

INTRODUCTION: PROPERTY RIGHTS FACT AND FICTION

by Jonathan H. Adler

The rise of property rights activism was one of the untold stories of 1994. For without significant economic resources or political expertise, the property rights movement came of age in the last year, growing from a dispersed, loosely-organized collection of grass-roots groups and concerned individuals into an important political force.

Conventional wisdom in Washington, D.C. is that the environment was not an issue in the 1994 election. This may be true of the environment, *per se*, but property rights was a hot button issue in many parts of the country. Candidates in California, Idaho, Texas, Arizona, Washington, and elsewhere made property rights an issue and responded to the concerns of landowners who are subject to federal land-use regulation. Property rights was one of the central issues in the Texas gubernatorial campaign — George Bush Jr. rode the property rights issue to victory, despite efforts by the Clinton administration to aid his opponent through announcements of planned regulatory relief. Increased Property rights protections are also contained in the GOP “Contract with America,” the national platform upon which Republican House candidates campaigned and won. Voters did not cast ballots against the environment, but they did register a call for reining in environmental regulation.

The organizations that represent America’s environmental establishment have not taken this news all that well. The Sierra Club, for instance, claims that regulatory reform proposals, including increased protection for property rights, amount to a “war on the environment.” Glenn Sugameli, an attorney with the National Wildlife Federation, charges that under the guise of protecting property rights “extremists are trying to take away the ability of Americans to act through their government to protect neighboring property owners and the public welfare.” *Washington Post* columnist Jessica Mathews agrees with that sentiment, claiming that proposed property rights laws would mean “the end of government’s role as protector of the little guy and provider of amenities the market alone cannot provide.”

In fact, the property rights movement is not “anti-environment,” nor is it about eviscerating the government’s ability to protect the American people. The property rights movement is about compensating landowners when they are denied the reasonable use of their land, such as when the federal government prevents a landowner from building a home on a designated wetland, or bars a timber company from cutting trees on private land when an endangered owl lives nearby.

When the federal government denies reasonable land uses — i.e. those land uses that do not directly infringe upon the rights of others — it is referred to as a regulatory “taking.” Most “takings” cases arise not when public health is placed at risk due to the actions of a landowner, but when the rights of landowners are suppressed by the exercise of government power.

If the public wants to protect an endangered species or preserve a scenic vista, the public should be willing to pay for it, just as it pays for highways, parks, military installations, and other “public goods.” The costs should not be imposed on whoever is unfortunate enough to hold title to a coveted piece of land. When the government wants land for a military base, it seizes the necessary land, and the landowners are compensated. However, when the government wants someone’s land to create a wildlife preserve, the land

is not bought and paid for. Rather, government can simply prohibit use of that property without paying compensation. It is this sort of situation that property rights legislation is typically designed to address.

Laws that propose requiring the federal government to compensate landowners are routinely portrayed as anti-environmental laws. If compensation were required, "government would have to pay polluters not to pollute," according to Jessica Mathews, and "the rest of us [would] have to buy off landowners who are prevented from using their property in ways that endanger their neighbors," according to the Sierra Club. This is a gross distortion of the position espoused by most "takings" compensation proponents.

Respecting property rights requires protecting landowners from both excessive government regulation as well as infringements caused by private actors. A private corporation should have no more right to dump toxic sludge onto someone else's land without permission than should the government have the right to effectively seize private lands through regulatory fiat. This point has been made abundantly clear by University of Chicago law professor Richard Epstein, author of *Takings: Private Property and the Power of Eminent Domain*. Epstein writes:

Two justifications for uncompensated takings are in principle available to the government in all cases. It can show that regulation is reasonably calculated to prevent the infliction of some present or threatened harm to others; or it can show that the in-kind benefits the regulation provides the landowners offset the losses that it imposes.

There is simply a fundamental difference between preventing a property owner from despoiling the property of his neighbor and enacting land-use controls in order to provide "public goods." (Perhaps the D.C. environmental establishment's insistence to the contrary is due to the fact that most environmental regulations would fail to pass the criteria outlined by Epstein.)

Opponents of compensation also argue that regulating property should simply be a prerogative of legislative majorities. In other words, if the majority of voters wants your land, you are out of luck. Such arguments are typically cloaked in the rhetoric of empowering communities to make collective decisions. Yet communities are routinely prevented from infringing upon individual rights, such as those protected in the Bill of Rights. Opponents of property rights seem to forget about the "takings clause" of the Fifth Amendment to the Constitution: "nor shall private property be taken for public use, without just compensation." Requiring the government to pay compensation, as is Constitutionally required, forces public officials to consider the costs of "public goods" — officials must consider whether the benefits of such goods outweigh the costs of compensation. Those restrictions that are truly beneficial will be imposed, even with a compensation requirement.

Another anti-compensation argument is the idea that since government provides benefits to citizens, it is acceptable for the government to impose regulatory costs through land-use controls. "Recent complaints about the 'taking' of private property ignore 'givings' that have increased the property's value in the first place," argues Edward Thompson, Jr., director of public policy for the American Farmland Trust.

It is certainly true that the government provides benefits to citizens by building roads and bridges, providing police and fire protection, and so on. However, such benefits are paid for through taxes and user fees for government services. Arguing that the generic "giving" of roads and the like justifies stringent land-use controls is absurd, as these are "givings" for which taxpayers have already paid.

In those cases where there is a specific government "giving" to particular landowners, as in the case of subsidized crop insurance, land-use controls may be justified if they are designed to control potential side-effects of the government program, i.e. a requirement that beneficiaries of subsidized crop insurance adhere to responsible farming practices. However, in these instances as in most, it would be preferable for the government to neither "give" nor "take." If the government is concerned about the potential environmental impact of subsidized coastal development, then the government should simply end the subsidies.

It is difficult to oppose the idea that landowners should be compensated when they lose the right to use their land. Polls indicate that a clear majority of Americans supports compensation for regulatory takings. Perhaps this explains the insistence by environmental lobbyists that the property rights movement is the result of a massive corporate lobbying effort and that environmental laws are not denying property owners the use of their land.

William Callaway, Washington representative of the National Parks and Conservation Association, claims that "oil, gas, mining, and timber companies, along with ranching interests, are the major supporters" of property rights. Yet studies conducted by the Wilderness Society and the W. Alton Jones Foundation have come to the opposite conclusion. These studies found that the property rights movement is a truly grass-roots phenomenon and that it is popular with the American people.

Claims such as Callaway's are further belied by the fact that property rights groups are simply not well funded, whether by corporate interests or anyone else for that matter. When Greenpeace compiled a list of "anti-environmental organizations," including many groups supportive of property rights, the combined annual budgets of the fifty-plus groups listed was still less than Greenpeace's budget alone. When environmental groups have budgets in the tens of millions of dollars, property rights groups can only compete through the mobilization of genuine grass- roots support.

John Kostyack, counsel to the National Wildlife Federation, makes even more outrageous claims than most, arguing that horror stories of property owners losing the right to use their lands are simply myths. According to Kostyack, the Endangered Species Act (ESA) "has never prevented property owners from developing their land." Interior Secretary Bruce Babbitt, whose agency administers the ESA, takes quite a different view. In a speech before the Society of Environmental Journalists, Secretary Babbitt, himself the former head of the League of Conservation Voters, explained:

Why do you keep reading stories about hardships? The tough case is a small landowner on a strategic piece of property. When a species is listed, there is a freeze across all of its habitat for two to three years while we construct a habitat conservation plan which will later free up the land.

Sometimes the land is not freed up; conservation plans inevitably free up some land while restricting or prohibiting the use of other land. Indeed, at the time of Kostyack's statement, the federal government had already initiated legal proceedings to prevent the Anderson and Middleton timber company from harvesting timber on 72 acres of its own land. Why? Because a pair of spotted owls had been discovered nesting on government land over a mile away. Wetlands laws infringe on property rights too, such as when Howard and Grace Heck, 81 and 76, were barred from building homes on their 25-acre plot once the land was classified as a wetland. The wetland designation ruined the Hecks economically, and as a result a Florida bank foreclosed on their home. Clearly such cases belie the claims of property rights opponents.

The property rights issue is not going to go away. Landowners, enraged at their government for its regulatory excesses, are demanding increased protection of private lands. Such protections are long overdue.

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Most of the selections in the *Property Rights Reader* were previously published in *CEI UpDate*, the monthly newsletter of the Competitive Enterprise Institute. Additional articles were added to round out the discussion. These articles summarize the current conflicts over government regulation of property in the name of species conservation and wetland protection; analyze the political context of the property rights debate; discuss the treatment of property rights in the courts; and examine the role of private property in encouraging conservation and sound environmental stewardship. A closing essay addresses the extent to which property rights are supported by the American public and the CEI environmental staff has compiled a short list of additional readings for those who wish to pursue this issue.

Since its inception, CEI has focused on property rights as one of the most important policy issues. The protection of property rights is central to the promotion of free enterprise and limited government. Without the protection of property rights there can be no economic liberty — indeed no true liberty at all. Property rights are the foundation upon which the institutions of a free society are built. It is our hope that the selections in this reader will communicate that message.

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