

Unlikely Alliances Attack Property Rights Measures

By TIMOTHY EGAN (NYT) 2118 words

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Correction Appended

Rarely does an issue unite an anti-pornography preacher in Mississippi, the cultural elite in New York City and families living here in the cozy towns of the Cascade foothills.

But the nationwide campaign to expand private property rights, which has been embraced by the new Congress and is under consideration in more than half the state's legislatures, has managed to do just that, creating the most unlikely of allies to oppose the enactment of laws that seemed a sure bet in the opinion polls last fall.

Taken together, a House-passed bill that was a barely noticed provision of the Republicans' Contract With America and an even broader measure that has been proposed in the Senate would require taxpayers to compensate property owners whenever the Government did something that reduced the value of the owners' holdings. Whatever law emerges would arguably affect more people than anything else considered by Congress this session.

The Fifth Amendment to the Constitution already requires "just compensation" for land that is "taken" for public use. But the new proposals would carry the concept of compensation to a level rarely approved by the courts, which have long weighed public concerns against private property rights.

The move in Congress is aimed largely at environmental laws that restrict development of wetlands or land that is home to endangered species. Landowners argue that by regulating such property, whether by imposing limits on logging to protect the habitat of rare birds or adopting provisions against the draining of swamps that contribute to clean water, the Government has reduced the property's value and so essentially "taken" it.

"Through its regulations, the Government is destroying property values at an unprecedented rate," said Nancie Marzulla, president of Defenders of Property Rights, an advocacy group based in Washington, D.C. "We need an across-the-board statute, because the Government needs to know that if it takes something there is a big price to pay."

Representative Tom DeLay of Texas, the Republican whip, calls the bills "an answer to a growing movement of property owners at the grass-roots level who believe their rights are being infringed upon."

But opponents maintain that some of the language in the bills, and similar proposals in at least 30 states, is so broad that it amounts to an attempt to rewrite the Fifth Amendment and therefore amend the Constitution on the sly.

The House bill would compensate property owners only for a loss of value resulting from environmental regulation. The Senate bill, and one just passed here in Washington State, would apply to virtually any government regulation and, like the House measure, even to enforcement of regulations already adopted. The Interior Department estimates that the cost resulting from surface-mining regulation alone would be \$27 billion.

Opponents everywhere along the political spectrum say these bills could dramatically change American life for the worse. They raise a number of questions:

What if a government entity decided that a topless bar could not open next to a church, or that an open-pit mine was not appropriate on farmland with shallow wells, or that the flight path of incoming jets had to be changed? Would acts of government even as routine as these require taxpayers to pay the owners of property that declined in value as a result?

Is a commercial seller of assault weapons entitled to payment when Congress bans them, as one gun dealer in California has claimed?

Would a motel owner be entitled to compensation if he could prove that complying with the public accommodations provisions of Federal civil rights law had reduced the value of his business, as an owner in Georgia has asserted?

And, since the House bill defines "the right to receive or use water" as property, would taxpayers have to pay irrigators the full market price for the Federal water they get at heavily subsidized rates when, as has occurred in California, it is taken away to meet the needs of a drought-stricken city?

And what about the person or neighborhood adversely affected by the absence of government action? If an oysterman loses shellfish because somebody in a nearby tidal wetland fills in part of the swamp, where does he go to recover what he has lost?

Property rights advocates say the critics' parading of such horrors is little more than scaremongering. Government, they note, would still be able to regulate property when it posed a threat to public health or was considered a nuisance. Even environmental regulation would continue; it would simply cost more.

But the problem, legal scholars say, is in defining a nuisance or health threat. As a regulated activity, most industrial polluting is not legally a nuisance. To any number of judges, a topless bar might not be a nuisance, and so taxpayers might have to pay full value to prevent it from opening in a neighborhood from which it had been barred. For that reason, the Rev. Donald E. Wildmon, president of the conservative American Family Association in Tupelo, Miss., calls a property rights bill proposed in his state "the porn owners' relief measure."

Even people with the strongest of free-market credentials have started attacking such new measures. David Frum, a leading conservative theorist and author, says that enacting the

water provisions in the House bill would be akin to paying money to a Park Avenue resident who loses a rent-controlled apartment because of a change in the law.

Defining the point at which property protection becomes community nightmare is one of several snags hampering the property rights movement just as it approaches milestone victories in Congress and state legislatures around the country.

Senator Phil Gramm of Texas has made property rights one of the top items in his campaign for the 1996 Republican Presidential nomination. In so doing, he has pushed the Senate majority leader, Bob Dole of Kansas, regarded as the front-runner for the nomination, into supporting broad compensation measures, which Mr. Dole earlier opposed as budget-busting. President Clinton has vowed to veto the takings bills in Congress.

Only one state, Arizona, has put the new theory of takings to a popular vote. Last November, when Republicans won virtually every race in the state, three-fifths of the voters there opposed a measure that would have required that before any regulation could take effect, state or local officials consider whether it violated property rights.

That proposal had been criticized as a bureaucratic mess that would have burdened suburbs and cities alike any time they so much as asked developers to include a ball field or a bicycle path in a new subdivision.

Last month, acting on an initiative financed by the timber and building industries, the Washington State Legislature passed the nation's first major overhaul of traditional takings laws.

Developers and many landowners have applauded the legislation, saying they are tired of carrying on their backs so much of society's demand for open space, clean water and species diversity. But the measure has horrified local governments, which fear it would make zoning laws unenforceable.

As an initiative, a proposal that does not originate within state government, the Washington measure cannot be amended in the Legislature or vetoed by the Governor. It will become law unless 90,000 signatures against it are gathered by midsummer, which would prompt a statewide vote in November.

Government efforts to enforce height limits on buildings or place restrictions on where billboards can be placed, or to make laws for the historic preservation of certain areas, could be construed as a taking under the Washington measure.

Restrictions on historic preservation in general have riled cultural interests in New York City, who worry that laws protecting airspace over landmark buildings could be made impotent by a blanket mandate that governments pay for any action that reduces maximum property value.

And in New Orleans, some people wonder what the French Quarter would look like without property regulation.

"These kinds of proposals are terribly dangerous," said Christina Ford, the planning director of the City of New Orleans. "Our powers are mostly persuasive. We try to prevent a city from looking like a fence on a windswept prairie that has collected all the debris thrown at it."

Billed as a boon for small landowners, the property rights movement has stirred even some of them against it.

Five years ago, when Steve Mansky found his dream home here in Granite Falls, a small town about 35 miles northeast of Seattle, he thought he was buying himself a respite from the noisy clutter of urban America.

Then came a proposal to build the state's largest gravel and sand quarry just a stone's throw from Mr. Mansky's home. If the project is approved, as many as 600 trucks a day will rumble down the valley's narrow main road and around its blind curves. The road, designated a National Scenic Byway, is heavily traveled by tourists venturing into the North Cascades.

"The quarry owners have admitted that there are going to be 'conflicts' between gravel trucks and pedestrians," Mr. Mansky said. "I guess that's a politically correct way of saying people are going to get run over."

Should Snohomish County, where Mr. Mansky lives, choose not to change zoning regulations to allow an industrial use like a quarry in Granite Falls, its decision could be viewed by the owners of the property where the quarry would be located as a government taking that required full compensation, Mr. Mansky said.

The property rights debate is anecdote-driven. For every story on one side, there is one on the other.

The case of O. C. Mills, for example, was evoked on the floor of the House. He is a Florida man who purchased swampland in 1986, tried to develop it, then was convicted and jailed for repeatedly violating a Federal regulation against draining wetlands. His case is "one of the stark est illustrations of how crazy regulations have become over the past 20 years," said Representative Joe Scarborough, Republican of Florida.

But others say that if onerous regulations are the problem, they should be changed or be enforced with more common sense, not made the victim of a stealth attack on all laws protecting the public weal and the environment.

In an effort to still critics of the Endangered Species Act, the Clinton Administration recently announced that small landowners would be exempt from the law's major requirements, and set incentives for people who serve as good stewards of the

environment.

But many Republicans say such incremental steps are not enough. Even if Mr. Clinton vetoes the legislation now being considered by Congress, they plan to carry the property rights banner all the way through next year's Presidential election. AT A GLANCE Laws on Private Property Here are the provisions of the Private Property Rights Act, which was passed by the House of Representatives in March. ELIGIBILITY. Private property owners are entitled to receive compensation for any "measurable" reduction in the value of their property resulting from Government restrictions on otherwise lawful use of it. "Measurable" is defined as a decline of 10 percent or more in the property's value. HOW TO APPLY. Within 90 days of receiving notice of a final Government action restricting use of the property, an owner may submit a written request for compensation. SETTLING THE CLAIM. Within 180 days after receiving that request, the agency involved must offer to compensate the owner for the difference between:

"(1) the fair market value of the property determined based on the value of the property if the agency action were not implemented; minus (2) the fair market value of the property determined based on the value of the property if the agency action were implemented." ARBITRATION. If a property owner rejects the offer, he can request arbitration. "An arbitration is binding on the head of an agency and the private property owner as to the amount, if any, of compensation owed to the private property owner...." FINE PRINT. The term "property" means land, "any interest in land," and "any proprietary water right."

Under the final version of the Private Property Rights Act, a Federal agency would have to compensate a landowner if a regulation lowered value by at least 20 percent. But the Government would not necessarily be required to buy the affected property. If Federal action reduced the property's value by 50 percent or more, the landowner could require the Government to buy it.

Correction: May 18, 1995, Thursday

A chart on Monday headlined "Private Property," about a bill passed by the House in March, misstated a provision on compensation to owners whose property values are reduced by Federal land-use rules.

Photo: Five years ago Steve Mansky and his family thought they had found their dream home on this piece of property in the Cascade Mountain foothills. Now plans for a quarry nearby, added to a Washington State legislative initiative, have left them far from sure. (Therese Frare for The New York Times)(pg. A12)

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