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The James Madison Institute
P. O. Box 37460
Tallahassee, Florida 32315
Voice 850-386-3131
Toll free (1) 800-376-1119
Fax 850-386-1807
Web www.jamesmadison.org
E-mail jmi@jamesmadison.org

Message from the publisher

j. stanley marshall



In the summer issue of *The Journal*, we present a varied and eclectic group of articles that deal with several areas of interest to the JMI family.

The lead article in this issue comes from a practicing attorney in Jacksonville. The author accepted our invitation to participate in a panel several months ago on tort reform as part of our conference on “The Judiciary: An Appropriate Role in Our Republic.” Charles Trippe’s off-the-cuff remarks were so cogent and so well-organized that we asked him to prepare an essay for *The Journal*. We think his message is one every lawyer—whatever his or her position on tort reform—would do well to read.

One of our present themes at JMI has been individual rights (and yes, responsibilities), including especially property rights. In this issue we are pleased to continue the focus on a different aspect of government intervention: possible environmental degradation of private land taken under sovereign land claims.

Professor Richard R. Hawkins and two of his associates at the University of West Florida take a look at 28 sovereignty land claim cases in Florida to examine the effect of state control on the environmental quality of the parcels. See what you think after reading the account in “New Tragedy, New Commons? Potential Environmental Degradation under Florida Sovereign Land Claims.” It starts on page 9.

While it’s possible, I suppose, for some citizens to overlook the importance of the rights enjoyed by citizens living in a free society, writer Ian Drake

reminds us that Americans ought never to take the role of property ownership for granted. In his review of Hernando de Soto's new book, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, he points out that in some Third World countries, the concept of private property is almost unknown, and he shows how hard it is for poor people to get legal title to property. For instance, in the Philippines, an individual or family must perform more than 100 steps requiring as long as 20 years; in Haiti, more than 100 steps over at least a decade; and in Egypt, about the same. Consequently, few persons in these countries are ever able to use property—their homes, for example—in the marketplace and thereby accumulate capital because they lack legal title or the costs of ever achieving it are so great. De Soto's book, by the way, recently won the prestigious Antony Fisher International Memorial Award, and we recommend it to all our readers.

Over the past five years, *The Journal* has drawn some favorable responses from readers and we're naturally pleased about those. But we're also mindful that not every reader agrees with us on every issue. In the past, some readers have wondered about our criticism of state-sanctioned gambling, which we've addressed in four previous issues: by noted author Susan MacManus, a nationally recognized expert on public opinion and politics as well as an accomplished and prolific writer (see Nov./Dec. 1998); by Tait Trussell, former

vice president of the American Enterprise Institute in Washington, D.C. (July/August 1998); as well as by JMI's own Policy Analyst Peter Schorsch (July/August 1999 and Winter 2000).

And such may be the case again with the article in this issue entitled "The Losing Number for Florida Gamblers" that begins on page 15. Author Schorsch outlines the recent attempts to expand gambling in Florida, an effort that comes in the face of new research by the University of Florida reporting that Floridians, among all Americans, have a propensity to suffer from gambling's negative effects. I'm pleased to report that, having written on this issue for JMI before, Schorsch is able to balance the Institute's belief in individual responsibility with our desire for responsible social policy. It is, after all, an inescapable fact that Florida's public policy—particularly its education system—is intertwined with the fortune of the state lottery. It has been claimed that this is a regressive relationship that has the state's poorest citizens financing education programming and school construction that disproportionately benefit middle- and upper-class citizens.

Finally, we are ever mindful that we must be attentive to issues that concern our primary clients, namely the citizens of Florida. The Institute and its publications exist to serve you, our readers, and we are always eager to hear your thoughts on the contents of the current issue or anything else in the wide, wonderful world of public policy. ∞

COVER STORY

the problem of torts: Need for reform?

by charles m. trippe



Lawyers need to show restraint in pursuing their interests and their clients' interests.

The following remarks were made at "The Judiciary: An Appropriate Role in Our Republic" workshop sponsored by JMI in December 2001 in Orlando, Florida.

Just as one can never be too rich or too thin, one can never have enough tort reform. Our civil justice system has been out of balance for a generation. Tort reform, it seems, never amounts to much more than a finger in the dike. Oftentimes we don't even get to keep our fingers in the dike for very long, as state supreme courts eviscerate legislative limits on the ever-burgeoning industry of mass tort and class action lawsuits.

I wouldn't call myself an expert on Florida procedure or the nuances of Florida tort law. That I leave to real experts. And it seems that every time I get into a debate about a particular tort reform topic, such as the *Fabre* doctrine or the burden of proof in a slip-and-fall case, my friends from the Trial Lawyers Academy always manage to paint me as a flint-hearted corporate goon, trying to get in between some deserving, injured grandmother and her judgment.

A few days ago, as I was pondering these things, I remembered that I had recently received a thought-provoking piece of mail from the bank that issued one of my credit cards. If you are like me, you tear up these things as fast as they come into the house. In

this case, because it originated from a bank with which I do business and because it looked a little more official than the usual stuff they send me, I actually opened the letter.

Imagine my surprise and delight when, opening the envelope, I realized that my bank, rather than sending me a bill, had mailed a check. For a moment I thought that there must have been some kind of credit on the account or perhaps, in the words of the old Monopoly game, a “bank error in your favor.”

This seemed like pretty good news—maybe not Publishers Clearing House stuff, but better than getting a routine piece of junk mail.

Then I got to the punch line: “Pay to the order of Charles M. Trippe Jr., zero dollars and 86 cents.” My first thought was: some midlevel executive at this bank is going to lose his job, at least if checks like this went out in any number. Sending out a check by mail to credit 86 cents to a customer’s account is, as a purely economic matter, just wacky. Add it up: 34 cents, or close to it, for the postage; a nickel or two for the mailing piece; the cost of cutting and processing a check—that must be at least a nickel, maybe more. Throw in some programming costs and general and administrative expenses, and pretty soon you’ve eaten up the whole 86 cents. There had to be a better way to get 86 cents back to a customer than that. Why not just credit my account on the next

statement? Whoever came up with this, I was sure, had just shortened his or her career dramatically.


I remained confused until I noticed the fine print. “Dear Charles M. Trippe Jr.: Enclosed is a check for disbursement of the settlement awarded in the class action entitled *Mayamura v. Chase Manhattan Bank USA NA.*” Of course—it was a litigation play. Only something dreamed up by lawyers could make so little sense.

Now I don’t know the first thing about *Mayamura versus Chase Manhattan*


Bank. I would guess that it is a class action lawsuit alleging some kind of violation of the consumer credit laws or regulations governing credit cards. I don’t know what kind of recovery other people got from *Mayamura versus Chase Manhattan Bank.* But knowing the kinds of balances I used to keep on that credit card, which were well into four figures for many months at a time, my guess would be that there couldn’t be a lot of people in the class who would be entitled to much more than I was.

I do know one thing, though, and I don’t have to find any court records to back me up on this one: the lawyers representing the class got a lot more than 86 cents for their efforts. They got a lot more than \$86. Indeed, they got a lot more than \$86,000, in all probability.

Well, my friends from the Academy will say, what of it? If it weren’t for those enterprising lawyers who



Lawyers and the way they behave are the day-to-day manifestation of the rule of law.



brought the class action, the bank—which must have been at least colorably (to use a lawyer’s word) guilty of some regulatory infraction—would have gotten off scot-free. And the deserving public would not have had its recovery, even if it came 86 cents at a time. We should not begrudge the lawyers their share of the recovery, even if it is many, many times 86 cents, because there would have been no recovery at all but for the lawyers. And good lawyers don’t come cheap.

The answer to that, ladies and gentlemen, is that there is plenty wrong with this picture, and it starts with members of the general public getting checks for 86 cents. Any system that pays lawyers tens or hundreds of thousands of dollars to get me (and I don’t care how many others) a check for 86 cents is broken, by definition. The experience of opening up a letter to receive this “recovery,” knowing that you and thousands of others have been used by lawyers whom you have never met as an occasion for generating a fee, results in something very disturbing: contempt for lawyers and the law—the rule of law.

The rule of law, you say to yourself? Surely, one could argue, a consumer credit class action and even the rather crass business of paying the lawyers does not have much to do with deep constitutional principles, as did, say *Gore v. Bush*. Nothing that happens in such a lawsuit will threaten the republic, one would assume. The use of the sonorous phrase “rule of law” in this

context is itself, perhaps, a little silly, a sign of a career defense lawyer conflating the defense of a corporate treasury with the defense of our way of life, is it not?

The problem with those arguments is that they fail to recognize that lawyers and the way that they behave are the day-to-day manifestation of the rule of law. There is a very thin line between contempt for lawyers and contempt for the rule of law.

Our Constitution, it has been said many times, is the single greatest work of genius ever produced by the human race. Placing as it does all power in the people, except for those powers entrusted by the people to their government, it has created the finest and strongest framework for rule of law anywhere on earth.

The legal profession cannot claim ownership in any sense of the Constitution or the rule of law that flows from it. Yet lawyers have had a unique and vital role in the life of the Constitution. Lawyers helped to write it. Lawyers have sworn to defend it, in and out of court, for more than 200 years. Lawyers in *Marbury v. Madison* have declared themselves to be the final authority on what it means and how it works.

In short, it is true that, without a strong and confident legal profession and a strong and independent judiciary, the Constitution of the United States would be no more an object of admiration and respect than the Constitution of Bolivia. But it is equally true that lawyers in their daily practice of the law must show restraint in pursuing their interests

and those of their clients, lest the rule of law be threatened not from without the legal profession but from within.

For this reason, the legal profession for most of the history of this country has been more a calling than a business. A generation ago it would have been, literally, unthinkable for a law firm to advertise on the back page of the yellow pages. Yet wherever you travel in this great country, you will find a lawyer advertising on the last page of the phone book. In recent years, other-than-prime-time television and even billboards have come to be dominated by personal injury lawyer advertising.

This gives the appearance, at the very least, of an assembly line operation and one that is strictly oriented to the bottom line.

Have lawyers always prospered in America? Generally, yes. Is there at least a trace of snobbishness in the way established law firms view their colleagues whose faces appear on billboards along the freeway? Of course. Is it so very bad to treat lawyering as more a business than a profession? It is, if it breeds contempt for lawyers on a massive scale. And the massive amounts of money now changing hands, with truly gargantuan fees slipping into the pockets of lawyers, are breeding exactly that. The recent round of tobacco settlements has been de-

scribed, with some accuracy, as one of the greatest transfers of wealth in history. For the most part, it was a badly hidden tax increase with smokers anteing up so that state and local governments would enjoy more revenue through the middleman—the tobacco companies. What the lawyers took out of the deal, nonetheless, was shocking and orders of magnitude greater than fees generated in the past, even in major class action suits. Did the lawyers who partook of this largesse really think that no one was watching, and that the public would not realize that the primary object of the whole exercise was money?

As the need grows to provide ever greater numbers of lawyers with ever richer paydays, there develops a difficult problem: there are only so many people injured every year and only so many companies that can be easily branded as villainous, as the tobacco industry was. That is why the litigation entrepreneurs increasingly focus on bringing claims on behalf of people who *aren't* injured. That is, for example, what so-called medical monitoring class actions are all about.

The need to generate income is also why punitive damages claims, especially in the context of mass tort lawsuits, are currently so attractive. One can leverage even very modest



We need a legal profession willing to return to the role intended for it in the constitutional order and to bring to a close the era of the legal entrepreneur.



injury claims into gigantic damages, so long as there is at least one deep-pocket corporate defendant around to turn into a villain. With the aid of sophisticated jury research, plaintiffs' firms are now able to hone arguments right at the basest of human emotions—fear and envy—and parlay them into hundred-million and even billion-dollar verdicts. Even if they cannot withstand scrutiny on appeal, enterprise-threatening verdicts of this size usually result in settlements, as no prudent manager would decline to buy off a risk that could result in the bankruptcy of the company. Any corporate manager who has gone through this experience, I can assure you, is deeply contemptuous of our profession.

How do lawyers respond to this charge? My friends from the Academy have certainly spoken eloquently for themselves and their colleagues. I doubt that they would try to defend the mega-fees directly. They are simply too large, and any attempt to defend them as such simply increases the cynicism of the public.

One tack that is often taken is to suggest that personal injury lawyers deserve credit for all of the many improvements in workplace safety, transportation safety, the safety of drugs and hospital procedures, and safety in a thousand other aspects of daily life. That, first of all, insults the people who are responsible for safety in those areas—employers, airline managers, doctors, and biochemists—and who make safety part of their daily lives. It is also

belied by the basic secular trend in safety—the workplace, transportation, and medical care have all improved their safety records throughout the 20th century and into the 21st, with most of those gains occurring before the rise of the highly paid personal injury bar. All that said, the claim of the tort lawyers is a dubious proposition anyway, as I have never seen a case where a lawsuit (as opposed to the accident itself) resulted in a safety improvement. As they used to say in the railroad business, “Every safety rule is written in blood.” That has nothing to do with lawsuits.

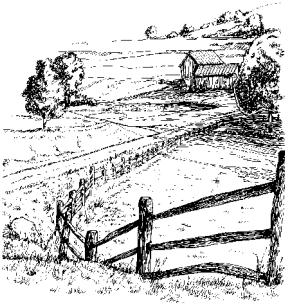
Perhaps the most offensive and most dangerous argument of all is what is sometimes called the “fourth branch of government” approach. According to this reasoning, the three existing branches of government are not up to the task of policing and punishing corporate malefactors. The organized trial bar, now very well-heeled and sharing its good fortune with judicial candidates and attorneys general around the country, is up to the task, or so goes the argument.

A few minutes ago we were ruminating about what lawyers on the back of the telephone book have to do with the Constitution and the rule of law. When lawyers organize themselves into a “fourth branch of government,” they are posing both a direct and an indirect threat to the constitutional order. Direct, because the Constitution does not provide for four branches of government; it

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NEW TRAGEDY, NEW COMMONS? POTENTIAL ENVIRONMENTAL DEGRADATION UNDER FLORIDA SOVEREIGN LAND CLAIMS

by richard r. hawkins,
tracy beach, and jennifer daugherty



Converting
land to public
ownership under
Florida's
sovereign land
claims may
jeopardize its
environmental
health.

Sovereign land claims are an old legal concept in Florida, by which the state government claims public ownership for navigable waterway beds. With these types of claims, waterways are kept open to public use and commerce is promoted. Roughly three decades ago, policymakers began to use sovereign land claims somewhat differently. Florida swamp and overflow property was reclaimed as sovereign land under the argument that it could never have been legally titled to a private party.

To date, policy analysis on the sovereign land claim issue has primarily focused on whether these claims—and the resulting conversion of private property to public—represent an appropriate role for the Florida state government.¹ Many citizens strongly object to the use of sovereign land claims and argue that the policy represents illegal seizure of private property. Environmental groups, such as the Florida Audubon

The authors want to thank participants at the 29th annual meeting of the Academy of Economics and Finance, Feb. 13–16, 2002, and to acknowledge the assistance of Peter C. Doherty, Ph.D., senior policy analyst at The James Madison Institute, in the preparation of this article.

Society, are largely silent on whether the claims represent good policy, but have opposed any legislative attempt to modify the definition of property that is eligible for a state land claim.²

In general, property owners appear to be unaware of the sovereign land claim issue until they attempt to somehow modify the property. In the permitting process, the landowner is informed of a claim by state attorneys, representing the Florida Board of Trustees of the Internal Improvement Trust Fund (under the Florida secretary of state), or by attorneys for an environmental group.³ The effect of a successful conversion on environmental quality, however, may be negative. In this article, 28 sovereign land claim cases are examined for whether the Florida property in question has clear use value and whether clear public access to the property will exist if the claim is successful. When both conditions are met in a case, a successful claim by the state of Florida is very similar to creating a new commons and absent strong monitoring of the users, one should expect environmental degradation from the conversion to public ownership. In fact, the Florida Department of Environmental Protection (DEP) appeared to recognize the problem of absent wetland management in the Potts Preserve case (Citrus County, Florida). The DEP has

made numerous proposals there, including one in which owners of adjacent property will monitor recreation use for alternative management of the area.⁴



For more than 25 years, sovereign land claims have been filed in Florida with the intention of converting private swamp and overflow property to public properties.




The Cases

Research for the development of this article showed that many of the sovereign land claims in Florida are not well documented. Background interviewees indicated that an owner may settle with the attorneys advancing the claim or the petitioners may drop the case. The authors of this study found 28 cases through two sources. Some were publicized by groups that oppose the land claims. In many instances, the private

landowner contacted these groups and complained about the circumstances of the claim. Others were documented in the database of Florida appellate court decisions.

Each set may be subject to selection bias. For example, critics of public conversion may only choose to publicize cases in which private owners were enhancing value with minimal environmental impact. Also appellate courts generally only hear unusual cases and the files should not include cases with clear legal precedent. Despite these limitations, the cases provide insight on the property characteristics involved in Florida's sovereign land claims.

Table 1.
Florida Sovereign Land Claim Cases Summary

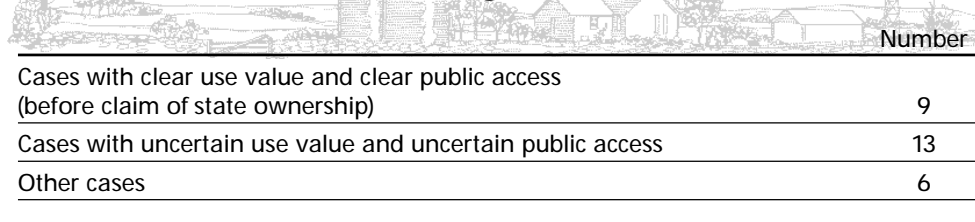


NO.		CLEAR USE VALUABLE	CLEAR PUBLIC ACCESS BEFORE CLAIM?	SOURCE (See codes below)	YEAR
1	The Cove Restaurant and Marina, Broward County	Yes	Yes	1	1997
2	Pierce	Uncertain	Uncertain	1	N/A
3	Secret Oaks HOA, St. Johns River	Yes	Yes	1	1998
4	MacNamara property, Kissimmee River	Yes	Yes	3	1991
5	Lombardo Marina, Crystal River	Yes	Yes	3	1987
6	Lykes property, Fisheating Creek	Yes	Yes	2	1997
7	Smith farm, Brevard County	No	Uncertain	2	1996
8	Lee property, Julington Creek	Yes	No	1	1998
9	Submerged land, undeveloped coastal island	Uncertain	Uncertain	1	1999
10	Seven undeveloped islands in Indian River	Uncertain	Uncertain	1	1997
11	Property North Miami River, Biscayne Bay	Uncertain	Uncertain	1	1978
12	Levy property, Gasparilla-Charlotte Harbor Aq. Preserve	Yes	Yes	1	1995
13	Coastal areas of Florida (drilling rights)	Uncertain	Uncertain	1	1997
14	Property, Key Lois and Raccoon Key (monkey breeding)	Yes	Yes	1	1994
15	Webb property, Orange Lake in Alachua County	Uncertain	Uncertain	1	1993
16	Laney mangrove swampland, Rodriguez Key	Uncertain	Uncertain	1	1981
17	Filled land, Crystal River	Yes	Uncertain	1	1992
18	Submerged tidal land, Pennekamp Park, Key Largo	Uncertain	Yes	1	1992
19	Lightsey property, Lake Kissimmee	Uncertain	Uncertain	1	1988
20	Stevens filled land, Hurricane Bay	Uncertain	Uncertain	1	1985
21	Sheraton Key Largo, Monroe County	Uncertain	Yes	1	1985
22	Sutton marsh/flats, E. Black Creek Canal, Biscayne Bay	Uncertain	No	1	1968
23	Sawyer property, intracoastal Boca Raton	Yes	Yes	1	1973
24	Helliwell property, Mashta flats	Uncertain	Uncertain	1	1966
25	Lobean property, Lee County	Uncertain	Uncertain	1	1960
26	Contemporary Land's property, Lake Louisa	Uncertain	Uncertain	1	1981
27	St. Joseph L&D Co. property, St. Joseph Bay	Uncertain	Uncertain	1	1979
28	Zabel and Russell property, Boca Ciega Bay	Yes	Yes	1	1963

Table Source Codes:

- 1 – Florida appellate file is a database of state cases accessed through Lexis-Nexis in December 2001.
- 2 – Florida Legal Foundation. It is no longer an active entity.
- 3 – Randall G. Holcombe is DeVoe Moore professor of economics at Florida State University in Tallahassee, Fla., and chairman of the JMI Research Advisory Council. Reference to his cases can be found in The James Madison Institute publication cited in this paper.

Table 2.
Use Value and Public Access Findings
for Florida Sovereign Land Claim Cases



	Number
Cases with clear use value and clear public access (before claim of state ownership)	9
Cases with uncertain use value and uncertain public access	13
Other cases	6

A summary of these cases appears in Table 1. The “Clear Use Value” is problematic. The authors’ intent was to establish whether the property, in its current state, had use value to the private owner before the land claim. But many claims were filed when the owners planned to develop the property. For the analysis here, the authors assigned a “no” for clear use value when the owner planned a dramatic conversion for the property. In essence, the owner intended to convert from one use to another and while this should enhance the overall value of the property, it does not represent the type of continuous use that could lead to a damaged commons. The designation of “Clear Public Access before the Claim” in the next column is rather straightforward and draws from information in the case. The “Year” of the claim is, in some cases, the year of the appellate decision.

Findings

The data in Table 2 indicate that in slightly less than 30 percent of the cases—9 out of 28—a sovereign land claim is an attempt to convert a property with clear use value to open

public access. In these instances, a successful claim by the state should reduce the financial incentive for the landowner to maintain the environmental health of the property. Absent strong monitoring by the state, we expect use to jeopardize the environmental quality of the property. An example of how a claim of sovereign land can hurt the quality of a Florida riverbank appears in the insert, “Environmental Quality and the MacNamara Land Claim” (page 13).

The existence of use value and potential public access does not preclude public use if these properties remain privately owned. If publicly provided substitutes do not exist, the private sector provides outdoor recreation opportunities through facilities such as hunting camps, fishing piers, and marinas. Only when substitutes exist or willingness to pay is relatively low can one expect a private market not to develop.

For nearly half of the cases, that is, 13 out of 28, a clear use value and public access after the claim cannot be identified. Here, the effect of state control on the environmental quality of the parcel is

not indicated in the details of the sovereign land claim case.

Land Claims as Second-Best Zoning

Through the case descriptions of Florida state sovereignty claims against swamp and other overflow properties, a consistent theme emerges. In almost every case, the property owner is planning a modification to the wetland and the claim is part of an attempt to block the modification. Clearly, to the policymakers—or in some cases, the environmental group filing the claim—zoning in the region is ineffective and a claim to the title of the property is a substitute for more traditional controls on land use.

Therefore, the question is whether a sovereign land claim is an appropriate policy for controlling land use. It is possible that the benefits to the public from claiming the land are greater than the gains to the owner of modifying, but there are three reasons to doubt the likelihood of effective “second-best” zoning.⁵

- First, there are no explicit policies on what conditions prompt a claim for sovereign land. Any property owner who is considering modifying a wetland has to somehow include an estimate of claim risk in determining whether to proceed with the plans. Since information on sovereign land claims is scarce, one would not expect the landowners to be good estimators. In other words, they are either taking too many or too few risks in planning the use of

Environmental Quality and the MacNamara Land Claim

The MacNamara case involved property adjacent to the Kissimmee River. The owners were concerned about trash on the property—allegedly from campers—and built a fence to limit access. The Kissimmee River Valley Sportsman’s Association sued the MacNamaras, claiming that the fenced property was actually sovereign land and belonged to the state. In a court decision, the MacNamaras lost title to some of the land and were not able to limit the dumping of trash.

Source: Randall G. Holcombe, “Florida’s State Sovereignty Land Claims: A Government Taking of Private Property without Compensation,” Background Policy Report No. 22, The James Madison Institute, July 1998.

- property they own.⁶
- Second, with a lack of information on the number and scope of the claims, it is impossible to determine how state policymakers apply any land claim policy that exists. One would expect some set of statewide standards for filing a claim of sovereign land. Without clear information on any standards, the trustees of the Internal Improvement Trust Fund cannot be held accountable for their actions.
- Finally, and especially for claims filed by environmental groups, the net benefits to the residents of

Florida are unclear. In some circumstances, extreme acts such as the taking of private property could be justified as promoting public welfare (even at the expense of the landowner). This action, however, should not be taken lightly and, in essence, the burden of proof should lie with the individuals who are initiating a sovereign land claim. Through the cases, proof of sizable public benefits does not exist.

These problems are important if the state chooses to compensate landowners who lose property. A compensation policy might appease critics of the land claims, but it will not address the underlying problems. These are a lack of standards on when to file a land claim, no accountability on how land claim policies are applied, and no evidence that the public benefits from state land claims exceed the cost to private landowners.

Conclusions

For more than 25 years, sovereign land claims have been filed in Florida with the intention of converting private swamp and overflow property to public property. The details for some of these cases, however, indicate that environmental degradation may occur if the claim is successfully executed. In essence, these parcels have clear use value and public access, but activities on the property will no longer be monitored by someone with a financial interest in the health of the property.

From the cases, the claims appear to be a fallback strategy to be used when zoning does not prohibit the property owner from certain types of parcel modification. Absent clear standards, accountability, and calculations of net benefits from the claims, one cannot believe that sovereign land claims are sound public policy. Thus, compensating property owners for sovereign land claims may appease many critics of the policy, but compensation itself will not lead to efficient controls on land-use decisions by private property owners. ∞

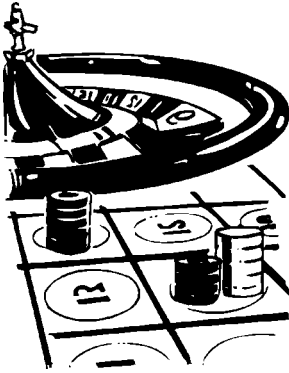
Richard R. Hawkins is associate professor of economics at the University of West Florida in Pensacola, Fla. Tracy Beach and Jennifer Daugherty are students at the University of West Florida.

Endnotes

- ¹ For an example, see Randall G. Holcombe, "Florida's State Sovereignty Land Claims: A Government Taking of Private Property Without Compensation," *The Journal of the James Madison Institute*, May/June 1998, pp. 10-14.
- ² See the 2000 Florida Legislative Update at <http://www.audubonofflorida.org/>.
- ³ The authors found one claim that was initiated by a local sportsmen's group.
- ⁴ The DEP proposal for neighbor monitoring appeared in Huntington, Ken, "Potts Preserve a Complex Issue," *St. Petersburg Times*, Citrus Times Issue, September 29, 1999, p. 2. The authors note that since these DEP proposals were introduced, the area has been the site for the dumping of a murder victim and an illegal dike modification by an environmentalist (compiled from various *St. Petersburg Times* articles).
- ⁵ The authors note that a successful land claim can result in two other externalities: the conversion bothers some policy analysts and should reduce the value of other swamp and overflow properties.
- ⁶ One highly publicized case could cause all agents to overestimate the risk. This would lead to no modification plans for wetlands and no revision of the estimates.

the losing numbers for florida gamblers

by peter schorsch



A new University of Florida study reports that a higher proportion of Floridians are currently at-risk, problem, and pathologic gamblers than found in a national study.

Banking on Gonzaga to reach the Final Four of the NCAA men's basketball championship, I saw my chances of winning the office pool dashed with the Bulldogs upset loss in the first round. Putting my money where my mouth was, I was only one of the tens of millions of Americans who participated in some kind of betting pool surrounding the tournament.

Laying a little action on March Madness has become a rite of spring. That's because gambling is a true national pastime with hundreds of billions of dollars in revenue.

But even that kind of bankroll isn't enough. That's why the gambling industry (motto: "What's a vacation spot without roulette?") has always had a predatory eye on Florida. And why not? Floridians are especially vulnerable to the allure of gambling. According to a recent University of Florida survey detailing the prevalence of problem gambling among adults in Florida, the state's citizens are more than twice as likely to become at-risk gamblers.

With those kinds of odds, is it any wonder the gambling industry is doubling down in its effort to expand in Florida?

(Not So) Political Long Shots

Efforts to introduce or expand gambling in Florida,

including recent attempts to allow casinos in counties with voter approval, to permit casinos on Indian reservations, and to place the state in the Powerball lottery have been consistently rebuffed.

The first attempt to bring gambling to Florida came in 1935 when the legislature, under pressure from Gov. David Sholtz, legalized slot machines in counties willing to accept them by referendum. However, “revulsion from slot machines,” wrote state historian Allen Morris, “caused the electorate to clean out the House [of Representatives].” Soon after, a little-known freshman representative named LeRoy Collins would lead the successful charge to outlaw slots in 1937.¹

Florida’s history is a story that is similarly retold in many states that have dared to dance with the gambling devil. The latest tale comes from South Carolina. Enticed with promises to enhance education, otherwise pious South Carolinians voted to let the gambling industry in through the front door with their video lottery machines.

It wasn’t long after the first slot was pulled that the state’s economy was cannibalized by the dastardly machines. Beset by political upheaval and horrified by tales of slot-addicted mothers abandoning their children in cars to suffocate, South Carolinians rooted out the video slot machines like weeds.²



***Is it any wonder
the gambling
industry is
doubling down
in its effort to
expand in
Florida?***



Those kinds of weeds are now sprouting up in Florida. Sixty-seven years after the state’s first foray into the numbers racket, the legislature gave serious consideration to a proposal that would legalize video lottery terminals—“the crack cocaine of the gambling underworld”—at Florida’s decaying pari-mutuel facilities.

Like an ex-con in a new suit who swears to do good, gambling expansionists have dressed up their legislation to appear as a wholesome mechanism for increasing education budgets, citing estimates of up to \$600 million in additional funding.³

This is a formula that gambling advocates are starting to believe can’t lose—linking the revenue from gambling expansion to financial improvements for public education, with a healthy “vig” for the operators.

This was déjà vu all over again. The crowd in Vegas has worked this con game before with the lottery, promising millions for Florida’s schools. Except that state lotteries are turning out to be nothing more than a high-stakes shell game.

The Lottery as Shell Game

Americans legally bet more than \$36 billion a year on the lotteries in 37 states and the District of Columbia.⁴ These operations are state sanctioned, state run, and state promoted. It’s difficult to imagine this was the limited government

envisioned by the Founders. In fact, in rereading the *Federalist Papers*, one would be hard pressed to find the section in which Madison and Co. espouse their support for a state-run numbers racket.

Nevertheless, the states got into the lottery business as a “means of raising revenues *without having to raise taxes.*” And any “puritanical objections to filling state coffers by means of a gambling scheme were quickly diffused by three arguments. First, because people are going to gamble anyway, it is better to place that gambling within the protection of the law rather than to leave it in the seamy environs of gangsters and thugs. Second, the lottery is one of the most benign forms of gambling. Many do not even consider it ‘real gambling.’ Spending a dollar’s worth of loose change on a lottery ticket every once in a while bears little resemblance to gambling at Las Vegas or Atlantic City. Besides—the third argument—it’s for a ‘good cause.’”⁵

The lottery euphoria, however, almost always subsides as the games’ novelty starts to wear off and ticket sales begin to plummet. Accordingly, “the ephemeral infusion of lottery dollars always results in prodigal spending, which, in turn, forces state legislators to raise taxes in order to shore up the budgetary shortfalls that develop when lottery revenue sags.” Just as in Florida, voters begin to ask, “What happened to all the education money that was in the general fund?”⁶

Point in fact, a study by *Money*

magazine found that from 1990 to 1995, taxes grew three times faster in lottery states than in nonlottery states.⁷

Unlucky Numbers

Despite this track record with the lottery, gambling proponents in Florida are now chomping at the bit to bring video slots to Florida, a state already littered with enough payday-lending loan sharks and pawn shops to stake any junkie scrounging for cash.

But more gambling is the one thing this state cannot afford. In light of the University of Florida survey on problem gambling, it is horrifying to consider what shape our state would be in had any one or more legs of the gambling expansion parlay paid off.

Titled “Gambling and Problem Gambling Prevalence Among Adults in Florida,” the report presents the results of the first statewide survey in Florida to evaluate adult gambling participation and the prevalence of problem and pathological gambling in the state. Among its troubling findings:⁸

- Approximately 500,000 Floridians have suffered from serious to severe gambling-related difficulties at some point during their lives.
- Presently, 250,000 Floridians are currently experiencing serious to severe gambling-related difficulties.
- The state of Florida’s at-risk population (5.2 percent) of problem and pathological gamblers is more than two times that of the national average.

The study states, point blank: “When comparing demographics and types of gambling and the nation, it is important to highlight that a higher proportion of Floridians are currently at-risk, problem, and pathologic gamblers than found (nationally).”⁹

This in a state with fewer gambling opportunities than all but a handful of others. But prevalence of problem gambling has to do with Florida’s demographics. Nationally, gambling is most prevalent among seniors, high school dropouts, and service industry workers.¹⁰ In a state known for retirement communities, poor education, and a tourism-based economy, Florida is an ideal target for gambling expansionists.¹¹

It is imperative that state lawmakers continue to reject any measure that would expand gambling in Florida, especially those that attempt to come through the back door of the legislative process and including those that supposedly would direct increased funding for state services.

This is not a live-and-let-live issue. As the statistics clearly indicate, unless some type of intervention or

awareness effort is realized, persons falling within the at-risk category now are likely to shift to problem or pathological stages, creating a potential epidemic.¹² ❧

Peter Schorsch, a political consultant based in St. Petersburg, is a policy analyst and senior writer of The James Madison Institute.

Endnotes

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BOOK REVIEW

the mystery of capital: why capitalism triumphs in the west and fails everywhere else

by ian drake



The lack of a widespread “formal” property system prevents most people in the Third World from raising their standard of living, according to the president of the Institute for Liberty and Democracy in Peru.

The control of the production of wealth is the control of human life itself. — HILAIRE BELLOC

Although the British author Belloc may have been thinking of the state and its power over citizens, his maxim is just as fittingly applied to citizens themselves. And how does a citizen produce wealth? Usually by any means available, including ingenuity, hard work, and use of one’s capital. But what is capital? Hernando de Soto, president of the Institute for Liberty and Democracy (ILD) in Peru, in his book, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, attempts to provide a definition of “capital” and explain capitalism’s successes and failures in certain parts of the world.


De Soto defines capital as “not the accumulated stock of assets but the *potential* it holds to deploy new production.” In other words, capital is the abstract ability to use one’s property to produce something more than mere physical uses; to use an asset within a market. French sociologist Pierre Bourdieu speaks of “social capital,” the accumulated academic credentials, family backgrounds, and resulting sets of aesthetic tastes that are *traded on* in order to achieve

something more. For example, a recent graduate from an Ivy League university, even a graduate at the bottom of the class, has a more marketable credential than a mid-level university graduate. The student can be said to “own” his credential and, therefore, he “trades” on his degree to produce a “surplus” or a job interview. Another example used by de Soto is the use of paper money. The paper itself lacks value, but it has representational value, which all in the society recognize and therefore allow the paper money to be “worth” more than just the paper upon which it is printed.


Similarly, de Soto describes capital as the use of property (usually land, but also including businesses or business acumen) to accumulate or produce more wealth beyond its mere physical usage—for example, the ability to obtain a loan to start a small business by using one’s home as collateral. De Soto then explains that, for a country to prosper, the ability to use one’s property to its fullest potential must be achieved throughout the country, regardless of income. He contends that the only way for a country to promote the fullest usage of property is to protect it through a nationally recognized system of laws coupled with enforcement of such laws through the courts.

This may seem elemental, and de Soto stipulates that it is—at least for

people in developed nations such as America, European countries, and Japan. De Soto contends that such a basic concept of being able to trade off of what you own is alien to much of the Third World. De Soto states that in developing countries, private property exists for much of the population, but only in a form that is outside the state’s law, or “extra-legally,” as he terms it. In other words, only a small percentage of people and businesses in the Third World actually have land or businesses (assets) that



People in the Third World cannot use their land to its fullest potential.



are listed and verifiable in the public records. Most property is “owned” informally; most property is locally recognized as being possessed or owned by someone, but no state records exist to verify such ownership. Therefore, de Soto acknowledges that most people in Third World countries “own” assets, but their ownership is recognized only locally (in their own village or amongst their neighbors) and not by the public authorities. Thus, he argues, people in the Third World cannot use their land to its fullest potential. They cannot create surplus value with their land because they lack the ability to verify ownership in order to use the property as collateral for a loan, or lack even a verifiable address to obtain basic utilities. In de Soto’s view, the lack of a widespread “formal” (state-recognized or legal) property system prevents most people in the Third

World from raising their standard of living and entering the middle and upper classes.

De Soto points out that poverty is not merely the result of culture (that is, society-wide habits, customs, and religious beliefs). Rather it is the result of many assets being “owned” outside the law. Such illegality prohibits a general, societal consent to use the property in the marketplace. (If a bank cannot verify your ownership, then you lack collateral for a loan.)

De Soto’s concern is with those who are poor, and the crux of his book is to propose a way of making “extra-legal” property into legal property. First, he contends that his own research has proven that there are extra-legal assets “owned” by many in the Third World. “Ownership” is a concept common to all in the Third World, but it varies from place to place in form and local requirements to prove ownership. The local requirements are simpler than the mountain of laws enacted by the state to require legal ownership of property.

In his native Peru, de Soto and his colleagues tried to determine how costly or difficult it would be to set up a fully legal business. He established a two-sewing-machine garment factory in a Lima shantytown. He and his colleagues went through the steps necessary under the law to legalize their business and concluded that it took more than 300 days, working at six hours a day to comply. Also, they concluded that it took 728 bureaucratic steps to legalize an

extra-legal home whose permanence the government had recognized. His colleagues conducted similar experiments and research on the costs of compliance in other countries in Latin America, Haiti, the Philippines, and Egypt.

He concluded that most of the property in the Third World is held outside the law. The reason, he argues, is that the costs of achieving ownership under the law are too great. De Soto believes that the total value of extra-legal real estate in the Third World is over \$9.3 trillion. The impediment to capitalizing on such assets is the lack of legal title. Such title is the first building block to a better life. The subsequent blocks—title insurance, mortgages, securities, and so forth—are only able to materialize when property can be registered with the state and, thereby, be made marketable.

Second, he proposes bringing the mountain to Mohammed—conforming the law to the customary rules and hallmarks of ownership “on the street” in the Third World. De Soto believes that granting legal status to these extra-legal assets, by changing the law to fit customary practices, is nothing new. He looks to American history for instruction. In particular, he reviews the California gold rush and other aspects of Americans’ expansion into the midwestern and western United States in the middle of the 19th century.

The gold rush of 1848-49 in California saw teachers, lawyers, store clerks, and even clergy leaving their staid lives to try to strike it rich in

the ravines of the Sierra Nevada. Almost overnight, San Francisco grew from a small town to a city of almost 25,000 people. Companies were quickly organized and were “grubstaked” (money invested in return for a share in the gold profits). Mining organizations created mining district regulations in order to prevent descent into a Hobbesian nightmare of anarchy. Since there was no enforcement of the existing federal law in the area (California was not yet a state), the miners made their own law, and local and California state courts later recognized the rights created by the miners.

De Soto offers this as one example of how a Third World government can adapt its laws to take in and legitimize the informal agreements and rules of ownership among landowners. In short, he recommends an across-the-board effort in Third World countries to adapt formal law to the informal, or extra-legal existing arrangements between poor people. However, the analogy to American history is somewhat flawed. The demands of making new laws to fit citizens occupying new territory are greatly different (and easier) than the demands of resolving the competing claims of people who have squatted on land for generations.



Once the poor can legitimate their property, a step will have been taken to allow them to better control and to enhance their lives.



There are additional deficiencies in de Soto’s arguments. For example, he lumps former Soviet republics in with other Third World countries. His research appears to have been only in Latin American, Caribbean, and North African countries, but not former Soviet republics. However, the problem in former Soviet republics is a corrupt bureaucratic system that fails to protect property rights, not merely a lack of inclusion of extra-legal arrangements. Additionally, de Soto fails to note that the land upon which most poor people “squat” is not a no-man’s land.

Rather, other people own it and the squatters occupy it illegally, as trespassers. De Soto omits any proposal of how governments should address the rights of owners of the occupied lands. He refers to some American state governments’ efforts to recognize the rights of trespassers to recoup for improvements made upon the land. He also alludes to the English common law right of acquiring title to land via “adverse possession;” that is, openly occupying the land of another for a statutorily determined number of years, and thereafter going to court against the original owner to obtain title to the land.

Nevertheless, the main point of *The Mystery of Capital* is well taken: many people live outside the legal

framework of land ownership and business organization. Therefore, such “extra-legals” are hindered in raising their standard of living and entering the middle class because they cannot rely upon their property to obtain loans or even basic services. If informal arrangements could be made “legal,” then their standard of living could be given the opportunity to rise by making their property able to participate in the

market. De Soto’s book is a reminder that Belloc was right—to control the production of wealth is to control one’s (or another’s) life. Once the poor can legitimate their property, a step will have been taken to allow them to better control and to enhance their lives. ❧

Ian Drake is an attorney who lives in Alexandria, Virginia.

tort reform *(Continued from page 9)*

provides for three. Indirect, because the dedication of lawyers to the constitutional order is essential to its preservation. If that doesn’t persuade you, then the proof of the pudding is this: the purpose of this fourth branch of government is not to promote the common good but to accumulate power and wealth in the hands of the legal profession.

We are living in difficult and dangerous times. The Constitution is now often in our thoughts and prayers because it must rise to meet challenges that were unimaginable even a year ago, when, perhaps naively, we believed we were in a constitutional crisis. Now more than


ever, lawyers need to set an example for their fellow citizens and to redouble their dedication to the rule of law.

Do we need more tort reform? Yes, but we need something more fundamental than that. We need a legal profession willing to return to the role intended for it in the constitutional order and to bring to a close the era of the legal entrepreneur. ❧

Charles M. Trippe is a partner in the law firm of Moseley, Warren, Pritchard & Parrish, P.A., in Jacksonville, Florida, and a member of the Jacksonville Bar Association.

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