

**PROPERTY RIGHTS AND THE CONSTITUTION--SHAPING SOCIETY THROUGH LAND USE REGULATION** by Dennis J. Coyle. Albany, NY: State University of New York Press, Albany, 1993. 382 pp.

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In the introduction to his book, Dennis Coyle quotes the legal scholar Martin Shapiro: "[A]lmost all the scholarly treatments of the modern Supreme Court have been produced either by active proponents of and participants in the New Deal or by its intellectual and political allies successors" (p. 12). Surely, Coyle is an exception to Shapiro's rule: he decries New Deal jurisprudence not just for moving property rights to the back burner but for taking them off the stove completely.

Coyle pulls no punches. His is a book about property rights from the perspective of the property owner. As he puts it: "I think abdication by the courts has exposed property owners and users to flagrant abuses of their fundamental rights" (p. 13). His views, quite interestingly, seem to emanate from a strongly-etched childhood memory. Coyle grew up on a dairy farm and one day, as he tells it, a state inspector came around. The inspector had two complaints. One was that the door to the milkhouse opened inward, when the inspector thought it should swing out to prevent flies from entering the building. The inspector was not concerned with the actual number of flies in the building or with the "general level of sanitation in the barn. The door had to open in the prescribed manner, and that was that." The inspector also told the family that it must replace the electric cooler with a "shiny new storage tank," which -- at considerable expense to the family -- would pipe milk directly into its truck. Coyle's own words best summarize the end of the story: "My father considered the demands of the state and the bleak outlook for small farmers, and decided it was time to embark on a new career. So the cows were sold, and our small contribution ceased to flow into the great stream of commerce. And to this day the milkhouse door still swings inward" (p.5).

In important ways, **PROPERTY RIGHTS AND THE CONSTITUTION** is an ode to that childhood memory. It searches for "the elusive rights of landowners" (p. 9) in records of state supreme courts and in those of the U.S. Supreme Court. And it finds some in both, enough to allow the author to make clear-cut recommendations about the direction into which the law should head.

But before I get to those, let me back up and tell readers something about Coyle's approach to property rights. From a theoretical perspective, he suggests that arguments (legal and otherwise) for and against the regulation of land use can be grouped on the basis of three beliefs or "cultures": hierarchy (or order), which asserts that well-ordered communities are desirable and promotable through controls on land use; liberty, which claims that such regulations often violate fundamental, individual freedoms; and equality, which suggests that controls on land use ought be used "to redistribute resources and power in societies" (p.20).

The balance of the book explores how recent constitutional litigation has sought to reconcile or, at least deal with, the obvious conflicts among these beliefs. Chapter 4 considers the Pennsylvania Supreme Court (with some attention to New Jersey); Chapter 5 takes up California; and Chapter 6 explores U.S. Supreme Court doctrine. Coyle's selection of the U.S. Supreme Court is obvious to most readers of this

publication: after years of silence on the issue of property rights, the Court has handed down several decisions of some interest. But it is the years of silence that make examination of state supreme courts so important: they left the state courts to their own devices, to deal with the subject in a reasonably autonomous fashion. So too, Coyle's selection of Pennsylvania and California is not haphazard. He polled eight experts in land use law, asking them to name the states that were most and least protective of property rights. As he tells it, California -- not

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surprisingly -- was "a near unanimous choice" (p. 11) in the least protective category. Pennsylvania and Illinois emerged as those with reputations for protecting property rights. But when Coyle examined Illinois court cases of the 1980s, he found its reputation overly exaggerated: in only about a third of their constitutional cases did the justices rule in favor of the landowner. Hence his choice of Pennsylvania, which supported the property owner in about half the cases and, along the way, developed some innovative doctrines.

Coyle's analytic approach is similar across the three substantive chapters. Mostly, it consists of thick doctrinal treatments of the key legal developments. Case facts are presented in some detail with the resulting court opinions extensively discussed. He also explores how jurists responded to the three basic beliefs (or cultures) about land use regulation. Interspersed within these discussions are data from the various courts. The chapter on the U.S. Supreme Court, for example, includes tables denoting the votes in key landowner cases, support scores broken down by issue areas, and justice-by-justice tallies. Chapters on the various state supreme courts hold similar information.

What do we learn from Coyle's presentation? Some of what we take away is quite court-specific. The Pennsylvania Supreme Court has not been particularly consistent in its approach to property cases but Coyle applauds its efforts to at least "struggl[e] with essential cultural conflicts [e.g., hierarchy, liberty] that other courts ignore" and to attempt "to articulate a rationale for finding consensus within the conflict" (p. 111). The California court is in flux. With the "liberals" now gone, so too could be the court's traditional hostility toward landowner rights. But such a conclusion, Coyle argues, might be premature: it is possible that the new justices are judicial restraintists and, accordingly, reluctant to overturn court precedent and state laws. If that is so, as Coyle writes, the California court may be "another case of `the more things change, the more they stay the same'" (p. 165). The U.S. Supreme Court chapter also points to a Court in transition, but less in terms of membership than in doctrine. Coyle's book apparently went to press before the Court handed down *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL* (1992). Yet his conclusion is apt and worthy of citation: "The revival of landowner rights by the Supreme Court has been modest and reluctant, more a consequence of the gradual extension of existing doctrine...than a dramatic leap in a new direction. While the Court has not become an aggressive defender of the constitutional rights of landowners, its occasional shows of support send a message to the members of the planning community and elected officials that they must indeed know the Constitution, a message they had grown unaccustomed to hearing, and tell the polity that property may be something worth protecting. In the land use area, the Court is no longer just the good soldier of hierarchy" (p.209).

We also learn about how the three beliefs (or cultures) play out in land dispute litigation. Indeed, it is quite important to Coyle that we come away from the substantive analyses with some sense about the various jurists' use of these cultures. For his ultimate objectives are 1) to demonstrate that allowing unlimited government regulation of land use does not serve well any of the three values and 2) to suggest an approach that can satisfy them. That approach is a mid-level standard of constitutional scrutiny under which legislation would be required to "bear a substantial relationship to an important governmental objective" (p. 258). Such an approach, Coyle argues, would satisfy egalitarians, libertarians, and hierarchists; it is also, of course, a compromise between the current (and, to Coyle, unacceptable) use of the rational basis standard and the compelling interest standard used for preferred freedoms.

Whether this seems a plausible solution is something I leave to readers to determine. And I do hope that this book gets read because there is much to commend about it. Before Coyle entered the academic world, he worked as a newspaper reporter and editorial writer. His former career served him well: **PROPERTY RIGHTS AND THE CONSTITUTION** is an

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elegantly-written work, a pleasure to read. What is more, I learned a lot. I admit here and now that I agreed to review this book because I wanted to bolster my knowledge of property rights -- one of today's hot legal topics. Coyle did not disappoint. When I finished the work I had taken enough notes to round out several constitutional law lectures and to supplement (if not completely revise) my writings on the subject. Finally, despite Coyle's own bias, the book is not a piece of propaganda. It has a perspective, to be sure; but it presents the material and the arguments in a rather objective, no-nonsense fashion.

All of this noted, I must register a complaint with one aspect of the work -- its aspirations to be a serious piece of political science. Quite early on, Coyle writes: "The study of doctrine has fallen out of favor in the social sciences, and that is regrettable...There is little recognition that the language and logic of legal doctrine is an important factor in the outcome of decisions and more fundamentally in the character and tone of society. This distrust of doctrinal studies stems from an understandable suspicion of backseat judging under the guise of scholarly analysis" (p. 5). First, let me write that I agree with Coyle's sentiment. And, second, that I take it to mean that he seeks to produce a work scholars could hold to the standards of good science.

If that is so, the book fails on several scores. Good science, I think, is cumulative in nature; it seeks to build on what others have done. Yet, this book -- while citing innumerable articles written by law professors (and, to be fair, by a handful of political scientists) -- ignores important works within the social science literature. From a theoretical perspective, Coyle might have consulted research on agenda setting, since so much of the book considers the resurgence of landowner cases. Along these lines, Richard L. Pacelle's **THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA** would have given teeth to arguments he makes only casually. Another surprising omission is the literature on state court decision making. Coyle could have used Melinda Gann Hall's research (e.g., 1987, 1989) to flesh out some of the observed variance among the courts. And it is almost bizarre to think that Coyle does not seem to have consulted Robert Sickel's aging but still informative article (1965) on zoning laws -- of all things! -- in the Maryland Court of Appeals.

By the same token, the results of good science should be amenable to replication. Coyle's work does not meet this standard because he does not tell us how he located the cases in the study. The reader cannot determine if his data (and narrative) are inclusive (covering all cases decided by the various courts for the time period under analysis) or merely illustrative. If it is the latter, Coyle fails to provide us with his criteria for case selection. In the absence of such information, I was left with considerable skepticism about the results of Coyle's data analyses.

Other problems with the book -- at least from a scientific perspective -- are not difficult to summon; for example, the small number of cases make his judge-by-judge voting analyses less than credible. But I shall stop here and simply reiterate my bottom line. PROPERTY RIGHTS AND THE CONSTITUTION may not live up to some of its more scientific aspirations, but it does meet many of its other promises. And, on balance, those far outweigh its shortcomings. I strongly recommend the volume for your consideration.

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