Takings/Private Property Rights

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A framework for environmental priorities, *Midwestern Perspectives. Research Note #6*

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Research Note #6

Takings/Private Property Rights

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A FRAMEWORK FOR ENVIRONMENTAL PRIORITIES
Midwestern Perspectives

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A FRAMEWORK FOR ENVIRONMENTAL PRIORITIES: A Midwestern Perspective

Research Note #6: Takings/Private Property Rights
R. Rajagopal and David Osterberg

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THE IOWA EXPERIENCE

We come from places wide and far
To find out what the factors are
That make a law succeed or fail
The stones that lie along the trail
As we seek to break the long stagnation
With good environmental legislation
And start upon a broad alliance
Let’s carry on this weekend’s labors
And infect our legislative neighbors
Till they, without a single pause,
Unite with us in common cause,
So that efforts here to make a start
Won’t falter, fail, and fall apart
So that facts and feelings both come through
Yielding better laws for me and you
That yes, for ours and other nations,
Will last for seven generations,
And we’ll know we’ve played a special role
When we know, at last, our earth is whole.

Llewellyn Williams, Sage of the Sagebrush

Note: Dr. Llew Williams, one of our Steering Committee members from the U.S. EPA graciously contributed the above poem at the end of the first annual meeting in 1993; and also the poem on the back cover of this note at the end of the second annual meeting in 1994.

About the Authors

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R. Rajagopal, professor in the Departments of Geography and Environmental Engineering at The University of Iowa, has directed a number of integrated environmental assessments. He is the founding editor of The Environmental Professional, and in 1988 was recognized by the Environmental Protection Agency for his outstanding contributions to innovative problem solving and creative thinking.

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Glossary of Terms

Eminent Domain: The right of a government to appropriate private property for public use, usually with compensation to the owner.

Fifth Amendment of the United States Constitution: "No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Just Compensation: Established under the Fifth Amendment of the United States Constitution, if a person's property is harmed or taken by government action, the property owner must receive just compensation for the loss. "Just compensation is measured generally by the fair and reasonable market value of the property or interest taken, as of the date of taking."

Liability: An obligation to pay or make good for every hazard or harm a party was directly or indirectly responsible.

Limited Use of Property: A use of property is limited by an agency action if a particular legal test to use property no longer exists because of the action. Physical takings: The actions of a government by annexing property is annexed for public use, with just compensation. Property means land and includes the right to use or receive water, as defined in the House bill "H. R. 925: Private Property Protection Act of 1995."

Regulatory takings: The actions of a government whereby the particular uses of a property are regulated, i.e., zoning or environmental regulations.

Section 404 of the Clean Water Act (1987). U.S. C. 1344): The most hotly debated law in current takings cases, requires anyone wanting to dredge or place fill in waters of the United States, including wetlands, to obtain a permit from the United States Corps of Engineers.

Introduction

At the time of writing of the United States constitution, the framers recognized that private property ownership could not include the right of absolute use. The drafters of the Bill of Rights realized that if society was going to be able to build roads, dams, and other public works facilities, the rights of the greater numbers would have to be balanced against the rights of the few that would accrue if absolute use were granted to the greater good was found to be in the acquisition of the property, the government could take the property as long as it provided just compensation to the property owner.

An interesting question is whether this constitutionally espoused balance is also reflected in public opinion polls. A 1992 Gallup poll showed that 52–60% of the public believed that government should compensate property owners for reduction in land value resulting from regulations that protect wetlands and endangered species. From these poll results, Seasholes concludes that Americans want strong environmental protection and the protection of property rights.

On stewardship: "In 1979, the Iowa Supreme Court ruled it was not a taking for the state to require landowners to spend money to implement soil conservation because soil was a vital resource the state had the power to protect. The court upheld Iowa's innovative soil loss limits that make it the duty of every landowner to protect the soil. Consider how the state's agricultural future could be threatened if the court had ruled the state had no power to require soil conservation without compensation."4

History of takings

A taking implies a transfer of possession, dominion, or control of private property to the government. Modern takings law includes both physical taking, the annexing of property for public purposes with just compensation; and regulatory taking, the setting of limits on the uses of property, such as zoning or environmental regulations.

Early takings law was developed primarily to permit government to acquire access private property for public use; that is, the formulation of the law of eminent domain. The concept of takings has been expanded in the intervening years since the Bill of Rights to include not only the taking of land but also the taking of physical property and to provide a mechanism for civil remedies to citizens when property is taken in violation of constitutional protections.

A framework for environmental priorities

While there is no disagreement on the need to pay compensation for a physical taking, significant differences exist over when a regulatory action might require compensation to an owner whose property might be worth less after the regulation. Compensation did not exist. In recent years, the courts have struggled to find an equitable balance between property rights and the very real concerns of health and environmental quality of communities. Historically, only a small portion of takings lawsuits against the United States or its federal statutes result in property-owner victories. As shown in the table below, about 15 percent of the cases result in finding of a property owner victory.6

Session

Decisions on Finding taking of a taking

Year to

1990
1991
1992
1993

Finding on Taking of a taking

14
23
36
31

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The right to use private property has never always been in our court, the property rights always have been subject to the power of the courts to limits uses to protect the interests of other landowners, that is the basis of nuisance law. Property rights are also subject to the power of government to enact reasonable restrictions to protect public health, safety, and welfare, known as the police power.7

Anglo-Saxon civilization has taught the individual to protect their own rights; American civilization will teach him to respect the rights of others.

William Jennings Bryan

Two recent Court Decisions

1. Lucas vs. South Carolina Coastal Council (1992) 8Lucas bought two vacant lots in the Wild Dunes subdivision of a barrier island near Charleston, South Carolina. The lots suffered a history of impacts from hurricanes and floods, and were under water between 1957–63. In response to the Federal Coastal Management Act of 1980, South Carolina enacted its Coastal Management Act in 1988. To protect beachfront property, the South Carolina Legislature, utilizing Federal and State statutes, prohibited construction by establishing a "baseline" back from the sand dunes. Lucas's lots fell in this "prohibited for construction" area. He sued, claiming that this regulation is a compensable taking under the Fifth Amendment to the U.S. Constitution. The trial court awarded him $1.2 million. On appeal, the South Carolina Supreme Court ruled it was not a regulatory taking stating that construction would be hazardous to the owner and the environment. On Lucas's appeal, the U.S. Supreme Court (vote of 6-3) reversed the lower Court's decision and held that regulations that deny a property owner all economic value of the property—regardless of protecting the public interest—violate the owner's right to just compensation. The State Supreme Court then directed the trial court to make specific findings of damage and exacting a meaningful taking (covering the period of 1984 when the Beachfront Management Act was passed and the date of the trial court's order). The case was set out of court, due to mounting attorneys' fees and the uncertainty over the temporary takings law. The case bought the lots for $1.575 million.

2. Dolan vs. City of Tigard (1994) 9Dolan, in the city of Tigard (a suburb of Portland, Oregon) wanted to expand his hardware store and the adjacent parking lot. To get the city's permission, the store owners were required to dedicate 10% of their 1.67-acre property to put in a bicycle path and a storm-water drain to an adjacent creek. Part of the parking lot lies in the creek's flood plain. The store owners sued claiming that individuals should not be singled out to bear public burdens and that the terms of the permit could be unilaterally amended to an unintentional taking of private property without compensation. The city contested the land to meet its long-term plans for increasing pedestrian pathways and parks in the downtown area. The lawyer for the plaintiffs proposed: "first, the government should be required to demonstrate that a landowner's proposed use of his property would have a specific, adverse impact on the public welfare; and, second: the government should have to show that its regulatory action was appropriate, in this case, approximating 10 percent of the property was directly proportionate to the public need." The Oregon Supreme Court upheld the city's conditions for the permit as "reasonably related to" the city's need for traffic and flood control and open space. The case was then heard in the U.S. Supreme Court, where the city's permit conditions were struck down and the court said that the rough proportionality of 10 percent was not closely tied to the impact of the proposed development. The Clinton Administration argued in support of the city of Tigard above) refined and perhaps slightly expanded the rights of landowners to compensation, but the courts continue to pass environmental regulations.

Before the 1980s, what constituted a taking was decided by judicially created law. During the Reagan era and since, there has been a push toward codifying what constitutes a taking. A full blown property rights movement has been able to push legislation to change the definition of a taking in several state legislative bodies and Congress.

Legislative action in the states

Most property rights legislation are of an "ad hoc" nature or compensation. Assessment bills are front-end approaches, wherein a detailed takings impact evaluation of adverse actions is performed. Compensation bills are back-end approaches which attempt to set a
I don't view the discussion as being whether you are for private property or for more powerful government. We all enjoy the freedom and economic potential offered by private property, just as we all benefit by a strong government.

Neil Hamilton

Pros & cons of assessment bills

Proponents assert that the preparation of takings impact assessment (similar to the preparation of Environmental Impact Statement under the NEPA process) would minimize agency encroachments on private property use. They concede that there are constitutional remedies, but point out the limited scope and the practical difficulties in obtaining such remedies.

Opponents argue that impacts on private property are overstated and the assessment process is simply another layer of bureaucratic red tape to keep agencies from accomplishing important environmental protection and safety goals. The process would also provide a litigation roadmap for landowners, increase lawsuits, and further delay agency actions.

Pros & cons of compensation bills

Proponents argue that the existing constitutional remedy is too time-consuming, too expensive, too unpredictable, and requires a major (100 percent loss) impact for a successful claim. Having a stated or specific percent threshold trigger for compensation, they say, would bring clarity and certainty. A threshold much lower than the constitutional trigger would create necessary care and respect for the protection of private property. Proponents contend that by requiring compensation to come out of agency appropriations, the agencies will be forced to become more attentive to private property encroachments.

According to opponents, environmental laws protect collective property values, discourage harmful use of land, and minimize downwind, downslope, and downstream impacts, whereas, property rights legislation undermines these objectives. About 75% of the private land in the United States is owned by 5% of the landowning public and compensation bills will benefit this small but wealthy interests. Finally, opponents alert us to the notion of "giving." Over the years, the Federal government has heavily subsidized agriculture, water, and transportation infrastructure, which in turn has enhanced the land value of private property owners. Since the enhanced value of such properties are not shared with the Federal government, why should the government be expected to compensate for reduction in property values resulting from regulations?

In a recent article in State Legislatures Magazine, Morandi classified state takings bills into four groups [see map, next page]. Those bills that:
1. require the state attorney general to review proposed agency regulations and ensure no takings claims result;
2. require the agencies themselves, with the help of the attorney general's office, to review the proposed regulations to avoid compensable taking;
3. that define a regulatory taking by a specific percent of reduction in property value; and
4. require a combination of assessment and compensation (1 and 3 or 2 and 3).

The equal right of all men to the use of land is as clear as their equal right to breathe the air — it is a right proclaimed by the fact of their existence.

Henry George

President Reagan's Executive Order 12630 is an example of an assessment type of an effort (Morandi's second category). Although its implementation was blocked by Congress, E. O. 12630 required Federal agencies to consider the consequences of their various actions on the rights of property owners. At the state level, several takings bills of both types, assessment and compensation, have become law. Only during the 1995 legislative sessions did states venture into the compensation type of taking statutes. Three states passed laws in 1995 that required the state to pay a property owner for the lost value resulting from a regulation, when that reduction exceeded a given percentage of the property value. Congress is also considering such an action.

Recent legislation in the Midwest

Based on current information (November 1995), Morandi classified North Dakota's Senate Bill 2388 as an agency-driven assessment bill. It requires state agencies to prepare an assessment of the taking implications of a proposed rule. It exempts regulatory actions that substantially advance legitimate state interests, as well as those that comply with applicable state or federal laws.

The second Midwest takings law to pass in 1995 was in Kansas, again an agency-driven assessment bill. In the 1994 session, Senate Bill 293 passed both chambers of the legislature, but was vetoed by the governor. The bill required the Attorney General to adopt guidelines for agency actions with potential taking implications. For actions with potential takings implications, the agencies would be required to prepare takings impact assessment documents. These documents should include a description of safety and public health impacts resulting from unrestricted use of private property.

The 1995 law, House Bill 2015, was less far-reaching. It required the attorney general to adopt guidelines...
to assist state agencies in evaluating regulations which might constitute a taking. For some regulations a state agency, this bill would require the agency to submit a written report justifying the regulatory action and assessing its taking implications. The report will be submitted to the governor and the attorney general.

Several other states have considered and rejected a takings law. In some cases, as with Iowa in 1995, a bill has passed one house of the legislature only to be stalled in the other. The Iowa bill is a compensation requirement bill.

South Dakota tabled House Bill 1263 in committee in 1994. In the last two sessions a Nebraska takings bill has failed to pass the Nebraska unicameral.

Congressional action

Besides producing the first compensations requiring "takings" law, the year 1995 led to significant changes in the actions of Congress. The major features of a bill that passed the House (H.R. 925) and the other being marked up in a Senate committee (S. 605) are described below.

The House: In 1995, there were over 100 House bills that contained the phrases "takings" or "property rights" in their text, and five had such phrases in the title. One of those five, H. R. 925 Private Property Protection Act of 1995, introduced by Rep. Canady (R-FL) was marked-up in the Judiciary Committee, debated and discussed in the House, and in less than four weeks after introduction, with very little debate, passed the House on March 7, 1995 with a 277-148 majority. It was then sent to the Senate, where it was referred to the Committee on Environment and Public Works.

The purpose of H.R. 925 is to compensate owners of private property for the effect of certain regulatory restrictions. In particular, H.R. 925 covers the reduction in property value resulting from the implementation of the following four regulatory provisions: (a) section 404 (wetlands protection) of the Federal Water Pollution Control Act, (b) the Endangered Species Act of 1972, (c) Title XII of the Food Security Act of 1985, or (d) with respect to an owner's right to use or receive water under a section of one of several other acts such as The Reclamation Act, The Federal Land Policy Management Act, or The Forest and Rangeland Renewable Resources Planning Act.

Under H.R. 925, the Federal Government shall compensate when the use of any portion of a property has been reduced in fair market value by 20 percent or more. The amount of compensation shall equal the reduction in value. If the reduction in value of the portion is greater than 50 percent, at the option of the owner, the Federal Government shall buy that portion for its fair market value. It also establishes a procedural mechanism for claiming and receiving compensation from the relevant Federal agency.

The government of the United States is a device for maintaining the rights of the people, with the ultimate extinction of all privileged classes.

Calvin Coolidge

Some of the salient amendments that were rejected or agreed to before final passage are as follows:

- the legislation applies to all laws that impact property, not just the environmental laws; agreed to by 277 to 148; a bill to Voice Vote in the Committee, but later rejected and hence not included in the final bill.
- the amount of compensation due a property owner should be offset by the value it had increased due to government action; rejected by 10-12 in the Senate.
- the amount of compensation due a farmer owner should be offset by considering the risk in land value that farmers experience when they receive crop subsidies; rejected by Voice Vote in Committee.
- compensation should be denied to anyone who knew when they bought the land that existing regulations restricted its use; rejected by Voice Vote in Committee.
- the Senate: The U.S. Senate is moving more slowly on private property rights legislation. In 1995, there were over 70 Senate bills that contained the phrases "takings" or "property rights" in their text, and six were introduced in the title. Two of those six, S. 22 Private Property Rights Act and S. 605 Omnibus Property Rights Act, were introduced by property value before a "takings" action would be declared. On the other hand, several laws are required to go far more agency actions than those included in the House bill. It will also protect private property through several other other circumstances such as property owner consent for entry (section 504), sharing of data collected at no cost, right to review and dispute data collected from private property (section 505), right to an administrative appeal of wetlands decisions (section 506) by amending section 404 of the Federal Water Pollution Control Act, right to administrative appeal by amending section 11 of the Endangered Species Act (section 507), and promoting private property owner participation in cooperative agreements by amending section 6 of the Endangered Species Act (section 509).

It appeared for a time that takings legislation had stalled in the Senate. However, recently, Senator Hatch (R-UT), one of the sponsors of S. 605, announced that it would be marked up on November 2nd and be referred to the Judiciary Committee before Thanksgiving. President Clinton has announced that he will veto either the House bill or the present version of the Senate takings measure.

Commenting that "takings" legislation is a two-edged sword, Senator Patrick Leahy (D-VT) provided the following hypothetical lawsuits:

Old Oil Company A vs. U.S. EPA: The company A uses the U.S. EPA for enacting a pro-environment rule. The company claims this to be a taking of property (by reducing its value) and demands compensation. The argument is that the pro-environment policy of the government has reduced the value of the company's petroleum derived from natural gas.

Grain Trading Company B vs. the U.S. Department of Agriculture: The company B uses the USDA for extending the Conservation Reserve Program. The company claims this to be a taking of property (by reducing the volume of business and demands compensation. The argument is that the CRP program of the government has reduced the amount of grain that the company can export.

Pasta Manufacturers Association C vs. the U.S. Trade Representative: The Association C uses the U.S. Trade Representative for implementing restraints on Canadian durum wheat to the United States. The Association claims this to be a taking of property (by increasing wheat costs) and demands compensation. The argument is that the trade restrictions on Canadian wheat has increased the cost of wheat used by the association members.

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Pros and cons of takings legislation

People who favor takings legislation tend to belong to groups that have major financial interest in real property and natural resources. Such groups include land and real estate developers, farmers, ranchers, and the resource extracting industries such as timber, mining, oil and natural gas.

However, many others who own little property but are affected by government interference in their lives also support takings legislation. A wide array of groups are in opposition to proposed takings laws. While environmental groups such as the Sierra Club are key players, there are many others. Groups representing consumers, tenants, labor, the handicapped, hunters and fishermen, architects and planners, civil rights, preservationists, senior citizens, and environmentalists all oppose or support takings legislation.

The disadvantages to takings legislation are that: that the current environmental laws, and creating new ones, these groups believe that Congress and state governments want to bury these laws with red tape.

The primary advantage of takings legislation, according to the proponents, is the establishment of a formal process for碓 operators of proposed regulations. They claim that it is similar to the environmental impact assessment process under the National Environmental Policy Act. They believe that such a process would protect the constitutional rights of property owners from regulatory encroachments.

The Constitution already provides sufficient protection to property owners and the added bureaucratic mechanism or red tape is not warranted.

The disadvantages to takings legislation are that the cost of pollution avoidance is borne by the taxpayers; that the policy undermines existing health, safety, labor, civil rights, consumer, and environmental laws in place; and that it narrows the scope of land use op-
Implementing environmental regulations
American Resources
American Planning Association. Priorities. Time
property by regulators, and opponents
counter that such instances are rare.
Sources for
permits to landowners to fill in
motions passed
landowners and developers are
Takings issue and setting
ments, has cost the United
injury.
Congress is painfully aware how
environmental legislation has created
costly takings lawsuits. Section 404 of the
Clean Water Act, which grants
environmentalists' awards. An
laws, can cost the United States
more

Takings issue and setting
environmental priorities
Over a third of the states have
priorities of their
landowners to fill in wet
Takings in the
R. 925 and the
bill that
Congressional Green Sheets.

solutions to simply one economic
interpretation. Proponents argue that
"takings" legislation will limit govern-
ment controls on individuals' right to use their property as
they see fit, as long as they are not inflicting
harm upon their neighbors. In addition to being bureaucratic in
assessment and review procedures, takings legislation can be quite costly.
Congress is painfully aware how environmental legislation has cost
landowners to fill in wetlands, has cost the United States $11.6 million in
sizeable takings awards. An additional $301 million in claims are pending according to
the General Accounting Office.

Takings issue and setting
environmental priorities
Over a third of the states have passed some form of an eminent
domain bill and at the federal level, the House has passed H. R. 925 and the Senate bill S. 605 in 1993, being marked up in the Senate committee. Proponents argue that small landowners and developers are being subjected to undue delay and restric-
tions in the use of their property by regulators, and opponents counter that such instances are rare. Given this background, takings bills will definitely impact the cost of implementing environmental regulations and thus setting of environmental priorities. Time alone can tell the size and scope of this impact.

Sources for further information
American Planning Association, 1776 Massachusetts Avenue, N.W.,
Washington, DC 20036. Tel.: (202) 872-0611.
American Resources Information Network, P.O. Box 33048, Wash-
ington, DC 20033. Tel.: 1-800-846-2746.
Competitive Enterprise Institute, 1001 Connecticut Avenue NW,
Suite 1250, Washington, DC 20036. Tel.: (202) 331-1010.

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