Property Rights and Eminent Domain

ELLEN FRANKEL PAUL

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To the memory of my father
Edward Marvin Frankel
who inspired my interest in the law.

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Introduction

That august political philosopher of the seventeenth century, John Locke, insisted that governments are constructed by men for one reason only, and that is to protect their property rights. He believed that the right to acquire, possess, and enjoy property is the fundamental liberty upon which all other inherent rights of life and liberty depend. The American founding fathers were deeply imbued with these Lockean notions. They, too, cherished property and the opportunity for personal development it represented. They embraced the idea that government exists to protect people's inalienable rights and should be tolerated only so long as it acts as a rights protector. In recent years these tenets have been much battered by legislative encroachments and castigated by philosophers more favorable toward state power. Still, average Americans, landowners or not, would probably endorse some variant of these Lockean principles as their own. They would entertain the conviction that when they owned a portion of this earth, they thereby possessed the right, absolutely, to exclude all others from encroaching upon it, so that they could use it, enjoy it, or dispose of it as they alone choose.

Yet, despite these beliefs of Locke and our average Americans, governments today do exercise considerable powers over how any of us can use our property. We enjoy our plots of land only so long as we pay our real estate taxes. We have come to accept zoning regulations. Sometimes we stand by helplessly while the government condemns our property and takes it for public purposes, or even gives it to other private individuals. Principally, governments in the United States exercise control over property by employing three powers: the taxing power, the police power, and the power of eminent domain.

In this book we will exclude taxation and discuss only the latter two powers, for they result in regulations and takings that fall disproportionately on certain unlucky property owners. If, for example, Jones received a property tax bill for $5,000 and Smith a bill for $1,000 even though they both owned farms assessed at the same value, everyone, including our courts, would acknowledge the inequity and a correction

would be made. However, if a state legislature were to invoke the police power and suddenly prohibited Brown from developing his property without the permission of several state commissions (a permission these commissions are increasingly less likely to grant), there would be no universal perception of injustice, nor would Brown be assured a sympathetic hearing by many of our courts. Similarly, if Freemont's ranch house happened to stand upon land that the city of Oxnard required for a new municipal parking garage, and the city proceeded to condemn it, no enraged citizenry would arise to defend Freemont's rights, nor would the courts come to his aid. Thus, the police power and the power of eminent domain cry out for examination, precisely because they are so uncritically accepted by citizens and jurists alike.

Those few philosophers, judges, and commentators who even recognize the need to defend the power of eminent domain generally argue that government would be inconceivable without it, that it is an "inherent" attribute of government. Most writers on eminent domain consider the power so obviously justified that even this flimsy explanation is absent from their discussions. Surely such a sweeping power—the power to confiscate a person's hard-earned property, or property that has passed to an owner through generations of labor by forebears—deserves a more compelling defense than the unabashed assertion that it constitutes an inherent attribute of sovereignty.

The power of eminent domain is nowhere expressly granted to the federal government in the Constitution, nor to the states in most state constitutions. Rather, it is circumscribed in our federal Constitution (and by similar language in state constitutions) by a portion of the Fifth Amendment that reads: "nor shall private property be taken for public use, without just compensation." These restrictions—that property can be taken only for "public use" and that all takings must be accompanied by "just compensation"—limit a power that, according to conventional wisdom, would otherwise remain boundless. As we shall discover shortly, however, the eminent domain power is hardly as innocuous as the near-universal acceptance of it would lead one to believe. Property owners dispossessed of their holdings often fail to perceive the justification for the supposed "public use" to which their property will be put by government. Others recoil at the prospect of receiving a "just compensation" that fails to compensate them for all the ancillary losses accompanying a forced sale.

As for the police power, it has become in our time the most expansible and adaptable tool by which governments of all sizes and varieties seek to control private property, property still nominally residing in the name of its owner. The police power is, yet again, considered by most theoreticians to be an "inherent" component of any state. It is the power to regulate

private property for the "health, safety, morals," and, more recently, "general welfare" of the public. Particularly with the inclusion of this "general welfare" category, the police power has greatly expanded its purview. Economic rights have taken a back seat to the police power when judges have found them in conflict. Under our system of government, it is the states that possess the police power. The federal government is an institution of delegated powers and is usually not considered to possess the police power. Nevertheless, the federal government regulates property in a similar manner. It does so under its expressly granted powers: the powers to regulate interstate commerce, to provide for the general welfare, to defend the nation, and so on. The states, then, are the principal engines of police-power legislation, together with municipalities that derive their powers from the states. Usury laws, minimum wage and maximum hour legislation, zoning, no-growth policies, and statewide land-use restrictions have all been justified by invoking this nebulous police power. As we come to explore the justifications for this power and the uses to which it has been put in recent years, some alarming trends will emerge. Property rights cannot long survive legislatures that are willing to divest owners of virtually all beneficial uses of their property, certainly not if courts are willing to uphold such excesses, and legal commentators encourage them. Some police power enthusiasts have even encouraged city councils and state legislatures to expand the police power to its constitutional limit, that is, to the point where it trenches upon the Fifth Amendment's prohibition on the taking of property without payment of just compensation. Of course, I do not want to leave the false impression that the police power is a wholly unjustifiable exercise of state power. In its proper place—as a tool for prohibiting criminal activity and setting punishments for transgressions—it is eminently justifiable.

Scholarly articles on the police power and eminent domain are numerous, yet practically all of them focus upon the problem to which I have just alluded. The "taking issue," as our contemporary commentators perceive it, constitutes the heart of what is interesting about these two powers. The crucial question in the debate is when does a police power regulation become so onerous that its purpose could be constitutionally accomplished only by the exercise of the eminent domain power. For the police power, in contrast to eminent domain, requires no compensation for its proper exercise. Police power and eminent domain are pictured as though they were on a continuum. If a police power regulation goes too far in the direction of eminent domain, by depriving an owner of too much control over the property owned, it is unconstitutional.

This whole debate, I will argue, is misconceived. Rather than focusing upon this secondary issue, attention ought to focus upon the natures of the

two powers themselves. Where do they come from? Can they be justified? What are their proper limitations? These lead us to even more fundamental questions. What is the nature of property? Are property rights defensible? What limitations ought to be placed on individual appropriation? Before the narrowly conceived takings issue can be resolved, all of these fundamental questions need answers.

The first chapter will examine the arguments of environmentalists in support of land-use legislation, and explore a few particularly troubling examples of the exercise of eminent domain and police powers. The rise of the environmental movement in the 1970s has had an enormous impact upon the rights of ordinary property owners, and not just the conduct of business enterprises. While the latter connection has been well documented, the former has not. Environmentalist philosophers have greatly influenced the way we can use and dispose of our land. Chapter 2 will trace the philosophical arguments for the two powers as well as their tortuous judicial history. The third chapter, in some ways the heart of the book, will examine the meaning of property rights, investigate how previous thinkers have defended these rights, and suggest a more adequate defense for them. We will see that the "takings issue" is essentially insoluble as it is now conceived. What we need to do to work ourselves out of the current morass is fundamentally to rethink the basic issues. *Ad hoc*, pragmatic decision making by the courts simply has not worked. In the concluding portion of the book, the very legitimacy of eminent domain will be questioned. The police power will emerge as a partially justifiable power, but one not sufficient for accomplishing the objectives of those who favor rigorous land-use regulation. Finally, I will offer recommendations that will move our real world closer to the ideal of pure theory.

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Environmentalism and Property Rights

The Land-Use Battleground

Imagine that you are a skilled watch repairer who owns a small shop in a lower-middle-class, ethnically heterogeneous neighborhood in downtown Cincinnati, Ohio. You are far from wealthy, yet your modest business affords you many satisfactions, not the least of which is a long association with your customers, some of whom recall the days when your father, and even your grandfather, fixed their watches and exchanged pleasantries in this very same store. Then one day you hear disturbing rumors. The city council, which wishes to revitalize the downtown area, is contemplating a proposal from a group of out-of-state developers to construct several luxury hotels, condominiums, and office buildings. To attract this development, the city will have to offer a convenient downtown location, parking facilities, and various public services. Lamentably, the block upon which your shop now stands lies precisely at the spot where the projected redevelopment will occur. Several months later you receive a condemnation notice: your property will be taken from you. You are to receive "fair market value" and relocation costs, but no recompense for such psychic detriments as loss of business goodwill, possible loss of income due to the dismemberment of the community from which you drew your customers, and the incalculable losses associated with leaving a business you loved.[1] *This is eminent domain.*

Now imagine that you are a retired salesperson who, through hard work and thrift, has amassed enough money to purchase a lot in an attractive development along the northern coast of California. Your dream is to build a small hideaway where you can spend your declining years close to nature and free from the smog and congestion of metropolitan life. Attaining building permits for your dream house from the county does not prove insurmountable, but a seemingly insuperable obstacle lies ahead. Something relatively new, the California Coastal Commission, has different plans for your town, plans that include the provision of public beaches and public accessways. These accessways, as things turn out, must be carved out

of your lot. Unfortunately, your lot lies within a planned development, and you, as an individual lot owner, are subject to a deed restriction by which the homeowners' association forbids any further subdivision of your land. You are unable to accommodate the demands of the Coastal Commission for accessways across your property. Other homeowners who already have constructed homes on their lots are not at all disturbed by your predicament because the commission's moratorium on new construction does not adversely affect them. Indeed, it enhances the value of their holdings. Naturally, they are unwilling to alter the deed restrictions affecting your property. You are powerless to comply with the demands of the commission for public access, but you are prohibited from building until you do comply. You are now owner of a nearly worthless lot upon which you must continue to pay property taxes to the state of California, the very agency that rendered your property useless.[2] *This is the police power.*

These are not hyperbolic examples. Property owners throughout the United States increasingly hold their land tenuously, as "stewards" for the "public interest" rather than as absolute owners free to determine how their land shall be used, disposed of, or developed. If you own a marsh and wish to dredge and fill it to construct condominiums, you may find that state law prohibits any modification to the marsh that alters its natural state. If such filling were permitted but your land happened to fall within a state coastal zone, you would be confronted with a myriad of bureaucratic stumbling blocks. These might include local zoning commission permits, or state permits if your project had more than local impact, or forced dedication of public accessways to the ocean, or height and density restrictions to preserve scenic vistas, or possibly a requirement to construct "affordable" units for low-income people, or the entire project might be vetoed. Property owners face uncertainties, costly delays, and outright prohibitions against the development and use of "their" land. Undeniably, government has arrogated a substantial portion of what has traditionally been considered by Americans to be the prerogatives of property owners. Rather than confining its role to the protection of owners in the enjoyment of their land—that is, the role assigned to it by John Locke—government now sees its function in more interventionist if not feudal terms.

Since the mid-1960s governments in the United States have moved away from the Lockean individualism that infused the thought of our founding fathers and their earlier successors. They have enacted land-use regulations the spirit of which reflects feudal more than Lockean conceptions of land ownership. For the Englishman, John Locke, property belonged to an individual not because a king granted it to him, but because he "mixed his labor" with it and thereby transformed it into something separate and distinct from the common, unowned land in the state of nature. This view

contrasts markedly with the feudal notion of property as a system of privileges imposed from the top rather than generated by individual initiative.

It is ironic that today many environmentalists explicitly reject these Lockean notions of land as an absolute dominion in favor of a nostalgic vision of duties, obligations, and a sense of community supposedly exemplified by the feudal land tenure system, that is, the system of conquerors and not of free men.[3] Environmentalists think of themselves as progressives, yet some of them feel an affinity for a reactionary system; this is puzzling. E.F. Roberts, to cite just one example, enthusiastically embraces a return to a more feudalistic conception of landholding. In "The Demise of Property Law," he writes:

> We may yet choose a new praxis. Zoning and local government devices demonstrably have not worked very well to control haphazard development and urban sprawl. . . . that is, we might choose to socialize land, at least on the urban fringes, and then either keep it in public ownership, leasing it back to private use, or sell it back to private use at a subsidized price after stamping it with covenants locking it into regional master plans. . . . within the traditions of property law, moreover, there is nothing particularly radical in visualizing land being owned by the sovereign and being channelled out again to persons who would hold it only as long as they performed the requisite duties which went with the land. In this instance, of course, instead of knighthood service, the landholder would have to hold and use his parcel according to the purposes set forth in the regional or statewide master plan.[4]

Thomas Jefferson presumably would be aggrieved at our calm acceptance of a slide back toward a feudal notion of the state as ultimate authority over the use and disposition of land. As a shaper of the Northwest Ordinance and the Virginia Constitution, Jefferson vigorously contended for the abolition of all remnants of the feudal landholding system. He argued in favor of allodial ownership instead, ownership in which estates would be held in absolute dominion free of any feudalistic obligations to one's lord or the state. Such feudal remnants as primogeniture and entail were anathema to him as badges of serfdom imposed upon free Saxons after the Norman Conquest. It was precisely this conception of property as the prerogative of the state, to be dispensed at the discretion and pleasure of William the Conqueror and his successors, whether kings or states, that Jefferson abhorred.[5] If the state held ultimate ownership of all land, then it could at any time reduce any man to penury, or worse, to serfdom, as William had dealt with the vanquished Saxon freeholders after the Battle of Hastings. Then, surely, no man could long remain secure in his freedom.

Most proponents of an expanded state role in determining land use do not see themselves as embracing a return to feudalism. Rather, they focus upon the supposed waste and environmental degradation foisted upon

society by rapacious developers who are concerned only with profits and care nothing for the welfare of future generations. To replace these individual market decisions, they advocate some form of state or national land-use policy that will collectivize decision making while leaving the ownership of property in private hands. To go further than this and urge outright land nationalization would, of course, be nearly suicidal as a political strategy, given the American hostility toward anything that overtly smacks of socialism. However, it is possible to imagine that the current process may one day lead to the same result. First, property owners are denied portions of their decision-making powers through such devices as local zoning or state planning in areas of critical environmental concern. Gradually even that amount of control seems insufficient, and property owners suddenly find their land declared a scenic treasure, which they may never develop. Eventually, the rights of property ownership may become so eviscerated that explicit land nationalization will seem politically acceptable.

To recognize the credibility of such a scenario one need only examine the land-use legislation passed by the federal government in recent years, all of which extends governmental control over decisions previously left to individuals. Should the market provide housing or should the state intervene? With a whole series of legislative acts—from the Housing Act of 1949, to the Demonstration Cities and Metropolitan Development Act of 1966, to the Fair Housing Act of 1968, to the Urban Growth and New Community Development Act of 1970, to the Housing and Community Development Act of 1974—the federal government has become a direct provider of housing.[6] It also subsidized nearly all new apartment complexes, encourages the destruction of old neighborhoods via urban renewal and, later block grants to localities,[7] and mandates standards of racial impartiality in the rental and sale of housing. Is the quality of our environment a private, local, or state concern, or is it a federal problem? Again, the policies pursued in the past fifteen years have resoundingly shifted the balance in the direction of federal involvement. A few of the most conspicuous federal efforts are the Clean Air Acts of 1963 and 1970, the National Environmental Policy Act of 1969, the establishment of the Environmental Protection Agency in 1970 and the Council on Environmental Quality in 1969, the Water Quality Act of 1965 (which created the federal Water Pollution Control Administration), the far more rigorous federal Water Pollution Control Act Amendments of 1972 (which mandated the eradication of all pollution in navigable waters by 1985), and the Solid Waste Disposal Act of 1968. Should landowners control the use of their marshes, beaches, bogs, and coastal land or should the federal government? Again, recent policy decisions have shifted the locus of control from individuals and local govern-

ment to Washington. The Federal Coastal Zone Management Act of 1972 called for statewide planning for coastal conservation, with the federal government paying 80 percent of the planning bill.[8]

As this sampling of federal legislative initiatives indicates, the early 1970s spawned an elaborate apparatus of controls over the use of land, water, and air. Even more notable than the successes of those who favor greater control over land use was their one conspicuous legislative failure: the attempt to enact a national land-use policy. A pronouncement by President Richard Nixon in 1970 illustrates the sentiment behind that attempt:

> Today we are coming to realize that our land is finite, while our population is growing. The uses to which our generation puts the land can either expand or severely limit the choices our children will have. The time has come when we must accept the idea that none of us has a right to abuse the land, and that on the contrary society as a whole has a legitimate interest in proper land use. There is a national interest in effective land use planning across the nation.[9]

From 1971 to 1975 the Nixon administration's bill competed with another one introduced in the Senate by Henry Jackson and in the House by Morris Udall. The intent of the two proposals was roughly similar. Both bills envisioned federal funding on a modest scale ($800 million over eight years in Jackson-Udall; $100 million over five years in the administration bill). The money would be used to promote or mandate (depending on which version of the two bills one inspects) state land-use planning, with the federal government ultimately judging the adequacy of the state plans. Under the Nixon proposal, states that did not qualify for the planning grants would be penalized by reductions in their federal grants for highways, airports, and recreational facilities. Both proposals justified national land-use planning on the ground that areas of critical environmental concern needed immediate protection. The Jackson bill passed the Senate in 1972, but failed in the House. In 1974 a version of the same bill died in the House on a 211 to 204 vote.[10]

It is difficult to suppose that if these plans had been adopted matters would have ended there. As Bernard Siegan observed, the penchant for regulation, once appeased, takes on a driving force of its own.

> Few, if any of the benefits that better planning and more regulation are supposed to bring about will actually occur. . . . The expectations created by the rhetoric will remain just expectations. The usual pattern emerges anew. The existing legislation will be condemned as inadequate, and new and more restrictive legislation will be sought and probably obtained. A greater federal role will continue to evolve as each new legislative version fails again to meet the expectations of the rhetoric. The same people will find that the landscape and the buildings are still not beautiful and that housing problems still re-

> main. The chronology of local zoning will be repeated: the failure of existing land use controls leads down the Parkinsonian path to more, or more severe, controls, not less, or less stringent, ones.[11]

We were prevented from taking the first step down this path by a handful of votes in the House of Representatives.

But the environmentalist activism of the past few years has not been limited to shifting the locus of control over land use to the federal government. Of equal or even greater impact has been the veritable flood of state land-use programs. These seek to supersede local zoning authorities and regulate land that falls into the nebulous category of land involving "statewide concern." The earliest and most comprehensive of these efforts began in Hawaii in 1961, when all property was subjected to statewide zoning in an attempt to preserve the state's agricultural land. All land within the state was assigned to one of three, later four, categories: conservation, agriculture, urban, and rural. Any developers seeking a change in the status of their land were required to seek a variance from the State Land Commission. Not surprisingly, land and housing costs have escalated dramatically in Hawaii. Although other factors such as population growth undoubtedly contributed to the increase, extensive land-use regulation played a significant role.

Other states, including Colorado, Florida, Minnesota, Nevada, Oregon, Wyoming, and Vermont have enacted comprehensive statewide mechanisms for regulating so-called critical areas. Vermont presents a particularly interesting case. In 1970 the legislature passed the Vermont Environmental Control Act (Act 250), which mandated state oversight of large-scale developments (over ten units). It established environmental standards and created regional commissions to administer a permit system. In addition, a plan for what amounted to statewide land classification was initiated. As a further indicant of the strength of antidevelopment sentiment in the state, the legislature in 1973 enacted a special capital gains tax on land speculation. The final stage of Act 250 was supposed to be a state land-use plan designating permissible densities on all land. A map was published that showed how each landowner's holdings were to be regulated, with 80 percent of the land designated for construction of no more than one dwelling per twenty-five to one hundred acres. An uproar ensued, and the legislature failed to enact the plan. This experience has led some environmental activists to warn against such foolhardy explicitness, and to advise keeping landowners in the dark until they are confronted with a *fait accompli*.[12]

Various states have pursued regulatory policies directed at particularly sensitive areas. New York designated the Adirondack Park area in 1971 as

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