Perceived Legitimacy of Regulation...

Influential Factors?

Participation in Decision Making
Transparency of Process
Value Imposition
Strength of Science
Capacity to Challenge Science & Law
Compensation
Adirondack Pie: Public and Private

- WILDERNESS: 18.54%
- WILD FOREST: 22.34%
- RESOURCE: 26.93%
- HISTORIC: 0.01%
- INTENSIVE: 0.33%
- WATER: 5.79%
- CANOE: 0.79%
- MODERATE: 1.76%
- HAMLET: 0.93%
- LOW: 4.68%
- PRIMITIVE: 0.30%

Open Yale courses
© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.
Definition of Wilderness: Wilderness Act 1964

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain.
William Cronon:
The Trouble With Wilderness

“If we allow ourselves to believe that nature, to be true, must also be wild, then our very presence in nature represents its fall.”
PARADOX OF WILDERNESS....

• CULTURAL CONSTRUCTION

• PLAYGROUND FOR RISKY BEHAVIOR

• ASSOCIATION WITH LIBERTY

• REGULATED WILDERNESS?

• COMMODITY: GUIDES & PERMITS?

• TO KNOW IT IS TO LOSE IT?

• OPPORTUNITY TO SOCIALIZE
Nepal Everest Regulations

1.) Single Climber: US $ 25,000

2) 2 Person Team: US $ 40,000.

3) 3 Person Team: US $ 48,000

4) 4 Person Team: $56,000.

5) 5 Person Team: $60,000

6) 6 Person Team: $66,000.

7) 7 Person Team: $70,000
Adirondack High Peaks Wilderness Area: Carrying Capacity?
US: 1 Million Sold Each Year
Property and Environment

• Property and Freedom
• Property and Privacy
• Property: Rights and Obligations
• Property and Knowledge
• Property and Science
• Public vs. Private & Mixtures
Origin of Property?

- God
- Labor: John Locke
- Inheritance: Rousseau and Inequality
- Scarcity: Caruso vs. Lost
- Opportunity
- Custom and Tradition: First Possessin
- Regulation?
- Permits and Licenses
Types of Property

- Commons
- Private
- Public
- Hybrids
5th Amendment of the US Constitution

“Nor shall private property be taken for public use without just compensation”

1. What is private property?

2. What is a justifiable public use?

3. What government appropriation becomes a “taking”?

4. When has land been rendered valueless?

5. Should government’s regulation of private property be limited?
$250 million in real estate value on 10 acres of water....
Weed Eliminator
Concentrate

HERBICIDE Kills Lawn Weeds
(dandelion, clover, thistle, and other listed broadleaf weeds)

Active Ingredients:
- Mecoprop, dimethylamine salt ........ 10.60%
- 2, 4-D, dimethylamine salt .......... 3.05%
- Dicamba, dimethylamine salt ......... 1.30%

Inert Ingredients: ..................... 85.05%
TOTAL 100.00%

KEEP OUT OF REACH OF CHILDREN
CAUTION
See back label for additional precautionary statements.

EPA Reg. No.: 123-114-16802
EPA Est. No.: 50263-PA-A
Net Contents: 32 fl oz

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.
New York Supreme Court: Upheld Density Guidelines Despite Absence of Quantitative Estimates of Damage
GREATER YELLOWSTONE ECOSYSTEM
Tsongas National Forest
Maine Land Use
Regulation
Commission

Authority to control development in “unorganized and de-organized areas of the State”
California Coastal Commission

California Coastal Act of 1976.
Point Reyes National Seashore
Lake Tahoe Commission

Created the Tahoe Regional Planning Compact to Protect the Quality and Clarity of Lake Tahoe

1968 California, Nevada & USFS
Horse Whisperer’s Complaints
Coal Bed Methane Extraction
Nuisance: Mugler v. Kansas 1887

• If a land use is considered a nuisance, it may be regulated without compensation.

• In Mugler, the sale of alcoholic beverages on property was considered to be a public nuisance, and prevented by regulation.

• Not all rights to use the land were removed, as the land could still be used for other purposes.
Euclid v Ambler 1926  Supreme Court (6-3)

- Questioned Constitutionality of Zoning Ordinance
- Segregated Residential and Commercial Districts
- Restricting Development in Each Zone
- State Police Power May be Used to Classify and Regulate Land Use to Prevent Nuisances
Is the designation of a railroad terminal as an historic landmark—thereby prohibiting development above the terminal—a taking of property (air rights) without compensation?
“The Supreme Court affirms that the restrictions imposed under New York City's Landmarks Preservation Law on Penn Central's right to construct an office building above Grand Central terminal do not constitute a taking of private property.”
Hawaii Housing Authority v. Midkiff: 1984

- 96% of the state was owned by 72 landowners, or state or federal government

- 1967 Hawaii legislature approved use of eminent domain to condemn residential lots and sell land to existing tenants, even if the landowner objected.
Midkiff Ruling

• Supreme Ct.: Use of Eminent Domain is not a taking.

• The single most important criterion to justify the use of eminent domain is the nature of the public use.

• A public use is created, even when immediately turned over to private hands.

• In this case the public use or interest lay in the breakup of a land oligopoly.
Kelo v. City of New London 2005

- US Sup Ct upheld the Supreme Court of Connecticut, which found that the use of eminent domain for economic development did not violate the public use clauses of the state and federal constitutions.

- The court found that if an economic project creates new jobs, increases tax and other city revenues, and revitalizes a depressed (even if not blighted) urban area, it qualifies as a public use.
THIS LAND'S NOT YOUR LAND
SUPREMES
THANKS TO YOUR RULING ON EMANCIPATION, WE CAN FINALLY LEVEL THIS BUILDING TO MAKE WAY FOR A CHUCK E. CHEESE.
What Renders Property “Valueless”?  

Pennsylvania Coal Co. V. Mahon 1922

A statute that prohibits the mining of coal underground in a manner that causes subsidence of homes on the surface went “too far” and constituted a “taking”.

Why? Underlying mineral rights become worthless…

Oliver Wendell Holmes:

“While property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking…”

Open Yale courses

© Yale University 2012. Most of the lectures and course material within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.
Nollan v. California Coastal Commission

1. Nollan leased property in Ventura California with an option to buy, conditioned on replacement of a 500 sf bungalow.

2. Construction of a larger home required a permit from the California Coastal Commission (CCC).

3. CCC found that the new house would block the ocean view, contributing to the development of "a `wall' of residential structures" that would prevent the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to.
1. The new house would also increase private use of the shorefront. And would cumulatively "burden the public's ability to traverse to and along the shorefront."

2. CCC granted the permit conditioned upon grant of a public access easement.

3. Finding blocked visual access, it required physical access.

4. Nolan argued: access condition = taking
Supreme Court. Response…..

“It is quite impossible to understand how the access requirement lowers any "psychological barrier" to using the public beaches.”

“…if California wants an easement across the Nollans' property, it must pay for it.”

“A taking without compensation occurred.”

Nexus Requirement: The Court demanded a tighter connection between the harm (loss of visibility) and the remedy (access).

Should the government have flexibility to allow 1 type of harm (loss of visibility) conditional on requiring a different type of benefit?
Lucas v. South Carolina Coastal Commission 1992:

1. 1986…Lucas bought 2 residential lots on a South Carolina barrier island--Isle of Palms--for $975,000.

2. 1988…South Carolina adopted Beachfront Management Act, prohibiting Lucas from building on the lots. (Established a critical erosion zone including all of Lucas’ lots.)

3. Lucas claimed the law deprived him of all “economically viable use” of his property.

4. State trial court agreed and awarded $1.2 million.

5. Supreme Ct. of So. Carolina reversed… no compensation is needed when a regulation is designed to prevent serious public harm… regardless of effect on property values. (Mugler v.
Part of "Wild Dunes" resort on Isles of Palms, SC, 11/94

 Row of Large House

 cul de sac

 Row of Large Houses

 street: "Beachwood East"

#10 large house
#11 Lucas (vacant)
#12 large square house
#13 Lucas (vacant)
#14 large house
#15 large house

DEAD ZONE

Charleston, SC about 15 miles

Atlantic Ocean

Open Yale courses

© Yale University 2012. Most of the lectures and course materials within Open Yale Courses are licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 license. Unless explicitly set forth in the applicable Credits section of a lecture, third-party content is not covered under the Creative Commons license. Please consult the Open Yale Courses Terms of Use for limitations and further explanations on the application of the Creative Commons license.
Lucas continued....

**Harmful or Noxious Use:**

These cases rest on the principle that the State has full power to prohibit an owner's use of property if it is harmful to the public.

[S]ince no individual has a right to use his property so as to create a nuisance or harm others, the State has not "taken" anything when it asserts its power to enjoin the nuisance-like activity."

Does an individual have a constitutionally protected right to place others at risk?
The Result?

1. The case was remanded back to state courts to consider the magnitude of the nuisance (harm).

2. How is the public interest served by restricting development, and has all economic value been removed by the restriction?

3. South Carolina Supreme Ct reversed its earlier decision (membership changed)

Damages must be assessed and paid to Lucas.
Former Lucas Lots
1. SCCC granted Lucas permission to build.

2. Lucas was compensated: Sold lots to the State for $1.575 million.

3. Instead of protecting dunes, the State sold lots to a
Dolan v City of Tigard Oregon:

1994 US Supreme Court

Dolan applied to the city to significantly expand hardware store in a floodplain.

The City approved, but required:

• Dedication of floodplain area to improve city drainage system

• 15 foot easement for a pedestrian/bicycle pathway adjacent to floodplain

Sup. Ct. cited the need for a “Principle of Rough Proportionality” in relation between the potential public harm and the remedy.
Pesticide Bans:

- Government Required to Purchase Existing Stocks of Newly Banned Products
- Presumption of Safety Implied by Earlier Government Licensing
- Compensation is not required to recover R/D costs for chemicals not allowed to reach the marketplace.
Pesticide Tolerances

• 10,000 tolerances for pesticides on foods.
• Does the act of regulation creates a private property right? Normally yes— a right to pollute that often creates or protects property value.
• Cancellation of tolerances, or pesticide bans, remove those rights.
• Normally bans have been considered attempts to prevent harm.
• By contrast, courts have normally demanded compensation when government regulates to create a benefit.
Tahoe Regional Planning Compact

7 Land Use Capability Districts
Each District assigned a maximum percentage of land coverage
By impervious surfaces—asphalt, roofing, etc.

Most sensitive zone: 1%
Least sensitive zone: 30%

Exceptions led CA to withdraw from compact & set tougher rules.
1980: 94 Stat 3235-3238

TRPC was restructured, and allowed development moratoria.

“Regional environmental threshold carrying capacities” required.

Considering: Standards for air quality, water quality, soil conservation, vegetation preservation and noise.
Eagle Protection Act and the Migratory Bird Treaty Act

"Bald eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to June 8, 1940, and golden eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to October 24, 1962, may be possessed, or transported without a Federal permit, but may not be imported, exported, purchased, sold, traded, bartered, or offered for purchase, sale, trade or barter. . . ."

Effect: Separation of the right to possess eagles from the right to import, export, sell, purchase or trade.

Does prohibiting trade constitute a taking?

No. Considerable value remains simply from possession. The inability to trade does not remove all value. Compensation is not required.

“..where an owner possesses [444 U.S. 51, 66] a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.”
Principles of Takings Law

1. Acquisition for Public Use Requires Compensation. (Vieques).
2. Eminent Domain for Private Development Is Legitimate (Kelo)
3. Regulation of Private Use is More Complex. (Adirondacks)
4. Ad Hoc Factual Inquiry: Weigh Each Case Independently
5. Nolan: Means-Ends: Objective and Form of Regulation Should be Closely Tied (Nexus argument).
6. “Harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation.”
   Legitimate State Interest to Protect: Env, Econ, Health, Welfare
7. Dolan: Rough Proportionality: Regulation Should be Proportional to Adverse Effects of Private Action
8. Lucas: Compensation Required in the Relatively Rare Case where All Economic Value is Denied