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Just Who's 'Taking' What?

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Well, we finally got a semi-decent decision out of the U.S. Supreme Court. With Rehnquist, Scalia, and the never-doubting Thomas in snarling dissent, the court finally ruled against some bad guys in the case of Tahoe-Sierra Preservation Council Inc. (those being the bad guys, in enviro-logo drag) vs. Tahoe Regional Planning Agency.

On the facts, the court ruled that it was OK for a local planning agency to limit private commercial development around Lake Tahoe, one of nature's most beautiful accomplishments. On the law, the court rejected the argument, made by local developers and big landowners, that such zoning and land use controls were an unconstitutional "taking" under the Fifth Amendment, thus requiring compensation by government of any potential private value lost through public action.

The case is important because this "takings" argument has recently been a favorite of the corporate right in its unending attack on the legitimacy of any government regulation of business behavior. With deep antecedents in American constitutional history, it has been revived recently by Richard Epstein, a free-market lunatic at the University of Chicago Law School.

Epstein is actually a nice guy, with enormous interest in all sorts of things and a willingness to talk about almost anything for hours. Nor does he deliberately kick old ladies in front of snowplows or run over immigrant workers in his SUV. But he doesn't believe in society. He told me so himself. "Markets, of course. Individuals, sure. Families, I suppose. But society? Forget it!" - that's his basic view of the world, of which he has sought to persuade his colleagues and the general public in an unending series of "can you top this!" articles and books on why we should get rid of almost any attempt to build one worth living in.

Epstein's "takings" argument goes like this. Property has rights. In fact, property itself is a bundle of rights, including sale, gift, destruction and improvement, and these rights inhere in the owner of property. So if government passes some law that limits your ability to do with property what you wish, it's trampling on your rights. Specifically, it may be "taking" from you something of value - the possible use of the property in a way now barred by law.

Say you've got a nice chunk of waterfront property at that national treasure called Lake Tahoe. Say you'd like to establish a six-story parking facility on your lot, maybe with the parking underground and a nice casino on top. You might make some money doing so, as the tourists need a place to park, and working-class people are always looking for fun ways to lose their money.

But government won't let you do this - "Bad government! Bad, bad government!" - which means that it's keeping you from that money. Epstein's argument is that government should compensate you for the money you have been prevented from making.

Of course, this sort of argument has no end, which is why Epstein made it. If property is understood so expansively, and the rights to property are understood to be assigned exclusively to their private owner, then almost any government regulation has some effect on some owner's right. And if government has to compensate all owners for all potential losses they suffer through restriction on property's disposition, well, government soon runs out of money and grinds to a halt.

So it was important for the Supreme Court to say, if not entirely clearly, that this argument is a little crazy, and to lend its authority to more conventional understandings of "taking" - in which the concept is limited to cases where government literally seizes or condemns some land or facility. In the Tahoe case, the court observed, the only thing that had happened under the zoning and land use regulations was that the owners couldn't use their land exactly as they pleased. But this happens all the time across America, and is a defensible consequence of government regulation pursued for other legitimate purposes.

In truth though, one might have questioned the way in which the developers' property was theirs in the first place. What makes something "private," and what is the role of state action in producing that? And where at law are we able to assert social interests in things held in common? Like air, for example. Who owns the sky? Or water? Who owns the Great Lakes, home to one-fifth of the world's fresh water? Or open space farmland? Who gets to decide the fate of the horizon, over 250 miles of northern Wisconsin, that some private power companies want to change?

These questions are not mere academic musings. They come up directly in some big and very costly decisions Wisconsin is about to make on our environmental and energy future - like who is going to pay to build new energy capacity in Wisconsin. What's not so funny about these decisions is that the general public knows almost nothing about them, even though that's who's going to get stuck with a bill running into tens of billions of dollars. These are "takings" of a different kind than those imagined by Professor Epstein. They're more like the familiar theft of the public by private interests - not a "taking" but your basic power grab.

Joel Rogers is director of COWS, the Center on Wisconsin Strategy, at the UW-Madison. COWS is sponsoring "Sustaining Wisconsin," a statewide dialogue about the future of Wisconsin. Go to www.sustainingwisconsin.org for more information.

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