Takings & Givings:
Toward Common Ground on the Property Rights Issue

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The emergence of a property rights movement in the United States is causing a fundamental re-examination of the relationship between the use of property and protection of the environment, between land as a commodity and as a natural resource. Not since the birth of environmental activism a generation ago has there been at much at stake in the public debate over this issue. The outcome will have important implications, not only for the health of our ecosystem, but also for the way we share the cost of its protection.

Advocates for expanded private property rights have become increasingly organized and vocal in seeking to curtail governmental regulation of land use, much of it aimed at protecting the environment. Their concern is for the competitiveness of business, individual freedom of choice and the equitable treatment of landowners, all of which they say, not without some justification, are being eroded by the accretion of environmental regulations. But property advocates are inclined to dismiss evidence of environmental degradation and the finiteness of resources. They also tend to ignore the benefits they derive from regulation and the public subsidies that expand their opportunities to make money from the land.

On the other hand, environmentalists and many government officials are concerned about the expansion of property rights because it is likely to make regulation more expensive, in some cases prohibitively so. They argue, with good cause, that regulation is needed to compensate for the tendency of the market system to disregard considerations of protecting the environment. They also point out that our tradition of private property has never conferred on landowners the right to injure neighbors or society as a whole.

But for their part, environmentalists often overlook the fact that most property owners do a reasonably good job of protecting natural resources, thus providing a benefit to society for which they do not get enough credit. Even more troublesome is the failure of resource protection advocates to acknowledge that some landowners simply cannot afford to comply with regulations because they do, indeed, tend to concentrate the cost of achieving environmental quality.

Though property advocates and environmentalists have engaged each other in spirited, often bitter debate, there has been little constructive dialogue between the two camps. Neither seems to want to acknowledge that the arguments of the other have any merit. Clearly, a dialogue on property and resources is needed. One that is better informed by fact and less motivated by ideology. One that goes beyond the narrow issue of the constitutionality of regulation to come up with practical solutions that reflect what is right for both landowners and society. This paper is intended to contribute to such a dialogue.

Traditional "Takings" Doctrine

The Fifth Amendment to the U.S. Constitution says that the government may not take private property without paying the owner just compensation. For generations this was understood to apply only to the actual, physical appropriation of property. But since the 1922 case of *Pennsylvania Coal v. Mahon*, the Supreme Court has recognized that government may just as effectively "take" property by so regulating its use that all or nearly all its value is destroyed. Except when regulation goes this far, the courts have acknowledged that land use regulation is a legitimate exercise of government police powers aimed at protecting the health, safety and welfare of the public; and that landowners, as much as anyone, share the benefits.

Thus, the courts have broadly deferred to the discretion of the political branches of government when it comes to weighing public and private interests in land use. This deference has been reflected not only in the substantive law of takings, but also in the traditional remedy courts have ordered when a taking has occurred. Instead of ordering legislative bodies to compensate landowners, they have simply refused to allow the over-reaching regulation to be enforced against the property in question, thus permitting the landowner to go forward with his or her plans. Thus, no compensation is required and the separation of judicial and legislative powers is maintained. The power to spend taxpayers money is reserved to elected legislatures, insulating the public treasury from unforeseeable court-ordered takings awards.

Judicial Activism and The Cost of Being Second-Guessed

Much of this traditional "takings" doctrine has been called into question by recent decisions of an increasingly conservative Supreme Court. Though the basic rule -- that virtually all use of the land must be denied before the Constitution is violated -- has not been changed, the traditional deference of courts to elected officials is eroding and the consequences of judicial disagreement with legislative choices have become more momentous.

Two 1987 Supreme Court cases marked the beginning of this trend. In *Nollan v. California Coastal Commission*, the Court ruled that state administrative officials must be able to demonstrate a close "nexus" between the intended purpose of a regulation or restriction on private property and the means adopted by the regulation to achieve it. Splitting hairs, the Court in that case disagreed with state officials that an easement *along* the beach of a residential shorefront lot would help promote public access *to* the beach. This effect of this case was to impose a higher burden of proof on legislators to justify regulations, signaling an increased willingness of the courts to second-guess elected officials on matters of the public interest in land use. The recently-decided case of *Lucas v. South Carolina Coastal Council* continued this trend.

The Lucas Case: Waiting for the Other Shoe to Drop?

This celebrated property rights case, decided by the Supreme Court in June, left intact the basic constitutional rule that all economic use of land must be denied before a regulation is a taking. But if a regulation has this effect, it is constitutional only if it passes a new test:

whether the regulation merely codifies "existing rules and understandings" of property law such those embodied in common law nuisance.

Conceptually, this new test is quite a departure from precedent and signals a trend toward even greater judicial oversight of elected officials in land use matters. Not many contemporary environmental regulations could be justified as preventing common law nuisances; if they could, there would be no need for such regulations in the first place because the offensive land uses could be halted on nuisance ground. The practical impact of this new, Catch 22-like rule will be small, however, unless the Supreme Court redefines "property" for purposes of determining whether all use is prohibited.

To appreciate the potential impact of such a redefinition, consider the example of a regulation that denies all use of a 10-acre wetland that is part of a 100-acre farm. Should the courts look at the entire farm -- as they now do -- and conclude that, since the remaining 90 acres may still be cultivated, there is no taking of the property as a whole? Or should they look only at the 10 acres and conclude that all use of the wetland as a distinct piece of property has been taken?

Justice Scalia's majority opinion in Lucas invites the Court to take up this question in an appropriate future case. It could be a roll for all the marbles: The practical consequences of such a redefinition of property for constitutional purposes could be to render almost any government activity a taking of some interest in property. Could government itself become unconstitutional ....?

The other 1987 case, *First English Evangelical Lutheran Church v. County of Los Angeles*, compounded the difficulty for legislators by ruling for the first time that a land owner may actually collect monetary damages from the public treasury if his or her property is taken by a regulation. Refusing to enforce the offensive law in the future, the Court said, was not enough to *retrospectively* satisfy the Constitution's requirement of just compensation. So, while the Court adhered to the principle that judges shouldn't force legislators to condemn land, it did rule that damages can be collected for the period between the date on which a regulation effectively denies all use of the land -- generally, when all administrative appeals have been exhausted -- and the date on which a court decrees that the regulation cannot be enforced against the property in question. The prospect of damages for these "temporary" takings considerably increases the stakes of judicial second-guessing of elected officials: it can now cost the public money. Generally, the amount will not be as great as landowners seeking to avoid regulation can be expected to claim. (Compare, for example, a couple years' rent on a piece of land with the cost of buying it outright.) However, at least one court that figures prominently in takings jurisprudence, the U.S. Court of Claims, has gone beyond any Supreme Court precedent to hand down multi-million dollar judgements, amounting to the full value of properties whose use was severely regulated to protect the environment, against the federal government. Though these cases -- *Florida Rock Industries, Inc. v. U.S.* and *Loveladies Harbor, Inc. v. U.S.* involve wetlands; *Whitney Benefits, Inc. v. U.S.*, stripmining -- have yet to pass muster with even the federal circuit court of appeals, nevermind the Supreme Court, they have caused concern among officials at all levels of government that environmental and land use regulation could bankrupt the nation.

Avoiding the Cost of Takings

One response to the threat posed by these cases has been the promulgation of a presidential executive order (E.O. 12630) that requires a review of all federal regulations that could affect private property, and their modification to avoid potential taking judgements. Though this sounds straightforward enough, the executive order adopts its own interpretation of the Constitution as a standard for reviewing regulations; one that is far more solicitous of property rights and less protective of natural resources than any federal appellate court has yet adopted. And under the auspices of this order, a number of proposed federal environmental regulations have been held up, watered down or killed.

> *Executive Order 12630 was actually issued during the Reagan years, anticipating the more recent Court of Claims decisions -- which Administration officials themselves argued for in legal briefs. A similarly expansive interpretation of property rights was used even earlier in that Administration to water down the Farmland Protection Policy Act. This law, passed by Congress in 1981, was intended to modify federal construction projects to avoid removing prime farmland from production. But the implementing rules issued by USDA -- not yet final, 11 years after the fact -- took the position that no actual modifications could be made under the law because that could negatively affect the value of private property the projects would benefit.*

A bill sponsored by Sen. Steve Symms of Idaho (S. 50), once passed by the Senate but awaiting further legislative action, would codify this executive order, making it impossible for future administrations to repeal it. The bill would also make takings decisions of the executive branch -- at least those striking down regulations -- unreviewable by the courts. (One asks why, if not for purely ideological reasons?) This would have profound implications for the balance of powers within the federal government. If it should be enacted, laws passed by Congress to protect resources and the environment could be nullified, not just on a case by case basis as applied to individual properties by the courts, but in their entirety, before their effect can be tested, by politically-appointed executive officials.

Having abdicated its police powers, Congress would retain only its power to spend taxpayers' money as a tool for protecting the environment from even the most egregiously harmful land uses. Though this seems imprudent on its face, further reflection reveals it to be a prescription for bankrupting the nation both fiscally and environmentally.

Who Pays for Protecting Natural Resources?

The takings debate is largely about how the cost of protecting natural resources and the environment should be shared between landowners as a class and the public at large. The more land is regulated to protect resources, the more landowners bear the expense in reduced property values that reflect its economic use. The more frequently regulation requires compensation of landowners for takings, the more the public must pay -- or the more environmental harm it must tolerate.

The trend today, reflected in the recent court rulings and the Symms bill, is a shifting of costs from landowners to the public. If it goes too far, the ability of government to use regulation to protect resources could be made prohibitively expensive. (The more so because of today's rampant government budget deficits.) Indeed, this seems to be the ultimate objective of some property rights advocates who believe that an unfettered, freely competitive market will best allocate and, so it is claimed, protect resources.

Competitiveness

The problem with this argument is that it proves too much. Regulation is intended to "internalize" the cost of avoiding environmental damage so that the market takes it into account and uses of land that deplete or abuse resources become more expensive to continue than benign uses. Without regulation, uses that abuse or waste resources are, indeed, made more competitive but only because their full cost is not borne by the consumers of products thus produced. This cost is passed along to the general public. And, unlike consumers who are compelled by the market response to regulation to pay-as-you-go for avoiding environmental harm, the public at large (through its representatives) can and, in the absence of market accountability, usually does pass the cost along to future generations in the form of resource degradation and depletion. Hence, by shifting costs from landowners to the public, we are not merely, in the popular phrase, borrowing the land from our children but, as the bumper sticker says, spending their inheritance.

"Givings"

This cost-shifting effect is aggravated by government spending on public works and subsidies such as below-market leases and fees, depletion allowances, tax preferences and direct grants to property owners. These "givings" -- the other side of the takings coin -- are seldom conditioned on how land is used and, therefore, encourage the kind of land uses that cause environmentalists to demand regulation to protect the public interest. Though they almost certainly amount to billions, if not trillions of dollars, nobody seems to have taken the measure of these subsidies to private property. (One clue: The National Agricultural Land Study done by USDA in 1981 identified some 90 federal spending programs that contribute to farmland conversion. It was expenditures like these that the Farmland Protection Policy Act was supposed to redirect.)

Against the weight of this unguided spending juggernaut, mere regulation, no matter how burdensome it may get, doesn't have a chance of effectively safeguarding the nation's resource base. And, of course, the more that is spent to subsidize unwise land uses, the less money will be available to compensate landowners who deserve it, either because of over-reaching regulation or because, as a practical matter, financial incentives are the only way that will enable them to change the way they use land without putting them out of business.

The "givings" received by landowners courtesy of the taxpayers are capitalized into property values, creating expectations that influence investment decisions. When these investment-backed expectations are frustrated by regulations, it isn't just a philosophical principle that is at stake, but cold cash. As we have seen, the courts are beginning to entertain the idea of awarding money damages to landowners who suffer a loss of "equity" when their ability to use

the land is curtailed. Under these circumstances, "givings" will inevitably lead to more takings Thus, if we wish to eliminate takings and avoid their potential fiscal impact, we must firs eliminate indiscriminate "givings."

Freedom & Fairness

A recognition of "givings" also offers a new perspective on questions about individual freedom and fairness posed by regulations on property. Subsidies received by landowners create economic opportunities where none existed before. (That *is* what they are for.) But the absence of resource protection conditions on these "givings" reinforces the expectation among landowners that they can take advantage of these opportunities to do anything they want with their property. When regulations are then imposed as disconnected, after-the-fact conditions, landowners see it as a denial of their freedom.

In this way, "givings" cause landowners to mistake public largesse for constitutional principle as the source of their liberty to use land. In its most extreme manifestation, the attitude thus engendered becomes one of entitlement to public funding of private ventures. (This is essentially the position taken by Reagan Administration officials in weakening the Farmland Protection Policy Act regulations.)

"Givings" also stand on its head the whole question of "just compensation" for regulatory restrictions. To the extent that the value of land has been inflated by public subsidies, is it just to insist that landowners be compensated when the public decides to take back some of this value? Is it fair to sock the taxpayers *twice* to achieve socially-desirable land uses -- once in "giving" value to property, again for "taking" that value back? To answer affirmatively is to come perilously close to an assertion that property owners have a constitutional right to stick their hands into the taxpayers' pocket.

Toward Common Ground

The fact of the matter is that government can only give what it takes from others. "Givings" are a taking by property owners from the American taxpayer. When this is acknowledged, the legitimate complaint of landowners who are aggrieved by environmental regulations is *not* that they are being asked to pay too much, to shoulder a disproportionate share of the burden of protecting natural resources. If anything, they have been paying too little in comparison with their role in creating the burden. Rather, it is that they have been living on credit, but are just now -- starting in the early 1970's anyway -- being told how much they have borrowed and that the bill has come due.

Through unconditional "givings" and uncoordinated regulatory takings, society has given landowners very mixed signals. And they -- at least those who have not tried deliberately to exploit the inconsistency -- have a right to be frustrated and angry. For some, farmers and ranchers in particular, the push and pull threatens genuine hardship; the investment of their life savings, not to mention enormous sweat equity, is jeopardized by the changing rules. And their bitterness is compounded by their own strong sense of land ethics; the feeling that they are doing a pretty good job of stewardship.

Regulations alone are not likely to secure the compliance of such landowners with even the most solidly-justified environmental standards. They must be accompanied by a good faith attempt by society to ameliorate the impact of changing rules; to provide landowners with positive financial incentives that are clearly and unconditionally linked to the uses of resources we expect of them.

The bottom line is that *we need to rethink the way we treat landowners as much as to rethink how we treat the land*. Encouraging property owners to do a certain thing, then turning around and telling them they can't do it, breeds animosity and divisiveness, and wastes a great deal of time and money. Like driving with the brakes on, it will get you there, if at all, only at great cost. Yet that is what our current system of land use subsidies and regulations amounts to. What we need to do is look for every opportunity to eliminate both unconditional "givings" and regulatory "takings." To uncouple government spending from land abuse and recouple it to the conservation of resources and the environment.

If this prescription sounds familiar, it is because it is precisely what has been happening to federal farm program spending beginning with the 1985 farm bill. Conservation compliance assures, or is supposed to assure, that taxpayer funds are not given to producers who abuse soil and water resources; the Conservation Reserve and Wetlands Reserve offer compensation to landowners in amelioration of restrictions that tend to take value away from their property. In this way, we all share in the cost of protecting our common environment. What is more, we share the satisfaction and, indeed, the relief, of discovering that two fundamental American traditions -- private property and our unique, irreplaceable resource base -- are not in irreconcilable conflict after all.