PROPERTY RIGHTS AND ENVIRONMENTAL REGULATION: THE CASE FOR COMPENSATION

JAMES W. ELY, JR.*

The right to acquire, use, and alienate property has long been regarded as a fundamental value in Anglo-American constitutional thought.[1] Historically, respect for private property was seen as providing the basis for individual autonomy and the enjoyment of liberty.[2] Reflecting this link between liberty and property, both the federal and state constitutions contain guarantees of private ownership.[3] Still, as with other individual rights, the rights of property owners have never been absolute. The common law of nuisance imposes restrictions on landowner activity that adversely impacts a neighbor's enjoyment of his or her land.[4] Moreover, zoning has limited land use for decades, ostensibly to safeguard public health and safety.[5]

In the late twentieth century, the emergence of the modern environmental movement, accompanied by often apocalyptic rhetoric,

---

* Milton R. Underwood Professor of Law and Professor of History, Vanderbilt University. The author thanks Jon W. Bruce and Michael P. Vandenbergh for comments on prior drafts of this piece. He is also grateful to Emily Urban of the Vanderbilt University Law Library for locating research documents.

1. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 3–58 (2d ed. 1998).

2. JAMES V. DELONG, PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT—AND WHY YOU SHOULD CARE 24–51 (1997) (analyzing arguments in favor of private property).

3. Among the most important protectors of private property are the contract clause, prohibiting the states from "impairing the Obligation of Contracts," U.S. CONST. art. I, § 10, cl. 1, and the property clauses of the Fifth Amendment, U.S. CONST. amend V. Adopted as part of the Bill of Rights, the Fifth Amendment provides that 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." *Id.* Most state constitutions contain similar language.

4. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 413–19 (3d ed. 2000).

5. In fact, early zoning ordinances were prompted by the desire of landowners in wealthy neighborhoods to safeguard upscale communities and stabilize property values by excluding uses and persons deemed undesirable. Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege? The Pre-*Euclid *Debate over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 368 (1994). *See generally* ELY, *supra* note 1, at 113–14 (discussing the emergence of zoning laws).

resulted in the enactment of a series of laws stringently controlling land use. Such legislation has made substantial inroads upon the traditional rights of owners. Property rights advocates have increasingly challenged the environmental agenda in both the judicial and legislative arena. Today, environmentalists and landowners appear trapped in a destructive cycle of mutual antagonism. Environmentalists harbor deep suspicions of market forces, and they commonly posit that recognition of the traditional dominion rights of property owners is antithetical to environmental protection. They frequently assert that unfettered private rights in land lead to widespread degradation and that individual property rights are an obstacle to regulations that effectuate the public interest.

In contrast to these environmentalists, I contend that scrupulous regard for the constitutional rights of owners is fully congruent with, and may even enhance, the achievement of sound environmental goals. The discharge of pollutants, an activity analogous to a nuisance and appropriately subject to the police power, will not be included in this discussion. Property ownership does not encompass a right to pollute. Instead, I will focus on laws designed to protect wetlands, woodlands, and species habitats in a natural state. Such measures, in effect, compel owners to convert their land into nature preserves and necessarily curtail economically productive uses. The subordination of use and development rights to often-hazy environmental objectives has triggered fear that growing governmental controls threaten the institution of private property. Affected landowners have turned, with only limited success, to courts and legislatures for relief from what the landowners see as regulatory takings of their property in contravention of the Fifth Amendment.[6]

Environmentalists have taken special aim at the just compensation requirement of the Fifth Amendment. Environmentalists have sought to place a highly constricted interpretation on the protection afforded owners under the Fifth Amendment; this interpretation sharply contrasts with the expansive reading afforded other individual rights in our constitutional system.[7] Much of the environmental literature

---

6. *See* ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 270 (2003) (observing that "[c]urrent takings law ... is not a serious roadblock to new conservation laws"); Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 STAN. ENVTL. L.J. 3, 27 (2004) (finding "little evidence" that regulatory takings doctrine "has significantly limited the regulatory authority of state and local governments").

7. *E.g.*, J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89 (1995).

postulates transparent theories designed to circumvent the just compensation requirement, often by radically redefining the meaning of property ownership.[8] Rather than responding to efforts to reconceptualize private property, my objective here is to question the basic assumptions of the environmentalists. Why should property owners, who suffer a substantial loss by virtue of environmental regulations that restrict land use, fail to receive compensation? Why should a few individuals, rather than society as a whole, bear the cost of achieving public goods?

Payment of such compensation would be consistent with the fundamental premise of equity that underlies takings jurisprudence. As the Supreme Court has explained, "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[9] The Fifth Amendment does not prevent any regulatory regime. It simply mandates that the expense of governmental actions should be spread among the community. In other words, the Fifth Amendment prevents government from loading disproportionate burdens on the politically weak, such as scattered landowners.

Notwithstanding this constitutional norm, environmentalists read the Takings Clause in a constricted way because they are apprehensive that robust enforcement of the Takings Clause will undermine environmental protection.[10] This concern warrants some exploration. Perhaps the real concern is that a compensation requirement will force government to more carefully assess the costs and benefits of regulation. It is easy to be an environmental enthusiast when someone else has to pay the bill. When the costs of

---

8. *See* Eric T. Freyfogle, *Community and the Market in Modern American Property Law*, *in* LAND, PROPERTY, AND THE ENVIRONMENT 382, 382–412 (John F. Richards ed., 2002) (urging an increased communal role in managing privately-owned land); *see also* J. Peter Byrne, *Green Property*, .7 CONST. COMMENT. 239 (1990) (asserting that property law should be revised to accommodate ecological values).

9. Armstrong v. United States, 364 U.S. 40, 49 (1960). Decades earlier, the Court had voiced a similar assessment of the Takings Clause. In the landmark case of *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), it described the purpose of the just compensation requirement:

> [It] prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

Id. at 325.

10. *See* Byrne, *supra* note 7, at 91 (describing the regulatory takings doctrine as "frustrating democratic attempts to protect the environment").

environmental protection are presented to taxpayers, however, their support for the regulations may wane. For instance, studies have shown that individuals are notoriously reluctant to accept that their personal behavior may be a source of environmental harm.[11] The general public loves automobile travel, for example, and many people oppose vehicle inspection requirements, ride sharing, and reduced speed limits.[12] Similarly, though household products are a major source of air pollution, even a modest proposal to mandate low-polluting charcoal lighter fluid in Los Angeles aroused heated controversy.[13]

Taxpayers who are unwilling to alter their personal habits may well be similarly reluctant to shoulder the financial burden of environmental controls. Also consider the final chapter in the *Lucas*[14] litigation. After the courts determined that South Carolina's beachfront controls effectuated a taking of the lots at issue, the state purchased the land from Lucas. Instead of preserving the beachfront in its natural condition—the requirement imposed on Lucas—the state sold the lots for residential development.[15] Apparently environmental goals prevailed only so long as an individual private owner had to bear the cost. In the last analysis, the shrill opposition to the payment of compensation may well betray a fear that environmentalism enjoys a lower level of public support than its champions wish to believe. The Fifth Amendment, in effect, mandates that the public must put its money where its mouth is.

Cost, in my view, is not a legitimate reason for ignoring a constitutional obligation. As Justice Oliver Wendell Holmes reminded us many years ago, "We 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."[16] This proposition, however imperfectly

---

11. Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 518, 585–97 (2004) (pointing out that "individuals are now the largest remaining source of many pollutants," and observing that a focus on industrial pollution allows individuals to avoid considering their own environmentally harmful behavior).

12. Efforts to control automobile emissions by limiting the allowed speed or the frequency of vehicular use have also aroused intense public opposition. *Id.* at 554–57.

13. Gary Polakovic, *Chemicals in Home a Big Smog Source*, L.A. TIMES, Mar. 9, 2003, at B1.

14. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

15. Gideon Kanner, *Not with a Bang, but a Giggle: The Settlement of the* Lucas *Case*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 308 (David L. Callies ed., 1996).

16. Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

realized by a checkered course of Supreme Court decisions, articulates the constitutional norm that should govern the application of takings jurisprudence to environmental regulations. Taxpayers either are or are not willing to bear the burden of environmental regulations. If they are, then they should bear the burden both because it is efficient and because, in my view, it is required by the Fifth Amendment. If taxpayers are unwilling to bear the burden, then the regulations should not exist, as they will exist only in violation of the Fifth Amendment. Landowners should receive compensation for the loss of longstanding development rights.

In addition, it seems unlikely that enforcement of the compensation requirement would cause a rollback of environmental controls. After all, environmentalists insist that situations in which regulation of landowners is so severe as to even pose a takings question are unusual. If that is so, claims of potentially massive costs are wildly exaggerated. In addition, environmentalists may have underestimated the public's willingness to bear the expense of an environmental program. In 2003, for instance, voters in 23 states approved referenda aimed at securing nearly $1.2 billion in conservation-related funding. Much of these funds were earmarked to purchase land for parks and other open spaces.[17] If the voters are as committed to environmental goals as this record suggests, they might be equally prepared to compensate those individuals whose land is severely regulated to further environmental objectives.[18]

Evidence from Australia also supports the proposition that payment of compensation is consistent with a strong environmental program. A number of Australian states have established funds to safeguard wildlife habitats by purchasing private land and reselling it subject to conservation easements. Other programs provide financial incentives for farmers to enter into agreements to protect native vegetation.[19]

---

17. The Trust for Public Land and Land Trust Alliance, *Land Vote 2003: Americans Invest in Parks & Open Space* (Feb. 2004), *available at* http://www.tpl.org/content_documents/landvote_2003.pdf (last visited Oct. 2, 2004).

18. It is possible, of course, that this manifest support for parks and open spaces is not a symptom of a green streak running through citizens. It may be a result of parochial self-interest in the tendency of such parks and open spaces to increase average property values. Even if this animates some voters, it would not alter their prospective willingness or incentive to support the compensation of private property owners whose land is regulated to provide a public benefit.

19. DEP'T OF THE ENV'T & HERITAGE, DETAILED REPORT FOR 2002-2003 UNDER SECTION 516A OF THE *ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT* 1999, 10-11 (2003), *available at* http://www.deh.gov.au/esd/national/epbc/2002-2003/index.html (last updated June 20, 2004); Australian Bureau of Statistics, *Yearbook Australia: Environment, Nature Conservation* (Feb. 27, 2004), *available at*

Tasmania, for example, has instituted a scheme to conserve forests on privately owned land by making payments to owners in exchange for conservation easements.[20] Studies indicate that these efforts have increased conservation, proved cost effective, and won strong landowner backing.[21] Australians seem to have realized the simple truth that it is easier to work with landowners than against them.

With this in mind, we can turn the dialogue between landowners and environmentalists in a more fruitful direction, and perhaps even make allies out of sometime enemies. The key to success is providing compensation to landowners threatened by sizeable regulatory losses. In addition to the constitutional imperative, let us consider the case in favor of compensation as a tool for environmentalism.

First, spreading the cost of regulation among the public as a whole might reduce political opposition to environmentalism.[22] To the extent that affected landowners feel that they are unfairly singled out to carry the burden of implementing environmental policy, they are likely to become disengaged from the program. Landowners can manifest their opposition by putting pressure on legislators and administrators to delay regulatory action and weaken enforcement efforts.[23] Compensation would lessen the propensity of landowners to battle conservation initiatives and might even help to create a new, powerful lobby advocating land conservation.

Second, payment to private landowners would encourage their

---

http://www.abs.gov.au.

20. DEP'T OF PRIMARY INDUS., WATER, & ENV'T, NATURE CONSERVATION ON PRIVATE LAND IN TASMANIA 5-6 (Apr. 2003), *available at* http://www.papl.tas.gov.au/con_brochure.pdf (last updated Dec. 15, 2003); Res. Planning & Dev. Comm'n 2003, *State of the Environment Tasmania 2003*, *at* http://www.rpdc.tas.gov.au/soer/sus/8/issue/110/ataglance.php (last modified Sept. 13, 2004); Private Forest Reserves Program, *Growing Numbers of Private Reserves* (Jan. 2003), *at* http://www.pfrp.tas.gov.au/news/news_2003/news_03_01.html (last visited Oct. 2, 2004).

21. *See, e.g.*, ENV'T PROT. AUTH., STATE OF THE ENVIRONMENT REPORT FOR SOUTH AUSTRALIA 2003: SUPPLEMENTARY REPORT (Nov. 2003), *available at* http://www.environment.sa.gov.au/soe2003/sup_report/index.html (last modified Nov. 24, 2003); N.S.W. DEP'T OF ENV'T & CONSERVATION, N.S.W. STATE OF THE ENVIRONMENT 2003 § 6.1, *available at* http://www.epa.nsw.gov.au/soe/soe2003/chapter6/chp_6.1.htm (last modified Nov. 13, 2003); DEP'T OF AGRIC., FISHERIES, & FORESTRY, REVIEW OF THE NATIONAL LANDCARE PROGRAM (Oct. 2003), *available at* http://www.affa.gov.au/corporate_docs/publications/pdf/nrm/landcare/nlp_review_report_final.pdf (last updated Oct. 17, 2004); Allan Curtis, *The Landcare Experience*, *in* MANAGING AUSTRALIA'S ENVIRONMENT 442–56 (Stephen Dovers & Su Wild River eds., 2003).

22. E. Donald Elliott, *How Takings Legislation Could* Improve *Environmental Regulation*, 38 WM. & MARY L. REV. 1177, 1191–93 (1997).

23. Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 349–50 (1997).

cooperation with conservation efforts. At present, environmental controls create a perverse incentive. Since stringent land use regulations markedly reduce the value of land, owners may manage their property to avoid the imposition of environmental restrictions.[24] There is ample evidence that owners have actively destroyed species' habitats and pushed rapid land development to forestall regulation. Several empirical studies, for example, conclude that landowners seeking to escape potential regulation have preemptively destroyed habitats in order to prevent endangered species from occupying their land.[25] This phenomenon has found expression in the phrase "shoot, shovel, and shut up."[26] Such behavior accelerates the loss of habitats and is clearly antithetical to conservation goals. Some observers have gone so far as to suggest that the Endangered Species Act, a comprehensive regulatory regime governing millions of acres, has actually done little in saving species.[27]

In light of these concerns, the crucial question is how to dispel landowners' fear of regulation and win support for environmental goals. We should move away from the command-and-control model and give greater weight to positive incentives. Environmental regulations should be redesigned to respect private property rights. Rather than relying on coercion, regulators should purchase rights—in the nature of conservation easements—to safeguard wetlands, woodlands, and habitats. Given the need to assemble contiguous tracts, voluntary purchase will not be feasible in all situations. In such cases, government should utilize the power of eminent domain to deal with the hold-out problem. The payment of compensation would do much to alleviate the economic concerns of owners and foster a perception of fair treatment. In short, it is time to try the carrot as well as the stick.

Even paying owners the market value of their land, however, may

---

24. Richard A. Epstein, Babbitt v Sweet Home Chapters of Oregon: *The Law and Economics of Habitat Preservation*, 5 SUP. CT. ECON. REV. 1, 31–37 (1997); Andrew P. Morriss & Richard L. Stroup, *Quartering Species: The "Living Constitution," the Third Amendment, and the Endangered Species Act*, 30 ENVTL. L. 769, 787 (2000) ("Indeed, the ESA [Endangered Species Act] is a powerful incentive for landowners to manage their land so as to make it less attractive and useful to the listed species whose presence, due to the ESA, can impose serious penalties on the landowners who harbor them.").

25. Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27 (2003).

26. Thompson, *supra* note 23, at 351.

27. Jonathan H. Adler, *Bad for Your Land, Bad for the Critters*, WALL ST. J., Dec. 31, 2003, at A8 ("The ultimate measure of the ESA's success is the extent to which it is effective at recovering species from endangered status. By this measure, the law is an abject failure.").

not dispel all fears. The expense and hassle of securing compensation, together with the tendency of courts to undervalue land and exclude consequential losses, renders it probable that some degree of landowner resistance will continue. Still, the payment of compensation would surely do much to satisfy constitutional objections and to mute landowner hostility to environmental goals.

Current environmental laws, with their emphasis on command and control rather than compensation, are both constitutionally suspect and problematic as policy. What, then, are the prospects for heightened protection for property owners? Here, one must sound a note of caution. Despite a modest resurgence of scholarly and judicial interest in property rights, property has yet to regain its once high constitutional standing.[28] Courts have given a broad reading to environmental laws, and they have recognized claims for compensation only in limited situations. Although courts should invoke the regulatory takings doctrine more forcefully, it is unrealistic to think that they will seriously question the environmental policies set by Congress.

Efforts to win legislation to better protect the rights of property owners have also been disappointing. Proposed property rights laws, seeking to define the concept of a regulatory taking and/or to afford aggrieved owners more ready access to the federal courts, have stalled in Congress.[29] Some property rights statutes, however, have been enacted at the state level. Florida has embraced the most innovative approach. Florida's Harris Act provides for compensation when land is so regulated that the owner "bears permanently a disproportionate share of a burden imposed for the good of the public."[30] The adoption of such a standard by Congress would be an improvement toward restoring the property rights of individuals. Unfortunately, congressional action along these lines does not seem to be imminent.

Still, there may be reason for guarded optimism. Congress has enacted a program to compensate farmers who enroll their land under a conservation security contract and minimize the adverse environmental impacts of agriculture. This voluntary program is designed to bring about conservation of agricultural lands, especially the preservation of wildlife habitats, through collaboration between regulators and farmers.[31] Another constructive example is New York

28. ELY, *supra* note 1, at 160–63.
29. Porterfield, *supra* note 6, at 26–35.
30. Fla. Stat. Ann. § 70.001(3)(e) (2004).
31. Farm Security and Rural Investment Act, 16 U.S.C. §§ 3838h-i (2004); *see* Jesse

State's program to purchase conservation easements on agricultural land.[32] Political considerations aside, there is no particular reason why farmers should be in a privileged position vis-à-vis other landowners. This type of voluntary and compensated scheme should be extended to become the primary vehicle for accomplishing environmental goals. Command-and-control regulations should be utilized only as a last resort and, depending on the severity of the land use limitation, may amount to a taking, which necessitates the payment of compensation.

Private property is a vital component of a free society, and it is accorded substantial protection in the Constitution. The environmental conservation movement also reflects important societal values, but it does not trump every other consideration in a willy-nilly manner. While property rights and environmentalism often appear to be on a collision course, conflict is neither inevitable nor desirable for everyone.[33] Individual owners should not have to bear the cost of the public benefits of environmentalism. Rather, the cost should be appropriately shared by society as a whole. This approach is both consistent with constitutional norms and more likely, in the long run, to foster public support for land conservation.

Ratcliffe, *A Small Step Forward: Environmental Protection Provisions in the 2002 Farm Bill*, 30 ECOLOGY L.Q. 637 (2003).

32. N.Y. ENVTL. CONSERV. LAW §§ 49-0101 to 49-0311 (McKinney 1997 & Supp. 2004). *See generally* 55 N.Y. JUR. 2D *Environmental Rights and Remedies* § 65 (2003).

33. One champion of an ecological understanding of land ownership has warned: "In the long run, conservation is not going to succeed if it unduly disrupts private property. ... Already public support for conservation is weakening because many citizens are unsure about how conservation measures affect private rights." FREYFOGLE, *supra* note 6, at 278.