1985

The Property Rights Paradigm and the Protection of Oak in California

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Introduction

Once again our country is caught on the horns of a serious dilemma. Natural resources, such as land and water, are becoming increasingly scarce and therefore valuable. Concomitantly, and perhaps more importantly, these resources are recognized as having attributes or characteristics in the form of amenities that are coveted by nonowners of these resources. A cheap and effective way of acquiring these amenities is to assert that the legal owners of the resources do not have the right to exclude those who want the amenities from consuming them. Or, almost equivalently, the resources must be used in certain ways that guarantee the availability of the amenities regardless of the preferences of the resource owner or the profitability of the primary uses. The upshot is that the resource owners are deprived of valuable property rights that have previously been theirs.

There is a plethora of examples: prime agricultural land is frozen in zones where it may be used only for farming and thus will provide open space for largely urban dwellers who want it without paying; the Public Trust Doctrine is invoked to prevent the City of Los Angeles from exercising its longstanding right to remove water from Mono Lake and thus it is alleged protect wildlife; in many states owners of riparian land adjacent to water courses are coerced into providing easements to people who want to cross the land in order to gain access to the water. And

finally, the public has declared an interest in oak trees on private land, and therefore wants to impose restrictions on the landowner in terms of what might be done with these trees.

This situation produces a dilemma because such a weakening of traditional property rights involves a shift in the structure of incentives and the creation of uncertainty, both of which are inimical to the efficient management of resources and performance of the economy. For example, if the owners of California woodlands cannot harvest their oak trees because nonowners would like to see the trees remain, why should the owners invest in land improvement and management practices that will maximize the productivity of the resources on a long-term basis? If water rights cannot guarantee delivery of a given quantity of water and on a timely basis, why should the farmer profitably invest in planting and growing crops? This relationship between incentives and productivity seems not to be understood nor appreciated by those legislative and judicial bodies responsible for altering property rights in response to pressures from those that wish to benefit from utilizing resources but who do not own them.

I will attempt to show in this paper that clear and nonattenuated property rights are indispensable to both promoting efficient economic performance and to protecting resources, especially recreational assets. If rights to manage and dispose of resources are removed from the legal owners, the general tendency will be for the resources to be neglected, resulting in depletion or despoliation of the resource base. Of course, these results are the opposite of what the promoters of such action claim to desire.

This is not to argue that the decisions of private economic agents operating in free markets will always produce socially desirable outcomes. The conditions under which markets fail will be described in a later section of the paper and some suggestions made as to how they can be remedied without destroying the property-rights base on which economic progress depends.

Property Rights and the Creation of Wealth

The market is a process in which individuals voluntarily interact with one another in pursuit of their own interests. With appropriately designed institutions--such as well-defined and respected property rights, freedom to make contracts and the power to enforce them, and complete freedom of exchange--the voluntary behavior of economic agents will generate what Hayek calls a "spontaneous order" (Hayek, 1973, p.41). This order is chosen or ordered by no one, yet it tends to maximize the subjective values of all those who participate in exchange (DiLorenzo). All traders expect to gain, and thus market exchanges are always a positive sum game (Anderson) so long as all costs and benefits are taken into account by decision makers. The rational resource owner can be expected to attempt to maximize his wealth which, in turn, necessitates utilizing the resource at maximum efficiency. If a given use, such as a recreational use, is growing in popularity and thus in value, the resource owner will lose wealth unless he factors in the new circumstances and discovers how he can accommodate the new users. In this way, property rights cause resource owners to be fully accountable for how their resources are used and managed.

It is difficult to overstate the importance of the property-rights framework in our economic system. It is basic to a myriad of economic functions. It largely provides incentives for innovation and entrepreneurial activity by dictating who gets the benefits from such activity (Demsetz). Thus, it is property rights that identify the "residual claimants" to the net returns of resources (Alchian and Demsetz); i.e. it is the owners of the resources that have the final claim to the profits of using the resources after all nonowned resources are paid whatever is necessary to induce their employment. Thus, it is property rights that provide incentives for these claimants to carefully monitor the performance of resources such as labor, capital and management.

Innovative technological change and managerial know-how are the source of the bulk of our economic growth. Innovation depends on man's ingenuity, his estimates of people's preferences, and incentives to accept the risk of failure. Without clear property rights, the optimal quantity of innovation will simply not occur. The property rights framework also determines the location of knowledge most likely to yield these productive innovations (Pejovich). It also provides a basis for establishing liability rules that permit interacting parties to negotiate their mutual impacts on each other to the benefit of both parties (Coase).

Baden and Stroup (1981) have demonstrated why private ownership is superior to public ownership and management in conserving resources. Privately-owned resources will tend to be held and controlled by those who are most optimistic about the

future. That is, the optimist expects the future to yield greater profits on his resources than the present. For this reason, he postpones present use in order to be able to supply the more profitable future uses. Future generations are thus represented in the market by speculators and entrepreneurs who profit from conserving resources for their expected use. Therefore, just as free markets ensure efficient allocation to those current consumers with greatest effective demand, so do they ensure optimal allocation to those time periods with "expected" greatest effective demand.

There is absolutely no doubt that clear and untrammeled property rights are essential to the efficient functioning of a market system which, in turn, is indispensable to a free society.

Efficiency and Equity Tradeoffs

If the arguments of the preceding paragraphs are valid, how is it that some property rights have been changed and weakened to the point where their effectiveness is greatly reduced? I would advance three reasons: 1) widespread public ignorance about the nature of property rights and their functions, 2) an egalitarian ethic that uses the political and judicial system to redistribute income and wealth to the detriment of economic efficiency, and 3) quite legitimate circumstances under which markets are prone to fail and thus the public interest might be served by extramarket means. These three issues will be briefly considered in turn.

It is not so strange that the public is largely ignorant about the functions of property rights in a free society. Like most other "public" issues, even if the relevant information is

known to be available, incentives to become well-informed seldom exist. Knowledge acquisition is costly in terms of human time and energy. But on the other hand, for most public issues the direct rewards of being informed are comparatively low. By their nature, public decisions are made by the public, often by direct vote, and the importance of any individual's vote or influence is likely to be small. Thus, the average voter is likely to be "rationally ignorant," except on those issues in which he has a large stake.

Redistributing income and wealth by political means is what the political system is all about. The problem is that whereas shifts in the distribution of income and wealth resulting from policy changes can be described, inferences about the desirability of these shifts are impossible to draw without the required norms. Often observers make assumptions that egalitarian distributions are better than highly concentrated ones, but these assumptions are simply value judgments about which science has little to contribute. Recent literature (Varian) has developed some concepts of "fair" allocations that appear promising, but so far no concensus has emerged that would allow us to be confident that we can say anything very definitive about the social desirability of alternative income distributions.

What is well understood are the interrelationships between equity and economic efficiency (Gardner). Policies that capriciously deprive some agents of income and wealth in order to transfer them to others in the name of equity are clearly a negative-sum game that militates against efficient production and investment (Anderson and Hill). The transfer itself involves

using up resources that could have been used for productive purposes. But perhaps even more importantly, if individuals know that their wealth is likely to be confiscated and given to others as a transfer, the incentives for producing the wealth in the first place are weakened and wealth creation will be impaired if not eliminated altogether. And perhaps even more important still, once it is discovered that the political system can be manipulated to transfer income and wealth, investment will be made to influence the system to bestow its largesse to benefit those who make the investment. Economists call this "rent-seeking" activity. Increasing quantities of real resources that have valuable alternative uses are simply squandered from the societal point of view in an attempt to influence the political system to transfer real wealth to those involved in these rent-seeking activities.

The final point of using nonmarket allocation to serve the public interest because of "market failure" is an alluring goal, but is most difficult to implement in practice. There are several reasons. In the first place, it is not always clear just what the public interest is? Too often the words "public interest" are used as rhetorical support for a policy that some partisan advocate believes would be beneficial to the country (Dennis). The public interest may be used to disguise the taking of some purely private good by politically acceptable means. Most people appear to believe that they can recognize a public interest when they see one. At the same time, they accuse their opponents of promoting a selfish private interest rather than a

public interest. Dennis reminds us that "strictly speaking, a policy in the public interest, at least in the long run, affects everyone in an equally beneficial manner, receives public support through a principle of unanimity, and has costs that are widely and equally shared" (Dennis p. 378). Dennis argues that if these criteria were applied to most proposals alleged to be in the public interest, they would be revealed for what they actually are; i.e. policies to promote special interests.

No private property will ever be safe if majority rule can override private rights. The Founding Fathers understood this. In Federalist paper No. 10, Madison wrote: " . . other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tained our public administrations. By a faction, I understand a number of citizens, whether amounting to a majority or minority on the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens.

government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. . . To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular goverrnment, is then the great object to which our inquiries are directed. . .Hence it

is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths." Madison's answer to the problem was the creation of a republican form of government and the Constitution, which would protect rights of individuals.

The moment that our courts permit private rights to become unstable and subject to collective (legislative) determination, all of the general productive activities of society will have to take on a new form (Epstein). People will no longer be able to plan private arrangements secure in the knowledge of their social protection. And inefficient resource allocation will be the inevitable consequence.

There are many examples of the courts doing just this sort of thing. An important precedent case occurred in 1954 in Berman V. Parker, when the U. S. Supreme Court decided that urban renewal--even though the sale of private property was to private contractors--was a "public use" that justified a change in private ownership (Paul). The public purpose was ostensibly to reduce "blighted areas" in urban centers. Then, in 1984, the Supreme Court decided a Hawaii case that was the coup de grace on any restraint on the government's power to take private property. In Hawaii Housing Authority v. Midkiff a unanimous Court condoned the taking of property by the state's housing authority from large landowners to be resold to lease-holders under the provisions of the Hawaii Land Reform Act of 1967 (Paul). How far have we strayed from the Fifth Amendment that reads, "nor shall

private property be taken for public use without just compensation?" At least one legal scholar (Paul) believes that the Fifth Amendment is not meant to be a grant of power to government; "rather it is a limitation--indeed, two limitations--placed upon the power of eminent domain, a power that everyone at the time of the drafting of the Bill of Rights considered an inherent attribute of government. Following the logic of the Fifth Amendment, government can take property only if it adheres to two restrictions. First, the taking has to be for a public use; consequently a taking that simply takes property from one owner and sells it or distributes it to another private owner would clearly fall afoul of this public use proviso. Second, the divested property owner must be paid "just" compensation (Paul p. 836).

Eminent domain, of course, is the traditional tool that government has used to take private resources for public uses. It has acquired land for parks and preserves, possibly construed as appropriate public functions, but more often the government has used it to acquire land for dams, access roads, pipelines, and recreation, all benefits that accrue mostly to private parties (Dennis).

I will turn next to the third reason given above for the weakening of private property rights; namely, those situations where private markets are of limited efficiency in allocating resources.

Market Failure--Externalities and Public Goods

The problem of optimal management of resources can be viewed

as how private parties respond to what faces them, and under what circumstances the intervention of government is justified in pursuing the broad public interest. If property rights are clear and secure, and if commodity prices accurately reflect value and cost, then wealth-maximizing private entrepreneurs buying and selling in markets will efficiently allocate the resources over which they have command. Unfortunately, these conditions are sometimes violated, and if so, we refer to the situation as "market failure." Significantly, market failure is rather common in the allocation and use of recreational assets.

The first case of market failure results from the fact that not all goods are "private" goods, those which have clear titles of ownership and use, and thus where owners can legally exclude other potential users from unauthorized use (Mishan). Outsiders cannot with impunity invade my home without my permission. Land has traditionally been regarded as a private good. We call unauthorized use "trespass."

In contrast, collective or public goods are those that do not have clear property rights that grant exclusive use. In addition, consumption of public goods is nonrival in the sense that additional consumers do not diminish the quantity available for existing consumers (Samuelson). A good example of a public good associated with agricultural land is open space. It cannot be packaged in such a way that consumers can be excluded from use. Additions to the population that consume open space do not generally reduce the quantity of it available to existing consumers and thus consumption is nonrival.

Other examples of public goods or "near" public goods that

result from the use of recreational assets are aesthetically pleasing views, the sightings and sounds of migratory wildlife, and some instream uses of water, such as navigation, flood control, habitat for wildlife, and biological "banks" where resources may be stored for future use. Another important public good is the so-called "existence" value of natural things; e.g., utility or satisfaction created for people just knowing that wildlife exists even though they never intend to hunt or harvest it.

Why is the distinction between private and public goods so critical for this discussion? Since owners of private goods can capture exclusively the benefits from their use, there are incentives aplenty to invest efficiently in their production, acquisition, and use. With public goods, however, no such incentives exist for the private investor. Since others cannot be excluded from use, they will "free ride" on any investment designed to provide or supply such goods. It will be impossible for the land owner to recover his investment cost by charging for the services provided. Thus, if a public good is to be supplied in efficient quantities, a case for collective action exists.

Another prominent case of market failure is known as "externalities" (Buchanan and Stubblebine). They exist when all the benefits and costs of a given action cannot be captured by and/or are imposed on the initiator of such action, and thus do not directly affect his decisions. Under these circumstances also, private actions may not be socially optimal. Examples would be the pollution of a watercourse by user A when the costs

of the pollution are borne by user B downstream. B does not own rights to a given level of water quality that might constrain A's actions. Similarly, an externality exists when a pesticide applied by a farmer kills the honey bees of a beekeeper, or when the use of agricultural chemicals by farmers pollutes the water source of a nearby city. If the costs of mediating the damages inflicted on one party by another (called transactions costs) are small, negotiations may be carried out until both parties are satisfied (Coase) and the externality ceases to be a problem. But sometimes the affecting and affected parties are large in number, and/or opportunities to resolve differences are difficult to arrange. Under these circumstances, transactions to mediate differences are very costly. When this occurs, these external actions which impose costs on others will be produced in greater quantities than is socially optimal. Let us consider a few examples.

When large water development occurred in California, water flows were diverted from the Sacramento-San Joaquin River delta to the San Joaquin Valley, where they were largely utilized for irrigation. Huge state and federal pumps at the Southern end of the delta reversed the flow of water, which historically moved out to San Francisco Bay. The effects of these actions on the fishery in the Sacramento and San Joaquin Rivers have been quite severe. Anadromous fish species, particularly, have been confused by the contrived water flows and have been attracted to the pumps rather than to the ocean. The result has been a significant reduction in fish numbers and a loss of income and pleasure suffered by fisherman. Those who provide services to

the fishing industry have been similarly affected.

Another example from California is the debacle at Kesterston Reservoir, a Bureau of Reclamation facility designed to store agricultural drainage water and used at the same time as a National Wildlife Refuge. Irrigating lands upstream from the reservoir resulted in the loading of selenium, a toxic element at high concentrations, in the drainage water. The drainage water then flowed into the reservoir where wildlife were exposed, and were subsequently destroyed or deformed. The upstream irrigators had no accountability for the wildlife loss until ordered to plug their drains by the Bureau of Reclamation and the California Water Resources Control Board. A better example of externalities hardly could be found.

Let us now ask what difference public goods and externalities make in relying on private markets and fashioning public policy?

If private decision takers have the requisite information in the form of prices and costs, they can be counted on to do all in their power to make those changes in the status quo that will enhance their well-being and maximize their wealth. With costs and benefits assigned by well-defined and enforceable property rights, and in the absence of public goods and externalities as defined above, maximizing private wealth would at the same time maximize societal wealth. If potential changes are not to be subsidized or penalized by public action, and this is understood by all, we would expect that only the economically-feasible changes would be made. The decision takers would be irrational to undertake those that were expected not to be feasible and

would be eager to undertake those that were. For example, land owners would supply the socially-efficient mix of agricultural products and recreational services. The owners of water rights would see to it that an efficient mix of electricity, irrigation, and water recreation resulted. There would be no problem whatever in optimally protecting and utilizing recreational as well as any other kink of assets.

In this connection, it is interesting to speculate on what might have been the outcome at Kesterson had the farmers themselves owned the reservoir and the conveyance facilities that carried the drainage water. They then would have been liable for the damages to the wildlife and would have taken steps to reduce the loading of selenium in drainage water to safe levels if it were economic to do so. They had no such incentives since the federal government owned and managed the drain and reservoir.

Still, unfortunately, we do not live in a world completely devoid of public goods and externalities and thus cannot be confident that all private decisions will be socially efficient. Suppose that there are significant public goods sacrificed by proposed actions. Or, perhaps there are external costs that cannot be internalized to any reasonable group. Under these conditions, in principle, a case can be made for governmental intervention of some sort.

But even though a theoretical case can be made for governmental intervention, I would urge caution in turning to it automatically. The reason is that such intervention does not guarantee a more efficient outcome than its absence because it too is costly. Many reasons exist why the political process

will also fail economic-efficiency tests. One of the most prominent is that government is primarily in the business of redistributing income and wealth. Thus, there are tremendous gains to be made by influencing the outcome of the political process. The beneficiaries of government action, and the legislators and bureaucrats who produce such action have been called an iron triangle (Cuzan) for good reason. They have a secure grip on receiving and passing out government favors. The result is bloated government programs and activities. To make matter worse, in the public arena there are no stern profitability criteria that prevent uneconomic activities from being undertaken and perpetuated.

This negative tone about governmental activity in gereral is not meant to imply that all government functions in the area of the environment are illegitimate. Environmental quality is mostly a public good and thus the government might assume the responsibility of setting, monitoring, and enforcing environmental standards. But maximum freedom should be given to private producers to find the most efficient means of meeting these standards. This can often be accomplished best, for example, by imposing fees or taxes on emissions of environmentally-damaging pollution which would give polluters incentives to employ technology that would be more environmentally benign.

What does all this have to do with protecting oak trees in the Central Valley of California? Quite a bit! Attention must be focused on the valuable products and services that result from

the oak trees. Are they private or public goods? Does the presence of the trees confer benefits or impose costs on others besides the land owners? If so, how significant are these costs and benefits? If it can be clearly established that public goods are produced or that significant externalities exist, then, in principle, a case for public action exists. But any public action will alter the property rights of landowners, and it is terribly important to analyze the effects on the management and protection of the affected resources.

The Weakening of Private Property Rights and the Problem of the Commons

The most important point of this paper is that if property rights are attenuated to the point that the landowner is not able to control access and use of his property, the inevitable consequence will be to create a situation of "communal" ownership. Demsetz defines communal ownership as "a right which can be exercised by all members of the community . . . The community denies. . . to individual citizens the right to interfere with any person's exercise of communally-owned rights" (Demsetz). These types of situation have been studied by a host of social scientists over the past quarter of a century.

Robert Smith concludes that "the problems of environmental degradation, overexploitation of natural resources, and depletion of wildlife all derive fundamentally from communal property rights. Wherever and whenever we replace communal ownership of rights with private property rights, we find greater efficiency of resource use. Wherever we have exclusive private ownership, there are incentives for the private owners to manage and

preserve the resource. No matter that it is self-interest that motivates the private property owners. The results are socially beneficial." Smith argues that it has nothing to do with the need for a new environmental ethic. "Asking people to revere resources and wildlife won't bring about the peaceable kingdom when the only way a person can survive is to use up the resource before someone else does" (Smith, p.456).

The validity of this assertion is obvious to those anglers who have crowded the banks of publicly accessible lakes and streams on the first day of the fishing season. Or those who use the public beaches on a hot summer afternoon. Or those competing for a camping site in a National Park at the peak of the visitation season when thousands of others are also looking. All are examples of recreational assets that are open-access or communally-owned resources which are allocated on a first-come, first-served basis. And all depend on resources that are in danger of being seriously depleted as demand for their services grows.

In contrast, private ownership allows the owner to capture the full capital value of the resource, and self-interest and economic incentives drive the owner to maintain its long-term capital value. The owner of the resource expects to enjoy the benefits on a long-term basis, and therefore he will attempt to manage it so as to perpetuate its yield (Smith, p. 457). To do otherwise would reduce his wealth.

It was a biologist Garrett Hardin who first popularized the problem of communal ownership, although economists have been writing about the issue for decades. He characterized the

situation as "the tragedy of the commons." But nowhere does Hardin state that the tragedy of the commons is the result of free enterprise, the profit system, or the fact that resources are owned privately. Since common property is the very antithesis of private property, there is simply no way in which private property can be the cause of the tragedy (Smith).

Overexploitation of wildlife is not a peculiar characteristic of Western man, nor is it a consequence of the "profit" system. Whenever and wherever there have been incentives to overharvest or deplete wildlife it has occurred, whether by primitive or modern man (Smith). Stroup and Baden document what a difference the framework of property rights made to two tribes of Native Americans in their use of available resources. The Plains Indians nearly exterminated the bison when it became very cheap to harvest them with the use of the horse and the gun, because private property rights could not be established because of the migratory habits of these animals. On the other hand, the Montagnais on the Labrador Peninsula developed property rights in the more sedentary beaver, and managed them on a sustained-yield basis (Stroup and Baden). Other examples supporting these conclusions could be multiplied many times over.

Concluding Comment

If we as a society restrict private property rights and create situations of communal ownership and management, we do so at our peril. It is important to emphasize that private property in resources entails the complete control, use, and

disposition of these assets. If property rights are attenuated in any degree they cannot be called private, regardless of the legal ownership of the resources. I know of no exception to the rule that if private property rights are nonattenuated, the productivity of the resources for private goods will be protected. This applies to resources utilized for recreational purposes as well as any other kind. Whenever or wherever resource degradation or depletion is observed, I believe that a thorough search will reveal some problem with the exercise of private property rights. Either rights do not exist, such as often happens public goods and/or externalities manifest themselves, or there is some social interference to the exercise of rights. This will surely be true whenever and wherever the so-called Public Trust Doctrine is invoked to weaken private property rights and substitute community rights.

If it can be clearly demonstrated that truly public goods are likely to be sacrificed by private ownership, or that significant externalities are neglected in private decisions, then some form of government action may be feasible and desirable. But I emphasize the word "may." The government action will never be costless, and in fact, may be highly inefficient in protecting and allocating resources, especially those natural resources that furnish the bulk of our environmental amenities.

* This paper was prepared at the request of the California Department of Forestry, Sacramento. It draws heavily on an earlier paper delivered at Symposium WESTERN RESOURCES IN TRANSITION: THE PUBLIC TRUST DOCTRINE AND PROPERTY RIGHTS, sponsored by the Political Economy Research Center, Bozeman, Montana, May 17, 1986.

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