

## In defense of the forgotten right

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By Richard Miniter

Sen. Malcolm Wallop, Wyoming Republican, couldn't resist seeing if fellow Westerner Bruce Babbitt was in the real world. During confirmation hearings for Interior Department secretary, Mr. Wallop asked the nominee what he thought of the Fifth Amendment's "takings clause." Mr. Babbitt, the quixotic former New Mexico governor and avowed environmentalist, said he was "not familiar" with the clause that transformed land-use cases during the 1980s.

If Mr. Babbitt wants to become familiar with the legal landslide brought on by new interpretations of "takings," he should read Mark Pol-lot's "Grand Theft and Petit Larceny."

The "takings clause" itself reads: "nor shall private property be taken for public use without just compensation." This is the constitutional foundation for the simple case of the government condemning land in order to build a highway, for instance, and compensating the owner at what a court decides is a "fair market value."

What happened during the Reagan administration took this simple legal principle into the 20th century. Mark Pollot, then a Justice Department official, asked a simple question: If the government doesn't take your land outright, but commands you to devote it solely to public use and doesn't pay you for it, are you entitled to compensation?

This is a common occurrence; government regulations routinely compel landowners to forgo the use of their property without compensation for reasons of zoning, wetlands or historic preservation, endangered species and a range of others. Lawyers call this "regulatory taking."

Although these regulatory takings of private land are expected to deliver some public benefit, the cost is borne entirely by the property owner. Mr. Pollot and Tom Hookano, another Reagan official, convinced the president to issue Executive Order 12630 requiring federal agencies to assess all relevant regulations and estimate the cost of potential claims by property owners. (President Bush subsequently issued another executive order that amplified and extended the Reagan order.)

This federal assessment proved to be more than an academic exercise. The potential federal liability proved too huge, and the courts got involved. Led by the decision of Chief Judge Loren Smith of the Court of Federal Claims, the federal government soon began handing out multimillion-dollar damages to landowners.

Last year, the Supreme Court validated the legal theory of regulatory takings on which the Court of Federal Claims based its decisions. That means that Uncle Sam could be liable for billions of dollars in claims. And the cost of implementing regulations may soon become an effective political argument against proposed rules that fail to balance benefits with costs.

Of course, environmental lawyers and other friends of increased regulation are seeking to undermine this theory or find exceptions to it. It is this important intellectual fight that Mr. Pollot's book is joining. He marshals considerable evidence and legal argument in support of compensation for the victims of regulatory takings. His coverage of the Framers' constitutional debates on the subject of property are first-rate, if a bit repetitive.

He also puts forth the idea that property rights are the "forgotten civil right." In fact, he holds that without protection of property all other civil rights are easily swept away. Who would speak out against government bureaucrats, Mr. Pollot wonders, if they had the power to put one out of business or seize the land upon which one intends to build his home?

This argument is a real public service. First, it correctly places property rights in the bundle of civil rights that most liberals cherish, instead of on the back of the bus with "economic concerns." Ask any American what he longs for, and sooner or later his answer will include property. For most of us, the most valuable thing we will ever own is our home or small business. The power to take those things away without compensation or cause is surely the most terrible civil-rights violation. Mr. Pollot says many building contractors and homeowners refused to talk to him on the record for fear of suffering the wrath of the regulators.

If Mr. Pollot's well-argued book succeeds in attracting more civil libertarians and civil-rights advocates to the defense of property rights, then it will have accomplished its goal. But Mr. Pollot pushes his arguments further. In the wake of the U.S. Supreme Court case *Lucas vs. South Carolina Coastal Council*, courts must now award damages when regulations deprive a landowner of all economically viable uses. But if the government pays damages when it takes 100 percent of the property value, Mr. Pollot asks, what about when it takes 95 percent or 5 percent?

As Mr. Pollot argues, there is no difference in principle between paying compensation in any of those instances. "The Constitution," he says, "forbids petit larceny as much as grand theft and it does not distinguish between the taking of some property and the taking of all property."

*Richard Minitzer is a writer for Insight magazine.*

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GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA

By Mark L. Pollot

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