

Should Taxpayers Pay People to Obey
Environmental Laws?

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We have been hearing a lot lately about the so-called “property rights” issue—about a number of bills in Congress¹ and in state legislatures,² about the literally hundreds of new cases in the courts,³ and about people rising up to demand protection from laws that impinge on property rights. Actually, by definition, laws cannot “impinge” on property rights. At least laws cannot impinge on *legal* property rights. After all, legal property rights are whatever the law says they are, no more, no less, and the law can be changed.

What we are witnessing, however, is a debate about what property rights *ought* to be, or, as viewed from the other direction, a debate about what ought to be the American land ethic for the twenty-first century.⁴ We are in the midst of a transition, a transition about how we, as Americans, view the future of our national land.

On one side of this transition is a highly motivated property rights movement. These defenders of private property rights are people who are typically energized by an understandable desire to protect their own economic interests—larger landowners, mining interests, forest owners, real estate dealers and speculators, and the like. But their claim is founded on a deeply rooted idea, an idea of basic fairness: “what’s mine is mine.” As such, these claims have a powerful pull on the American psyche. People identify with such claims and

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1. At the time of this editing (March 25, 1995), the House of Representatives had passed a “Private Property Protection Act of 1995,” H.R. 925, 104th Cong., 1st Sess. (1995) (subsequently incorporated into another bill, H.R. 9). Several somewhat different bills have been introduced into the Senate, and have been combined into an “Omnibus Property Rights Act of 1995,” S. 605, 104th Cong., 1st Sess. (1995) (as introduced on March 23, 1995). The House bill would require compensation to owners when their land, or a portion thereof, is reduced in value by more than 20% due to the enforcement of certain environmental laws. The Senate bill would require compensation for real property value reductions of more than 33% due to government actions under a much wider array of federal laws.

2. According to a National Audubon Society database, a total of 83 “takings bills” had been offered in 33 states as of the end of 1994, and six of these had been signed into law. *National Audubon Society’s “Takings” Fifty State Review*, A CLEAR VIEW (Clearinghouse on Envtl. Advocacy/Envtl. Working Group, Wash., D.C.), Dec. 1994, at 3.

3. For a more extensive discussion of several of the rare victories for owners suing under the Constitution, see John A. Humbach, “Taking” the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments, 42 CATH. U. L. REV. 771 (1993).

4. For more extended discussions on this subject, see Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENVTL. L. 1439 (1994); John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339 (1989).

respond to them, and when they come wrapped in a philosophical garb of free markets and suspicion of government generally, these claims can be very potent indeed.

On the other side of the debate are people who have a less obvious personal interest, or at least a non-economic interest, in the issue. These are people who believe that, to have a high quality of life, human beings need decent and pleasant surroundings in which to live—people who believe that laws like the Clean Water Act⁵ and the Endangered Species Act⁶ address serious environmental concerns. These are people who recognize that we all have a stake in our shared national landbase—that the land Americans walk today is the same land Americans will have to walk for generations to come. In short, these are people who believe that, as a matter of basic patriotism, we need to ensure that landowners treat this country like they care whether there *is* a country here fifty years from now, or a hundred years from now, as a decent, vital, economically viable, and beautiful place for people to live.

The reality is that most people relate to both sides of this debate to a greater or lesser degree. Of *course* private property rights are important. There is no issue about that. For most Americans, however, private property rights are not the only thing that is important. For most people, there are many other values that are also important: decent surroundings in which to live and raise a family; clean, wholesome waters in our rivers and reservoirs; good air to breathe; a healthy environment for all of God's creatures; and a beautiful country for ourselves and for our children for generations to come.

In fact, the very reason we have our rather considerable body of environmental law is because there are these other values, in addition to property-right values, that are also important to so many people. The other reason for so much of our existing environmental statutory law is that the common law of nuisance has proved itself, over and over again, to be totally inadequate to give the people and communities of our nation the environmental protection that rightfully belongs to them.⁷ For example, the common law of nuisance simply does not prohibit the polluting of water bodies or the pollution of the air *unless* certain thresholds are met.⁸ Typically, individual polluters do not meet the threshold even though, cumulatively, their contaminants de-

5. 33 U.S.C. §§ 1251-1376 (Supp. V 1993).

6. 16 U.S.C. § 1531 (1988 & Supp. V 1993).

7. *See, e.g.*, *Hatch v. W.S. Hatch Co.*, 283 P.2d 217 (Utah 1955) (noise, fumes, bright lights); *Bove v. Donner-Hanna Coke Corp.*, 258 N.Y.S. 229 (App. Div. 1932) (refusal to enjoin operation of heavily polluting coke plant erected across street from plaintiff's home).

8. *Id.* *See generally* RESTATEMENT (SECOND) OF TORTS §§ 826-31. *See also* Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 212-36 (1990).

grade or destroy major waterbodies or pollute the air to seriously unhealthy levels.⁹

The fundamental problem, however, is that across our nation, there are literally millions of acres of important natural resource lands—shore lands, dunes, wetlands, reservoir watersheds, endangered species habitats—that have relatively little commercial value in their present natural condition. Yet, many owners are understandably tempted to supplant and destroy the long-term natural resource values of these lands to reap a return in their own lifetimes.

People often talk about buying such lands and, indeed, some government purchases to protect these lands are possible. Nevertheless, we must face the fact that government purchases are simply not a feasible way to protect the millions of acres of our nation's lands that are threatened by poorly conceived development or improperly executed utilization. Overall, for these millions of acres, only two practical choices exist. Either we can adopt land use laws that will protect and defend these lands, our nation's one and only national landbase, from shortsighted modifications; or, we can surrender the fate of our national land, and the quality of the lives of our descendants, to the self-interested decisions of a relative few.

Thus far, the choice that we have made is to *not* leave the future of America's land and natural resources to the relative handful of people who happen to be the current owners in our generation. America is a republic and, as such, its destiny belongs first and foremost to the people as a whole, not to some narrow class of large landowners as it was in, for example, the England from which we rebelled. Our present body of environmental law represents our nation's democracy-driven choice that some land uses are just too socially intolerable to allow.

Even the self-appointed "defenders" of property rights seldom overtly deny that our nation's environmental laws serve important purposes. The issue, as usually phrased, is different. The issue is framed as whether the government should compensate people for the burdens of complying with these laws. In other words, should our nation's taxpayers, you and I, have to pay people not to do things that the national legislature has determined to be bad for other people, bad for the community, or bad for the nation as a whole?

Should taxpayers have to pay people not to put pollutants into streams and reservoirs? Should taxpayers have to pay people not to kill off entire species? Should taxpayers have to reach into their pockets and pay people not to disperse development seamlessly across the countryside, relentlessly consuming, fragmenting, and degrading our nation's remaining natural lands until almost all is gone? Should we,

9. For a more detailed discussion, see John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 17-22 (1993).

in short, have to pay people not to engage in land-uses that have been determined to be too socially unacceptable to allow?

The property rights advocates say this is all a fairly simple matter. To them, it is a simple matter of the Takings Clause of the Constitution. Now, the Takings Clause, itself, is simple: "nor shall private property be taken for public use, without just compensation."¹⁰ The original intent of this language was also simple. The Framers of the Constitution intended that the Takings Clause only apply to *physical* takings, not to mere regulations on the *use* of land.¹¹ To be sure, 130 years after the Constitution's Bill of Rights¹² was adopted, the import of the Takings Clause was extended to encompass not just physical takings but also certain extreme forms of land-use regulation. The 1922 case, *Pennsylvania Coal Co. v. Mahon*,¹³ prompted this unabashed burst of judicial activism, and has remained a favorite of the property rights defenders.

It is striking to me that *Pennsylvania Coal* has become such a favorite of people who, supposedly, *favor* property rights protection. *Pennsylvania Coal* is not really a property rights protection case at all. Instead, it is a case that stands for a very different proposition, namely, that some people's property deserves more protection than other people's property. In *Pennsylvania Coal*, the Supreme Court struck down a state statute enacted to protect people's homes from being destroyed due to the undermining activities of the coal companies that owned the coal under the homes.¹⁴

The Supreme Court decided to favor the coal company's property rights over the homeowner's, reasoning: "[t]his is the case of a single private house,"¹⁵ and "a source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in differ-

10. U.S. CONST. amend V.

11. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 n.15 (1992). See also Scott M. Reznick, *Land Use Regulation and the Concept of Takings in Early 19th Century America*, 40 U. CHI. L. REV. 854 (1973) (reviewing the cases in which, absent physical invasion, no compensation was required); William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985) (reviewing evidence of the intentions of James Madison and his contemporaries).

During the nineteenth century, the "immense weight of authority" held that there was no requirement of compensation under the Takings Clause unless the governmental act consisted of a "physical invasion of the real estate." *Gibson v. United States*, 166 U.S. 269, 275-76 (1897) (quoting *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878)).

12. U.S. CONST. amends. I-X. The Takings Clause is contained in the Fifth Amendment of the Bill of Rights.

13. 260 U.S. 393 (1922) (striking down a law to prohibit coal companies from extracting certain coal that formed the subjacent support for various kinds of surface structures and improvements).

14. *Id.* at 414.

15. *Id.* at 413.

ent places.”¹⁶ After considering the respective property interests involved, the Court concluded: “[t]he statute does not disclose public interest sufficient to warrant so extensive a destruction of the [coal company’s] constitutionally protected rights.¹⁷ In short, when mere homeowners’ interests in protecting their homes collided with a coal company’s interests in utilizing its property rights, the homeowners’ rights carried so little “public interest” that they (and the laws that protected them) had to yield. To understand what the so-called “property rights” movement is really all about, re-read *Pennsylvania Coal Co. v. Mahon*.

However, despite the judicial activism of *Pennsylvania Coal*, laws are not unconstitutional merely because they may have the incidental effect of diminishing the value of land. As the Supreme Court determined in *Lucas v. South Carolina Coastal Council*,¹⁸ it is “a reality we nowadays acknowledge explicitly” that “government may . . . affect property values by regulation without incurring an obligation to compensate.” And the reason is obvious: otherwise “government hardly could go on.”¹⁹ Nearly everything the government does has the potential to raise or lower property values. The Federal Reserve raises the discount rate, and bond values drop. The government deregulates the airlines, and some of them go bankrupt. It deregulates the savings and loans, and the private economic impacts are even worse. A state enacts stiffer Driving-While-Intoxicated laws, and marginal saloons go broke.

Yet, by the same token, when the government builds a new interstate highway or underwrites flood insurance, the effect may be to raise property values. Again, to quote Justice Scalia, “[t]he fact is that virtually all [economic] regulation benefits some segments of the society and harms others.”²⁰ However, this fact does not make such laws invalid.

Consider, for example, Mr. Lucas himself. Lucas owned two beachfront lots that he claimed to be worth \$1 million.²¹ He asserted that the government took all of the economic value of his property by forbidding him to build on those lots.²² Lucas brought suit and was awarded nearly \$1.5 million of taxpayers’ hard-earned money.²³ Consider, however, *why* Lucas’s two lots had a fair market value of \$1 million.

16. *Id.*

17. *Id.* at 414.

18. 112 S. Ct. 2886, 2897 (1992).

19. *Pennsylvania Coal*, 260 U.S. at 413.

20. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 377 (1991) (upholding a billboard regulation with preferential effects against an antitrust challenge).

21. *Lucas*, 112 S. Ct. at 2889.

22. *Id.*

23. *Id.* at 2890.

It turns out that Mr. Lucas's two lots had a value of \$1 million for one key reason—because the federal government runs a program to underwrite flood insurance for shorefront property, which is especially vulnerable to hurricanes and other big storms. Without such flood insurance there would be no mortgages because banks do not lend money for beach houses unless they are properly insured. Without mortgages there would be no buyers. Without buyers there would not be a \$1 million land value because, as a matter of simple economics, fair market value depends on there being demand for the property. As for the flood insurance that is the key to it all, there is, of course, only one insurer around who is gullible enough to back up the risks involved: that is us, the American taxpayers. It is the federal government's flood insurance program that makes possible reasonable cost insurance for these houses.

Therefore, the government made possible the insurance, which made possible the mortgages, which made possible the buyers, which gave the two Lucas lots their \$1 million value. Without the insurance, they would have been worth what beaches have always been worth—perhaps as little as the value of the sand.

When the government's actions *create* a high value for beachfront property, everybody seems to like that. What if, however, the government's actions happen to reduce the very same values that government actions have created. Should the taxpayers have to pay the amount of the reduction, as they did in *Lucas*? It does not seem fair that they should. Thus, the real question here is whether taxpayers should have to pay to prevent socially undesirable uses of land, even when the Constitution does not require it, and even when, for the last 200 years, the law has not required it?

The concept here seems to be that we have two kinds of laws in this country. First, there is the kind of law that people are supposed to obey. Then, there is the other kind of law, the kind of law that certain people should *not* have to obey—unless they get paid.

Laws against using your property as a pornography shop or to grow marijuana are good examples of the first kind of law. Nobody expects to get paid to obey that kind of law. When there is a law against filling a wetland, or a law against destroying some of our nation's prime agricultural lands, these laws would fall into the second category. Not long ago, an outfit called Whitney Benefits received a \$60 million judgment, payable out of taxpayer dollars, as its reward for complying with a law of the latter type.²⁴

Now, most of us are willing to obey the law for free. We do not ask to be paid, even when the law in question happens to be based on values we do not necessarily agree with. For decades, most urban

24. *Whitney Benefits v. United States*, 926 F.2d 1169 (Fed. Cir. 1990), *cert. denied*, 502 U.S. 952 (1991).

property owners have accepted and lived with the proposition that you cannot necessarily change the use of your land just because you can make a profit doing it. This is a principal effect for the vast majority of American landowners (homeowners) of ordinary local zoning laws: if you own a single family house and lot, you cannot tear it down and replace it with condos, or a little grocery store, or a medical arts building, just because you could make money doing it. People have accepted this for decades.

Here, then, is a basic difference between the so-called defenders of property rights and the rest of us. They want to get paid for the inconvenience of obeying the law of the land, at least when it comes to laws that are aimed at protecting the land itself.

Why do some people think they should be paid to obey our nation's environmental laws? In fact, I think their reasons are understandable—not right, but understandable. There are many good and decent people who just honestly do not think there is anything wrong with doing the kinds of things environmental laws prohibit. You have to remember, it is not long ago that wetlands were “marshes and swamps,” noxious places that people wanted to drain and fill. Wild animals were just in the way. A lot of old historic buildings in your town represented the opposite of “progress.” Beaches and flood plains were ideal places to build a house, and farms and forests were often seen as holding areas until somebody came along to put the land to productive use.

Knowledge and widely held values have evolved, but there are still many good and decent people who just do not take seriously environmental harms that other good and decent people take *very* seriously. Many people simply do not believe that destroying wetlands is a bad thing to do, or that killing off entire species is a serious affair. Many people simply do not believe there is anything wrong with building on beaches and dunes or in flood plains, or that the gradual death-by-a-thousand-cuts of a whole water body really justifies saying to any one watershed owner: “you can't take your nick; we're drawing the line here.”

That is what the so-called property rights debate is really all about. It is not a disagreement about property rights, as such. It is a disagreement about values, and to some degree scientific knowledge associated with a handful of questionable land-uses. This problem exists because, as I mentioned earlier, we are in a transition, a transition about how we as Americans view the future of our national land. The question is, what do you do when you are in a transition? What do you do when you have a country with 260 million people, a depleting natural resource base, and many, many different views and different values about what is important and what should be a priority. It is a question of “who decides?” Who decides some of the most difficult and controvertible questions of our time?

I do not think there is an easy answer here, and anybody who has an easy answer (such as, "let the landowners decide for us all") is pretty likely wrong. Nevertheless, here is my answer—well, my answer and the Supreme Court's.

For me and the U.S. Supreme Court, it is the fundamental premise of democracy that when different people have varying values on issues like protecting the national land, it has to be the values of the majority, as represented in the elected legislature, that get reflected in the law.²⁵ The dissidents do not have a right to payment for obeying the law just because they dissent, even if they happen to think that the law in question makes no sense. There is nothing in the Constitution that limits the legislative majority's rights in this regard (except, of course, if there is a physical taking of property or its functional equivalent, a total diminution of value).²⁶

So, what is the big deal here? If our elected Congress wants to extend compensation beyond what the Constitution requires, who can object? After all, fifty-one percent of the voters in this country voted for the present congressional majority in the contested elections last fall. True, fifty-one percent is not an overwhelming majority, but a majority is a majority. If the majority wants to extend owners' rights to compensation beyond what the Constitution requires, who can object?

One possible objection, perhaps, is that paying landowners to obey the law of the land would totally disrupt the difficult balance between private rights and public protection that is enshrined in our Constitution, as interpreted by the Supreme Court. But, so what if a new compensation scheme disrupts the Supreme Court's interpretation of the Constitution. If that is where the majority's values fall, should it not be the law?

For me, the real objection here is something different. The real objection is that this property rights legislation looks a lot like a deception. It looks like a deceptive attempt to do something the majority does *not* want. It is a sneak attack on our nation's environmental laws.

The proponents of this new compensation legislation should come right out and call it the "Environmental Rights Abolition Act of 1995," because that is what it is. Rights are just the correlatives of

25. "Power to determine such questions, so as to bind all, must exist somewhere Under our system that power is lodged with the legislative branch of the government." *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887). And "in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interest." *Lawton v. Steele*, 152 U.S. 133, 136 (1894).

26. *Lucas*, 112 S. Ct. at 2892-95.

duties; one person's duty is another person's right.²⁷ Hence, whenever you abolish somebody's duties, or make them too costly to enforce, the effect is to abolish somebody else's rights.

We know the reason why the proponents do not forthrightly call their legislation the "Environmental Rights Abolition Act of 1995." They do not do so because then it would not sell. Polls indicate that the vast majority of Americans support our nation's environmental laws and do not think those laws go too far.²⁸ That does not, however, mean that there is any real issue about property rights. Just about everybody recognizes that our system of private property is essential to our enjoying a level of material well-being that is unsurpassed in history. Just about everybody also agrees, however, that there are some uses of property that are simply too intolerable to allow. Maybe it is using your land to grow marijuana. Maybe it is running an unsanitary tenement house. Maybe it is an adult magazine store next to a junior high school (my guess, a very profitable use of real estate). Or maybe it is a junkyard or waste transfer station right in the middle of a residential neighborhood. Whatever your favorite anti-social use of land might be, the point is that just about everybody agrees that there are *some* uses of property that are too unacceptable to allow, and that the taxpayers should not have to pay people not to make those uses.

In summary, the real dispute is not about property rights. It is a dispute about a handful of questionable land-uses. Some people honestly believe that these land-uses are *not* too socially intolerable to allow, while others think they *are* too socially intolerable to allow. These are uses such as filling wetlands or wrecking historic buildings, or building houses on beaches and dunes—uses as to which there are differences in understandings and differences in the values that people hold.

When you get down to it, to focus on property rights, as such, is really a distraction, a device to turn our eyes from what is really at stake. The real question is not about property rights. The real question is, what right does our nation have to protect itself from the shortsighted destruction of its national land? What right does a nation have to protect the land on which the quality of its citizens' lives depends? I say our nation has plenty of right. For even though private property rights are important, no nation can bind itself to pay off those who, if not paid, would harm or waste its natural resources. No nation can leave the quality of its land or of its children's lives to the

27. WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 35-50 (Walter W. Cook ed., 1919) (also found at 23 *YALE L.J.* 16 (1913)).

28. According to a recent Time/CNN poll, for example, 88% of Americans consider environmental protection to be "very important" or "one of the most important" problems facing the country today. Dick Thompson, *Congressional Chain-Saw Massacre*, *TIME*, Feb. 27, 1995, at 58.

self-interested decisions of a relative few. No nation can give up its right to defend its national land.