

Social and Economic Education for Development

Property Rights and Agricultural Environmental Concerns

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Much of the debate about agricultural change, land use issues, and environmental concerns eventually end up addressing property rights. The following provides a brief overview of property rights and how questions related to property rights influence the discussions of these critical social issues.

What is property?

Property is anything that a person owns, such as fixtures, leases, options, stocks, and other items. The ownership of land and all those qualities associated with land are of particular interest in land use and environmental issues. Certain rights are associated with land ownership, but understanding those rights can be complicated.

What are property rights?

A convenient way to think about property rights is as a bundle of rights to use property. Some of these are held by the individual property owner, but others are reserved for the state to use in certain circumstances.

Private property rights are those rights of use reserved to the individual property owner. These include the various uses and ways to enjoy property, such as the right to sell, rent, mortgage, subdivide, to devise and to grant easements (access). But this list also implies a great number of derived rights such as mining minerals or the hunting of the animals or birds on the property, or those associated with the right to develop the land.

Public property rights are reserved for the government to use on behalf of its citizens. The government has the right to tax, to control the use of property, to take property for public use, and to gain ownership of property if someone dies without a will.

While this is a tidy and popular way to think about property rights, the reality is that there has been little consensus over the centuries about what rights accompany the ownership of property. Consider, most of us would agree that people should be able to do what they want with the property they own. You have worked hard for your property, you should be able to use it. As the federalist Arthur Lee of Virginia noted: *"the right of property is the guardian of every other right, and to deprive people of it is in fact to*

deprive them of their liberty.” Yet, most of us would also agree that at some point the public (the rest of us) has an interest in how your property is used. Your use of your property may affect the rest of us. As the colonial republican Benjamin Franklin commented: “Private property is a creature of society and is subject to the calls of that society where its necessity shall require it.”

“History teaches us that what we mean by “property” and “property rights” has never been set in stone. Instead, our recognition of these interests is constantly evolving - what may have been allowed yesterday may be unacceptable to society today...As the information age has evolved, we have seen additional changes in property. Trademarks and copyrights may be far more valuable than land. Property rights in Internet web sites, body parts, fertilized human eggs are things the framers of the Constitution could never have dreamed of and yet we must adapt their ideas to fit these new realities.”

Jerry L. Anderson, “Property Rights in Historical Perspective,” Western Wire, Winter, 1999 11-12.

The tension in these two ideas -- that property rights arise from the natural order of things and are foundational to all other rights and therefore must not be limited by government or, that property rights emerge from the consensus of the members of a society as to just what rights will be respected by the social contract -- has framed all discussions and decisions about property rights since the Founding Fathers. In general, the idea that property rights are not absolute but evolve from the conditions and circumstances of society has tended to dominate. As a result, this has meant that while individuals who own property have rights to use it as they see fit, they can't use it in a way that infringes on their neighbors' use and enjoyment of their property. In effect, our private property rights are, at a minimum, limited by our responsibilities to other property owners and to the community at large.

How might one individual's use of his/her property become an infringement on a neighbor's use and enjoyment of his/her property?

A nuisance is anything annoying, harmful, or offensive to another person, and may include odors, sounds and certain uses of land such as keeping a junkyard or operating an adult book store. Two types of nuisances are defined by law.

A *private* nuisance is an unreasonable interference with the enjoyment of a person's land. An example might be throwing trash onto someone's property.

A *public* nuisance is an activity that adversely affects the health, safety, welfare, or comfort of the public. An example might be disposing improperly hazardous chemicals on private property.

If you act in a way so as to create a nuisance for other land owners, you are liable for any damages or violations of their property rights. This means that other property owners may file a lawsuit against you and seek compensation for a violation of their property rights or seek to have your nuisance actions halted permanently.

In *Mugler v. Kansas* (1887) and *Hadacheck v. Los Angeles* (1915) the Supreme Court upheld the right of governments to establish laws and ordinances that resulted in the closing of two businesses (a brewery and a brick-making factory) because they represented nuisances for the larger communities. "*No one may act so as to unreasonably interfere with the property rights of another.*"

Susan Buck, *Understanding Environmental Law and Administration*, 1996.

What is the basis of property rights?

Two amendments to the U.S. Constitution together form the bases of our notion of property rights. The 5th amendment states "*nor shall private property be taken for public use without just compensation.*" The 14th amendment asserts "*nor shall any state deprive any person of life, liberty, or property, without due process of law.*" Together these two amendments are the basis for the following principles with respect to property rights:

- ☞ The government may take property for public uses (e.g., roads, parks, post offices, military bases, government offices) in order to secure public health, safety, welfare and morals. The mechanism by which this occurs is the exercise of eminent domain wherein the government condemns land for private use and then takes control of this land for the public use.
- ☞ The government must provide “just compensation” for property that is taken for public use.
- ☞ The government may regulate the use of land for the purposes of public health, safety, welfare and morals.

The phrasing of the 5th amendment “nor shall private property be taken for public use, without just compensation” in effect asserts that the government has the power to take private property for public use. The only limitation on this power is the need to provide just compensation. Eminent domain, it has been argued, is an inherent right of government. Again, it is important to remember that this represents one particular interpretation of property rights.

What is a public use?

In the very beginning, public use meant just that -- property could be taken through eminent domain for a project that would be used by the public, such as when the government acquires land for a road that all persons can use. But just as history has taught us that what we mean by “property” and “property rights” is not set in stone, so too has our understanding of “public use” evolved in response to changing circumstances, changing values, and changing knowledge.

So how do we determine what’s in the public interest? The Supreme Court has stated that what constitutes the public interest may change over time, as values, preferences, technologies, and conditions in society change. As a result, the public interest has come to encompass public safety, public health, public morals, peace and quiet, law and order -- and to include such things as civic centers, airports, the preservation of historic sites, promotion of beautification, establishment of green space or public parks, construction of low income housing, urban renewal, economic development projects, and protection of the environment.

In 1954, in *Berman vs. Parker*, the Supreme Court unanimously stated: *“The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”* In effect, what is in the public interest is what the public, as represented by legislative or governing bodies, defines as in the public interest at a particular point in time.

Obviously, there are many groups in society that seek to shape our shared understanding of the public welfare or the common good, especially as these concepts relate to land use and environmental issues. Property rights advocates, environmentalists, real estate developers, small business owners, farmers, and homeowners each may argue that their description of the public interest and the common good is the one that most appropriately reflects the limitations that ought to be imposed on private property rights.

“Debates over ‘the public interest’ frequently call for a reallocation, or a rethinking of the distribution of rights in real property. Whether a change of property rights is a cost or a benefit really depends on one’s point of view and the existing set of property rights.” Larry Libby, “Property Rights: A glossary of common terminology,” Western Wire, Winter, 1999: 13-15.

What is a “taking”?

Since the adoption of the Constitution, we have struggled to determine what constitutes a “taking” of private property. Clearly, when the government exercises eminent domain through a condemnation procedure and removes ownership of property from an individual owner it has “taken” this property. But, what if government action simply results in a reduction in the value of property (for example, because of excessive noise from an airport or the loss of accessibility because of the closing of a public road)? Does this then constitute a taking where compensation is also required? The answer by the courts has tended to be yes.

But the question of whether a government regulation can so restrict the use of property *“that it is tantamount to confiscation of the property,”* and thereby require compensation is much more difficult to answer. In general, the Supreme Court has ruled that simply regulating the use of property is not a taking.

In 1922 in *Pennsylvania Coal vs Mahon*, the Court ruled that despite the fact that coal mining under homes led to subsidence of land and therefore damage to homes on the surface, the state could not prohibit mining underneath homes. Justice Oliver Wendell Holmes wrote: *“the rule is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.”* Since 1922, the question of “how far is too far?” has continued to be debated both in and out of courts.

Zoning has generally been supported by the Court as an appropriate exercise of the state’s police power in support of legitimate public interests. In *Village of Euclid vs. Ambler Realty Company* (1926), the Court ruled that a community can re-zone property from industrial use to residential use, even if this might cost a property owner money because the property is worth more as industrial rather than residential property. In this case, the Court found that a community has a right to manage the use of land in order to achieve orderly growth. This case established the legal basis for planning and zoning

as well as the legality of down-zoning, wherein a change in acceptable use (e.g., from 3 housing units per acre to one unit per acre) reduces the value of property.

Over time, the Supreme Court has further refined our understanding of a taking. With respect to zoning, the Court offered two criteria for determining if a taking has occurred and stated that if the answer to both questions is yes, then a taking that must be compensated has occurred (*Agins vs. City of Tiburon*, 1980):

- (1) Does the ordinance substantially advance legitimate state interests?
- (2) Does the ordinance deny a property owner economically viable use of their land?

In other cases, the Court further defines our understanding of a taking.

(3) Does the ordinance result in a property owner losing “economically viable use” of their whole property (*Keystone Bituminous Coal Association vs. DeBenedictis*, 1987)? If so, then a taking has occurred.

(4) Does the ordinance regulating land use directly relate to the impact of the proposed project? In other words, are the property owners being required to do something with their property that has nothing to do with their particular use of the land, such as being required to allow public access across their land as a requirement for receiving a permit to build a home (*Nollan vs. California Coastal Commission*, 1987; *Dolan vs City of Tigard*, 1994)? If so, then a taking has occurred.

Finally, the Court is clear that if an action by the government meets all of these criteria but is only a temporary taking, a private property owner still must be compensated (*First English Evangelical Lutheran Church vs County of Los Angeles*, 1987).

The history of the limits of planning and zoning with respect to a takings has clarified the extent to which governments can go to manage the use of land through planning and zoning. But still to be answered is the question of whether a constitutional taking also occurs when federal and state regulations affect land use in order to achieve environmental or other social goals.

Lucas vs. South Carolina Coastal Council (1992) is an important case in answering this question. Lucas purchased two parcels of land on a South Carolina barrier island in 1986, when a considerable amount of development was occurring in the same area. But in 1988, given a growing concern as to the relationship between beach front development, beach erosion, and the growing costs of damages due to severe storms, the Beachfront Management Act was passed by the South Carolina legislature. The Coastal Council was established to manage the coasts more effectively and one regulation adopted prohibited development beyond a certain point along the barrier islands. Lucas sought a building permit for his property and was denied because there was no way to site the proposed building without violating the Coastal Council’s regulation. Lucas sued asserting that the environmental regulation was a taking since

the regulation effectively prohibited his building anywhere on his property. The Supreme Court returned the case to South Carolina courts commenting that the state cannot simply assert that Lucas's desire to build a beachfront home was inconsistent with the public interest. Rather this would have to be proven. Lucas eventually received compensation for the regulatory taking of his property rights.

But the Lucas decision did not finally answer the question of how far is too far in terms of environmental regulations relating to the use of private land. For example, the Endangered Species Act make it unlawful for any person to "take" or "harass, harm, pursue, wound, or kill" an endangered or threatened species. But what does this mean for someone who want to harvest the trees on their property, trees which also provide a suitable habitat for an endangered species? In *Babbitt, Secretary of Interior vs. Sweet Home Chapter of Communities for a Great Oregon* (1995) the Supreme Court rules that actions which result in "significant habitat modification or degradation where it actually kills or injures wildlife" is an appropriate meaning of harm and therefore the Secretary of the Interior could limit where timber harvest activities can occur in order to protect the habitat of endangered species. But if owners cannot harvest the trees on their land because of society's interest in protecting the habitat of an endangered species, has a "taking" of property rights occurred that must be compensated?

Similarly, is it a taking for the Environmental Protection Agency (EPA) to prohibit a farmer from draining a field which is prone to flooding because this land is used by migrating birds as a seasonal resting area? Is it a taking for the EPA to tell a developer that he cannot build a new subdivision because it bisects a migratory route for an endangered species? These are the types of questions being debated as the nation struggles to balance private property rights with environmental goals.

The question of taking goes beyond environmental regulations to a host of other ordinances and government actions designed to achieve community goals. Some communities require developers to donate land or to make other contributions to help offset the costs to taxpayers of new public facilities. These are called exactions. For example, a developer may be required to set aside a given percentage of land in a new subdivision for a neighborhood park that will be maintained by the community. Neighborhood parks contribute to the public good because they provide open/green space for children and families for recreation and leisure. In other communities, river walks, bicycle paths and "green ways" are becoming popular redevelopment projects. For downtown merchants and other residents, these public access projects contribute to a revitalization of neighborhoods and tourism development. But do these exactions represent a taking? Two cases provide a sense of how far the public interest might go before becoming a taking.

A California landowner was told that he would have to permit public access across the private beach in front of his new house as a condition for getting a building permit. This exaction was to compensate the state for the loss of public access to the beach caused by the construction of his new home. In *Nollan v California Coastal Commission* (1987) the Supreme Court asserted the nexus standard, that is that "*any exaction or other*

requirement must be directly related to the impact of the proposed project.” If such a direct relationship cannot be demonstrated, the exaction cannot be a requirement for the building permit.

In another case in one Oregon community, the city required, as a condition for a permit to expand a hardware business, that the owner dedicate a flood plain area to handle increased runoff and a bicycle path for public access that would connect to a city-maintained bicycle and walking path. In *Dolan v City of Tigard* (1994), the Supreme Court ruled *“the city failed to show how the impacts of the business were related in a rough proportion to the need for public access on a bicycle path”*, reinforcing the concept that there must be a nexus or strong relationship between the condition of approval and the impact of the proposed development in order to avoid a taking.

On the other hand, if a regulation simply denies the most profitable use of land, it does not constitute a taking. In 1987, the Supreme Court once again visited the question of the extent to which a state can regulate mining. Pennsylvania had passed a law requiring coal companies to leave 50 percent of the coal beneath buildings and cemeteries to prevent subsidence or the collapse of the land. The coal companies argued that this prohibited them from using part of their property and therefore represented a taking of all the economic value of that restricted portion of their property. In *Keystone Bituminous Coal Association v DeBenedictis* (1987), the Court upheld the state law stating that *“when the whole parcel was considered, the coal companies retained an economically viable use of their property,”* and therefore a taking had not occurred.

The Public Trust

The public trust doctrine asserts the right and obligation of government to protect the unorganized public from actions taken by individuals in the private sector, or from the arbitrary actions of other governments. For example, if the unorganized actions of many users of Lake Cumberland are severely diminishing the quality of this valuable water resource, then it is the right and obligation of the government to act so as to monitor and protect Lake Cumberland because it is a critical factor in the public good. In California, development near Mono Lake was restricted because of the importance of that resource. *“Acting in the public trust, government stepped in to protect the basic environmental and scenic quality of the lake and adjacent lands.”*

Can it be argued that under the doctrine of public trust, Kentucky government should act to protect its prime farmland by limiting development? Do Kentucky counties have an obligation under the doctrine of public trust to protect historically significant horse farms from development? Is there a compelling obligation for government to protect and preserve farmland?

Thus, the answer to the question of “how far is too far” continues to shift with the times. At this point, it can be said that a taking which requires compensation may occur if:

- C A regulation does not substantially advance a public purpose;
- C A regulation leaves no reasonable economic use of the whole property;
- C A regulation leaves no economic value for any portion of the property;
- C There is no direct relationship between the impacts of a proposed project and the exactions required by government;
- C A landowner is forced to permit public access to private property or when any other form of “invasion” occurs on their property; or,
- C Any of these conditions occur even temporarily such that the property owner is denied use of their property as a result of government actions.

What is just compensation?

If it has been determined that there has been a taking of private property for public purposes, the last question to be addressed is, What is just compensation? Legislative and judicial history have established the following general criteria for what is just compensation.

- U First, just compensation is fair to both the private property owner and the public.
- U Second, all types of property interests (e.g., easements, leases) as well as interests in intangible property (e.g., patent rights, trade secrets) may merit compensation.
- U Third, determining just compensation begins with evaluating what might be the fair market value of property, that is, what would a willing buyer pay to a willing seller for uses that are possible and intended for that property? As the Supreme Court has stated *“mere possible or imaginary uses or the speculative schemes of its proprietor, are to be excluded”* from the calculation of just compensation.
- U Fourth, the owner of the property must be no worse off economically than if the property had been taken.
- U Fifth, the compensation is owed from the time the property is taken, not from the time the compensation is agreed to.

But the truth is that often the decision as to what constitutes just compensation ends up in the courts because the property owner and the government cannot reach an agreement on the appropriate level of compensation. A property owner has a right to due process during the condemnation process. This means the property owner must be given timely notice and be allowed to speak about the purpose for the loss of land as well as whether the compensation is appropriate. Furthermore, in pursuit of their own interests, property owners can present evidence and cross-examine witnesses and appeal any decision.

What if a property owner believes that the government has acquired an interest in his or her property without giving compensation? An inverse condemnation is a legal action initiated by an individual who feels that a government has “taken” his or her property through some action or regulatory activity and yet does not appear to be willing to exercise eminent domain. While not everyone is willing to go this far, there is a strong sentiment that environmental regulations such as wetlands protection, coastal management, and the Endangered Species Act are examples of takings without compensation (i.e., inverse condemnation) because they severely restrict a property owner’s rights. Here, property owners are claiming the government is trying to avoid paying compensation by not taking the property in order to achieve an environmental good but instead is simply regulating its use as extensively as possible.

An example of an inverse condemnation is *Palazzolo vs Rhode Island et.al.* (2001). In 1960, Palazzolo acquired a parcel of land that was primarily salt marsh subject to tidal flooding. In 1971, Rhode Island established the Coastal Resources Management Council to protect coastal areas including salt marshes which were defined as coastal wetlands. These areas could not be developed nor filled in unless the proposed activity on this property would “*serve a compelling purpose.*” In 1983 and again in 1985, Palazzolo submitted development applications, both of which were rejected. As a result, Palazzolo filed an inverse condemnation action asserting that Rhode Island’s wetlands regulations had, when applied to his land, taken “*all economically beneficial use*” of his property, and he therefore should be paid \$3.1 million for the value of a 74 lot residential subdivision that could have been built on his property.

Palazzolo lost all the way to the Supreme Court. But the Supreme Court sent the case back to state court for reconsideration. Among several points, Rhode Island had argued that since Palazzolo had not acquired full ownership interest in the land until 1978, he had notice of the restrictions of the Coastal Resources Management Council and therefore had no reasonable expectation that the salt marshes could be developed. In effect, the state was saying you cannot claim a taking for a state regulation enacted before you become a property owner.

But the Supreme Court rejected this claim asserting that there is no expiration date on a takings because “future generations have a right to challenge unreasonable limitations on the use and value of land.” On the other hand, the Supreme Court also noted that Palazzolo had not proven that he had lost all economic use of his land, for he could still develop on an 18 acre upland portion of his property.

Hence, the determination of what is “just compensation” is difficult. Property owners may feel that the value they anticipated their property would bring from a particular use (e.g., a residential subdivision of a given density) at some time in the future is lost with a particular governmental action. But depending on the circumstances, some or none of this value may be recovered in a takings case. In other words, what is just compensation is contingent on a host of other factors more important than what property owners think they ought to receive.

Summing Up

Many Americans feel that their private property rights are absolute. But in fact, from the beginning the public, represented by the government, also has held sovereign property rights. The government may act to take control of land as well as to regulate its use to achieve the common good. But these public interests in property are constitutionally limited by the need to demonstrate a clear public benefit and to provide just compensation. In other words, the government cannot arbitrarily exercise its property interests without acknowledging the legitimacy of the property interests of private citizens.

Yet, the exact meaning of each of these key concepts – a taking of private property, for public use, without just compensation – has been contested terrain, both legislatively and judicially from the time the Constitution was ratified. Perhaps the Supreme Court was right in 1954 when it stated that the meaning of each of these terms reflects the central concerns and understandings of society at a particular point in time. Clearly, the Founding Fathers did not anticipate a need to weigh the protection of coastal areas against the desire of property owners to build beach front homes, nor the need to balance society’s concerns for the survival of endangered species against the state’s interests in building a dam. In other words, as the critical issues confronting society or communities change, it has been argued that our understanding of property rights also must change. But precisely how remains uncertain.

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