

• Professor T. NICOLAUS TIDEMAN claims that courts in the US are responding to what he calls a "not-yet-consciously acknowledged idea" that land is a common heritage.



• Nicolaus Tideman

# Just moves?

## PROPERTY RIGHTS: Part Two

THE PUBLIC assumes that laws are made on its behalf by a democratically-elected assembly of politicians. Sometimes, however, law is made by judges.

An article in the *Columbia Law Review*\* claims that the courts are beginning to signal limits to the rights of private property. If these hints of change are carried through by the political process into a full-blown revision of the law of property, American society would be subjected to a peaceful transformation, the likes of which have not been seen since the Civil War was fought over the right of plantation owners to keep slaves.

The analysis by Nic Tideman, an economics professor at Virginia Polytechnic Institute and State University, in Blacksburg, Virginia, relies heavily on the notion of an evolving sense of morality which must affect the rights of the individual to claim absolute power over land and natural resources.

Prof. Tideman begins by presenting a concept of justice that addressed four concerns: equality, stability, efficiency and authority. The first is the most important, and is written into the American Constitution in one of the best-known phrases in the English language: "We hold these truths to be self-evident, that all men are created equal..."

But justice also requires that society should be both stable and operationally efficient, important considerations when an individual finds himself in dispute with the community over a decision to deprive him of what he has come to regard as his property rights - called "takings" in the United States.

"Our commitment to stability is reflected in the constitutional requirement that takings be compensated and in the general sanctity of property rights, which may mean anything from the right to traverse a path to the right to be employed in a particular job," writes Prof. Tideman.

Legal disputes originate when the individual decides that his property rights are being unfairly eroded by the actions of society. "We are willing to impose some unanticipated costs on people, to tax them, to protect their entitlements by liability rules rather than property rules, to reduce the value of their entitlements through regulation, but in our pursuit of efficiency we stop short of taking all of the value of a thing. That would be considered unjust."

IN THE ideological disputes over property rights, there are those who claim that the law has assigned all property rights, and that the political process should not be used to erode those rights without full compensation.

Wrong, argues Prof. Tideman, who explains: "The development of our moral knowledge periodically requires us to introduce discontinuities into the claims that we recognize, and the political process is the principal arena in which we decide what these discontinuities will be and when we

\* "Takings, Moral Evolution, and Justice," *Columbia Law Rev.*, Vol. 88, No. 8, Dec. 1988, pp. 1714-1730.

• If correct, this suggests a major shift in property rights is in the making which would have an impact on the politics and economics of the West as radical as perestroika in Russia.



• Sleepy Hollow, Kentucky owners are mineral-rich but moral justice emerges

will introduce them. While the courts may perform a supporting role in this process, they cannot be the principal actors because the process used must provide substantially equal participation for all members of society."

Slavery is the classic example that illustrates how a shift in moral attitudes can seriously erode property rights without compensation. Today, argues Prof. Tideman, a process of moral evolution is once again operating which could radically alter property rights to land.

"Often in the development of legal doctrine, an unrecognized principle can in retrospect be seen to have determined the outcomes of cases long before it was stated, and sometimes even while it was being denied."

That principle commands as little support today, he argues, as the principle that human beings cannot be property commanded in 1750. But something is happening, in his view. *The principle emerging as new content for the concept of equality in justice is that land and natural resources are our common heritage, to which we all have equal claims.*"

This principle, notes Prof. Tideman, was popularly articulated a century ago by Henry George, the American social reformer who demonstrated that land had to be managed for the equal benefit of everyone in all generations. To support his contention that the courts are beginning to acknowledge this principle, Prof. Tideman cites four recent cases of takings.

"Indirect evidence of the Supreme Court's recognition that land and natural resources require different treatment than other assets in takings cases is provided by the rule that the 'deprivation of reasonable investment-backed expectations' is a taking that requires compensation."

"While this rule is too new for us to be completely confident how it will be applied, it is noteworthy that the economic definition of investment is not 'the purchase of an asset that is expected to yield its owner a return,' but rather 'an increase in the stock of capital (produced goods that are used to produce other goods).' Thus land and natural resources are not components of capital. From an economic perspective, the purchase of land or natural resources does not qualify as investment."

Prof. Tideman illustrates this analysis by examining a legal dispute over coal deposits in Pennsylvania: "The Supreme Court held that Pennsylvania could require coal companies, without compensation, to leave in the ground coal that supported surface structures, even though the coal companies had previously purchased (or had declined to sell to purchasers) the right to mine coal without regard to the consequences for the support of surface structures."

But Prof. Tideman acknowledges that it remains to be seen whether courts will make the economic distinction between capital, which represents economic investment, and land and natural resources, which do not."

He then examines other cases to support his view that the law of property, as it applies to compensation of owners, is far from settled in the landowner's favour. One dispute involved the assignment of an easement

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