

Private Property Rights

Educational Approaches in Public Land Use Policy Development

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6 Main points...

- Fee simple ownership of land is relatively recent.
- Government plays a large role in creating/preserving private land interests.
- Public policies that affect property rights vary locally & regionally.
- The Constitution provides a basis for U.S. land laws.
- Court decisions outline general principles for balancing public & private interests in land.
- We can anticipate & avoid some problems in public policy implementation.

Our understanding of "property" changes.

- Roman patriarchs held life/death powers over family & slaves.
- Feudal European monarchs claimed all lands by divine right.
- Nomadic & hunter/gatherer societies hold land in common (including some contemporary societies).
- Fee simple ownership* evolved gradually.

*Ownership of all rights in property that can be privately held.

Can you describe your land rights? (an interactive exercise)

A basket of fruit, a bundle of rights!

Private interests in land...

A bundle of divisible rights:

- Exclude others
- Sell or transfer title
- Divide lands
- Grant easements
- Rent or lease
- Develop for agriculture, residential use, mining, etc. subject to reasonable regulation

Government interests in private lands:

- Eminent domain (condemnation, public utilities too)
- Taxation
- Regulation

- Escheat (government takes title if no heir)

Private interests in land...

Rights in land are accompanied by responsibilities for its reasonable use.

- Some are codified in government regulations.
- Others are based on societal ideas about acceptable stewardship.

Government creates land values:

- Systems of property description
- Recording/recognition of title
- Rules for dispute resolution (legal process)
- Protection from harmful activities of neighbors
- Value added by public improvements, programs & services
- Tax or land grant incentives for preferred development
- Government participation in the market place

These systems provide economic development, estate inheritance & other cornerstones of modern society we take for granted.

Government roles...

Current ownership of U.S.'s 2.3 billion acres:

- Federal - 29%
- Native American trust lands - 2%
- State & local - 9%
- Private - 60%

Historic federal land disposition:

- 328 M acres for state schools, roads, etc.
- 288 M acres to homesteaders
- 61 M acres to early vets as bounties
- 94 M acres to railroads

Is there a tort law alternative to land regulation?

Injured parties sue for money damages.

- Injured party has the burden of proof (difficult to prove long term & cumulative impacts).
- Injured party continues to suffer during pursuit of a claim.
- Owner may decide that profits outweigh the risk of claims for damage.
- Not an effective public policy & planning tool (not preventive).

- Public interests (in environmental protection, public lands, economic/tax efficiency, etc.) are not well represented.

Policies vary regionally...

Wisconsin water law...

Includes public trust & riparian rights elements.

Public Rights

Boating
Swimming & wading
Fishing
Water quality
Natural beauty
Habitat

Riparian Rights

Access for navigation
Exclusive use of exposed lake/river bed
Domestic use of water
Trapping
Harvest of aquatics
State/DNR permit standing

Constitutional basis for property law...

- Delegation of powers (which level of government regulates what)
 - Federal government is limited to enumerated (& implied) powers. (Interstate commerce & treaty powers authorize important federal land/resource policies.)
 - General police powers reserved for states.
 - Local powers must be authorized by states.
- Protection for private property

Constitutional protection for property...

"...nor shall private property be taken for public use, without just compensation" 5th Amendment to the U.S. Constitution

Important concepts:

- Recognition of **private property**
- Acknowledgment of **eminent domain**
- A **just compensation** requirement
- A prohibited "**taking**"

Regulation that goes too far...

"...if regulation goes too far it will be recognized as a *taking*."

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)

State law prohibited mining that caused land subsidence.
Coal company was not compensated for its lost mining rights.

Evolution of judicial "taking" criteria...

- Through successive decisions the federal Supreme Court has developed criteria that can be applied in a balancing test.
- No single criterion is deciding.
- There is no precise formula or trip wire for *taking* determinations.
- Most judicial decisions are highly deferential to legislative acts.
- State courts may afford greater protection to private property but not less.

Judicial "taking" criteria...

Courts have distinguished two general categories of *taking*:

- "facial" *taking*
(the regulation is a *taking* on its face)
- "as applied" *taking*
(the regulation as applied in a particular case results in a *taking*)

Generally...

- Regulations which prevent significant harm to public interests without undue burdens on property owners are acceptable.
- Regulations which provide a public benefit are likely to be found to be a *taking*.

Judicial "taking" criteria...

- A wipe out of an essential element of the bundle of rights is likely a *taking*.
 - Physical occupation/use by a governmental unit, its agents or the public is a "per se" *taking* even if the occupation is temporary &/or minimal.
 - Denial of the right to will property to an heir has been found to be a *taking*.
- An individual landowner should be regulated the same as others similarly situated.
- An individual landowner should not bear a burden that should properly be shared by the entire community.
- If a landowner benefits from a regulation then a diminution in property value will less likely be view as a *taking* ("average reciprocity of advantage" tenet).
- A *taking* may be found where a landowner establishes "reasonable investment backed expectations" prior to a prohibitive regulation ("vested interest" concept).
- A landowner must be left with a reasonable economic use of property which may not be the most profitable use.
- State nuisance law may justify extreme restrictions.
Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992)
- Zoning is a valid exercise of municipal police power.
Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926)
- "The state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful..."
Just v. Marinette County, 56 Wis. 2d 7 (1972)
- "...the necessity for monetary compensation... arises when restrictions... create a

public benefit rather than prevent a public harm."

Marshall & Ilsley Bank v. Town of Somers, 141 Wis. 2d 271 (1987)

- "Essential nexus" test
Exactions/conditions on development must address project impacts.
Nollan v. California Coastal Commission, 483 U.S. 825 (1987)
- "Rough proportionality" test
Exactions/conditions on development must be proportional to extent/degree of project impact.
Dolan v. City of Tigard, 114 S.Ct. 2309 (1994)
- The entire parcel & bundle of rights will be considered.
Penn Central Transportation Co. v. New York City, 438 U.S. 394 (1987)
A property owner may not segment a parcel in order to establish a taking.
- Compensation is required for a temporary *taking*.
First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987);
Jordan v. Village of Menomonie Falls, 28 Wis. 2d 608 (1965);
Zinn v. Wisconsin, 112 Wis. 2d 417 (1983)
- A specific plan for development & exhaustion of administrative remedies must precede a *taking* claim ("ripeness" for judicial review).
The government decision must be final in order for a court to determine economic & other impacts of the regulation.
Agins v. City of Tiburon (1980);
San Diego Gas & Electric v. City of San Diego (1981);
Williamson County Regional Planning Commission v. Hamilton Bank (1985);
MacDonald, Sommer & Frates v. Yolo County (1986);
Lake Bluff Housing Partners v. City of South Milwaukee, 540 N.W. 2d 189 (1995)

Alternative philosophies & approaches...

- "Givings" = benefits of public regulatory policies, planning decisions & investments.
"Givings" are unequally distributed. Property taxes often do not recoup "givings".
- The "wise use" movement advocates compensation for all/most restrictions on land use.

Things change...

Social, economic, technological & political conditions affect property rights.

- Increasing population
- Competition for scarce resources
- Increased suffrage
- Increasing standards of living
- New information about land & natural resources.

Legislatures are challenging the role of the courts...

Many state *taking* initiatives share common features:

- A taking threshold (% reduction in property value).
- Standards for assessment of value reduction.
- A prospective look at new regulations to

minimize effects on property values.

Legislative initiatives & legal developments...

- 1994 Wisconsin Senate Bill 757 (not adopted by either house)
- Proposed property rights advocates with a duty to "intervene" where private rights were threatened.
- Proposed a threshold for a *taking* (40% value reduction).
- January 2001 U.S. Supreme Court decision limiting federal wetland jurisdiction to "contiguous wetlands".

Government response to "takings" concerns...

Each of the notable *takings* cases has a lesson:

- Land use plans & policies should clearly state their public interest objectives.
- Private & public interest impacts of policies/projects should be analyzed.

Regulations should provide:

- Administrative appeals for review of impact assessments & to provide opportunities for flexibility.
- Land division standards that describe developable parcels & consider costs & benefits of large lot, clustered & mixed use development.
- Development that discloses & mitigates threats to the environment (air, water, lands).
- Multiple land management tools

What the future holds...

- The market place cannot substitute for a "responsibility" or land stewardship ethic.
- Regulations may be viewed as public consensus on land use ethics (Hardin's "mutual coercion, mutually agreed to")
- Multiple public policy tools will be used to influence economic behavior regarding land development.

A Quiz (for discussion) - Is it a "taking"? Why or why not?

1. Shoreland management prohibitions on timber removal in near shore areas.
2. Shoreline setback requirements.
3. Prohibitions on watercraft operation in designated natural areas.
4. Restrictions on ground water withdrawal.
5. The DNR *Deer 2000* report recommendation to allow public hunting of deer on private lands near deer damage claims.
6. State laws allowing one landowner to access another's property to remove beaver dams.
7. Limitations on livestock watering access.
8. A sunset date causing removal of signage along public roadways.