Oklahoma Law Review

Volume 50 | Number 3

1-1-1997

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OKLAHOMA LAW REVIEW

VOLUME 50 FALL, 1997 NUMBER 3

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Although the goal of protecting the natural environment has gained increasing importance over the last generation, in recent years it has faced a number of serious challenges, not the least of which is the charge that it is inconsistent with respect for private property rights. At the federal, state, and local levels, advocates for the environment and defenders of property rights have contended with each other in courts, in legislatures, before agencies, and in the arena of public opinion. Thus, the conflict between environment and property has emerged as one of the thorniest political issues of the day, one which is national in scope, but which has immediate meaning for every community.

It was with this conflict in mind that legal scholars and practitioners, academics from a range of disciplines, and members of the public came together at the University of Oklahoma on April 26, 1997 for a symposium on Environmental Protection and the Politics of Property Rights. Sponsored by OU's Interdisciplinary Perspectives on the Environment program, the gathering provided a forum for exploring society's efforts to negotiate the proper boundary between private rights and public control over important features of the environment.

Three invited speakers were heard: Andrew Sawyer, Assistant Chief Counsel of the California Water Resources Control Board, presented an overview of the takings implications of the famous Mono Lake case; James L. Huffman, Dean of the Northwestern School of Law, Lewis and Clark College, offered a defense of private property rights in environmental values; and John D. Echeverria, General Counsel of the National Audubon Society, gave an analysis of the present state of the political battle between environmental advocates and the property rights movement. To provide an interdisciplinary outlook, comments were provided by members of the University of Oklahoma faculty representing three different approaches to the conference topic: Drew Kershen, of the College of Law, showed how the presentations raised legal issues that are also at work in Oklahoma cases; Baxter

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Vieux, of the School of Engineering and Environmental Science, related the presentations to his practical experience in the U.S. and Europe; and I, a faculty member of the University's Philosophy Department, considered how the presentations posed questions about the nature and justification of property rights. Informed and revised in light of the discussions on the day between speakers, commentators, and audience members, the presentations and comments are presented here.

By way of a conceptual introduction, it is worth examining what it means to consider the question of balancing environmental protection and property rights as a *political* matter. In the Anglo-American tradition, perhaps the central role of the political system is the enforcement of private property rights. But it is a matter of substantial dispute whether or not property rights themselves are to be understood as having a political character — that is, whether the content and extent of the right of property are matters for political debate and decision, or rather are facts given in advance of politics. Since society's effort to preserve environmental values requires a degree of interference in what people wish to do with their own, it is inevitable that this dispute over the fundamental nature of property will be provoked.

Let us approach the question of the nature of property from a practical standpoint. To call property a right implies that an owner is entitled to noninterference in his or her enjoyment of the good in question, in particular noninterference by the government. In practice, of course, the government may interfere in an owner's use of his or her property when that use threatens to harm others. In practical terms, then, the individual's right of property is bounded by the government's right to regulate property use in the interest of preventing harms. This simple formula stands behind Ernst Freund's classic statement of the distinction between the police power and eminent domain: "[I]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . ."[1]

The requirement that compensation be paid in cases of eminent domain, but not for exercises of the police power follows from Freund's dictum. It is just that the public bear the costs for the benefits provided by eminent domain; it would be unjust to compel an individual to subsidize the common good. Conversely, it is only just that parties responsible for harms to others bear the costs involved in prevention; it would be unjust to impose that burden on those subject to the danger. Compensation practice thus gives effect to the intuition that there is no *right* to use property in a harmful way — that one's property right is limited to uses that do not cause harm to others.[2] That is why no compensation is required in police power cases: since no property right is infringed, no property is taken. By contrast, the

1. ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 511 (1904).

2. *See* JOEL FEINBERG, THE MORAL LIMITS OF CRIMINAL LAW: HARM TO OTHERS 11-12 (1984); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 9 (C.B. Macpherson ed., Hackett Publ'g 1980) (1690).

payment of compensation in eminent domain affirms that the affected owner had a right to the goods taken, i.e., that they were his or her property, for which the payment is meant to be a just exchange.[3]

Freund's principle thus allows us to approach the boundary of property from the outside, so to speak — property begins where the government's right to interfere ends. That line is determined by whether the government's action provides a benefit or prevents a harm. But how are we to tell? Two considerations seem relevant here: First, something is beneficial or harmful with respect to some condition or other — e.g., one's health, or the state of one's reputation. Second, for that condition there is some minimum threshold or baseline which is accepted as an enforceable entitlement.[4] Although the condition above the baseline is certainly desirable, it is only when conditions fall below it that government is held to have the right to intervene. Thus, in respect of that right, benefit and harm are not defined simply as positive and negative changes in the given condition. Rather, they are changes that cross the threshold.[5]

In a practical sense, therefore, the contours of the right of property are set by the understanding of the threshold condition or baseline which separates benefits from harms. But how does the notion of a baseline help establish whether property rights have a political or nonpolitical character? Simply put, the political nature of property rights depends on how the condition and relevant baseline are conceived. Some conceptions lead to the view that the right of property is defined independently ("in advance") of political experience, while others lead to the view that the content of that right must be determined politically. I will briefly review four conceptions to illustrate the contrast.

The first conception is closely allied to the view that property is a natural right, hence conceptually prior to politics, and immune to political modification. Defenders of the idea of natural rights standardly make use of the narrative device of a "state of nature," and argue that the natural right to property is grounded in a fundamental human right to survive.[6] Insofar as the goods of the Earth are needed for survival, individual ownership is justified as a way to execute that basic right.[7] Individuals survive by consuming goods; to enable consumption they must have a right to those goods against other individuals; they gain this property right either by

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3. *See* U.S. CONST. amend V ("[N]or shall private property be taken for public use, without just compensation."). This phrase is known as the Takings Clause.

4. *See* FEINBERG, *supra* note 2, at 53-54.

5. *See id.*

6. Religious versions of this argument, to the effect that God grants human beings dominion over the Earth, are found in the classical natural rights theorists. *See* HUGO GROTIUS, THE LAW OF WAR AND PEACE 186 (Francis W. Kelsey trans., Bobbs-Merrill Co., Inc. 1925) (1646); LOCKE, *supra* note 2, at 18; SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 84 (James Tully ed., Michael Silverhorne trans., Cambridge Univ. Press 1991) (1673). Contemporary versions of the argument take a more secular tack. *See, e.g.*, RICHARD ALLEN EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 11-12 (1985); ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 224-39 (1987).

7. *See* JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES *passim* (1980).

original appropriation of goods not claimed by others, or by exchange. Of course, each individual's right to property is limited by the right of each other individual to survive as well.

Therefore, harm is defined in terms of the threshold condition of being able to execute one's right to survival.[8] Locke's famous "proviso" that appropriators in the state of nature leave "enough, and as good"[9] reflects this rights-based conception of harm. Individuals are not under the obligation to ensure that their fellows survive, but only to ensure that they have the opportunity to survive — it is up to each to provide for his or her own survival, through his or her own labor.

In the state of nature story, the baseline between harm and benefit is established prior to political life, implying that the limits on property rights that correspond to that baseline are a conceptual given, not subject to modification through political discussion. Specifically, neither that baseline nor the moral limits on property it specifies change when people enter into society. Rather, people enter into society to enforce the property relations that develop in keeping with that baseline, and are morally justified by it. If the dimensions of the right of property were changed as a result of the political process (e.g., by a majority vote), increased entitlements for some would correlatively produce liabilities against such pre-existing (and sufficiently justified) rights of others. Thus, the political redistribution of property rights would violate the moral foundations on which the political system itself is based.

It follows that the natural rights view of harm is in general hostile to the use of the police power to further the goals of environmental protection. Short of obvious cases where a property owner poses a clear physical danger to others (e.g., by allowing toxins to seep into neighbors' water), acts purported to harm the environment (e.g., by causing loss of habitat, or loss of scenic amenities) do not fall outside the scope of legitimate property rights.[10] As a matter of public policy it might be advisable for the government to preserve a wide range of environmental values. But, when this requires interference in private property rights, the government must act by eminent domain, and pay just compensation.

Second, while the first conception of the baseline between benefit and harm seems to favor property rights over environmental values, the second conception we shall consider has the opposite effect — while at the same time affirming the belief that the baseline is a given, hence that the content of the right of property is not subject to political review. This second conception appeals to the belief that human well-being rests in various ways on an environmental foundation. First, human beings draw on the environment for the raw materials and energy that are inputs into their economies. Well-being in the economic sense, that is, relies on "natural

8. I say the ability to execute one's right to survival, as opposed to survival itself. I follow Locke, who insists that the goods of the Earth are for "the industrious and rational," i.e., for those who make the effort to use them. LOCKE, *supra* note 2, at 21.

9. Locke, *supra* note 2, at 21.

10. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1021-23 (1992) (holding that only property uses that pose a clear nuisance can be regulated without violating the Takings Clause).

capital," and actions that damage that form of capital can be as harmful as violations of fiduciary trust regarding financial capital.[11] Second, as organisms within the environment, human beings are organically affected by environmental changes. Well-being in the sense of physical health, that is, can be diminished by a decline in environmental quality. Third, people are also affected psychologically by the condition of their surroundings. Well-being in a psychic sense thus seems to require access to the natural world, preserved to some degree of integrity.[12]

While the first version of the baseline is allied with the classical liberal view that the role of the state is to provide conditions in which individuals can pursue their own notions of what makes for a good human life, the second version moves toward the view that the state should recognize and enforce a particular conception of well-being for its citizens.[13] Actions which lessen people's prospects for a good life as defined by that conception are thus the sort of harms that government is obligated to prevent. On this view, then, government could employ the police power to interfere in property uses that would affect the environment in ways that lessened human well-being; such uses would not be encompassed in owners' property rights. Since well-being is conceived as relying on a broad range of environmental features, the scope of private owners' rights over the environment would thus be much narrower than with the first view.

Despite this contrast, the contours of the right of property in both views are established in a nonpolitical way, in virtue of the character of the baseline as a given. Under the second view, the conditions of human well-being are an objective matter, revealed by scientific investigation into the connections between the environment and human life. This view thus suggests the idea of "environmental platonism," whereby property rules are devised and enforced by a cadre of experts ("eco-guardians"), on the basis of criteria formulated independently of any political deliberation.[14]

Third, with the first two conceptions of the baseline, the definition of harm is a conceptual given; hence, the limit of the right of property is conceptually independent of governmental authority and not subject to political revision. The third conception begins to show how the definition of harm can change, leading to politically instituted changes in the extent of property rights. This conception is inspired by utilitarian thinking about property.

Utilitarianism justifies governmental action by reference to the net balance of satisfaction over dissatisfaction across society. Harm then involves a negative balance — where the "costs" of an action outweigh the "benefits." But as noted above, we must refer to some threshold point on the continuum of degrees of net satisfaction. Following Jeremy Bentham, we can identify this baseline with the

11. *See* Salah El Serafy, *The Environment as Capital*, *in* ECOLOGICAL ECONOMICS: THE SCIENCE AND MANAGEMENT OF SUSTAINABILITY 168, 171 (Robert Costanza ed., 1992).

12. *See* THE BIOPHILIA HYPOTHESIS *passim* (Stephen R. Kellert & Edward O. Wilson eds., 1993).

13. John Rawls refers to this sort of view as perfectionism. *See* JOHN RAWLS, A THEORY OF JUSTICE 25, 325 (1971).

14. *See* H.J. MCCLOSKEY, ECOLOGICAL ETHICS AND POLITICS 157 (1983).

"established expectations" of people regarding the continued enjoyment of their goods and the future return on their investments.[15] That is, the baseline between benefit and harm is that balance of satisfaction that is struck when established expectations are respected. Thus, if individual property uses would interfere with established expectations, the balance of satisfaction would fall below the threshold, and that use could be legitimately enjoined under the police power.

While Bentham was concerned with individuals' expectations regarding their private goods, consideration of the environment reminds us that the utilitarian calculation should take account of those satisfactions people derive from environmental goods. Especially where environmental goods are publicly owned, the public's "established expectations" regarding them should thus be factored into the location of the baseline between benefit and harm. But what "establishes" a publicly held expectation sufficiently for it to be enforced through the rules of property? Note that a related question can also be asked regarding environmental goods that are held privately: might public expectations regarding that good outweigh the private expectations of its owner?

These questions raise an explicitly normative one: what legitimizes people's expectations regarding property? Plausibly the answer is a broad social consensus, evidenced by long usage.[16] But we must bear in mind that a social consensus is dynamic: it changes as people's attitudes change, in response to slow developments, or relatively sudden shifts.[17] On the utilitarian conception of the baseline, then, the limits of property rights will change in response to changes in the social consensus. It can be argued that public discussions generated by the increasing environmental concern of recent decades have begun to work a change in the people's expectations about property. On this view, the current political debate over the appropriate means for protecting the environment is part of a social process by which the consensus, and thus the content of the right of property, will be revised.

Fourth, the utilitarian conception of the baseline introduces a dynamic understanding of the right of property. The extent and content of that right is defined, and can be revised, by society's political institutions, in response to underlying changes in the social understanding of what constitutes a harm. The last conception we shall consider is likewise dynamic, but it incorporates a criticism of utilitarianism and presents an even more robustly political picture of property.

For utilitarianism, the role of political institutions generally, and the property regime in particular, is to maximize satisfaction across society. The baseline of harm is a lower bound to the acceptable level of general utility. If, say, one owner

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15. *See* Jeremy Bentham, *Security and Equality of Property, in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 51 (C.B. Macpherson ed., 1978). For a contemporary statement of Bentham's view, see Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* 80 HARV. L. REV. 1165, 1211-58 (1967).

16. *See* CAROL M. ROSE, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, in* PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 105, 105-62 (1994).

17. For example, the abolitionist movement and then the Civil War led to the exclusion of human beings from the range of permissible property.

did not respect another's established expectations, society would suffer net dissatisfaction — hence, the government is permitted to prevent such actions. Thus, for utilitarianism, the function of politics in establishing property rules is purely instrumental: it is to provide for maximum utility by optimally reconciling the competing preferences held by everyone in society.

But this instrumentalist view is perhaps too weak a conception of politics, based on a misleading conception of the individual. As Mark Sagoff argues, people are more than havers of preferences — they are also judges of values.[18] That is, people distinguish among their own (and others') preferences, determining some to be more worthy of satisfaction than others according to various standards of value. While a preference is an affective state that a person simply has or does not have, a value carries some cognitive content. Thus, while different people can simply observe the similarities and dissimilarities among their respective preferences, with their respective values they can do more. Specifically, they can explain and justify their values, with the potential effect of persuading others to come around to their way of seeing what is valuable. Politics can be conceived as embodying this process of collective deliberation about values — indeed, for Aristotle, it is our ability to deliberate over what is better and worse that makes human associations distinctively political.[19]

In this light, the baseline that separates benefit from harm can be seen as a matter of socially held values. The ongoing social discussion of what is valuable will produce some agreements on which political institutions can act. The baseline can be conceived in terms of conditions that are deemed to meet minimal value criteria: an action that alters conditions so that these criteria are not met counts as a harm that can be enjoined by the government. However, just because the debate over value is ongoing, any agreements that are produced will be dynamic — i.e., constantly under review, and subject to revision. As people gain experience of the social life produced by their value agreements, they will reflect publicly about the fitness of their values, and public agreements on values will change.[20] In particular, there will be changes in the agreements on the minimal criteria that define harm — in other words, the baseline will shift.

On this last conception of the baseline, then, the right of property is political in a quite fundamental sense. It is not simply the case, as with utilitarianism, that the political process changes property rules in response to underlying social changes in the conception of harm. More, on the current conception the change in the conception of harm is itself political in nature — it grows out of a process of public deliberation over values. This process is political in a broad way. It takes place within specifically political institutions, in the courts, and in the culture at large —

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18. *See* MARK SAGOFF, *At the Shrine of Our Lady of Fatima; or, Why Political Questions Are Not All Economic, in* THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT 24, 24-49 (1988).

19. *See* ARISTOTLE, POLITICS: BOOKS I AND II 2-4 (J.L. Ackrill & Linday Judson, eds., Trevor J. Saunders trans., Clarendon Press 1995).

20. This claim is central to the outlook of John Dewey. *See, e.g.*, JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 84 (1954).

and none of these contexts is sealed off from the others. Indeed, precisely this broadly political process of deliberation is the setting for the present controversy over the environment. As our society debates the value of the environment, it reconsiders whether actions once viewed as beneficial are harmful instead — and whether to change property rules in order to implement its reevaluations.