Sovereigns, Squatters and Property Rights: From Guano Islands to the Moon.

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Abstract:

Legal systems establishing property rights over land are government-created monopolies similar to such devices as Patents. Essentially, they are an extension by the government of monopolistic control over a parcel beyond that which might be able to be established by mere acts or indicia of ownership such as fence-building, planting or improving, etc. Hernando De Soto's book, *The Mystery of Capital* (Basic Books 2000) nicely summarizes the developments and refinement of the U.S. real-property regime. Of particular interest is the recognition, unique in the U.S., of squatting as a legal means of establishing priority of ownership over a parcel. In fact, as we shall see, squatting has been perfected in this country, and has even become institutionalized as a means by which the U.S., as a sovereign, may come to legally own, recognize and pass title in newly discovered territories, from Guano Islands, to the moon.

The Three Means to Title

There are three essential means by which individuals may come to possess land: 1) by deed from a sovereign, 2) by deed from a previous owner. Or by 3) adverse possession (later recognized by the sovereign). Each of these may result in ownership of a parcel in "fee simple" providing the owner with all of the benefits accruing to a property owner under the dominion of the sovereign, subject only to laws or regulations which may prevent certain acts or dispositions of land. The first two means of individual possession of land occur by means of complex "cadastral" systems whereby the title to the land is recorded by the sovereign. Adverse possession is essentially how a "squatter" may come to legally own land. Depending upon the jurisdiction, the squatter comes to be the legitimate owner of a property by the open, notorious, and adverse possession of lands which are not his. But eventually, even squatters must have their right recorded by the sovereign.

Squatters' rights to parcels are typically defined by the extent to which he can establish indicia of ownership. Inasmuch as property rights over land might be "natural" as opposed to positive, they are defined by the degree to which an occupier of land may reasonably assert his ownership, through improvement, delineation, and other indicia of ownership. The extent to which a squatter has asserted ownership through such indicia, typically defines the extent to which a squatter may come to be legitimately recognized as the owner of a parcel. There are parallels to these indicia of ownership by a sovereign.

These means of individual "taking" of land are somewhat parallel to the means by which a sovereign itself may come to be the sovereign of a territory. Sovereigns come to

possess land by either 1) treaty, 2) war, or 3) fiat. In the case of treaty, lands are agreed to be owned by a particular sovereign by other signators to the treaty. In the case of war, lands are taken from a prior owner by force (and then usually recognized as owned by the taker through treaties). In the case of fiat ownership, unoccupied lands are taken by virtue of the sovereign's exercise of dominion over the lands without regard to formal recognition of that ownership by other sovereigns.

Sovereigns and Monopoly: Land Patents

One of the defining characteristics of a sovereign is that it holds primary title to its lands. From this primary title, all other subordinate owners gain their title to the lands of the sovereign. The most interesting means by which sovereigns themselves come into possessions of land is by fiat. Most of the western lands of the United States were taken by wars and treaties, such as through the Treaty of Guadalupe Hidalgo, or by the Louisiana Purchase. Through both of these expansions, the United States assumed primary title to certain lands, and recognized prior individual land claims asserted as against the prior possessory sovereign. In these cases, the lands taken were contiguous to lands already owned. The allegedly "natural" rights of the sovereign over contiguous lands are expressed in a Supreme Court decision from 1842:

> "The laws of nature and nations establish the following propositions, pertinent to this question: 1. Every nation is the proprietor [owner] as well of the rivers and seas as of the lands within its territorial limits. Vattel 120, 266. 2. The sea itself, to a certain extent, and for certain purposes, may be appropriated and become exclusive property as well as the land. Vattel 127, 287; Ruth. book 1, ch. 5, p. 76, 3. 3. The nation may dispose of the property in its possession, as it pleases; may lawfully alienate or mortgage it. Vattel 117, 261-2. 4. The nation may invest the sovereign with the title to its property, and thus confer upon him the rights to alienate or mortgage it. Vattel 117, 261-2. The laws of England establish the following propositions material to this point: 1. The common law of England vests in the king the title to all public property. 1 Bl. Com. ch. 8, 298-9; 2 Ibid. 15, 261-2; Harg. Law Tracts, de Jure Maris, ch. 4, 10, 11, 12; 6 Com. Dig. tit. Prerogative, 60, B. 63; Tenure 337; 5 Com. Dig. tit. Navigation, 107; 3 Co. 5, 109. 2" *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842)

Ordinarily, the territorial limits of a sovereign are defined either by geography or by treaty. Geography, for instance, defines the eastern and western borders of the United States (apart from Hawaii, Peurto Rico, and other island territories recognized by treaty), and treaties define the northern and southern borders. Treaties also define the territorial limits or legal jurisdiction of sovereigns over the seas. For a long time, 3 miles from shore was recognized as the territorial border of a sovereign with a shoreline. This was "cannonball" distance. Now, the territorial limits recognized by the UN extend to as much 200 miles out to sea.

Guano Islands: Sovereign as Squatter

In the mid-nineteenth century, the U.S. adopted a law which would significantly alter the means by which it could acquire certain territories. Essentially, it laid claim to a whole category of islands based not upon their geographical position, or based upon any other treaty, but upon these islands' compositions. The Guano Islands Act of 1856 established the United States' claim to any so-called guano island upon which an American citizen might set foot, and which is not otherwise occupied or laid-claim to, and which has any "deposit of guano." 48 U.S.C. Ch. 8, 1411 et.seq. This odd example reveals how sovereigns may take possession of lands by fiat.

Notably, the Guano Islands Act necessitates entrepreneurial activity by a citizen taking possession of a guano island. It grants him, in return for possession, profits from the extraction of guano from the island. While the U.S. becomes the territorial sovereign, the possessor becomes the parcel owner simply by virtue of "improving" the island by exploiting the natural resource. This sort of improvement is akin to the indicia of ownership which granted tens of thousands of early American squatters legitimate title to lands in the continental U.S. [De Soto, 113-15].

The Strange Case of Navassa:

In 1857, the United States claimed possession of the uninhabited Island of Navassa, between Haiti and Jamaica, pursuant to the Guano Islands Act. As it turned out, the sea captain who discovered guano on the island was mistaken. What he had in fact discovered was phosphorite, of which promptly was mined nearly a million tons from the island by the Navassa Phosphate Co. based in Baltimore. Mining operations ceased by the time of the Spanish American War, although the island still comes under the flag of the U.S. The U.S. Coast Guard manned a lighthouse on the island until 1997, but abandoned it when the prevalence of GPS systems replaced the usefulness of lighthouses. Haiti has asserted an adverse claim to Navassa, and it seems likely that, given the means by which the U.S. came into accidental possession of this island, and it failure to continue to occupy it, Haiti's claim may yet become strong.

The Guano Islands Act, and the case of Navassa, underscore some interesting issues concerning the means by which sovereigns come into possession of territories, and maintain their claims. Specifically, the class of strategically important islands were claimed by fiat, not by war or treaty, and claims were asserted even prior to actual occupation or possession based only upon the presence of a certain substance on the islands. It is interesting to note that these claims have not, by and large, resulted in major confrontation between sovereigns vying for possessions of guano islands. There were no "Guano Wars." Beyond mere recognition of squatters' rights, The Guano Islands Act was the official institutionalization of squatters' rights in the U.S.

Natural vs. Positive Monopolies

De Soto's reflection on the emergence of squatting as a bona fide means of property ownership in the U.S., and governmental acceptance of this previously illegal act, emphasizes the largely entrepreneurial role of property owners in the U.S. as opposed to elsewhere. I contend that the distinction between land patents (or state-created monopoly rights over carefully delineated parcels) and "squatters' rights," is analogous to the distinction between Intellectual Property Patents and trade secrets.

Natural Monopolies

Natural monopolies arise not due to some government-sponsored right or positive law, but rather through the mere assertion of possessory interest over some resource. Natural monopolies might be thought of as what Searle calls, a "brute fact." The only natural monopoly which might be exerted over ideas, for instance, is via secretiveness, recognized in the common law as "trade secrets." My possession of a certain piece of moveable property, to the exclusion of all others, gives me a monopoly over that resource. My occupation of a certain parcel of land, with accompanying indicia of ownership, gives me a similar monopoly, to the extent that I can maintain that possession against others.

Artificial, or State-Sponsored Monopolies:

Sovereignty is essentially the exertion by a political unit of a monopoly over land. All other rights to land flow from that monopoly. In fact, the monopoly power of Intellectual Property Patents owes its etymology to "Land Patents," which are monopolies over land granted by sovereigns to citizens. Eventually, the crown began to grants "Letters Patent" to individuals wishing to express certain ideas as well. Both Land Patents and Intellectual Property Patents exist today, and continue to be recognized as monopolies granted by sovereigns:

> The patenting process is essentially a judgement of the Land Office tribunal**,** serving as documentary evidence that:
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> Legitimate national obligations (compliance with international treaties and extinguishment of Indian occupancy) have been discharged so that national "interest" in the property can be quitclaimed;
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> The courts held that the operation of a patent as a deed was of the nature of a quitclaim to any interest as the United States possessed in the land; *Beard v. Federy*, 70 U.S. 478, 3 Wall, 478, 18 L.Ed.88. A patent to land of the United States constituted a full conveyance of title out of the United States; *McArthur v. Brue***,** 67 So. 249, 250, 190 Ala. 563. The issuance of a

> patent divested the government of all authority and control over the land; *Moore v. Robbins,* Ill. 96 U.S. 530, 24 L.Ed. 848.
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> A patent passes to the patentee all interest of the United States, whatever it may have been**, in** everything connected with the soil and in fact everything embraced within the meaning of the term "land"**;** *Damon v. Hawaii*, 194 US 154, 48 L.Ed 916, 24 S.Ct. 617; *Energy Transp. Systems, Inc. v. Union P. R. Co.,* (DC Wyo) 435 F.Supp 313, 60 OGR 427, *affd* (CA10 Wyo) 606 F2d 934, 65 OGR 576[further citations omitted]

The Efficiency of Natural Monopolies

Artificial monopolies, created by positive law and granted or enforced by governments, are not necessarily efficient. In intellectual property, patents are routinely granted for new and inventive products or processes, and those new or inventive products or processes may not necessarily readily enter the stream of commerce. The patent itself has become a valuable form of property, because of the strong and exclusive nature of the monopoly granted, so that a company may be valued now not necessarily by what it makes or sells, but by the perceived value of the intellectual property it may be sitting upon.

As I have argued in *The Ontology of Cyberspace* (Open Court 2000), patents are in many ways a drag on the economy, slowing the movement to market of new and innovative technologies, and ultimately unnecessary as a means to promote innovation. Rather, given new technologies, innovators may reap huge rewards by speedy innovation, and getting quickly to the market, even without government created monopolies. [Koepsell 108-110]

So too may the government-sponsored monopolies of land patents be a drag on economies. This fact is implicit in the willingness of U.S. jurisdictions to accept squatters' rights as valid, where the land has been improved and other indicia of ownership asserted. Much like the economic benefit of a *laissez faire* world without government supported intellectual property regimes, a "squatters' regime" recognizes that government sponsored monopolies over land, which divvies up parcels without regard to the prospective owners' ability to improve that land, may not be the most efficient use of that resource.

The Future of Institutionalized Squatters' Rights

The monopoly exerted by the sovereign may be defined legally as among equal sovereigns (as in treaties), or may be asserted by fiat, as in the case of the Guano Islands Acts. The former method is particularly important for the future of exploitation not of Guano islands, but of outer space. For instance, the U.S. and most other major nations refused to sign "The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies", 1984, (the Moon Treaty). The U.S. Senate's refusal to ratify means that the Moon Treaty's provisions are not "the law of the land" in US courts, and

therefore need not inhibit the actions of US citizens or legislators. Essentially, the U.S. could pass an act just like the Guano Islands Act which would authorize private individuals to take the moon, or parts of it, "in the name of the United States."

References:

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