

DOCUMENT RESUME

ED 376 466

CS 214 587

AUTHOR Chiaviello, Tony
 TITLE Taking Sides on "Takings": Rhetorical Resurgence of the Sagebrush Rebellion.
 PUB DATE Mar 94
 NOTE 27p.; Paper presented at the Annual Meeting of the Conference on College Composition and Communication (45th, Nashville, TN, March 16-19, 1994).
 PUB TYPE Speeches/Conference Papers (150) -- Guides -- Classroom Use - Teaching Guides (For Teacher) (052) -- Information Analyses (070)
 EDRS PRICE MF01/PC02 Plus Postage.
 DESCRIPTORS Environment; Environmental Standards; Higher Education; Rhetoric; *Rhetorical Criticism; Rhetorical Theory
 IDENTIFIERS *Fifth Amendment; Historical Background; Private Property; *Sagebrush Rebellion; United States (West)

ABSTRACT

The "Takings Clause" of the Fifth Amendment to the United States Constitution seems clear enough: when the government takes an individual's property, it must pay him or her for it. The "Sagebrush Rebellion" refers to the numerous incarnations of a movement to privatize public lands and contain environmental regulation. This latest rebellion is a populist mobilization of historically disenfranchised western small-time property-owners by developmental interests. A rhetorical analysis of the debate between the environmentalists and those behind the rebellion exposes not only the rhetorical practices employed by both sides but also the philosophical and mythical underpinnings; only such an analysis offers some mutual understanding. Neither side in the debate hesitates to employ the full panoply of fallacious reasoning, including ad hominem attacks, poisoning the well, or slippery slope logic. Any critique of the rhetoric will find a rich vein of fallacy and unabashed emotional appeal on both sides. To unpack the foundations of these arguments, analysis must look to an assortment of theoretical orientations: (1) legal theory, which explains that property consists of a wide range of "entitlements," which are not identical to "rights"; (2) postmodernism, which critiques the "self-regarding" (or absolutist) vision of the property owner as independent and self-sufficient; (3) fantasy-theme and symbolic convergence theory, which examines the fantasy theme of cowboys and miners winning the Old West as a pillar of the Wise-Use movement. It can be effectively used for analysis in the classroom. (Contains 48 references.) (TB)

 * Reproductions supplied by EDRS are the best that can be made *
 * from the original document. *

Tony Chiaviello
Dept. of English
New Mexico State University

TAKING SIDES ON "TAKINGS":

RHETORICAL RESURGENCE OF THE SAGEBRUSH REBELLION

Abstract:

This article offers an initial rhetorical approach to the question of "takings," outlining the nature of the Sagebrush Rebellion and the debate over takings, reviewing the legal discourse on the issue, and identifying a few critical approaches to the issue from communication and rhetoric theory. The Sagebrush Rebellion is a cyclical phenomenon in the West, and its current resurgence is in reaction to a perceived unacceptable widening of government environmental regulation. Resolution of the key questions of the takings issue can be accomplished through an accurate interpretation of the motivational sources of the Sagebrush Rebellion, and a focus on "transactive" approaches in the environmental planning profession, which might lead to consensus, compromise, and resolution. It is a particularly useful example for a classroom filled with "western" students, such as those of New Mexico.

CS214.587

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

- This document has been reproduced as received from the person or organization originating it.
 Minor changes have been made to improve reproduction quality.
 Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE THIS
MATERIAL HAS BEEN GRANTED BY

T. Chiaviello

TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC)

**Taking Sides on "Takings":
Rhetorical Resurgence of the Sagebrush Rebellion**

"[N]or shall private property be taken for public use,
without just compensation".

- U.S. Constitution, Amendment V

INTRODUCTION

The issue of the "taking of private property" has come to the fore in the environmental debate as a result of the current resurgence of the Sagebrush Rebellion, which has resorted to court challenges and proposed state takings legislation as a strategy to limit or reverse government environmental regulation. The legal and rhetorical dimensions of this issue threaten to overwhelm political debate. A small but substantial debate has emerged in legal publications, and the mainstream environmental community has mobilized with takings informational materials. However, despite the intensely rhetorical nature of this issue, a scholarly study of the issue has yet to be undertaken.

This article offers an initial rhetorical approach to the question of takings, outlining the nature of the Sagebrush Rebellion and the debate over takings, reviewing the legal discourse on the issue, and identifying a few critical approaches to the issue from communication and rhetoric theory. The Sagebrush Rebellion is a cyclical phenomenon in the West, and its current resurgence is in reaction to a perceived unacceptable widening of government environmental regulation. Resolution of the key questions of the takings issue can be accomplished through an accurate interpretation of the motivational sources of the Sagebrush Rebellion, and a focus on "transactive" approaches in the environmental planning profession, which might lead to consensus, compromise, and resolution.

TAKINGS DEFINED

The "Takings Clause" of the Fifth Amendment to the U.S. Constitution seems clear enough: when government takes your property, it must pay you fairly for it. What it doesn't say is precisely under what conditions a "Taking": a compensatable public use -- as opposed to a legitimate exercise of eminent domain, or the state's police power to halt a nuisance -- does actually occur. Britain's The Economist magazine calls Takings-case jurisprudence, "the most perplexing area of American land-use law" (24).

A "taking" can be the result of a government regulatory action whose enforcement prevents a private-property-holder from engaging in certain (specified or classed) activities on his or her personal (usually "real") property. Such a regulatory action implies "public use," and if its result is an infringement or removal of one or more "sticks in the bundle" of property rights as are supported under the last clause of the Fifth Amendment to the U.S. Constitution, the action may represent a "taking" of property. If so, the property-holder is thus legally entitled to compensation (financial or otherwise) from the appropriate government agency for the property's fair market value, or the value of the denied activity. The "public use" dimension of "taking" has been assumed to be implicit in any government regulatory action, but such is not necessarily the case in every instance.

Whether a government action constitutes an actual taking or not is decided, case-by-case, in the court system, from state and Federal District courts to the U.S. Court of Claims and eventually, the U.S. Supreme Court. The Takings issue promises to be a defining issue of the environmental debate as the 20th Century ends; lining up and taking sides on Takings has made it a major, increasingly polarized source of confrontational environmental rhetoric.

THE SAGEBRUSH REBELLIONS

Over the course of the past 100 years, the Federal Government has burgeoned to absorb entrepreneurial capitalists into an

Jews and a cripple," spelled curtains for his government career (Graf 257).

This latest Rebellion is a populist mobilization of historically disenfranchised western small-time property-owners by developmental interests. Its goals include privatization of leased public lands and emasculation of environmental regulation. Philosophically, it rests on the sacred and unquestioned nature of Lockean individual "property rights." Largely due to the 19th-Century federal policy of cheap disposal of public lands to settlers, and the in-common, free use of "the unclaimed lands" for grazing and mining, modern extractive users claim pre-emptive rights to the land as "settlers." While this claim has been explicitly and definitively denied in court tests (Platt 259), it remains the basis for continuing challenges to federal control of western lands.

RANGE WAR 2000

What I propose to call "Range War 2000" is the fifth and most intensive of the Sagebrush Rebellions; it has escalated the land-use battle to courtrooms, legislatures, and Congress, in a culminating attempt to shift land-use decisions to the private sector. Range War 2000 is more than just the latest incarnation of the cyclical Sagebrush Rebellion. Its legal dimension -- in the form of Fifth Amendment challenges to land-use decisions, called "Takings" litigation -- has been aggressively pursued by the "property-rights" movement, under the umbrella of a "wise use" interpretation of the federal multiple-use/sustained yield policy. Because property rights on federal lands remain "unclear and uncertain" (Libecap 187), the legal resolution of private rights to public lands remains likewise uncertain.

The current property-rights campaign will not be resolved by continued placid reliance on federal regulation. Before such resolution can be achieved, we will have to understand the changing ethos and legal view of property, locate the underlying symbols and fantasy-themes that produce group identification, and demonstrate

that the motives entailed by absolutist property rights have become anachronistic in a post-modern society (Alexander 273). This project can begin with the penetrating analysis and interpretation of the hidden motivations of the property-rights proponents, and expand with the enlistment of broad public opposition to rhetorical demagoguery. Finally, a mutually satisfying resolution of property conflicts may be achieved with similarly broad public support of the legitimate regulatory powers of an informed polity, and the emergence of a mutually acceptable, postmodern philosophy of "transactive" planning (Carroll and Hendrix 346).

THE TAKINGS DEBATE

To understand the Takings debate within the framework of environmental rhetoric, we must start with the "quiet revolution" of the 1970s, when environmental protection laws and regulations were generally accepted, and relatively few voices were raised in objection. In fact, much of the literature on environmentalism today assumes a general agreement on goals, with dispute remaining only on the means, or the depth of one's ecological philosophy (Simon 211). Except among "leftish" intellectuals and deep ecologists, such is not the case. Economics still precedes environmentalism.

Takings militants subsume themselves under the "Wise-use" movement, a re-emergence of the Sagebrush Rebellion. Wise-users crop up in the "counties movement," which seeks to revert local Federal lands to county control; in the "custom and culture" campaign of the cowboy subculture, which seeks to prevent any change in traditionally subsidized grazing privileges; in lobbying by the extractive industries, which resists change in the 1872 mining law, to the extent that they resist internalizing environmental costs (Ophuls 179); and in the recreation industry, which seeks wider access to wildlands to boost off-road vehicle sales.

The campaign for property rights is conducted simultaneously in the courts and in state legislatures. In New Mexico and Nevada,

ranchers Weldon McKinley and Wayne Hage have sued in U.S. District Courts to reverse Forest Service decisions to cut cattle-grazing numbers on public lands (McKinley vs. USA et al, 1993). The New Mexico court ruled that a public-lands grazing permit is a privilege, not "an interest protected by the Fifth Amendment" ("Grazing Permit..." 3). The Hage case is still in litigation ("Wayne Hage..." 3).

The latest Western Takings case is Clajon Production Corp. et al vs. Petera et al (1993), in which three large landowners claim that Wyoming's regulation of big game hunting licenses has taken their private property rights. The suit claims property rights in wild animals on private land, and that Wyoming hunting regulations have "taken" their right to hunt (Tutchton, Memorandum of Points 2-3).

Led by conservative political-action groups like the American Legislative Exchange Council, the National Inholders Association, and the Defenders of Property Rights -- and financed by an array of mining, chemical, drilling, construction, and recreation companies, and even the Moonies (Knox 109) -- property-rightists have introduced two types of state takings laws. The weaker version requires government agencies to conduct "takings impact assessments" when contemplating any kind of regulation, and if such impact be found, compensate property holders up front, directly out of individual agency budgets. A stronger bill mandates that any property restriction that reduces worth or profit by 50 percent is automatically a taking, requiring compensation (Property Rights... 2).

OPPOSITIONAL RHETORIC

Neither side in this debate hesitates to employ the full panoply of fallacious reasoning, including ad hominum attacks, poisoning the well, slippery slope logic, either/or choices, and oversimplification. Any critique of the rhetoric will find a rich vein of fallacy and unabashed emotional appeal on both sides.

In response to the Clajon suit, the National Wildlife Federation and its Wyoming chapter say the suit "challenges the American tradition, written into law, that wildlife belongs to the public," and that the plaintiffs are "seeking to destroy this principle." An internal NWF memo identifies Clajon Corp. as "a Texas corporation controlled by Clayton Williams, the infamous 'gentleman' who ran against Ann Richards for Governor" (Tutchton, Memo to Sharon Newsome). He's "infamous" for his remark during that campaign, likening rape to the weather: "If it's inevitable, just relax and enjoy it." The NWF also alerts us that Williams was investigated by the U.S. Fish & Wildlife Service for killing an endangered Tibetan argali sheep ("Lawsuit Claims Wildlife..." 3). And a Wyoming Wildlife Federation news release warns, that

if large landowners can coerce more hunting licenses, they'll sell them to wealthy friends and clients. Then they'll try to lure wildlife to their land and trap them there with fences and special feed. First the earth, then the water, now wildlife. Can the air be far behind? (Rain 1)

Wise-use rhetoric reflects a more naive form of the same passion. Federal Lands Update, a newsletter published by the National Federal Lands Conference ("People for the West"), exhorts: It is We The People who now feel the heavy hand of the federal government on us and it is We The People who must reverse these oppressive processes which have usurped most of our freedoms. We are free to do anything we want until some lawmaking body makes it illegal. (1)

Common law is no longer taught, it has been replaced with a course named "Law as an Instrument of Social Change".

Scientific Dialectical Materialism is a philosophy that [holds] man is not created [but] evolved, and no better than any other organism. (1)

More ominous is their prescription for action:

Counties must be guided by the principle of protecting private property rights... When counties have commissioners [or]

"Takings" / - 8

supervisors who balk at this... they must rid themselves of those officers. (4)

In rural portions of the West, this kind of "good riddance" can still arrive via the business end of a six-shooter. Western environmental activists are on familiar terms not only with the rhetoric, but with the reality of death threats: suspected foul play is often less than zealously investigated by Western law authorities.

Environmentalists claim the Takings campaign is designed to halt laws and regulations aimed at environmental protection.

Reagan-era insider and Solicitor General, Charles Fried, says

The grand plan was to make the government pay compensation as for a taking of property every time its regulations impinged too severely on a property right. If the government labored under so severe an obligation, there would be, to say the least, much less regulation. (qtd. in Lavelle 34)

The Wilderness Society and the Sierra Club also claim that the "real aim" of the property-rights legislation drive is:

to weaken and prevent local laws that protect human health, safety and the environment. Regulators would have to document whether the new regulation would affect the value or use of property, or the operating costs or profits of a business.

Such a bill could end up forcing taxpayers to pay businesses not to endanger the public and to pay polluters to not pollute. ("Protect Your Rights," 1992)

The Sierra Club boasts that, "In legislatures across America -- our nationwide activist network beat back the 'wise use' campaign for anti-environmental private property 'takings' laws by defeating bills in 25 of 27 states" (Sierra Club 2).

Literature from the National Audubon Society makes an effort to reach common ground:

"Sound environmental protection policies are entirely consistent with and support private property rights.... pollution control laws..., [and protect]... property owner

from their neighbors' polluting activities. Zoning and other land-use regulations... [support]... the rights of every property owner" (Property Rights 1).

Nevertheless, takings claims continue to surface. In October, 1993, President Clinton signed a bill to protect 57 thousand acres of New Mexico's Jemez Mountains. The law's sponsor, Rep. Bill Richardson (D-N.M.), admitted that the measure was aimed at preventing Espanola businessman Richard Cook from expanding his pumice mining in the area.. Cook said he will file a takings claim in the U.S. Court of Claims "because the new law represented a 'taking' of land that he should have been able to mine" ("Clinton Signs..." D3).

Myron Ebell of the National Inholders Association, a group representing property owners within and around public lands, fears that Interior Secretary Bruce Babbitt's proposed National Biological Survey (NBS) "could lead to significant government restrictions.... [and] make property less desirable for future use.... Property owners would face a variety of restrictions... ranging from a prohibition on the killing of [endangered] species to potentially any activity that could destroy its habitat." Ebell "expects that the ecosystem managers will use the NBS to stop timber sales, curtail grazing permits, block mining permits and eliminate oil and gas leasing" (Sonner A4).

Secretary Babbitt asserts that "'the government will not compensate everyone whose land is affected by wildlife protection regulations,' [and] criticized congressional efforts to require payment to property owners" (qtd. in Beamish A1). Likening environmental regulations to city zoning codes and anti-pollution laws, he admitted, "There will never be enough money to say every time there's a government regulation somebody gets paid" (A1). He admits that the protection of species habitat "is going to limit the ability of some landowners to do anything they want" (A6).

Environmental legal activists, like Audubon's Washington legal eagle, John Echeverria, say property-rightists' ulterior motive of

rolling back environmental protection regulations and laws is done in the name of the "special interest" of unrestrained development (27). Conversely, radio spots aired in the Silver City, N.M. area last year, and paid for by Minuteman Media (headed by N.M. Cattlegrowers Association president Al Schneberger and mining lobbyist Charles Roybal), condemned environmentalists' biocentrism on moral grounds, as "anti-Christian" and "pagan nature-worship," whose advocates teach

the foundational beliefs of nature worship and eastern mystic religions... [and] witchcraft... [and have] a lot in common with Adolph Hitler.... If they can succeed in assigning humans the same worth as all other life, then they will be that much closer to their real goal: The dismantling of civilization which supports the human race. (Johnson 4)

Going one better, the reporter for El Reportero, a Silver City weekly, sarcastically satirized the radio ads, calling domestic livestock, which is exotic to the Western ecosystem, "**bovis destruans vegetationes**.... an exotic Eastern animal 'worsipped' [sic] by state ranchers, who are said to rend and eat its flesh.)" (Johnson 4).

TAKINGS LEGAL THEORY

Jack L. Knetsch provides a clear appraisal of the property-rights question in his monograph, Property Rights and Compensation (Toronto: Butterworths, 1983). Property, he says, consists of a wide range of "entitlements," which are not wholly identical to "rights." Their existence is dependent upon community recognition and protection, and they are "neither absolute nor static" (1). The use and enjoyment of property results from a number of associated and narrower entitlements, or "bundle of rights," which may or may not allow transfer, lease, or some particular use, and may prohibit some or all of these (2).

Whether a claim of some individual entitlement is legitimized by the community depends on how consistent it is with other social benefits, such as efficiency, equity, and "justice goals"; these

evaluations may change over time, according to the re-ordering of societal priorities (Knetsch 2). The generally perceived need for regulation -- to prevent pollution or preserve ecosystems, for instance -- entails the coerced internalization of production costs that have heretofore been spread to the commons and assiduously avoided by industry as an unnecessary economic cost.

The situation is complicated by the tendency for non-market values (such as ecosystem integrity, or threatened species) to be viewed as "less worthy claimants to the use of resources"; this devaluation results in "political market failure" (3). Such costs have a considerable cumulative impact, but their effects on one person is usually so slight as to prevent the necessary individual effort to pursue the issue; larger impacts make such pursuit more rational for those with adequate means, and the consequence is that small groups -- such as the wise-use movement -- mobilize to gain market benefits at the expense of the taxpaying community (4).

The concept of compensation from the government when it seizes your property "for public use" goes back to English common law. For our Founders, property in this sense was restricted to actual seizure of land. In the 19th Century, it was argued than any impairment of beneficial use or land value ought to be considered a taking (Bosselman et al 123). Only in the 20th Century has the Supreme Court characterized property as consisting of a "bundle of rights," and applied the concept of Takings to the removal of some number of sticks in that bundle. Justice Oliver Wendell Holmes -- in Pennsylvania Coal vs. Mahon (1922) -- established a general rule, that, "if regulation goes too far, it will be recognized as a taking." However, the Supreme Court declined to define "too far," leaving an answer to the basic question, "when has regulation gone far enough to become a taking?" as a legal mystery (Bosselman et al 16).

Many believe that the Constitution protects every person's right to do what she wants with her land, and that environmental protection and zoning limitations on land use were "probably

sneaked through by the Warren Court" (Bosselman et al 1). In truth, for the past 100 years there has always been some kind of restriction placed on private property, whether due to zoning regulations, protection of safety, health, and welfare (and morals), or to control public nuisance. Attitudes toward the environment began to shift after the first Earth Day in 1970, and land-use regulatory thinking "drew away from the only use of land as for profit" (Bosselman et al 212-213). Restrictions to protect the environment were widely seen as necessary and desirable. This trend is fully documented in Bosselman and Callies' 1971 book, The Quiet Revolution in Land Use Control.

TRADITIONAL LEGAL PERSPECTIVES

University of Chicago conservative economics and law theorist Richard Epstein is the property-rights conservatives' guru of the "absolutist" view of Takings law. His landmark treatise on the subject is Takings: Private Property and the Power of Eminent Domain (1985), in which he sees Supreme Court Takings rulings as a perversion of modern Eminent Domain law.

Yale law professor Jed Rubenfeld proposes narrowing the concept to "Usings," which would limit government takings liability to property taken for public use only, and would result in a far smaller class of regulations to be scrutinized for a "Using," as opposed to a taking (1149).

Finally, legal scholar Laura Underkuffler seeks to find common ground in the "comprehensive" approach, which redefines the concept and role of property, positing that individuals need to develop self in the context of relatedness to others. While admitting that property retains its symbolic meaning and rhetorical power, "even as the principle of the supremacy of the individual has been attacked," a comprehensive view "is a step toward rapprochement of ideas of individual liberty, individual autonomy, and collective life" (142-147).

POSTMODERN PROPERTY AND TAKINGS

Alexander (1992) offers a "postmodern" dialectic of property and takings that recognizes the myths and underlying motivations associated with property rights. He begins by describing the "self-regarding" (or absolutist) vision: that the purpose of property is "to create a wall between the individual and the collective" (260), saying, in effect, "I don't owe society or the community anything, except to avoid harming others." Alexander calls this the "lone ranger or Natty Bumppo vision" (262), as it plays out the American mythology of "the American as westerner -- alone, out on the frontier, responsible only for himself, unconstrained by society or government... [which is] wildly at odds with the conditions of modern American life" (263). His analogy is telling, inasmuch as it goes to the heart of "the chaining-out of fantasy-themes" (Bormann, 1985 397) of the underlying motives and self-image of the cowboy "custom & culture" movement. Those who hold this view believe that the Constitution subordinates democracy to certain fundamental individual rights (Alexander 264).

This foundationalist theory contends that individual private property rights are "the pre-eminent source of individual autonomy in our political system" (264), and their explicit recognition is the best way to limit government (265). Yet, in "the famous footnote" to United States v. Carolene Products (304 U.S. 144, 152 n.4, 1938), the Supreme Court "explicitly stated that property rights are an inferior form of individual rights, less deserving of constitutional protection than [sic] political rights" (265).

The competing "communitarian" view (made explicit by Underkuffler in the "comprehensive" approach, above), holds that the owner is responsible to the community to fully realize his individual freedom (Alexander 261); its proponents "regard individuals as inextricably enmeshed within both various communities and the polity as a whole." Thomas Jefferson's citizen-farmer symbolizes this "Civic American" (263). The modern communitarian ethic stresses that "you are not free to use your

land or other resources in any way you want, simply because you own it...." (267). Property ownership is inevitably social and the source of both responsibilities and rights (269).

But there is a dialectic between these views, a "post-modern" approach (because it post-dates the era when property had a widely-shared understanding, see Knetsch, above); legal discourse can no longer assume a common, unified political theory of property rights (Alexander 261). Instead, in a post-modern world, such disputes are resolved through practical judgment rather than political preference. Thus, the question becomes, "What is the extent of the responsibilities that individuals owe to their communities as a result of their membership?" (262).

The question is answered in the dialectic of courtroom litigation, a "dialectic of sociality," that has changed over time (262). Alexander posits that "private ownership is both state-created and conditional.... the subordination of property rights to human rights is a mark of society's progress" (273) [and "...some measure of restriction on individual use and enjoyment exists as a consequence of civic responsibility" (275)].

The scope of such community responsibility is "politically and morally contestable and intensely context-dependent" (275). Alexander asserts that, "To prejudge the extent to which the community responsibilities of private ownership relieve the state from compensating owners... would cut off deliberative discussion, both within the political process and in takings adjudication" (276).

A post-modern dialectic privileges neither the communitarian nor the self-regarding vision. Mediation must be open and democratic: "ad hoc balancing is the only way to assure that the dialectic is not closed by one vision pre-empting the other through some formal rule that effectively codifies it" (277). The Supreme Court has reaffirmed that the constitutional validity of land-use regulation is context-dependent, so it seems highly unlikely that

the post-modern dialectic will disappear from the Court's takings rhetoric (277).

CRITICAL APPROACHES

Jimmie Killingsworth and Jacqueline Palmer, in Ecospeak: Rhetoric and Environmental Politics in America, note that, "where the turf of public life is divided..., writers and speakers create appeals" that can bring groups together for "cooperative social action" (7). This is accomplished through the Burkean notion of identification: the creation of symbolic common ground between rhetor and audience. That the environmental dilemma remains intractable indicates that environmentally concerned discourse communities have failed to create effective appeals (8). The result is "Ecospeak, where public divisions are petrified, conflicts are prolonged, and solutions are deferred" (8). Besides having created hardened positions from each direction, "The tendency to divide into two narrowly defined parties often leaves a huge population untouched or confused by the debate..." (10).

MOTIVES AND IDEOLOGY

Because both sides in the Takings debate want to advance in their rhetoric a number of subtle, sometimes unspoken, and often intentionally obscured agenda items, criticism necessarily involves a good deal of interpretation. To get at the sometimes consciously hidden and sometimes unconsciously held tenets of each side in this debate, Kenneth Burke's cluster-analysis approach, as he fleshes it out in The Philosophy of Literary Form, might constitute a fruitful theoretical approach to interpretive criticism. Burke tells us to identify certain words that crop up consistently in the text, then look for the values and ideas in words that tend to cluster around them. Such a method can be complemented with Burke's dramatistic pentad approach, developed in A Grammar of Motives, analyzing the various ratios between and among Burke's pentadic terms.

The rhetoric of opposing interests that underlies both sides of the Takings issue debate is closely linked to their competing ideologies, so any analysis, interpretation, and critique of the

rhetoric must of necessity serve to clarify and make explicit the "link between rhetoric and ideology" (McGee 1980). In his concept of the "Ideograph," Michael Calvin McGee extends Burke's philosophy of myth -- and what he feels is an "atrophied" concept of ideology as dogma or mass consciousness -- to suggest "a theoretical model which accounts for both 'ideology' and 'myth'" (4). McGee conceives the "ideograph," those "one-term sums," or slogans, of an ideological orientation (like Burke's "entitlements") that "signify and contain a unique ideological commitment," such as "property," "religion," "freedom of speech," or "rule of law," for example. "No one is permitted to question the fundamental logic of ideographs" (7). Such "god-terms," to use Burke's word, function as a rhetoric of control (6); analysis of such terms, as they occur and function in the Takings debate, represents another potentially fruitful critical approach.

CHAINING OUT FANTASY-THEMES

Fantasy-theme and symbolic convergence theory, as articulated by Ernest G. Bormann (1972, 1985), together offer yet another theoretical approach to group rhetoric that aims to motivate the allegiance of a community. Bormann's concept of "Chaining out" can be applied to the drama of the pioneer spirit, which is inherent in the self-view of the property-rights advocates, and provides both an historical and a contemporary identity for that movement. A fantasy-theme of cowboys and miners winning the Old West is one essential drama (the Custom and Culture concept) of the Wise-use movement: "a recollection of something that happened to the group in the past or a dream of what the group might do in the future..." (1972: 397). Likewise, the self-image of environmentalists as altruistic crusaders for Mother Earth appropriates another fantasy, to which members "respond emotionally to the dramatic situation [and] publicly proclaim some commitment to an attitude" (397).

Bormann raises a number of questions about motives, scene, and act (401-402) that implicitly suggest Kenneth Burke's dramatistic pentad (in A Grammar of Motives 3-20). In his later articulation

of Symbolic Convergence Theory (1985), Bormann calls group fantasy the "result of sharing dramatizing messages...; the content of the dramatizing message... is [the] fantasy theme.... When participants have shared a fantasy theme they have come to symbolic convergence in terms of common meanings and emotions" (13). Thus, another way to analyze the political-environmental confrontation over Takings is by seeing conflict as a result of the opposing groups' sharing separate, mostly incompatible -- often even violently conflicting -- fantasy themes.

BURKEAN SYMBOLIC MOTIVATION

A major theme of Burke's A Rhetoric of Motives (hereinafter "RM") is how the rhetoric of modern politics has established social identification "atop a way of life [that is] highly diversified by money" (RM 42). Both magic and rhetoric, having in common their use of symbols, are essentially realistic, not "magical," because they both function to induce cooperation (RM 46). The assertions that "private property makes for a rhetoric of mystification," and that there exists "a fog of merger terms where the clarity of division terms is needed" (RM 109) provide clear avenues for the development of a symbolic motivational base for the critique of the takings issue.

Burke's placing of Jeremy Bentham's "invidious cult of conspicuous waste" (RM 128) and Thorstein Veblen's emulation motive (RM 130) on the ladder of social hierarchy, brings us to the center of the property-rights issue, as it shows how "the cult of property comes to reflect public norms, norms identified with social classes which are differentiated by property" (RM 130). Scapegoating emerges out of the efforts of class consciousness to "exorcise the elements it shares with other classes" (RM 141); thus the scapegoat: "one's own traits manifested by an alien class or individual" (RM 142). Calling themselves "the real environmentalists," while scapegoating the environmentalist movement, demonstrates this effort to exorcise the demon of

cognitive dissonance from the minds of the cowboy "custom and culture" component of the wise-use movement.

Eventually, Burke says, the elevation of property and its owners' identification with it culminates in the view that the most heinous crimes are those against property (RM 159). Such mystification raises property to the level of religion, pressing theology into the service of ideology, through rhetoric (RM 178). A dialectical approach to the property-rights debate may result in consensus and compromise, but that will not necessarily achieve a universally effective solution.

"ECO-DIALECTICS"

So far, these theoretical approaches to criticism, while powerful, are polar: they fail to provide for a dialectic -- a means by which both sides of the Takings issue might find enough common ground to solve the confrontation without conflict. Thomas W. Simon's integration of several "Varieties of Ecological Dialectics" (1990) is an effort to bridge that gap by combining the separately too-limited concepts of individual ethics and political philosophy in a broader "ecophilosophy" for conducting environmental debates.

Simon synthesizes Marxist (conflictual), anarchist (cooperative), and Native American (spiritual) approaches to nature -- and to dialectics itself -- into the "interconnected interpretative domains of a dialectically informed ecophilosophy" (211). He maintains that a focus on ethics, to the exclusion of socio/political philosophy, is "abstract and ahistorical" (214), and cannot account for historical considerations and circumstances. An exclusively ethical analysis thus ignores the "effects of capitalism, state socialism, and industrialism on the environment" (216). Similarly, exclusively political conceptions of environmental issues oppose and balance each other dialectically, and thus fail to be conclusive (230). Thus Simon calls for a broader dialectic, one that includes an ethical component:

The political philosophy needed to guide [environmental] action is found in a readily available version of ecological dialectics. In a world painted in blacks and whites, ecological dialectics colors the picture gray. (231)

Simon explicitly applies his approach to its function in the debate among environmentalist factions. I would seek to extend his opened-up concept of ecological dialectics to the larger debate between various environmentalist philosophies and their opposing developmentalist counterparts.

A dialectical approach to Takings will require both sides to play by the same rules, and consensus and compromise may not be the only alternative to a Hobbesian "war of all against all." On the subject of public-lands grazing, New Mexico grazing critic Jim Fish says, "Consensus is fine if there is agreement; if not, nothing changes and you're left with the status quo" (Fish, 1994). Ed Marston, publisher of High Country News puts it bluntly:

... ranchers will have to decide whether they are truly loyal to the land and to multiple generations on the land, or whether their real loyalty is to "private property rights," which is code for eventually selling out to subdividers for top dollar. ("Grazing" 16)

TRANSACTIVE PLANNING

Once the motivations of the takings debate have been understood, the relevant legal grounds analyzed, and a dialectic undertaken, a practical application involves what has been termed "transactive" environmental planning. The practice of the profession of planning is a thoroughly rhetorical activity (Throgmorton 1992). Transactive environmental planners seek to incorporate local values and interests into planning and management, create successful relationships with local residents, and enable agreement about acceptable levels of and arrangements for resource protection, offering strategies to avoid paralyzing conflicts at the local level (Carroll and Hendrix 346).

The authors explain the concept in the context of planning under the Wild and Scenic Rivers Act (1968). River protection measures, for example, involve the acquisition or regulation of privately owned land, often resulting in changes in the way local people have traditionally used resources, and in the actual loss of ownership or control of property. Often such environmental regulatory actions "provoke bitter and protracted locally based conflict" (Eugster, 1983, ref. in Carroll and Hendrix, 1992: 346).

The transactive approach to environmental planning "tries to reach the person behind the formal role" (350). The solution to conflictual situations -- in which federal planning agents and local residents attack and antagonize each other -- lies in direct conversations with each other as people, not as "personalities." When, for instance, environmentalists and ranchers confront BLM and Forest Service agents as representatives of a distant, unconcerned bureaucracy, passions rise and the public-involvement process is arrested. Yet, when such individuals approach each other with the respect they mutually deserve as "persons," and interact as equals, there is often a genuine feeling of respect and camaraderie. If such relationships can be translated into action, the result can be mutual learning and "construction of a joint reality" (Carroll and Hendrix 350).

Gaining local acceptance of an outside agency's plan requires both formal and informal communications and relationships with local groups, early in the process. These relationships must then be maintained as the process unfolds, by means of open and honest negotiations with all stakeholder groups. The establishment and maintenance of such personal relationships, according to the authors, "seems to be the most critical factor" (350) in preventing the kinds of reactions that often result in takings challenges. If residents can develop a sense of "genuine ownership in the planning process, even if they don't get all they want" (351), progress can be made. "Conflicts are more about issues of control rather than the substance of proposed regulatory actions" (351). Such

approaches have the potential to reduce the costs and human suffering that result from extended conflicts, and can effectively eliminate political backlash (351).

CONCLUSION

Compromise and short-term adjustment have become political ends instead of means; by failing to consider long-term future consequences of continued economic and population growth, and by elevating the need for compromise into a philosophy of government -- something for which President Clinton has displayed a certain genius -- the U.S. has become an "ad-hocracy" (Ophuls 193) of politicians perpetually unwilling to risk their futures by deciding in favor of long-term solutions. More important, at the ecosystem level, the natural resource itself cannot compromise. Ecosystem sustainability requirements are either there, or they're not; when elements of a natural system are perturbed beyond the system's capacity to respond, a discontinuity results: catastrophe (Beymer and Klopatek 146). That is the ultimate dimension of the property-rights issue.

One side of the Takings debate sees a society built on the concept of "economic man," reflecting a laissez-faire market system that places the highest value on the current desires of the individual. The other side sees in that concept an insidious growth, "until one further increment of growth will precipitate ecological disaster" (Pearce, 1973, qtd. in Ophuls 180), and realizes that continued "linear, single-purpose exploitation of nature is not in harmony with the laws of the biosphere and must be abandoned" (Ophuls 43). In this collectivist ecological view, community supersedes the individual.

But to move beyond the ad-hoc "policy" of muddling through to the future, both economic and ecologic perspectives must find ways to cooperate, to reach a shared vision that both sides can recognize as more important than - even crucial to -- their current uncommon interests. Enlistment of the technical writing corps of the planning profession in the practical approach of transactive

"Takings" / - 22

planning is a pragmatic application of a theoretical understanding of the motives of takings proponents. If we look at the rhetoric, and find not only the divisions, but also the underlying concerns we share, then we may have a chance to change our disparate future visions so that they come to reflect our common humanity.

##

CCCCTAKE

WORKS CITED

- Alexander, Gregory S. "Takings and the Postmodern Dialectic of Property." Constitutional Commentary. V.9, n.2, July, 1992: 259.
- Beamish, Rita. "Babbitt: No Pay for Land Limits." Albuquerque Journal, Oct. 23, 1993: A1.
- Beymer, Renee J. and Jeffrey M. Klopatek. "Effects of Grazing on Cryptogamic Crusts in Pinyon-Juniper Woodlands in Grand Canyon National Park." American Midland Naturalist. V.127, n.1, 1992: 139.
- Bormann, Ernest G. "Fantasy and Rhetorical Vision: The Rhetorical Criticism of Social Reality." Quarterly Journal of Speech. V.58, n.4, Dec., 1972: 396.
- . "Symbolic Convergence Theory: A Communication Formulation." Journal of Communication. V.35, 1985: 128.
- Bosselman, Fred, and David Callies. The Quiet Revolution in Land Use Control. Washington: Government Printing Office, 1972.
- Bosselman, Fred, et al. The Takings Issue: An Analysis of the Constitutional Limits of Land Use Control. Council on Environmental Quality. Washington, DC: U.S. Government Printing Office, 4111-00017, 1973.
- Burke, Kenneth. The Philosophy of Literary Form: Studies in Symbolic Action. 3rd ed. Berkeley: Univ. of California Press, 1973 (orig. publ. 1941).
- . A Grammar of Motives. Berkeley: Univ. of California Press, 1945.
- . A Rhetoric of Motives. Berkeley: Univ. of California Press, Calif. ed. 1969 (orig. publ. 1950).
- Carroll, Matthew S. and William G. Hendrix. "Federally Protected Rivers; The Need for Local Involvement." Journal of the American Planning Association (hereinafter: APA Journal). V.58, n.3, Summer, 1992: 346.
- Clajon Production Corp. et al vs. Petera et al, 1993. U.S. District Court for the District of Wyoming. No. 93 CV-223B, Aug., 1993.
- "Clinton Signs Jemez Recreation Bill." Albuquerque Journal, Oct. 15, 1993: D3.

Echeverria, John, and Sharon Dennis. "Takings Policy: Property Rights and Wrongs." Issues in Science and Technology. V.10, n.1, Fall, 1993: 25.

Epstein, Richard A., Takings: Private Property and the Power of Eminent Domain. Cambridge: Harvard Univ. Press. 1985.

Federal Lands Update. Bountiful, UT: National Federal Lands Conference. Jan., 1993.

Fish, Jim. Flyer. Public Lands Action Network (PLAN). Placitas, NM. Jan., 1994.

Graf, William L. Wilderness Preservation and the Sagebrush Revolutions. Savage, MD: Rowman & Littlefield, 1990.

"Grazing Permit Not A Property Right, Court Says." New Voices. V. 2, n.5, July, 1993: 3.

"Is Taking Stealing?" The Economist. V.326, n.7801, Mar. 6, 1992 24.

Johnson, Rex. "How Weird: 'Nazi' Ads Turn Up On Local Radio." El Reportero. Silver City, N.M., Mar. 17, 1993: 4.

Killingsworth, M. Jimmie, and Jacqueline S. Palmer. Ecospeak: Rhetoric and Environmental Politics in America. Carbondale, IL: So. Illinois Univ. Press, 1992.

Knetsch, Jack L. Property Rights and Compensation: Compulsory Acquisition and Other Losses. Toronto: Butterworths, 1983.

Knox, Margaret. "The Grassroots Anti-Environmental Movement." (rpt. from The Progressive, Oct. 1991.) Utne Reader. Jul/Aug., 1992: 109.

Lavelle, Marianne. "The 'Property Rights' Revolt." National Law Journal, V.15, n.36, May 10, 1993: 1.

"Lawsuit Claims Wildlife a Property Right." New Voices. V.2, n.8, Oct., 1993: 3.

Libecap, Gary D. "Review of W.L. Graf, Wilderness Preservation and the Sagebrush Revolution [sic] (Lanham, Md.: Rowman & Littlefield, 1990)." Annals of the American Academy of Political and Social Science. V.522, July, 1992: 186.

Marston, Ed. "Grazing: The Shape of the Future." High Country News. V.26, n.2, Feb. 7, 1994: 16.

McGee, Michael C. "The 'Ideograph': A Link Between Rhetoric and Ideology." Quarterly Journal of Speech. V.66, n.1, Feb., 1980: 1.

McKinley vs. USA et al, 1993. Memorandum Opinion and Order. U.S. District Court for the District of New Mexico, Civil No. 91-822-LH/RWM, May 28, 1993.

Ophuls, William. Ecology and the Politics of Scarcity. San Francisco: Freeman, 1977.

Pearce, David. "Is Ecology Elitist?" The Ecologist. V.3, 1973: 61.

Pennsylvania Coal vs. Mahon, 1922, 260 US 393.

Platt, Rutherford H. Land Use Control; Geography, Law, and Public Policy. Englewood Cliffs, NJ: Prentice Hall, 1991.

Property Rights and the Environment. Broadside, The National Audubon Society, Sept., 1993.

Protect Your Rights. Broadside, The Wilderness Society, 1992.

Rain, June. "Conservationists File Suit to Stop Greedy Ranchers..." News Release. Cheyenne: Wyoming Wildlife Federation, Nov. 17, 1993.

Rubenfeld, Jed. "Usings." The Yale Law Journal. V.102, n.5. Mar., 1993: 1077.

Sierra Club. "Recent victories won by Sierra Club member support." New-Member Enrollment Form (reverse). 1993-1994.

Simon, Thomas W. "Varieties of Ecological Dialectics." Environmental Ethics. V.12, Fall, 1990: 211.

Sonner, Scott. "Plan To Inventory Endangered Species Worries Landowners." Albuquerque Journal. Oct. 7, 1993: A4.

Throgmorton, James A. "Planning as a Rhetorical Activity; Survey Research as a Trope in Arguments About Electric Power Planning in Chicago." APA Journal. V.59, n.3, Summer, 1993: 334.

Tutchton, Jay. Memo to Sharon Newsome, re: Takings issues in the Clajon Production lawsuit. Boulder: National Wildlife Federation, Jan. 5, 1994 (unpublished).

---. Memorandum of Points and Authorities in Support of the State of Wyoming's Motion for Summary Judgment Filed on Behalf of Applicant-Intervenors. Boulder: National Wildlife Federation: Nov. 27, 1993

Underkuffler, Laura S. "On Property: An Essay." The Yale Law Journal. V.100, n.1. Oct., 1990: 127.

United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4, 1938.

"Wayne Hage..." New Voices. V.2, n.5, July, 1993, p. 3.

Zerbey, Ben. Personal Interview with retired NPS ranger. Las Cruces, NM. April 23, 1994.

##

TCQBIB