

## Who Should Control Our Land?

*The following is a point-counterpoint on the property rights issue between James DeLong and John D. Echeverria published in the March 1999 edition of the Washington Time's World & I magazine.*

### Our Property Rights Are Endangered

by James V. DeLong

The fall of the Soviet empire and the boiling stock markets of the 1990s have seemingly put a "mandate of heaven" on Western-style free market economics.

But a funny thing has happened on the way to utopia. While the U.S. government vociferously promotes the sanctity of private-property rights in countries around the world, within the United States many see such rights as being under serious attack by the very government that upholds them elsewhere.

The current impacts are mainly on landowners and not on holders of financial assets. Because discontent is concentrated in rural areas and particularly the rural West (which contains only about 15 million of the nation's 267 million people) and few journalists are being gored, the trend is well hidden. But it is an important political fact and the sense of grievance is growing.

Furthermore, problems arising in the context of real estate are spreading to areas dearer to the hearts of journalists, such as intellectual property and telecommunications. This being the case, an increase in the level of political turmoil is likely.

Much of the dispute focuses on two major federal environmental programs: the Endangered Species Act (ESA) and wetlands protection. Under the ESA, large tracts of private land have been declared off-limits to human use because they might provide habitat for some species.

This result comes from regulatory fiat by the Interior Department, involving, critics say, a strained interpretation of an amorphous statute. Despite a 1995 Supreme Court decision upholding the rule, the affected landowners do not accept its political or moral legitimacy. As the number of endangered species grows, so does the quantity of land set aside for them and the level of citizen unrest.

The wetlands programs are also an administrative adaptation of a vague law, this time as interpreted by a team composed of the Army Corps of Engineers and the Environmental Protection Agency.

The Clean Water Act was designed to prevent industrial pollution. The two agencies have extended it to mean that no one can make any use of any wetland without a government permit; these permits, critics say, are getting harder to obtain. The definition of wetland is also expanding steadily, and critics complain that they see pictures of property classified as wet that looks as dry as the Gobi Desert.

This program, like the ESA rules, puts large tracts off-limits to human use with no compensation to the owners. Like the habitat protection program, the rules are not regarded as morally or politically legitimate by those who bear the brunt, which boosts the bitterness of their opposition.

Endangered species and wetlands are the biggest areas of concern, but they are far from exhaustive. The government is also moving in the direction of federal land-use planning, using a

potpourri of domestic laws and international treaties on "biosphere reserves," "heritage areas," and other tags. While the import and dimensions of this effort are still murky, people in the affected areas see it as another effort to limit their use of land and natural resources.

## THE NATIONAL COMMONS

Another point of conflict is access to public lands. The federal government owns about half of the 10 westernmost states, including 83 percent of Nevada and 45 percent of California. Largely in the name of environmentalism, it is steadily limiting the extraction of natural resources, shutting down timber, mining, and energy production, and attempting to reclaim long ago alienated water rights.

Federal authorities are also shutting down access by recreationists. Some areas are formally classified as wilderness by federal regulations, which exclude all mechanical modes of transport (including bicycles). Road networks are being abandoned in other places, such as national forests. These road shutdowns create wilderness by end run, and recreational users who depend on motor transport regard them as an effort to transform the public domain into a private preserve for backpackers.

For complex historical reasons, the social pattern in the West has been a symbiosis between public and private property. People live on private land and make their living or amuse themselves in the public domain. Federal lands were not the property, critics say, of a "baron" called the government, which could do whatever it pleased, but a sort of "national commons" to which all should have access, administered by the government as a trustee.

The enclosures by the U.S. Forest Service, Bureau of Land Management, Fish and Wildlife Service, and National Park Service are creating economic dislocations and a strong sense of grievance. They are felt as the denial of the ancient right-a property right-of access to the national commons.

Federal actions are at work mostly in rural areas. Urban dwellers are not exempt from government encroachment on property rights, but the details are different. In the cities and suburbs, the chief actors are at the local level of zoning boards, planning commissions, and historic preservation commissions, not the federal defenders of the environment.

Discussion of property rights gets tricky here, because citizens love zoning. It protects their suburban homes from noxious neighbors. Zoning itself has become a property right-and woe to the politician who seems so kooky as to oppose it! But current practice, property-rights advocates say, is a long way from the original, sensible concept, which simply separated incompatible uses and provided predictability.

In the wake of the New Deal, according to critics, zoning fell into the hands of an interventionist urban-planning profession. Instead of creating simple, consistent rules and then letting people abide by them, the planners and politicians are seen as trying to micro manage everything. They have created systems, critics say, that are intrusive, whimsical, arbitrary, and political-and urbanites are catching on.

## THE FAILURE IN THE COURTS

These are the most important areas of conflict, but the perceived lack of concern for property rights is rife in other places, too. For example:

- Property forfeiture has become a standard remedy for violations of law. -The fizzled Clinton health plan of a few years ago contained asset-forfeiture provisions for doctors who provided unauthorized medical care.
- Programs for the cleanup of old wastes impose retroactive liability on property owners.
- Rent control still lives.
- New federal laws give artists some surprising control over buildings housing their work.
- The program to turn old railroad rights-of-way into biking and hiking trails is grossly unpopular with the people whose backyards are affected.

A major reason the property issue has grown is that the work of the courts has aroused controversy. The Fifth Amendment requires compensation when property is taken for public use, but judges have found no coherent way to interpret this requirement. Physical seizure of property is clearly a taking-the legal term for government requisition of private property-but what about a regulation that leaves the owner with the title but forbids him the use?

The classic formulation by Justice Oliver Wendell Holmes, made in 1922, is that a regulation takes property if it "goes too far." But the courts have never given a coherent meaning to that phrase. They look instead at a number of "factors," such as legitimacy of the governmental purpose, percentage of value lost, and frustration of investment-backed expectations. In a takings case, an argument is seldom logical; it is a contest between competing declarations about the sanctity of property versus the nature of the public benefit sought.

For almost 70 years after Holmes' pronouncement, the courts solemnly scrutinized the factors, then decided for the government. Always.

Lately, though, property owners have been winning some. The Court of Federal Claims has said that wetlands regulations can indeed cause a legal taking requiring compensation if they strip a property of all value. And the Supreme Court has curbed state power to be totally arbitrary in forbidding development.

So far, these checks have only been relatively slight. Thus, advocates of the right to property are convinced that the only road to reform lies through Congress.

The legislative pipeline is chock-full of proposals covering the spectrum of property-rights problems. They range from revision of the Endangered Species Act to omnibus protection measures to reform of esoteric doctrines of legal procedure that make it hard to get to court even when the substantive case is sound.

## DEAD END IN CONGRESS

None of these bills is likely to get far. The political reality is that the people exercised over property issues tend to be Republican and, as noted, are mostly in the rural West and South. The suburban Republicans of the Northeast are not in sync with their colleagues on this issue, so Republican representatives in that section tend to vote with the Democrats, giving the latter a pro-big-government working majority.

To make the issue even tougher, western politicians are walking a delicate line. The West is the most urbanized part of the nation, in terms of percent of population living in metropolitan areas, and many of these city folk have views quite unlike those of the rural population. Thus, the politicians tend to be long on property-rights rhetoric and short on action as they try to placate both constituencies.

The overall aggregate of forces has convinced the Republican leadership that the issue is a loser and should not be contested, especially given the party's spookiness about being tagged with the anti-environment label. As the system remains unresponsive, the people who believe their rights are being trampled grow surlier. This sense of outrage is exacerbated by the feeling that government actions with respect to property lack legitimacy, that-whatever the Supreme Court says-they are outside the bounds of our national understanding about the role and limits of governmental power.

Critics say the regulations violate basic precepts about agencies right to make law, equal protection, procedural fairness, and the power of special interests.

Even accepting the validity of the environmental purposes the programs serve, the present laws impose on a few people a burden that should, in fairness, be shared by everyone. As one landowner badly damaged by the Endangered Species Act put it, why should she be forced to donate her farm as a habitat for an endangered species when no urbanite is compelled to donate her spare bedroom to house the homeless?

As newly threatened groups cast about for legal protection, they will not be happy to learn that the constitutional moorings they planned to rely on have been battered and loosened in the context of wetlands, endangered species, and comprehensive urban planning. At that point, many observers believe, the rural westerners will find that they are picking up allies, and the political balance will have to be recalculated.

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How very odd for "conservatives" to still rail against the alleged excesses of federal environmental agencies, the U.S. Department of the Interior in particular. And stranger still to do so in the name of promoting property rights as supposedly protected by the "takings" clause of the Fifth Amendment.

Since the beginning of the 104th Congress, in response to relentless partisan and special interest attacks, the Clinton/Gore administration has abandoned the effort to obtain much-needed reform of the nation's natural resource laws. Moreover, according to some critics, it has essentially stopped enforcing existing environmental laws across the western United States as well. Under present circumstances, continued rhetorical attacks on the federal environmental bureaucracy amount to jack lighting an already wounded deer.

Consider the fact that the administration has, for all intents and purposes, given up on obtaining legislative reform of the outdated Mining Act of 1872 or the laws governing the public-lands grazing program. These laws not only result in egregious environmental abuses of the public lands. They also represent spectacularly generous corporate welfare troughs.

Or consider that the administration recently arranged a \$460 million payoff to get the Maxxam Company not to cut old growth forest in Northern California. The secretary of the interior justified the payment as necessary to prevent a taking of the company's property, although no precedent supports such a claim in these circumstances. John Skow, a columnist in *Time* magazine,

accurately called the deal "a textbook example of the wreckage that occurs when political imbalance-weakness on the part of federal and state environmental agencies, blustering strength among enemies of land use regulation-allows owners of private property to hold the environment at ransom."

Or consider the Department of the Interior's very recent response to the illegal shooting of Mexican wolves by an individual or individuals opposed to the reintroduction of wolves in the southwestern United States. Rather than focus on deterring future illegal behavior, and in a move that seems tailor-made to encourage further illegal actions, the department proposed to offer tax breaks and reduce already low public-land grazing fees to placate opponents of the wolf reintroduction program.

As to the Endangered Species Act, the Department of the Interior is promoting a bill in Congress that would weaken some of the law's most important provisions to satisfy its developer and resource industry critics. This effort is opposed by leading scientists and virtually every major environmental group in the country, an eye-opening commentary on the policies of an administration still vilified in some corners as off the environmental deep end.

As to wetlands, developers and resource industries can get a wetlands permit about as easily as a withdrawal from a neighborhood ATM. In the vast majority of cases, in fact, development activities are covered by blanket authorizations that require developers to simply notify the government of the planned wetlands destruction. In 1994, the most recent year for which data are available, the Army Corps of Engineers authorized some 50,000 wetland fill projects and denied approval for less than 1 percent of the projects.

In the face of relentless opposition, the administration has been reduced to promoting projects such as the American Heritage Rivers program. This no regulatory-authority, no-government-expenditure approach to conservation reduces environmental policy making to a series of public meetings and public relations events, offering little hope of establishing meaningful limits on activities that threaten our nation's rivers.

The painful irony is that citizens living in the western United States, the most urbanized region in the country, are demanding more regulatory protections against the depredations of polluters. For example, at the polls in November, Montana voters approved a measure to ban new gold and silver mining using cyanide, and voters in Colorado and South Dakota approved new measures to control corporate hog farms.

Having savaged natural resources management, takings advocates are now moving on to new battles. One novel idea is to attack the nation's Superfund law on the theory that requiring companies to clean up their toxic chemical messes results in a taking of the companies' property rights. Thankfully, courts have so far rejected this outlandish theory.

Ironically, although federal environmental laws have received the greatest public whipping at the behest of takings advocates, this has never been the true focus of the takings agenda in court. Relatively few cases have actually been filed challenging Endangered Species Act regulations as a taking, and no federal court has issued a final ruling in favor of a takings claim under the ESA.

By contrast, until very recently, the largest number of pending takings suits in the U.S. Court of Federal Claims involved claims filed by operators of savings and loans associations complaining about excessive financial regulations. Today, the largest category of cases involves tobacco companies, which have filed dozens of individual actions seeking to overturn as a taking federal regulation of cigarette vending machines designed to limit teenage smoking. Takings advocates scored a major victory this past November by convincing a federal appeals court to strike down a Massachusetts law requiring public disclosure of the ingredients in cigarettes.

In sum, there is a distinct lack of proportion or common sense in takings advocates' attacks on the current implementation of federal environmental programs. Their invocation of the takings clause of the Fifth Amendment to support these attacks is even stranger, however. The argument is fundamentally inconsistent with a genuinely conservative approach to constitutional interpretation.

The takings clause provides, of course, "nor shall private property be taken for public use, without just compensation." According to takings partisans, federal regulatory actions routinely violate this clause. Notwithstanding some occasional successes, such as the Boston tobacco litigation, they contend that the courts are generally unwilling to enforce the takings clause's compensation requirement against federal regulators.

## INACCURATE READING

This extravagant reading of the takings clause flatly contradicts how a true conservative should interpret this constitutional text. As jurists and scholars of all ideological persuasions recognize, the historical evidence demonstrates that the drafters of the Bill of Rights intended the takings clause to apply only to direct appropriations of private property. Notwithstanding the frequent beating of the regulatory takings drum, the framers never actually intended that the takings clause apply to regulations under any circumstances.

Justice Antonin Scalia has acknowledged that "early constitutional theorists did not believe the Takings Clause embraced regulation of property at all." This view also is supported by Charles Fried, President Reagan's solicitor general, and by former judge Robert Bork. In *The Tempting of America* (1990), Bork admitted his sympathy, as a matter of policy, with the goals of takings advocates to "repeal much of the New Deal and the modern welfare regulatory state;" at the same time, he frankly admitted that these goals "are not plausibly related to the original understanding of the takings clause."

The U.S. Supreme Court's takings precedents basically respect the original understanding of the clause by limiting the regulatory takings doctrine to government actions that are the functional equivalent of direct appropriations. The extreme claims of modern takings advocates, by contrast, would push takings doctrine well beyond any plausible understanding of the drafters' original understanding. In principle, conservatives who believe the Constitution must be read in strict accord with the actual language and original understanding of the provision should reject this view. Contrary to conservatives' repeated criticism of so called judicial activism, this approach positively invites judicial activism.

Equally striking is the degree to which takings advocates contradict the conservative stance in support of federalism and the idea that government functions should generally be left to the smallest possible unit of government. Indeed, a central virtue of America's political system is our federal structure, which helps ensure decentralized government responsive to the diverse needs in different parts of the country, increases opportunities for public participation in government decision making, and allows innovation and experimentation.

Established takings doctrines supports federalism by recognizing that the property interests protected by the takings clause are, in the words of Chief Justice William Rehnquist, "defined by existing rules and understandings that stem from an independent source such as state law." But a more expansive notion of takings threatens to federalize this issue, leading to a more uniform national standard on regulation of property and constraining local authority to meet the community's needs.

Finally, the takings agenda is inconsistent with conservatives' bedrock commitment to smaller, cheaper government and lower taxes. There is no dispute that some government actions result in

takings. When that occurs, the public obviously owes financial compensation for the taking. But one of the difficulties with an expansive reading of the takings clause is that it would impose a large new financial obligation on the public, over and above what the Constitution actually requires, ultimately forcing an increase in taxes on all of us.

Justice Anthony Kennedy highlighted this very point in casting his decisive vote against the takings claim in a recent Supreme Court property rights case. Adopting the plaintiffs' generous takings theory, the justice wrote, would "subject States and municipalities to the potential of new and unforeseen claims in vast amounts."

Will a principled conservative please stand up?

John Echeverria is director of the Environmental Policy Project and teaches at Georgetown University Law Center.

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The U.S. Supreme Court's takings precedents basically respect the original understanding of the clause by limiting the regulatory takings doctrine to government actions that are the functional equivalent of direct appropriations. The extreme claims of modern takings advocates, by contrast, would push takings doctrine well beyond any plausible understanding of the drafters' original understanding. In principle, conservatives who believe the Constitution must be read in strict accord with the actual language and original understanding of the provision should reject this view. Contrary to conservatives' repeated criticism of so called judicial activism, this approach positively invites judicial activism.

Equally striking is the degree to which takings advocates contradict the conservative stance in support of federalism and the idea that government functions should generally be left to the smallest possible unit of government. Indeed, a central virtue of America's political system is our

federal structure, which helps ensure decentralized government responsive to the diverse needs in different parts of the country, increases opportunities for public participation in government decision making, and allows innovation and experimentation.

Established takings doctrines supports federalism by recognizing that the property interests protected by the takings clause are, in the words of Chief Justice William Rehnquist, "defined by existing rules and understandings that stem from an independent source such as state law." But a more expansive notion of takings threatens to federalize this issue, leading to a more uniform national standard on regulation of property and constraining local authority to meet the community's needs.

Finally, the takings agenda is inconsistent with conservatives' bedrock commitment to smaller, cheaper government and lower taxes. There is no dispute that some government actions result in takings. When that occurs, the public obviously owes financial compensation for the taking. But one of the difficulties with an expansive reading of the takings clause is that it would impose a large new financial obligation on the public, over and above what the Constitution actually requires, ultimately forcing an increase in taxes on all of us.

Justice Anthony Kennedy highlighted this very point in casting his decisive vote against the takings claim in a recent Supreme Court property rights case. Adopting the plaintiffs' generous takings theory, the justice wrote, would "subject States and municipalities to the potential of new and unforeseen claims in vast amounts."

Will a principled conservative please stand up?

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