Baptists, Bootleggers & Spotted Owls

Tension Between
Private Property Rights vs. Regulation
Conserving Resources & Environment

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Take Home

- Explore positive role of PR in
  - Cleaner Safer Environment
  - Resource Conservation
    - PR helps us more accurately send price signals to allocate
    - More Prosperous, Freedom Protecting, Tolerant Society
  - Examples from viewpoint and experience as agriculturist, not legal scholar nor lawyer.
    - 1970s Nat Geographic experience on PPR and farm productivity meeting human needs.
Take Home

• Explore *tension* between
  – Common Law and Statute/Regulatory Law
  – Ordinary people vs. Special Interests & Government
  affecting environmental quality & resources issues.

• Examine issues, from local [down]zoning, and
  wetlands to int’l trade or healthcare though PR filter.
  – Valid govt. regulation of “Fugitive Resources.”
  – 4 paths to govt. environmental PR regulation
Take Home

• Rebalance the role of Common Law in seeking resource conservation solutions.

• What is “In the Public Interest?” Restraint using Public Interest Doctrine.

• Sensitize us to abuse of Environmental Partial Takings under Amendment V, U.S. Constitution.
PPR Role Playing

• Parable of the Baby Whale and Whaler.
  – Concept of Fugitive Resources.
  – Unclear PR = increased resource degradation and pollution.
    • Firewood and Wildlife Poaching and Ocean Fisheries
  – Valid role for regulation of Fugitive Resources.
  – “Tragedy of the Commons.”
    • Why Garrett Hardin was accurate, yet mistaken.
  – Ownership not perfect, but moves us more toward efficient use and conservation of natural resources.
    • Buffalo vs. Dairy Cattle. Whales vs. Aquaculture
PPR Role Playing

• “No one in the history of the world ever washed a rented car.”

• “Why? Because they didn’t own it. Preserving its value wasn’t important. Farmers who don’t own the land won’t worry about depleting the soil. Companies that don’t own forests won’t worry about sustainable harvesting.”
  – Is even public housing a PR failure?
• Parable of early 20th century dairy farmer and paper mill sharing stretch of upper Hudson River.
  
  – Role of evolved Common Law; Riparian in this case.

  – Prior to 1970s, prior to EPA, prior to Clean Water & Clean Air Acts, environmental disputes were conceived as PR problems.

  – Absolute settlement by Judges.

  – Problems with market power and monopoly power = biased, distorted, hidden, or coerced resource market prices.
Why We Need PPR Law

• Because the Law is how society metes out power in our daily lives and interactions.

  – Beachfront construction vs. Environmental Commissions - Lucas Case SC.
  – Management of NJ wildlife resource problems: deer, Canada geese, Black bear.
  – Rails-to-Trails disputes in communities
  – Navigable Waters Case, Cranberries in MA
  – Noxious weeds like Canada Thistle. NJ 1910 Reg.
  – Dairy barn nuisance flies
  – Historic Preservation
Why We Need PPR Law

• Because *the Law is how society metes out power* in our daily lives and interactions.

  – NJ Pine Barrens PDCs valuation
  – Economic Development Eminent Domain - Kelo Case CT.
  – Two pending NJ Acts:
    • Adverse Possession Act to Clarify PR
    • Compensation for Partial Takings

  – Go to NJ Legislature website, and search “*Property*”!
Outcomes of PPR

• Economic efficiency using & allocating scarce resources to satisfy human consumer needs.

• Conservation of natural resources
  – Faster response to [undistorted unbiased] price than to policies.
Other Outcomes of PPR

• Care for ourselves safely.
  – Where PR are not protected, people cannot safely care for themselves.

• Protect human freedoms.
  – Where PR are not protected, Freedoms and the Environment suffer.

• Encourage cooperative social behavior.
  – Behave as if we care for and value others, or at least tolerate [their rights and freedoms] even if we don’t.
Other Outcomes of PPR

• Because ideas have consequences.
  
  – Founders (T. Jefferson) saw economic PPR as a summary distillation of *all* our rights (based on historical experience of Western Civilization).
  
  – PPR the best defense against political nonsense.
    • PPR, and a Free Press “Restrain the follies of government and discipline its mischief.”
  
  – Careful censorship of government.
    • Limit size = Limit power = Limit mayhem and corruption
Defining PR. The 3 D’s

• Property must be:

  – 1. **Defined**; for exclusive use.

  – 2. **Defended**; for exclusive possession, by policing when needed. Primarily against thieves and government.

  – 3. **Divestible**; Ability to dispose, transfer, buy or sell, without market bias, coercion, or externalities.
Defining PR. The 3 D’s

• PPR are among the most significant institutional relationships of society, like marriage, family, employer/employee, or government/citizen.

• Institutions in social sense, not organizations; sanctioned patterns of behavior, force of custom.
2 ways managing world’s property goods

- Ordinary people can work hard, develop resources, produce things others value, and trade with other value-producing people to accumulate wealth.

- Ordinary people can assemble enough power and take what others have produced.
  - Princes, kings, and their armies have battles over who gets what from government, rather than who works for wealth.
2 ways managing world’s property goods

• Knowing this, ordinary people invented govt. for purpose of protecting their accumulated wealth and property.

• Tension because any government powerful enough to protect wealth is powerful enough to take property.
  – Regulatory *Partial* Environmental Takings, under guise of Public Trust.
  – U.S. Courts find “partial,” up to 90+%, not an Amendment V Taking. Takers usually win.
  – Deeply frustrating to ordinary people in daily life.
2 ways managing world’s property goods

- If gains from stealing exceed the gains from working, stealing expands.
  - Easiest path is to become member of “protected class.”
  - Smaller the group taking = bigger benefit; Downzoning.
  - When the cost of something desirable goes to zero, demand becomes insatiable; e.g., wetlands.

- There will always be a tension between protecting PR, abuse and coercion, and Government or special interest hunger for acquiring PR.
Question validity of PR notions

• Which nations have peoples more healthy, free, and prosperous?
  – Nations rich in Natural Resources? Or nations rich in Property Rights?
    • Venezuela or Hong Kong?
    • Brazil or Japan

• “What the Third World’s poor need most is a recorder of deeds.”
Question validity of PR notions

- Who better...
  - Protects the environment?
  - Practices conservation?
  - Efficiently allocates scarce natural resources?

- Nations rich in public ownership of resources?
- Or Nations rich in PPR and incentives?
  - Russia (former Soviet Socialist Republics) or U.S?
  - Sudan or Israel?
Question validity of PR notions

- Who better tolerates and respects people different from themselves?
  - Communities in nations high in PPR?
  - Or Communities in forced regulation of PR relationships?
  - New South Africa or Zimbabwe next door?
  - India or Iran?
Question validity of PR notions

• Who behaves more “as if” they value the concerns of others, tolerating others’ individual freedoms?
  – Nations rich in public economy ownership or nations rich in private economy ownership?
    • Former East Germany or former West Germany?
    • Former Apartheid So. Africa or Sweden/Norway?
  – U.S. urban poor living among high public property ownership or rural poor living among high private ownership?
    • Camden, NJ or Scranton, PA?
Summarize why PR

- Tolerance of others different from ourselves. Not embrace, but tolerate and respect enough to cooperate; not coerce, abuse, steal, etc.

- Efficient use and conservation of natural resources.

- Protect Freedom.

- Moral, possibly behavioral genetic basis for PR.
A Moral or Genetic Basis for PRs?

• Bible (Old Testament)
  • “Only where you sow may you reap.”
  • Goring by neighbor’s ox and other common PR disputes

• Youth; sign on young teens’ bedroom doors
  • “Melissa’s Room – Keep Out”

• Poetry: “Good fences make good neighbors.”
  • Robert Frost, 1914.

• Farmers
  • Deeply sense moral value of relationship with their land PR, even when they can’t explain it.

• Native Americans
  • Different notions; unsuccessful against onslaught abuse violations of their PR. A dark stain on US PR Law.
Summarize why PR

• Tolerance of others different from us.
  – Sand mine and minority truck driver.
  – PR provide incentive for people to socially cooperate and respect “as if” they were as concerned with well-being of others as they are of their own.

• Establish undistorted, unbiased, uncoerced unthreatened fair value for transfer, preventing ripoff and theft transactions. No power asymmetry.
  – Land or Trees are no different than iPods or NYSE Stocks
Summarize why PR

- Environmental civil public discourse (tolerance) declines, gets more vicious, more surly, as...
  - Size and scope of government ownership of PR enlarges.
  - Power over PR gets pulled more toward government center (more to fight over).
  - with increasing public ownership and declining property rights.
Summarize why PR

- “Because elections are a futures market in theft.”
  - H.L. Mencken
Break and Discussion!
Non-Renewable vs. Renewable Res & PPR

- Which deplete first? Non-renewable finite or renewable resources.
  - What’s the real world experience of oil, coal, gas, minerals, water, Nitrogen fertilizer, and sand... versus
  - Endangered species, some game species, forests, ocean fisheries?

- More non-renewable resources are privately owned and more renewable resources are publically owned.

- Conservation of resources depends on efficient use.

- PPR and undistorted response to price signals are main reasons we do not run out of resources.
Fugitive Resources

• Frequent association with degradation, depletion, and pollution.
  
  – Pollution, or resource degradation, commonly occurs when “environmental receptors” of pollution (air, water, etc.) are commonly owned, where rights are unclear, not held as private property.

• Likely one of valid limited roles for government environmental regulations.
Fugitive Resources

- These *Economic Externalities* occur when either producers or consumers do not consider all costs or benefits of their actions when making decisions.

- Pollution or resource degradation interferes with the rights of other individuals and enterprises in the enjoyment of those goods.
Fugitive Resources

- Most frequent cause of community resource & Right-to-Farm conflicts.
  - Air
    - Chemical trespass or Pesticide Drift. Pollution discharge enters your lungs; violates your rights (enjoyment of use).
    - Restrictions on owners to protect health and safety do not violate their PR, because they never had that right.
  - Water
    - Discharge on my property moves downward, spreads underground, lands on you. You can’t protect yourself.
  - Nuisance:
    - Noise from irrigation pumps
    - Odors, Flies, Dust
Fugitive Resources

• Most frequent cause of community resource & Right-to-Farm conflicts.
  – Scenic View PR (NJ Highlands to Yellowstone WY)
  – Problem wildlife; deer, black bear, Canada geese, etc.
Fugitive Resources

- Some good things can only be done by government violating private PR.

- However, whenever PPR are violated to do good, eventually there is a price to pay in disincentives for meeting human needs, for reduced Freedoms and Liberty.

- This is empirical experience of human Political Economy history, not my opinion.
Proper Role for PR Env. Regulations?

• Fugitive resources, especially in preventing nuisance pollution.

• Externalities demanding planning or zoning.
  – Public recreation access to PP, Rails-to-Trails

• Not everything obeys Robert Frost’s “Good fences make good neighbors.”
  – “But there’s nothing like a lawsuit to iron out a dispute with the folks next door.” Famous humor postscript on Frost
  – Love your neighbor, yet not pull down your hedge.
    – English proverb
Environmental PR Regulations

- Four theories explain our experiences with government regulation of environment, natural resources, and PR:
  - **Public Interest Theory**
  - **Capture Theory**
  - **Economic or Special Interest Theory**
  - **Baptists and Bootleggers Theory**
    - Thanks to Bruce Yandle
Environmental PR Regulations

• **Public Interest Theory**
  – Politicians seek to solve private sector problems that cannot be addressed otherwise.
  
  – *Externalities: Zoning, Schools, Immunization, Dams, Roads, Interstate Commerce, War*
  
  – Is there a compelling public interest? Growth in transfer payments to individuals rather than to public goods.
  – 44,000 federal lobbyists, 400 per Senator
  – What if there is no such thing as “in the public good” or “in the public interest,” just lots of competing private interests?
Environmental PR Regulations

• **Capture Theory**
  - In attempting to serve the Public Interest, regulators and politicians unwittingly become captured by the regulated sector.
  
  
  - One indicator is serious alternatives rarely proposed.
  - Licensing of trades reduces competition for remaining members.
Environmental PR Regulations

**Economic or Special Interest Theory**

- Politicians are just brokers. They “sell” government imposed restrictions to the highest bidders (re-election donations or votes).
  
  - *Grazing rights on Western federal lands vs. recreational outdoors users.*
  
  - *Under guise of public safety protection against snake oil salesmen, Food & Drug Admin restrictions on non-patent, natural, or homeopathic remedies stifle access to non-patent botanical products.*

- The smaller the group backing the regulation, the higher the per capita economic return to them.
Environmental PR Regulations

• Baptists and Bootleggers Theory
  – “Successful regulatory efforts have a moral foundation. Those seeking to serve a noble purpose share objectives with other organized groups who simply seek to serve their own interests.” - Bruce Yandle

  – *Spotted owls and Weyerhaeuser on Western public lands vs. private lands.* Lost opportunity costs to logging industry for saving 5,000 spotted owls on public land was $9 million per owl, $45 billion.

  – Ask who’s the Baptist and who’s the Bootlegger? Follow the path of who benefits. Not only what is said; examine behavior, the flow of rights and money.
Why PR Environmental Regulation?

- Until current 1970s regulation era, conservation, environmental pollution, and resource degradation problems were addressed and settled as property rights disputes, which they are.
Why PR Environmental Regulation?

- However, government was clever and powerful.
  - The “Public Trust Doctrine” is a notion there is a Public Interest stake in regulating Private Rights.
  
  - In 1970s, began greatly expanded use in U.S. environmental regulation to articulate that "I," i.e., any public member, has a stake in what you do with property.

  - Government began substituting regulatory restrictions for paying real value, and for obeying its own Laws = Partial Takings.

  - Includes wildlife, farming practices, recreational access on western rivers in grazing land, community neighborhoods, etc.
Which way out on Partial Takings?

• In our time, Partial Takings may be underlying cause of [un]civil conflict and possible path to violence and rebellion.
  
  – Endangered Species Act = Land use restriction, NOT species protection. AKA, “Shoot, shovel, and shut up.”
  – Recreational access mandates.
  – Local Downzoning = community theft.
  – Pinelands and Highlands = equity theft.
  – Environmental Zoning Restriction. Lucas SC beachfront.
  – Viewscape restriction.
  – Economic Development Eminent Domain. Kelo CT.
Amendment V Litigation Incentive

- When government cost for taking PR in guise of environmental public interest nears $0, demand becomes insatiable.
  - NJ Highlands get “designated;” cost to public for taking that value is near $0. Demand for env. zoning (like theft) rises.
  - If a parcel on your property is mapped as wetland, and use is restricted, cost of public taking drops to $0. EPA, DEP, and Private groups will increase mapping efforts to acquire more. Ditto if endangered species are found

- When you hear certain PR phrases, hold your wallet.
Which way out on Partial Takings?

- Amendment V, U.S. Constitution, 1787. “No person [shall be] deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.”

- Can a return to greater use of Common Law, Law of the land, offer hope? Pre 1973, Courts more strict, more absolute. Env. problems settled as property rights disputes.

- Returns more control to communities, using Courts. Protects against market power manipulation. Secure PPR can help solve some environmental problems.
Which way out? Take away concepts.

– Tune your ear and heart to PPR assaults.

– Skeptical, intellectually honest PPR filter, look for Baptists and Bootleggers in environmental resources regulation, and role of government.

– There may be no such thing as regulation “in the public interest.” Or at least it is overused. Restrain expanded use of Public Interest Doctrine.

– Lean legal pendulum a little toward respecting Common Law; trusting ordinary citizens in local communities, and judges, to address environmental problems.
PPR is a heady topic.


• vs.

• Scholars considering the role of PR (tempered with Justice) in a prosperous free society.