

Pipelines, Property Rights, and Environmental Justice

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Abstract: In 2016, protests erupted in opposition to a proposed pipeline that would cross through four U.S. states and transport as much as 570,000 barrels of crude oil per day.¹ As objections increased, two large ideological factions emerged: one regarding the Earth as property and commodity, maintaining the right to exploit its natural resources; and the other an environmentalist perspective, underscoring the finitude of the planet and its resources and the necessity of sustainable practices. Assuming the latter position is correct, that we are obligated to address the realities of resource depletion, this paper will explore the philosophical underpinnings of property rights and ownership and examine the duty to conserve. I will argue that the government ought to regard our most basic necessities, such as clean water and air, as common property; therefore, the state is obligated to take measures to ensure all can use them.

The Dakota Access Pipeline (DAPL) is a project developed by Energy Transfer Partners (ETP). Once installed, it will transport crude oil from North Dakota to Illinois, eliminating the need for vehicle transport. Supporters of the project indicate the benefits such as the creation of up to 12,000 jobs and the millions of dollars generated by sales and property taxes. The final segment to be installed, crossing beneath the Missouri river only two miles from the Standing Rock Sioux reservation, was met with resistance from the tribe and its supporters. However, the protesters were not alone in their opposition.

In March of 2015, the Iowa Utilities Board (IUB) granted the DAPL a hazardous liquid pipeline permit, which also gave ETP eminent domain authority when voluntary easement could not be negotiated.² Eminent domain is “the right of the state to acquire property from a seller in exchange for just compensation.”³ The understanding of eminent domain changed with the 2005 Supreme Court ruling in the case of *Kelo v. City of New London*. Eminent domain was typically invoked for projects like highways or parks; however, the case modified this interpretation by also allowing private corporations to appropriate, provided their project could be shown to have some public benefit. In the case of *Kelo v. City of New London*, “economic growth, revitalization, and increased tax revenues” were considered sufficient for this requirement.⁴ Nonetheless, the definition of public use remains

judicially controversial. Similar to *Kelo v. City of New London*, the economic advantages of the DAPL were deemed to sufficiently meet the public benefit standard. Yet residents living in close proximity to the route expressed the opinion that the DAPL does not constitute as a public benefit. After having their private property seized, owners of land parcels unsuccessfully filed lawsuits against the IUB.

Other objections arose from safety and environmental concerns. ETP insists that pipelines “have proven to be the safest, most efficient means of transporting energy resources,”⁵ but many scientists and environmental activists remain unconvinced. Statistically, pipelines have a problematic track record. A spill, rupture, or leak can occur due to improper installation, damage during construction, and most commonly, corrosion. Data compiled by the Pipeline and Hazardous Materials Safety Administration shows the number of pipeline incidents has been increasing, with an average of 560 per year since 1996.⁶ Though pipeline spills are less frequent than railway spills, the amount of oil discharged is typically greater.⁷ According to an analysis done by Dagmar Etkin for Environmental Research Consulting, “Since 1985, U.S. pipelines have spilled more oil than tankers and barges combined.”⁸ Such incidents pose serious environmental and health risks.

Exposure to petrochemicals can lead to health problems including cancer and reproductive and

respiratory issues.⁹ Those living near the DAPL route are especially at risk. Researchers Jon Gay et al explain why a spill is especially dangerous for nearby inhabitants:

Because of this proximity, oil and associated waste chemicals can seep into groundwater, streams, or rivers, all of which may be used as water supplies for laundry, cooking, bathing, and drinking. Additionally, polluted freshwater may be consumed by livestock or used to water crops, causing death in both the livestock and crops. Besides polluting water, petrochemicals may contaminate soil in which crops are grown and on which homes may be built.¹⁰

The pipeline's fracked oil also contributes to climate change. The Intergovernmental Panel on Climate Change stated: "Scientific evidence for warming of the climate is unequivocal."¹¹ NASA reports that most climate scientists agree the main cause of the current global warming trend is human expansion of the "greenhouse effect"—warming that results when the atmosphere traps heat radiating from Earth toward space."¹² The practice of hydraulic fracturing and the transportation of its end product through pipelines often result in the leakage of methane, "a potent greenhouse gas that is 25 times stronger than carbon dioxide."¹³ Further, the burning of, and continued reliance on fossil fuel energy only exacerbates the problem of greenhouse gas emissions. To date, almost

100 scientists have signed a petition against the DAPL. The resolution asserts: “the DAPL project is just one of many current haphazard approaches to continued natural resource extraction, which overlook the broader consequences of further oil development.”¹⁴ As oil production in the United States increases, so do pipelines and spatial demands.

Despite objections raised by residents, environmentalists, and scientists, corporations still seem to treat land and natural resources as commodities in infinite supply. The U.S. government continues to support these destructive endeavors by granting eminent domain. Private property may be seized to clear the necessary path, but property owners are only protected to the extent that they must be compensated. Within the Fifth Amendment is the “Takings Clause” which states, “private property shall [not] be taken for public use without just compensation.”¹⁵ Iowa landowners whose properties were seized will be given an amount that reflects their market value, but what of those who may suffer environmental consequences? What compensation is there in the event of an oil spill that destroys an ecosystem or contaminates a water supply? Clean water and air are human rights necessary to life, yet they are threatened by environmental pollution. The landowner who received market value for their home is ultimately better protected than the Iowan who has their water supply contaminated by Bakken shale. We must ask then, what right does

a corporation like ETP have to damage our shared resources for capital gain? How can the government justify deeming the results publicly beneficial? To fully understand this, it is necessary to return to the theories that laid the foundation for modern conceptions of property.

John Locke's political philosophy strongly influenced the framers of the U.S. government. This influence is apparent in the Declaration of Independence, which states: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."¹⁶ This echoes Locke's belief that the chief purpose of government is the protection of life, liberty, and property.¹⁷ In his *Second Treatise of Government*, Locke asserts that the state of nature men originally lived in was one of radical equality.¹⁸ In this state, the natural law "teaches all mankind who will but consult it, that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions."¹⁹ As men are naturally equal, Locke determines that the Earth was given to all mankind in common. What then gives anyone the right to claim something as private property? Locke notes that appropriation is necessary in order to survive: "There must of necessity be a means to appropriate them in some way or other before they can be of any use or at all beneficial to any particular man."²⁰ Locke assumes individuals have property

rights in their own bodies and labor. By extension, anything one “mixes” with their labor may be called private property.

Locke describes the limitations to appropriation, collectively called “provisos.” The proviso which remains most relevant today asserts that one must leave “enough and as good in common for others.”²¹ In writing this requirement, it is unlikely Locke imagined its fulfillment would, at some point, be impossible. Within the same chapter as the proviso, Locke stated: “this I dare boldly affirm, that the same rule of propriety (viz.), that every man should have as much as he could make use of, would hold still in the world, without straitening any body, since there is land enough in the world to suffice double the inhabitants.”²² Clearly, Locke could not have envisioned the threats posed by contemporary overpopulation and global warming.

If we are to attempt to follow the Lockean proviso, to leave “enough and as good for others,” we must ask if this only refers to the “others” in our current generation. The contemporary issues we face compel us to consider the impact our decisions will have on both present and future generations. Considering the Lockean proviso, the finitude of the earth and its resources, means that any taking decreases the amount left for others. This, as Clark Wolf notes, leads to Robert Nozick’s “zipper” argument:

Consider the first person Z for whom there is not enough and as good left to appropriate. The last person Y to appropriate left Z without his previous liberty to act on an object, and so worsened Z's situation. So Y's appropriation is not allowed under Locke's proviso. Therefore the next to last person X to appropriate left Y in a worse position, For X's act ended permissible appropriation. Therefore X's appropriation wasn't permissible. But then the appropriator two from last, W, ended permissible appropriation, and so, since it worsened X's position, W's appropriation wasn't permissible. And so on right back to the first person A to appropriate a permanent property right.²³

If we accept that the taking of the last resource or piece of land is impermissible, this means that no takings are justified. The invalidity of the last appropriation “zips” back to original one, rendering all illegitimate. In this context, there is no way the Lockean proviso can be put into practice. But for Wolf, it is certainly possible to leave “enough and as good for others” if we do not destroy or deplete.

Revisiting the proviso, Wolf argues it is best interpreted as a harm principle, only prohibiting any appropriation that harms others. Hence, according to Wolf, we can use this standard to determine what can be considered a valid property claim. For instance, if a corporation's claim to property is based on the financial gains from fracking shale rock, it is merely an adventitious one. Yet both present and future

inhabitants can assert a claim based on necessity: the need for enough resources to remain to ensure humanity's survival. The latter claim defeats the former. The individual's basic needs outweigh any corporation's desire for financial gains, particularly since these practices will cause harm.

Wolf proceeds to address a more significant challenge to the proviso, asserting that the harm principle also applies to future generations. This is indeed an arduous perspective, as the number of individuals who could be harmed is effectively unlimited. He concludes it would be wrong for future generations to suffer simply because we wish to reap immediate benefits. Wolf states that: "while there is no one else whose claims supersede those of current owners, such owners simply do not possess any valid claim to degrade, consume, or destroy resources in which future persons have an important stake."²⁴ In other words, we do not have full blown ownership. Rather, valid property rights are usufructuary. Rights in usufruct are characterized by an obligation to conserve. The freedom to destroy or damage is completely excluded and the right to modify is limited. Indeed, Locke agrees with this basic concept in his *Second Treatise*: "Nothing was made by God for man to spoil or destroy."²⁵ If valid property rights mean we are stewards rather than owners, we are prohibited from doing anything potentially harmful. The farmer has no more right to use hazardous chemical pesticides than an oil company does to damage land

for transporting shale. Such restrictions on property rights based on the harm principle preserve individual freedom, while serving to protect the interests of present and future generations by conserving basic needs.

The founding fathers of the United States did not discount future generations. The preamble of the Constitution affirms the resolve to “secure the blessings of liberty to ourselves and our posterity.” This notion has seemingly been lost to present-day politicians who enable monetary interests to take priority, by granting eminent domain rights to private corporations, denying climate change, and opposing the Environmental Protection Agency (EPA). Wayne White explains that the EPA has been a primary target, with repeated and continuing attempts by Republicans to undermine its authority. According to White, “The deniers and their corporate sponsors are correct in recognizing that the evidence accumulated by climate scientists over the past two decades has the potential to undermine the continued profitable extraction and use of fossil fuels and the myriad of industrial processes and products dependent on oil gas and coal.”²⁶

Wolf provides the theoretical foundations for a change in perspective, but it may be Native American environmentalism that best provides praxis. Winona LaDuke reminds us that natural law is indeed supreme: “Dump dioxin into the river, and you will inevitably eat or drink it. Assent to acceptable levels of radioactive

emissions, and sooner or later, those sensitive cells in the human body will likely respond.”²⁷ LaDuke argues that juridical laws must be changed to match natural laws, rather than continuing to enable myopic policies: “Environmental laws of today are outstripped by the poisons in our air, water, and land, and their cumulative impacts. We are frequently facing a ‘catch up’ situation at best, and most frequently, no cumulative or long-term policy protection.”²⁸

For LaDuke, part of the solution consists in defining common property that will enjoy the same protections as private property: “Common property resources are those that are not and cannot, by their nature be owned by an individual or a corporation, but are held by all people in common. These ‘blessings of liberty’ envisioned in the Constitution should be used or enjoyed only in ways that do not impair the rights of others - including future generations - to use or enjoy them.”²⁹ LaDuke asserts the need for a Seventh Generation amendment or Common property amendment, stating that “the right of the citizens of the United States to use and enjoy air, water, sunlight, and other renewable resources determined by the Congress to be common property shall not be impaired, nor shall such use impair their availability for the use of future generations.”³⁰ The amendment is similar to a Six Nations Iroquois Confederacy resolution that “considers the impact on the seventh generation from now.”³¹

Acknowledging that there are those who would deny the existence or severity of the problem, the evidence for the magnitude of the threat posed by a rapidly changing climate is overwhelming. According to NASA, “observations throughout the world make it clear that climate change is occurring, and rigorous scientific research demonstrates that the greenhouse gases emitted by human activities are the primary driver.”³² There are also those who would deny that threatened resources like water are a human right. Yet, the U.S. Declaration of Independence states, “We hold these Truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among men.” The men who established U.S. government recognized, just as Locke did, that government has a duty to protect inherent rights. Locke write, “the state of nature has a law of nature to govern it, which obliges everyone; and reason, which is that law, teaches all mankind who will but consult it, that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.”³³ So too does Winona LaDuke write, “the rights of people to enjoy air, water, and sunlight are essential to life, liberty, and the pursuit of happiness.”³⁴

To effectively address these issues, the government must recognize that these rights are violated by

contaminations of the environment. A Seventh Generation Amendment may be the action necessary to protect these interests we all share. Thus, the release of toxins into the environment would obviously violate these rights.

A major objection to the implementation of LaDuke's definition and protection of common property is the idea of the tragedy of the commons. This concept can be described as, "when a given natural resource is physically and legally accessible to more than one resource user, the result is said to be a free-for-all, with users competing with one another for a greater share of the resource to the detriment of themselves, the resource, and society as a whole."³⁵ We see examples of this in deforestation and overfishing. The tragedy of the commons is often used as justification for private ownership. For a private property owner has an incentive to use resources sustainably. The owner who cultivates her land in a non-damaging way has the potential to increase its value.

However, private ownership of communal resources serves more to threaten liberty than to promote it. Private corporations should not own the vital resources that the public depends on, as this would give them the ability to control access to those resources. There are other means of responding to the tragedy of the commons, such as government regulations, sanctions, and penalties.

An obstacle to implementing a Seventh Generation Amendment is the ambiguity of parameters. Existing amendments clearly limit government power; a close reading of the proposed amendment suggests restrictions would be imposed upon the government, corporations, and citizens. The stringency of the limits imposed by this amendment is also debatable. Some restrictions would need to vary by location to effectively address environmental issues. For instance, areas facing problems of water insecurity would require a different approach than those facing thawing permafrost. While the pragmatic specifications of the Seventh Generation Amendment still need to be clarified, the core purpose of LaDuke's approach is valuable. Acknowledging the crisis we face, as well as our interdependence with the earth, should inform government responses to rapid climate change. Common resources defended equally with private property would provide a path towards genuine sustainability.

The Standing Rock Sioux celebrated an apparent victory when the Army Corps of Engineers froze construction in December 2016, pending an environmental impact assessment. However, President Donald Trump signed an executive order to advance construction the following month, ensuring a continued fight between those who wish to protect our resources, and those who would destroy those resources for profit. The DAPL, along with other current pipeline projects, serves a short-term vision; it continues the reliance on

nonrenewable resources and environmental damage. We face irreversible destruction unless drastic measures are taken. If our inalienable rights of life, liberty, and the pursuit of happiness are to be truly acknowledged, the resources that enable them must be equally recognized and protected.

Notes:

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