proved to be superficial in two respects: It underestimated the competence of decentralized landowners, and it overestimated the competence of zoning officials.

A. *Landowner Coordination Without Agency Supervision*

Although little research has been done on the topic, impressionistic data suggest that Blackstonian landowners can coordinate to mutual advantage more easily than has usually been thought. Today, when subdividing a large tract of land, a developer is likely to draft a set of covenants restricting land uses and to set up a private association to administer them. A developer is likely to be better informed about its own land parcel and more motivated to maximize the parcel's value than local

7. The complexity of the zoning system may have scared my co-panelists, Dick Stewart and Jim Krier, into the Beltway Syndrome field of environmental law, where a scholar can focus mostly on a single set of national regulations. See Stewart, *Privprop, Regprop, and Beyond*, 13 HARV. J.L. & PUB. POL'Y 91 (1990); Krier, *The (Unlikely) Death of Property*, 13 HARV. J.L. & PUB. POL'Y 75 (1990).

officials are.⁸ Covenants are therefore likely to be more utilitarian than zoning regulations in controlling land uses in parcel interiors.⁹

The imposition of new covenants is impractical in established urban neighborhoods where landholdings are fragmented. Private nuisance actions are also likely to be cumbersome for minor annoyances in these locales. The failure of Blackstonian property in older urban neighborhoods, however, hardly creates an airtight case for the practice of zoning. There is a third alternative: informal property rights. *Zoning advocates have tended to underestimate the power of informal norms to constrain unneighborly land-use activities in established neighborhoods.*

Why are most homeowners concerned with keeping the fronts of their houses nicely painted and landscaped? Fear of the lash of law? Surely not. Governments intervene in these matters only in extreme cases. At work here, rather, are powerful norms of neighborliness. Neighbors themselves informally enforce these norms through gossip and other self-help actions. Particularly when neighborhoods are close-knit, informal norms of neighborliness may take the rough edges off Blackstonian property rights in a more cost-justified manner than zoning officials would. My casual examination of block maps of residential neighborhoods developed in the prezoning era suggests that landowners then engaged in much informal coordination. Lot sizes, building bulks, and land uses were less disruptive than one might have thought. Bernard Siegan's study of Houston, the only large United States city currently without zoning, suggests that this would continue to be true today.¹⁰ Because little research has been done on informal land-use controls, however, it is hard to speak with confidence about their relative effectiveness.

B. *The Fallibility of Zoning Officials*

Advocates of agency control of land uses, besides underappreciating the self-help enforcement of norms, tend to have an inflated view of what can be expected of local regulators. Zoning officials may stumble, just as markets can. Zoning is likely to

8. See *infra* note 10 and accompanying text.

9. Covenants work less well in controlling effects on outsiders.

10. See Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71 (1970).

misallocate land, involve undue administrative costs, and prompt wasteful and arbitrary rentseeking.

Who can better deal with a pending land-use controversy on a particular site—local officials or owners of land in the neighborhood of the site? Zoning officials are less likely than a multitude of neighbors to be beset by collective-action problems. On the other hand, neighborhood landowners have two significant comparative advantages as decisionmakers. First, because they live (or at least own land) in the area, neighbors are likely to know more than zoning officials about the characteristics of the development site, the neighborhood, and the people involved. Second, landowners and neighbors as a group bear (at least most of) the costs and benefits of appropriately resolving a land-use issue. Although zoning officials have some political stake in achieving a utilitarian result, they lack the sharp economic and social stake that landowners have. Regulators are more likely than neighboring landowners, for example, to restrict undeveloped land to open-space uses, in part because regulators do not “feel” the costs of taking away development rights. Regulators would be more likely to consider these costs, of course, if they were constitutionally required to pay for them. Usually they are not. An Illinois court, for example, has sustained a minimum lot-size requirement of 160 acres, an area equivalent to about 25 city blocks.¹¹

A suburb’s zoning officials tend to heed the suburb’s current residents, who make up its electorate. Conversely, zoning officials tend to be insensitive to the interests of nonresidents, such as housing consumers and owners of undeveloped land, who also have a stake in the suburb’s land-development market. When a suburb’s zoning decisions affect these nonresidents, public regulation becomes a potential *source* of externalities, not simply a means for internalizing them. There is abundant evidence that the large-lot zoning characteristic of many suburbs makes metropolitan areas sprawl further than they otherwise would, inflates the price of housing, and segregates people by social class.¹²

The administrative costs of zoning, moreover, are significant. A government that zones must staff its agencies, rule on permit

11. See *Wilson v. County of McHenry*, 92 Ill. App. 3d 997, 416 N.E.2d 426 (1981) (lot-size minimum held rationally related to permitted police-power objectives).

12. See R. ELLICKSON & A. TARLOCK, *LAND-USE CONTROLS* 795-859 (1981).

applications, weigh reports, hold public hearings, and so on. The increasing webs of regulation have made the land-development process much more time-consuming than it was in the pre-zoning era. In addition, the Pigovian argument fails to anticipate that zoning tends to become a rich trough at which rentseekers of various breeds come to feed. Developers can enrich themselves by securing unexpected approvals from politicians willing to exchange zoning concessions for campaign contributions or personal payoffs. Indeed, in a regime of agency-regulated property, a developer's ability to market a project to politicians is often more of a key to entrepreneurial success than is an ability to market a project to consumers. Land-use hearings may attract other interest groups who glimpse a chance to grab some of the rents that development projects generate. In Manhattan, for example, theater groups have sought to obtain subsidies for live theatre.¹³ In New Haven, union executives have asked that the city not approve a hotel unless the developer agrees in advance not to fight the unionization of the hotel's staff.¹⁴ More and more cities have begun to require developers to contribute to housing trust funds. These housing-linkage programs are largely an effort by professional housers to sustain the production of inefficient, subsidized housing projects.¹⁵

C. *Is Zoning Ever a Friend of Property?*

Zoning undoubtedly often operates to enhance the value of existing homes. This is why zoning is so popular, and why most law students who are currently members of the Federalist Society will defend zoning after they become homeowners. I have argued, however, that the various costs of zoning are likely to swamp its benefits in many contexts. Zoning is particularly likely to fail when its costs are borne mostly by the politically weak, such as persons not entitled to vote in local elections. When localized disputes arise within close-knit neighborhoods,

13. See Lesk, *Lessons for the Housing Trust Fund from the Theatre Fund Proposal*, in INCLUSIONARY ZONING MOVES DOWNTOWN 169 (D. Merriam, D. Brower & P. Tegeler eds. 1985). See generally Waldman, *Cities Are Pressured to Make Developers Share Their Wealth*, Wall St. J., Mar. 10, 1987, at 1, col. 6 (describing exactions for art museums, child-care facilities, and other services).

14. See *Should Aldermen Intervene in Union Organizing at Inn?*, New Haven Reg., Feb. 12, 1989, at B3, col. 2.

15. See Ellickson, *Inclusionary Housing Programs: Yet Another Misguided Urban Policy?*, in INCLUSIONARY ZONING MOVES DOWNTOWN, *supra* note 13, at 83.

agency officials are also unlikely to outperform informal coordination by decentralized landowners. On the other hand, agency regulation (or taxation) may be a useful complement to Blackstonian property in contexts where externalities are pervasive, as is typically the case with, for example, air and water pollution. Nevertheless, on balance, a utilitarian should see in the burgeoning land-use regulation system the countenance of an enemy, not a friend.