

This Land Is Whose Land?,

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The Magic of Property Rights

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In his 1787 book, *Travels*, Arthur Young wrote:

"Give a man the secure possession of bleak rock, and he will turn it into a garden; give him a nine years lease of a garden, and he will convert it to a desert. The magic of property turns sand into gold."

This common sense notion may have been lost by many, but the property rights movement - bolstered by strong evidence of the harms caused by excessive regulations purporting to protect our environment - is working hard to restore the "magic" of the principles of private property ownership.

In practical terms, the goal is to reclaim the basic constitutional right to own and use property in a responsible manner, safe from the suffocating web of environmental regulations that now touch every form of property use and ownership.

As easy a goal as this might seem, it has been an uphill battle for individual property owners. One of the most formidable tasks is to overcome the false perception that property ownership translates into a lack of regard for the environment. The challenge is to show the general public that property rights and environmental protection are not mutually exclusive goals and, in fact, are mutually dependent. Perceiving property rights activists as a growing threat to the old environmental order's efforts to increase regulation of private property and bar people from land that they deem 'environmentally sensitive', old order groups have vigorously attacked private property advocates as 'anti-environmental.' This label, however, could not be further from the intent of the property rights movement.

No one in his right mind wants dirty air or polluted water. But policies that diminish property rights so extensively that owners are left with little except the "right" to hold title and pay taxes on their land are hardly the way to improve environmental quality. Indeed, the property rights movement is fueled in large part by heavy-handed policies that actually impair the larger goal of environmental protection-and ignore the fact that less government is often the best prescription for curing environmental ills.

Private ownership fosters greater responsibility and concern for one's affairs. If a private owner damages his own land, that blight remains with him and his successors for as long as they own the land. If the harm is severe enough, he may not even be able to sell the land, since it will no longer have any productive use. By contrast, in the case of publicly held land, no one owns the land and there is no incentive to care for it. This is the all too familiar "tragedy of the commons." The classic example is a rental house. How many people ever renovate a rented house? In the eyes of renters, there is no need to do so because they do not own it and, except in extraordinary conditions, will reap no benefit from their investment.

Experience further teaches that uncompensated takings in the name of environmentalism often create perverse disincentives that are themselves anti-environmental in effect. For example, if government fails to compensate people when it takes wildlife habitat that they have created and maintained, who will continue to create such wildlife habitats?

Thus, private property ownership is a key tenet of sound conservation policy. Theodore Roosevelt, considered by many to be one of our most environmentally-conscious presidents, once said: "In every civilized society, property rights must be carefully safeguarded; ordinarily and in the great majority of cases, human rights and property rights are fundamentally and in the long run, identical." The genius (or "magic") of the principles embodied in the Constitution is that, by guaranteeing our right to own and make reasonable use of private property, it fosters the factors necessary to conserve natural resources. By insuring that privately owned property is not "taken for public use, without just compensation," the Constitution gives property owners the incentive to accumulate wealth and conserve the resources that help generate it. Thus, society as a whole benefits from the protection of natural resources, and individuals conserve their sources of wealth.

Yet the heavy-handed approach now being used by government ignores the constitutional responsibility to pay for what it takes. While government can freely exercise its power of eminent domain by paying the owner for the land it acquires, regulations often place so many restrictions on the owners that they can be considered the equivalent of taking the land without paying for it. Thus, individual property owners who have been victimized by confiscatory environmental regulations have been left with no alternative but to hash out their constitutional complaints through lawsuits.

Since 1922, courts have held that regulations can create situations where the government can be forced to pay the owners of taken property. In recent years, the United States Supreme Court has ruled for the plaintiff in several landmark decisions. In this past term's opinion in *Dolan v. City of Tigard*, Chief Justice William Rehnquist wrote: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment, should be relegated to the status of a poor relation in these comparable circumstances."

However, even with strenuous language by the highest court in the land, the fact remains that individual lawsuits provide only piecemeal relief to the litigants. Countless other individuals with legitimate cases cannot afford the costs or time involved in mounting the legal challenges necessary to sue the government. As Chief Judge Loren Smith of the United States Court of Federal Claims recently pointed out: "To the extent that the constitutional protections of the Fifth Amendment are a bulwark of liberty, [the courts] should also be understood to be a social mechanism of the last, not first resort. Judicial decisions are far less sensitive to societal problems than the law and policy made by the political branches of our great constitutional system." Thus, property rights advocates have increasingly turned to legislation as a means of preserving rights and reining in out-of-control regulations that strip Americans of their constitutional liberties.

Since 1991, 45 states have introduced over 130 bills relating to property rights protection. Twelve states have actually enacted such legislation. The legislation takes a variety of forms but can be grouped into two general categories. One, planning legislation requires government agencies to evaluate less expensive alternatives and, prepare a "takings impact analysis,"

which forces government agencies to "look before they leap." Two, compensation legislation defines a point at which compensation must be paid.

Property rights legislation thus works to reduce government costs over the long run in two important ways. First, by forcing agencies to consider the cost of their actions before implementing a new regulation, it gives the government the opportunity to avoid possible takings through careful planning. Second, compensation legislation spares government the expense of fighting lengthy and expensive litigation, by providing a trigger point at which compensation is required.

However, despite the obvious benefits of property rights legislation and the importance of the rights at stake, opposition to property rights legislation is strong. Much of the opposition comes from old order environmental groups. They claim that such laws would do everything from bankrupting the treasury to rolling back civil rights. They fail to see that property rights are civil rights, and that property rights and environmental protection are actually complimentary goals. Furthermore, as important as environmental protection is, the Constitution provides a mechanism within which regulation must occur in order to preserve essential liberties.

The Fifth Amendment provides that, when private property is taken for public use, the owner must be justly compensated, no matter how essential the objective. Excessive environmental regulations often leave property owners unable to use their land at all - except for the possible exception of nominal uses like bird watching or nature photography. The property owner, however, is still forced to shoulder the property tax liabilities and other responsibilities of title ownership. As Justice Oliver Wendell Holmes declared: "[W]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Contrary to critic's claims, property rights legislation does not emasculate the government's ability to keep individuals or businesses from polluting. The Constitution only protects a person's right to make reasonable use of his property. All landowners are subject to restraints on the use of their land. For example, nuisance laws prevent owners from using their land in a way that interferes with others. The government has always been able to prevent "harmful or noxious uses" of land, without being obligated to compensate the owner, as long as the limitations on the use of the property "inhere in the title itself." That is, the restrictions must be based on well established "background principles of the state's law of property and nuisance."

Neither do property rights bills hinder the government's ability to protect public health and safety. As ludicrous as it may appear on its face, an argument advanced against property rights legislation is that the owners of strip clubs and pornography shops could receive just compensation if they are shut down by the government. The Fifth Amendment, to the contrary, never forbids the government from acting to prevent imminent harm to public safety or health, or to diminish what would be considered a public nuisance. Further, property rights bills typically exempt the government from having to pay just compensation when they are acting to protect the public welfare in this manner.

Lastly, property rights legislation is often attacked for being too complicated. While it is valid to say that takings decisions have left many open-ended questions, the purpose of such bills is to provide some guidance to the courts, individual property owners and the government

regarding the regulation of private property. Indeed, this criticism seems particularly disingenuous given the complexity of environmental laws and regulations that the government must already implement or comply with. The law interpreting CERCLA ("Superfund") is so complex that some lawyers specialize in handling lawsuits brought exclusively under the Superfund act.

Likewise, preparing an environmental impact statement, as required of governmental agencies by the National Environmental Policy Act, can take months to complete, and require the services of a small army of engineers, scientists and lawyers. And wetlands regulations are so arbitrary and vague that one federal judge decried the government's legislative interpretation as being "worthy of Alice in Wonderland." He was dismayed that "the regulatory hydra which emerged from this Clean Water Act mandates that a landowner who places clean fill dirt on a plot of subdivided dry land may be imprisoned for the statutory offense of 'discharging pollutants into the navigable waters of the United States.'" The notion that private property itself is "anti-environmental" is itself a prejudice. To appreciate the importance of the institutions of private ownership in maintaining a healthy environment, one need only look at the unprecedented environmental catastrophe produced in Eastern Europe by the absence of such institutions. Even in the United States, private lands are far better managed ecologically than government lands. The "commons" are always at the mercy of politically powerful special interests with no stake in the land. Exclusive ownership and liability create the only lasting and effective incentives to conserve resources and minimize pollution.

In short, the property rights movement is not seeking less environmental protection. It asks only that a few unlucky landowners no longer be forced to bear an unfair share of the burden imposed by government regulations.

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