THE INTERFACE OF PUBLIC AND PRIVATE RIGHTS AND INTERESTS IN PROPERTY

By

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"This is my land. I own it. Rented it on shares first; then bought it on a purchase contract. It has one power line right-of-way across one side; fronts on a state highway with a set-back line along it that limits collecting on any new improvements in front of that line if the state takes more land for widening the highway. It's zoned industrial now which doesn't bother my farm uses, but I think it has raised my assessment over what it would have been if it had been zoned for agriculture. I thought I had a buyer for it, but I guess he was scared off by the court order against the processing plant next door -- it has something to do with polluting the small streem behind our land and a big fishkill down river. I've heard that they may be after me because of the manure from my cattle. Well, we'll see about that. Some of my new neighbors used to complain about the smell until I stopped spreading near them. This is different: something about phosphorous in the water. But hell, there hasn't been any fish in that stream for ten years. I'll be on social security and signed up for a free fishing license before they have fish in it."

1/ Presented at the 1972 National Public Policy Education Conference, New England Center, Durham, New Hampshire, September 18-21, 1972.

2/ Professor of Resource Economics, New York State College of Agriculture and Life Sciences, Cornell University, Ithaca, N. Y.

That isn't an actual quote from anyone; it's a way to summarize this paper. Tenure and terms of transfer, rights of way and the like used to be a major focus in considering rights in real property. Eminent domain and the use of police power have long been examined as modifiers to the bundle of rights that we have in property, used to express public rights over private rights. But the interface is shifting. And it may be more instructive to look at the administrative processes and related politics involved in regulatory activities in order to understand what's happening to property rights. Also you have to define property rights quite broadly. The language of equity law is too confining. Rights to social security, fishing and responding to the social pressure of neighbors hardly come to mind reading law books about what you bought when you recorded the deed.

Property as a System of Claims and Liabilities

John R. Commons concluded, "the term 'property' cannot be defined except by defining all the activities which individuals and the community are at liberty or required to do or not to do, with reference to the object claimed as property."[3/]

In a more recent treatment Wunderlich[4/] considers property as a system involving the individual, the state and objects. The private property system implies a strong claim by individuals, including various kinds of groups acting as individuals, in the benefits from property with limited interest by the state. The interest of the state is expressed

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3/ Quoted from Institutional Economics, p. 74 by Kenneth H. Parsons in "John R. Commons' Point of View," The Journal of Land Economics, Volume XVIII, Number 3, August 1942, p. 255.

4/ Gene Wunderlich, Emerging Views of Property in Land, a paper presented to the North Central Research Strategy Committee on Natural Resource Use and Development, Kansas City, Mo. Oct. 12, 1971. Sponsored by The Farm Foundation, Chicago, Ill.

through a system of laws which define the role of the state as an arbitor in the conflicting claims of individuals but also as a participant in the game.

The classic issue is the need for man's defense against the power of the state. And the classic counter issue is the need for unmanageable transfers of wealth from the "haves" to the "have nots" -- the threats to the survival of the society from "abuse" of property rights. That is, we have to consider the state's role in protecting the collective well-being against the economic behavior of individuals.

The function of property in the system has two parts. First, property distributes claims and liabilities for the benefits and burdens of society. Second, property allocates the access to use or in other words it conditions decision making. It is the basis of power and control. To the extent that the individual exercises power and control over use, he has property rights; conversely, to the extent that the state (and at more informal levels, the community) exercises power and control over use, public rights are expressed.

It is in the question of value that the potential breadth of the concept of property can be seen best. Value and what determines value is the essence of the social control system for property. Two general categories are suggested -- welfare and deference. Welfare includes concepts of wealth, i.e., income, services and goods along with consumption and saving. Welfare also includes wellbeing, made up of health, safety and security; enlightenment made up of knowledge, insight and information; and skill or proficiency.

Deference is also seen as a part of value with power -- the ability to influence the decisions of others as a leading element. But respect which includes status and prestige; rectitude, including goodness and

stewardship; and affection, made up of love and friendship, all play a part in the deference aspects of value.

The point is that the value of property is made up of very many parts, and it is conflict in values, conflict between these many parts expressed, conflict over property that leads to change in the property system. In this context, explaining conflict, and thus change, in terms of a few of the parts; for example services or goods from alternative uses, is risky. Such simplifications are necessary to get at the logic of property problems, but obviously runs the risk of leaving out much that is relevant to policy formation and public action.

Institutions complete the system. Commons defines an institution as "collective action in control, liberation and expansion of individual action."[5/] Property institutions deal with object classes, interest holders and express action rules. Not all, sometimes not even most, of the action rules are imbedded in statutory law or court rulings and common law. On occasion, stewardship preached from the pulpit may have more impact on rules of behavior than if issued from the bench.

Pollution and Legal Remedies

With respect to property, it seems likely that most think of the courts as the primary regulators in the control system. Public action through the state can also be expressed through the power of government to tax and spend (about which we probably should say more here if this were to be a well balanced presentation). Cost sharing for various facilities, research and tax treatment, by commission or omission, have important effects on the property system. This is particularly true in

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5/ Ibid., p. 253.

society's newly found problem of pollution. Further on administrative actions of the state, arbitration other than in the courts, and regulation by public agencies, will be discussed. But now the search for legal remedies to pollution provide us with some perspective on the recent use of the courts as an institutional vehicle for expressing changes in the action rules with respect to property.6/

The courts as a vehicle for change have appeal in part because of the large role which the injured individual can play, at least potentially. Indeed the courts are unable to act until someone comes before them, to ask them to intercede on their behalf. Once the person asking for relief is deemed to have standing before the court he may have considerable impact. To have standing before the court it is usually necessary to show a personal stake in the issue. A few jurisdictions and at least one state, Michigan, by legislation have said that in environmental cases everyone is affected and thus anyone has standing.

In recent pollution cases the results are sometimes measurable in terms of reduced discharges, but more to the point may be the urge on the part of polluters and control agencies to avoid the time and energy consuming conflict involved. The uncertainties involved may be reduced by more careful development of planning and enforcement procedures and this greater care may in turn lead to a reduction in pollution.

Nuisance law, a part of court developed common law, has the longest history of use in pollution cases. The issue is usually whether your neighboring property owner is unreasonably interfering with your use of your property, or with the rights of the public in general. The

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6/ This section draws heavily upon D. R. Levi and Dale Colyer, "Legal Remedies for Pollution Abatement," Science, Vol. 175, 10 March, 1972, pp. 1085-7.

complaintant must show damage, and may ask to be paid for damages sustained in addition to an injunction to prohibit further damages. Commonly damages are awarded but not the injunction, which implies that the award may be viewed to cover not only past damages but permanent reductions in market value of property if the pollution continues. A balancing of interests test finds that substantial financial interests are at stake if a complete prohibition were to be issued. However, more and more cases are resulting in orders for feasible modifications in processes and practices to reduce future injury.

Other approaches to legal argument for relief are less well tested and developed. Trespass rights are a protection that need not require damages to be shown, but courts have responded with results little different than with a nuisance argument. Water rights provide another line of legal reasoning. The natural flow theory of riparian doctrine, i.e., where rights of bank owners are to a reasonable use of the water, states that lower owners have a right to the flow undiminished in either quantity or quality. But this is not widely honored, giving way in most states to an interpretation of reasonable as a fair share of use that leads to the highest overall development of the uses on a body of water. In states that use prior appropriation there is the possibility that the right to use could be interpreted as maintaining the quality for lower order and future users. California has taken the step of combining water rights and water quality administration in the same board.

Some statutory provisions have been proposed and a few enacted to facilitate the use of the courts for relief from pollution. Class actions are a case in point. This is where one individual can act in the name of a group or class of persons injured and ask the court to apply the relief requested to the whole group. Declaratory judgment acts

offer the opportunity to ask the courts to spell out the validity of agency actions and the role of environmental considerations.

Under the National Environmental Policy Act of 1969, for example, environmental impact reports are required on all federally related projects. Many agencies have found themselves in court to defend the adequacy of their statements. But these cases illustrate a characteristic of court reviews that limits their impact. They are most reluctant to second guess decisions and the prerogatives of decision makers who are duly charged to make the decisions at hand. Courts limit themselves to protecting the due process rights of those affected. In other words, they will require more adequate procedures to meet the requirements of the statutes under review. But, once satisfied that the proper steps have been taken, reasonable studies made, and reports circulated, they will not put themselves in the place of the responsible officials. Thus, little new may be added to the real decision-making process. "Bad faith" must be shown to reverse a decision made when all the required procedural steps have been met.

Court actions have drama and can have impact on agency and polluter behavior; thus they have impact on the system of property rights, helping to shift the balance between private and public rights. However, is this "where the action is?" Administrative actions that exercise the police power of the state may be less dramatic individually but sum up to a much greater impact on behavior.

John Dales 7/ has illuminated the character of private rights and public rights by describing a kind of continuum between private property rights and common property rights. An owner of an asset which enjoys the status of a "pure" private property has exclusive use of that asset and may transfer it freely. These characteristics run with the asset.

7/ John H. Dales, "Rights and Economics," Perspectives of Property (Inst. for Research on Land and Water Resources, Penn State Univ.), 1972

The social results are best when the object or asset is easily divisible. Its use fully excludes value taken in it by others and in using it the owner excludes rivals. Externalities from that use are then insignificant. The price and market system will operate effectively. Price effects transfer with little or no cost.

At the other end of the continuum are common property rights. Rights to view a sunset or to civil liberty are not exclusive to any one owner. They are not transferable. The use by one does not diminish that available for a rival user. The social results from such objects are best when the resource cost of supply is zero or close to it. When resources must be used to supply them but access is difficult -- i.e. price is high -- they may be underutilized. At low or zero price overcrowding or overexploitation results with the attendant loss of the ability to provide value. This is the "tragedy of the commons."

But most of life goes on between these extremes. A high degree of exclusivity attends most objects, but not complete. Others take pleasure in your clothes, your car, your home, etc. Many limits are placed on transferability. Price isn't enough to effect transfer. Requirements of age, residence, examination, training, income and the like are placed on the transfer. Rights depend upon status, hence Dales calls these status rights. Institutions and their behavior rules deal with the definition of status rights making private goods more like common property and vice versa, as conflicts in value arise.

Regulatory Decision Making -- Where the Action is

Regulation of pollution provides a good example of the institutional processes that are changing the character and balance of private and public rights and interests in property. An examination of the politics

of regulatory decision making helps to understand how such institutions change the rules of behavior of the interest holders and the object classes involved.[8/]

What are the elements of such decision making? There is often an element of prior clearance. The person damaged doesn't have to act first; the potential polluter has to ask for a permit. If not, there is at least some standard of behavior spelled out which can later be judged to have been violated. Often there is an element of supervision over the initiation of the potentially damaging activity. And there is an element of later review for compliance. The expectation is that the regulator will not be passive but will seek out the wrong doer. Obviously, each of these elements can be expressed in a wide variety of ways, varying greatly in the capacity of the regulator to fulfill them.

The presumption is that these elements will have associated with them a number of characteristics. A public interest to be served, legal authority to do so and the power to take the initiative are perhaps obvious. Less obvious is the need to be comprehensive with respect to the system being regulated, such as a watershed or a basin. Also technical competence to make determinations of standard setting and compliance are not always to be taken for granted.

If this is regulatory decision making it is not hard to understand why most institutions established for the purpose fail to achieve the expectations of many of those who supported their creation. The political constraints are severe and not always appreciated by those same supporters. As Matthew Holden has observed there is usually considerable

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8/ This section draws heavily from Matthew Holden, Jr. Pollution Control as a Bargaining Process: An Essay on Regulatory Decision Making Publication No. 9, Cornell University Water Resources Center, Ithaca, N. Y., October 1966.

capacity of those to be regulated to "filibuster." That is, success is conditioned by the degree of consent of the regulated to be regulated. This consent is achieved in a process of bargaining and the regulating agency usually has little choice but to bargain.

Why must the regulators bargain with the polluters? Pollution is a matter of definition. There are hundreds of polluting substances, many of them found in nature. At each step in definition there is room for interpretation and disagreement. Conflict with the regulated usually occurs at every step. Standard setting is a kind of planning process. What uses should determine the classification for a stream stretch? Once uses have been determined, then requirements dictate the minimum levels of quality to be maintained. Shall the quality of individual discharges be a part of the standard (a less than usual result) or should only a stream standard be used, making an individual discharge a violation when it can be shown that it is responsible for degradation below stream standards? The regulator has many choices in seeking compliance -- who to ignore, how long to wait, what to accept as compliance. For many years regulators were forced to accept a statement of intent to comply, someday, as compliance.

The timing of action by the regulator can be critical to gaining support. There is the problem of many results, stemming from many other causes, being attributed to the obvious action. The big employer in the community with the obsolete plant, with other reasons to relocate elsewhere, is in a strong bargaining position. The regulator must pick a time to maximize backstopping and support and minimize blame. It is often very attractive to wait. The relevant constituencies have a chance to show themselves and demonstrate their strength. The regulated and their allies may be forced out in response to demands by the environmentalists

and their allies. Federal agencies have a chance to show their backstopping support, or lack of it, provide funds and publicity or a lack of either.

There are a number of situational factors that force bargaining. The polluter, for example, has most of the relevant technical information. He knows more about his own processes and how they can be modified, what is in his wastes and how to remove them. He can use this knowledge of feasible remedies to lend creditability to his arguments.

Many myths and values force the need for an apparent bargain. The very words "filth" and "exploitation" suggest a polarized view of the problem. Others see "jobs" and "development" at stake. The regulator has little choice but to seem to compromise.

The regulator also faces different mixes of constituencies at different levels and points in the political structure. Different agencies serve different clienteles and have as a result different postures with respect to the regulator's task. One house of a legislature may be dominated by "hawks" or by "doves" on the environment or on economic development. An elected executive may differ in his point of view from the legislature. Local, state and federal levels can have different mixes. The regulator can have to deal with all of them. A bargained result is almost inevitable if for no other reason than the advantages of the appearance of agreement. Overt conflict may not be judged on its merits but simply be taken as a symptom of incompetence. Those who would judge probably do not have the competence to consider the merits. A bargain has high value in keeping the wheels of government turning.

The regulator must bargain to achieve tolerable working arrangements. Success is a wide band of results. The regulating agency knows that it and those regulated will be there together long after a current flurry of public interest and debate.

Arbitration -- An Administrative Approach for the Future?

Arbitration has been most fully developed in the area of labor-management disputes. But it may have a place in environmental problems, particularly those that deal with conflicts in land use that do not lend themselves to the usual regulatory processes, such as in water and air pollution. But what will serve as the "collective bargaining agreements" for environmental problems? We may simply have to make it a part of our general governmental structure.

A task force of the American Law Institute[9/] considered some elements of this question in a review of zoning. Zoning simply wasn't getting the job done. They considered a quasi-judicial process to allow arbitration on the merits between conflicting agencies, between levels of government, between local people and utilities and the like. Highway and park agencies disagree over routes. Park authorities often wish the control of land uses by local government around their entrances was consistent with the environment in the park. Power lines and plant siting often conflict with the aims of local land use controls. The examples are endless and that is part of the problem.

Who can weild this kind of arbitration power? The power to decide often doesn't reside at a level any lower than the governor's mansion or the halls of the legislature. A view of property institutions as consisting of interest holders, object classes and rules of behavior is helpful but perhaps too simple here. Our government is a system of active and latent interest groups (the public), agencies and elected officials. New institutions, or old ones with broadened functions, will evolve in this context.

9/ A Model Land Development Code (Philadelphia, Pa.: The Executive Office of The American Law Institute), April 24, 1968.