Charles Schridde chose the subject of his painting *The Fence* to represent the state of Texas, which, in his own words, "seems to go on forever." The land and the fence dividing it near Clifton, Texas, also represent the pervasiveness of the need throughout our nation's history to separate private land from public, to claim a piece of property as one's own. The history and future of conflicts arising from the needs, on the one hand, to have and control private property, and on the other, to limit and regulate land use for the good of the community as a whole, are discussed in Harvey Jacobs' Longer View.

The artist, who concentrates on painting landscapes and figures of the American West, works out of his studio in San Juan Capistrano, California (www.schriddestudios.com).

Jacobs is a professor at the University of Wisconsin-Madison, where he holds a joint appointment in the Department of Urban and Regional Planning and the Institute for Environmental Studies. His edited book *Who Owns America? Social Conflict Over Property Rights* was recently published by the University of Wisconsin Press.

Journal of the American Planning Association, Vol. 65, No. 2, Spring 1999.

Fighting Over Land

America's Legacy . . . America's Future?

Harvey M. Jacobs

The private property rights movement may well be the most significant land use and environmental movement in the United States in recent decades.[1] The movement is a diverse coalition which is deeply disturbed by what proponents perceive as a serious erosion of private property rights. Through policy and regulation, they believe, one of the more foundational social contracts upon which the country was established is being undermined, seriously threating the future of our democratic society.[2]

The private property rights movement has succeeded in keeping its agenda before the U.S. Congress throughout the 1990s. Though the House and Senate have each considered legislation aimed at protecting private property rights, no bill has passed both houses (Sugameli, 1997). More significantly, the private property rights movement has succeeded in having bills introduced in every state and secured the passage of legislation in half of all states (Jacobs, 1998; Emerson & Wise, 1997; Lund, 1994). These bills are of three types. They seek compensation for landowners whose property values are lowered due to regulation, require "takings impact assessments" as a way to discourage regulatory activity, or require a conflict resolution process among aggrieved parties, in which the terms of negotiation favor compensation to the landowner. In addition, the movement has promoted significant parallel activity in over 200 counties (Arrandale, 1994; Hungerford, 1995).

Through its political efforts, the private property rights movement has succeeded in redirecting public discourse about land and environmental policy; more and more legislators, members of the media, and members of the American public now view the issue of land use and environmental policy from the perspective of how it impinges on private property, rather than how it furthers public goals. It is now more common for legislators to have to prove that the benefits of proposed regulations outweigh the costs, with costs broadly measured as the actual and anticipated burden placed on property owners (including their investment-backed expectations), and the benefits to the public welfare narrowly construed (Jacobs, 1997b).

To some extent, the rise and impact of the private property rights movement is perplexing. The 1970s was a period of seeming social consensus

about land use and environmental issues. At the national and state levels, we adopted many innovative approaches for land and environmental management. This was the period of the "quiet revolution in land use control" when some planning and policy analysts anticipated widespread restructuring of institutional arrangements for land and environmental policy (Bosselman & Callies, 1971; Popper, 1981). This was also the period when the modern environmental movement was born (the first Earth Day was held in 1970) with what seemed to be a revolution in consciousness about environmental issues. In fact, public opinion polls over the last 25 years show Americans consistently supporting environmental protection programs and activities at all levels of government (Dunlap, 1991).

So how to explain this dissonance? It might be attributed to the anti-environmental rhetoric and administrative appointments of the early Reagan administration. But the immediate impact of the appointment of individuals such as James Watt and Anne Gorsuch Burford was a surge of support for environmental organizations, including increases in their membership, activism, and influence (Dunlap & Mertig, 1991). Leading scholars and policy activists saw the quiet revolution continuing, though in the form of program- and resource-specific initiatives rather than integrated, comprehensive laws centralizing control over land and environmental resources (DeGrove & Miness, 1992; Popper, 1988). In 1994, the so-called Republican Revolution was swept to electoral victory with a strong anti-environmental/pro-property rights platform reminiscent of that put forth by the Reagan administration. However, the leaders of the Revolution soon found themselves having to soften their stand for the 1996 elections, portraying the party as defenders of the environment to avoid alienating the mainstream of voters.

In this essay, I explore why and how it is that Americans seem to be of two minds on property rights and land, as local, state, and national politics of the 1980s and 1990s suggest. Where is it that we agree, why is it that we disagree, and how might this issue unfold as we move into the early part of the next century?

The Goals for Land Use—Where We Agree

In a broad sense we all agree on principles of land use. That is, we want land to be used well. We do not want land to be degraded. We do not want land uses to burden the public with wasteful investments or costs (such as in roads, sewers, or water lines). And we want to give owners fair returns on their investments in that land. In short, we want land use to be rational, efficient, and equitable. The problem is that we do not agree on the definition of these terms, nor on specific measures to implement these goals.

The reasons for this disjuncture can be grouped into four areas:

- our interpretation of American *history*;
- our understanding of the human motivations and behaviors that drive the *economics* of land use;
- our *philosophy* of land; that is, we argue about the very nature of land itself; and
- finally, all of these factors—history, economics, and philosophy—are further complicated by the particulars of our system of *governance* and the inability of American democratic structures to easily yield workable answers to the land use problem.

Property Rights and Land—Why We Disagree

Our Interpretation of American History

Conservative scholars and activists want to start any conversation about land by talking about its importance in American settlement and American history—the centrality of land to the very core of what it means to be an American. They are right to do so.

The early political history of the United States was as much a history of settlement in search of freehold land unavailable in Europe as it was a search for political and religious freedom (Ely, 1992). In America's early years, western European countries were still structured under the vestiges of feudalism. An elite owned most of the land, and the prospects for the ordinary person to obtain freehold (obligation-free) ownership were nil. America offered an alternative. Here was a place where white immigrants could get ownership of land, and with that land as capital, make a future for themselves. America was the land of opportunity. The cultural myth of freehold private property—the open spaces of the American west, the attitude of "It's my land and I can do what I want with it!"—defines the American character as much as any characteristic. To be an American is to own and control private property. So, while public opinion polls show that Americans support environmental protection (of which land use planning is a part), many of these same citizens can be deeply disturbed by the public regulatory programs that achieve this goal by impinging on private property rights.

In America's colonial past, the existence of land converged nicely with the new political theories. In particular, drawing from the work of Jean-Jacques Rousseau and John Locke, ideas circulated about notions of own-

ership and democracy. One came to own land through using it (which provided the justification for taking land from America's native inhabitants, who were not using it in the European sense of active agricultural and forest management), and freely constituted governments (i.e., democracies) existed for the protection of individual liberties, including the liberty to own and use land.

The country's founders configured these ideas into a particular and specific relationship. Democracy required liberty (and vice versa), and both in turn required freehold property. It was Thomas Jefferson who articulated the notion of the yeoman, freehold farmer as the bastion of the new democracy, precisely because freehold ownership of land gave economic and thus political freedom. Because he could produce for himself on land he owned, he was encumbered to no one, and thus was free to make political judgements which reflected the best for the public interest (Gilreath, 1998).

This does not mean that we haven't always fought about land, its meaning, and the relationship of private property to citizenship and democratic structure (Ely, 1992). Drawing from the writings of John Locke, some of America's founders saw that one of the principal reasons to form a government was to protect property. As James Madison (Hamilton, Madison, & Jay, 1961) wrote in the *The Federalist Papers*, "government is instituted no less for the protection of property than of the persons of individuals" (p. 339). Others, including Alexander Hamilton and John Adams, concurred. Adams (1851) noted that "property must be secured or liberty cannot exist. The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence" (p. 280).

But this view of the relationship between property and democracy, and the fact of asserting property's primacy, was not unchallenged. Also drawing from Locke, others saw the need for private property ownership to bow to social needs. As John Locke (1952) himself wrote:

> For it would be a direct contradiction for any one to enter into society with others for the securing and regulating of property, and yet to suppose his land, whose property is to be regulated by the laws of society, should be exempt from the jurisdiction of that government to which he himself, and the property of the land, is subject. (pp. 68-69)

Thomas Jefferson, Benjamin Franklin, and others echoed these sentiments. As Franklin (1907) noted with force, "private property is a creature of society, and is subject to the calls of that society whenever its necessities require it, even to the last farthing" (p. 59).

Private property in land was thus a confusing issue for the founders. The Declaration of Independence speaks of "life, liberty and the pursuit of happiness," not life, liberty, and property.[3] The U.S. Constitution of 1787 contains no specific references to private property. Not until the Bill of Rights was adopted in 1791 did the now infamous and contentious so-called "takings" phrase appear as the closing clause to the Fifth Amendment to the Constitution: ". . . nor shall private property be taken for public use, without just compensation."

With the adoption of this phrase, the Constitution formally recognized four concepts: the existence of private property, an action denoted as taken, a realm of activity which is public use, and a form of payment specified as just compensation. The interrelation of these concepts is such that where private property exists, it may be taken, but only for a denoted public use, and when just compensation is provided. If any of these conditions are not met, then a taking may not occur. But the clause doesn't tell us exactly when a taking has occurred, what is a public use, and what constitutes just compensation. In fact, it doesn't even tell us what is private property. And all of these concepts have varied through American history, in response to changing social conditions.

In America's past, disagreements about private property were largely theoretical. When a government took property, the public use was usually clear—land for a school, a road, or other public facility—and the owner was compensated. And in early America, the taking of private land was not much of an issue. The new country had land in abundance, and it was the disposition of public land, not the acquisition of private land, that dominated the public agenda. It was not until the 20th century and the emergence of modern regulation that the issue of how to interpret our history became so important.

We therefore disagree about property rights and land, in part, because we disagree about how to interpret early American history. Land is clearly a central element in the history of the founding of the United States, but how we are supposed to use that history to understand private property rights today is not clear.

The Economics of Land Use

Another reason we disagree stems from conflicting views of human nature, human behavior, and individual motivation. Conservatives, the promoters of a strong private property rights perspective, view landowners, those to whom land use is entrusted, as stewards. Their benevolent interpretation suggests that individuals acting in their self-interest will want to be responsible managers of land because by doing so, they (the owners) benefit. Self-interest on the part of landowners becomes social interest. If you will, society gets rational and effi-

cient land use through the rational and efficient activities of individual landowners. This is exactly the key lesson we take from Adam Smith's seminal text *The Wealth of Nations* published in the same year as the Declaration of Independence.

In counterpoint, critics (liberals?) argue that landowners are trapped in a tragedy not of their own making, but one in which their efforts to maximize individual self-interest do not further society's interests—the opposite of Adam Smith's prediction. For example, landowners want to buy low and sell high. They are "encouraged" to pay attention only to their decisions on their property—not their neighbor's property—and to do so now, with little regard for the future, especially several generations off.

Individuals thus make land use management decisions that take into account neither the broader public interest nor a more expansive economic calculus. What results is a litany of common land use problems: farmland depletion at the urban fringe, wetland loss, suburban sprawl, downtown deterioration. All of these have been depicted as problems that arise from a version of what Garrett Hardin (1968) called "the tragedy of the commons." In these instances, the tragedy is that individual landowners make decisions that are economically and socially sensible to them, but are not judged to be as beneficial to the broader public.

So we disagree about property rights and land, in part, because we disagree about the economics of land, especially what motivates individual land users and how they respond to the signals they receive from the economic, political, social, and cultural systems within which they live.

The Philosophy of Land

Who owns America? Who owns the land? Who owns *your* land? On one level these rhetorical questions seem unnecessary. Americans know what ownership means. It means the right to do with your land as you please. It means the right to decide who will come onto your property. It means the right to buy, sell, lease, and transfer land as you see fit. Following from the perspective of James Madison and John Adams, you own your own land, and your bundle of rights is robust and enduring.

But our "modern" history seems to give us the opposite answer. History shows us that the public sector—the states and local governments—has exercised substantial regulatory restrictions over private property rights since colonial times (Ely, 1992; Bosselman et al., 1973). For example, colonial Virginia regulated tobacco-related planting practices (to prevent overplanting and require crop rotation); Boston, New York City, and Charlestown regulated the location of businesses such as bakeries and slaughterhouses, often (for the latter) to the point of exclusion (Treanor, 1995).

More importantly, private property rights have been repeatedly reshaped to reflect changing technologies and changing social values. So, for example, under a classic definition of private property—the definition taught to first year law students in their property class—owning property means *cuius est solum eius est usque ad coelum et usque ad inferos*: whoever owns the soil owns all the way to heaven and all the way to the depths. This definition made perfect sense until 1903 when the Wright brothers got their machine off the ground on a beach in North Carolina. Within a very few years the airplane went from a novelty to commercial development. But then what happened? Under a traditional, constructionist, restrictive definition of property, every time an airplane flew over my property it was guilty of trespass. The airplane had entered my property without my permission as surely as if the pilot had walked up to my fence line, smashed the fence, and kept walking. As air travel expanded, this definition of private property was no longer socially functional. If individual landowners could claim trespass of and demand compensation for their property by airplanes, air travel would become either too cumbersome or too expensive.

Over the course of 30 years (from the 1910s through the 1940s) the U.S. courts scratched their heads over this problem. Eventually they solved it by "public-izing" air rights above a certain elevation without requiring compensation under the Fifth Amendment (Jacobs & Ohm, 1995). That is, the courts reappropriated airspace to the public sphere so individual owners no longer owned *est usque ad coelum*, creating a new commons where one had not existed before (Jacobs, 1995a, 1996).

In the 1960s a similar redefinition reflected changing social values. In the popular mind, one focus of the civil rights movement was lunch counters in the American south. The owners of these businesses, reflecting their understanding of their private property rights, decided whom they would serve and whom they wouldn't. They acted no differently than anyone does in deciding who may come into his or her home. These owners said, in effect, "It's my business, I built it with my capital and my labor, I get to decide whom to serve!" But during the 1960s, owners of these commercial establishments lost their private property right to choose whom they would or would not serve (Hecht, 1964). Reflecting changing social attitudes on race and human relations, we decided as a society that the greater social interest was better served by taking this right away, and as with airspace, we did it without compensation (Jacobs, 1997a).[4]

These trends have been largely supported by the state and federal courts in the U.S. (Porter, 1997). In Wis-

consin, my home state, the state Supreme Court seems especially strong in their understanding of the social nature of land. In the famous case of *Just v. Marinette County* (1972), the court found that landowners could not assume any use rights other than the use of land in a natural condition; the right to develop land rested with the state, which could dispense it as it saw fit to best serve the public's agenda (Large, 1973). The Court had the chance to revisit this case in light of recent U.S. Supreme Court decisions, and found no reason to change their basic doctrine (Ohm, 1996, 1997, regarding *Zealy v. City of Waukesha*, [1996]). Regardless of the liberal or conservative makeup of these courts, their thrust has been to acknowledge the need for private property rights to bend and flex with society as society itself changes, technologically and socially.

My point is that who owns the land is not as straightforward a question as it would seem, and never has been. Land has always been a socially defined and flexible concept.[5] We thus disagree about property rights and land, in part, because we disagree about the fixedness or flexibility that should underlie the land.

The System of Governance

My last point on why we disagree has to do with how our system of governance complicates land use decision making. In most situations, people involved in the politics of land—land use decision making—want to do the right thing. But responding to a set of social signals—incentives and disincentives—land use decision makers are pushed towards what come to be judged as poor land use decisions from a social point of view. Why? Let us examine the case of local land use decision makers.

As politicians who are elected representatives, these people are often caught between strong opposing forces. First, their responsibility is to their local constituency. They would be remiss if they did not seek to maximize the welfare of local citizens over that of the region (however defined). Our longstanding system of local land use policy, which decentralizes public sector control over land use, almost guarantees a crisis in land use planning results (Jacobs, 1989). Each set of locally elected officials is seeking to maximize the fiscal, social, and quality-of-life conditions of their place in contrast to and competition with those of adjoining and other places. If they do not behave this way, we deem them not to be doing their jobs and we vote them out of office. In a very real sense they are compelled to behave in ways that maximize the local welfare and minimize the regional one.

Within the locality a parallel paradox operates. On the one hand everyone is concerned with land. Decisions about it are central to our individual and community well-being. Yet, we do not share the same vision for land use decisions. In fact, one author has characterized local land use politics as an attempt to navigate between the forces promoting expansion and those seeking exclusion (that is, those seeking to promote growth and land use change, and those seeking to protect the quality and stability of a place; Plotkin, 1987). Decision makers in a democracy seek a middle ground, a place of compromise, among these forces. They do exactly what we, as citizens, usually want them to do. In highly charged and contentious situations, they try not to completely favor one group over another.

The problem with this approach, which can work reasonably well in labor negotiations or social service budget allocations, is that the very nature of land makes it difficult to achieve compromises, especially when one or more groups take an absolute position. Does it satisfy an environmental group to fill only part of a wetland? Will a neighborhood association be pleased with a proposal to build a halfway house for drug addicts or homeless shelter at half its originally proposed size? Will a developer find it acceptable to get approval for a shopping center at only half its proposed square footage? In these cases, the answer is usually "No."

Land use decisions that follow the "logic" of democratic decision making (the logic of compromise) often end up satisfying no one. The logic of compromise, the rationalism of give and take, crumbles when it is applied to land. In fact, democratic rationalism in land use decision making often yields a profound sense of discontent. Decision makers feel burned; they are following the rules of democracy and nobody is happy. And citizens likewise feel burned, because they cannot make the system of democracy respond to their wishes. Moreover, a special problem with land use decisions is that participants often get only one shot. Decisions to allow land use changes are often irreversible. And yet, the system is doing precisely what it is supposed to do.

Added to the general problem of governance is the specific problem of the conflicting signals from our fragmented system of public service provision. A prominent example is highway construction. By making urban fringe and rural land easy to get to, we indicate to current and prospective landowners that we are committed to making their transportation to and from their properties as efficient, painless, and safe as possible. The same is true when public money is spent in the design of new types of on-site sewage systems for rural lands (Hanson & Jacobs, 1989). A third example is the independence of school districts, which are in the "business" of providing the best education they can for the dollar. This mandate often means that when it is time to build a new school, a district will examine its alternatives and, responding like many other land investors, will choose

cheap land, which, more often than not, is in the urban fringe or rural areas. New schools are thus built away from population centers. The net result is that they end up drawing population to them. What does this mean? On the one hand, a local plan, devised with citizen input, promotes the protection of rural resources, and reasonable, compact development. On the other hand, the school district decision encourages, even facilitates, urban sprawl.

The Future of Private Property Rights and the Politics of Land

History, economics, philosophy, and governance—these are four of the principal reasons why we so actively disagree about private property rights, and why the politics of land can be so contentious.

Underlying all four is something we can never lose sight of—land is unique. Land is a fixed, nonproducible resource whose possession often represents the major source of wealth, status, and security for its owners. Land use planning by local, state, regional, and national governments is, quite explicitly, a wealth-creating and wealth-distributing process. Since the stuff can't move and it has unique characteristics—including location—public discussions about its use become a process of selecting winners and losers through plans and regulations (Jacobs, 1995b). This is why bankers, realtors, and builders care so much about land use planning and are so active in local politics. This is why citizens show up in force at public hearings on halfway houses, homeless shelters, parks, office towers, sewage plants, shopping malls, and agricultural land conversions. In many ways, Frank Popper (1978) may have said it with the most insight when he wrote about private property and the politics of land, "... land is primarily a social weapon. It is a means by which its possessors protect their economic, political and other interests. In some ways, it is the most tangible and primitive form of power" (p. 5).

What is the likely basis for addressing the politics of land? Are we doomed to fight forever without resolution?

To the extent that private property rights proponents have succeeded, it is because they are tapping in to a set of cultural symbols about property that are central to the American character. People came and continue coming to America to secure land. The ownership of land is tangible evidence that one has "made it." Jefferson's ideas of independence rooted in land ownership live on in America's suburbs and among the varied political and religious fringe groups in America's hinterlands: When it is "my land," I can do what I want with it and on it. The private property rights movement speaks about land the way many Americans understand land from the stories they read, the movies they watch, and the myths they have absorbed.

Yet the private property movement is fighting a centuries-long trend in the social redefinition of private property. Since the late 1700s, the state in all its forms has passed myriad regulations that often impose onerous burdens on private property owners. As technology and social values have changed, society has seen fit to redefine the very idea of what is private and what is public.

And what about zoning? The central component of American land use regulation, used by cities large and small and vilified by right-wing property rights advocates, is by its very nature a conservative tool of social management. It was invented and promoted by middle-class business interests as a way to protect their private property rights from the vagaries of the unregulated market (Haar & Kayden, 1989). Zoning was invented and ultimately defended before the U.S. Supreme Court as a reasonable exercise of governmental authority because it served to maintain the private property rights of landowners. The same can be said for many of the land use and environmental management tools we've developed to help turn plans into reality. After World War II, the use of zoning spread beyond the urban areas to which it had previously been confined to suburban and rural areas. As housing and land became the principal form of wealth and investment for America's middle class, zoning became the tool to protect this investment. While zoning has expanded its scope to address an ever larger set of public interest issues, ultimately it is not a radical tool for social change.

Where is the social redefinition of private property likely to end? Is there a limit to regulation of private property rights in America? From a legal/theoretical point of view, the question can't be answered "Yes" or "No." But from a juridical and political point of view, the answer is clearly "Yes." In 1922 the U.S. Supreme Court noted that a regulation can go so far as to be equivalent to a taking.[6] In the last decade, the conservative jurists on the Court seem to be reviving this perspective and trying to specify exactly when that line is crossed.[7]

The problem is that Americans want both private property and limits on private property. We want freedom on *our* property and restrictions on other people's property. We are not, in the norm, a radical or ideological people. We want the middle of the road. With regard to property we want security (of our financial investment), clarity (of the rules and expectations for land use, for ourselves and others), and certainty (with regard to how future changes will affect our security).

Ultimately, private property will continue to evolve in America. Private property is a social contract. It establishes the rights of the individual, and it binds society.

The balance point between individual and social rights in property will continually be renegotiated, as technology and social values change. As Americans continue to reinvent their concept of freedom, of what it means to have liberty, they will come to understand anew what it means to hold private property while living in a democratic society.

As part of this process we will continue to fight about property rights and takings. There is no reason we shouldn't—we always have (Treanor, 1995). I for one think it is a good thing. As conservative scholars and activists have become more active in their promotion of a private property rights perspective, they are forcing clearer thinking from those who hold a different perspective (see, for example, the recent books by DeLong [1997] and Bethell [1998] as examples of conservative treatments). The land use and environmental movements took too much for granted in the policy process and often continue to do so. The rise and impact of the private property rights movement shows how unprepared the land use and environmental communities were for a counter-perspective. In fact when the wise use movement first appeared, many in the land use and environmental movements treated its emergence as a non-issue.

What does this mean for planners? First, we need to acknowledge the very real emotional appeal of property rights protection to the American public. Rather than cynically dismissing the base of support for the property rights movement and property rights legislation, planners and other proponents of land use planning need to recognize the ambivalent feelings of many Americans toward private property rights and regulation. Then we need to work on the substantive issues that underlie and prompt the introduction of property rights legislation. As planners we need to recognize that there are occasions of abusive administrative practices in the implementation of land use laws, and there are instances when the burden that individual landowners are asked to bear to achieve a public purpose stretches the realm of credibility, even if a court were to find it constitutional. Those concerned with sound land use policy need to develop mechanisms to alleviate any undue burden which may arise through the enforcement of land use laws (Strong, Mandelker, & Kelly, 1996).

This call is not unreasonable. We have long had an internal debate about ways, on the one hand, to respect the integrity of private property and, on the other hand, to achieve public objectives in land and environmental planning and policy. This journal among others has been full of ideas for doing just this, and numerous states and communities across the country have experimented with creative approaches, including mechanisms such as transfer of development rights, purchase of development rights, and the facilitation of nonprofit, public interest land trusts. More of these approaches need to be part of the regular way of doing business in the design and implementation of land use policy.

Most importantly, planners and others who oppose the agenda of the private property rights movement because it is bad public policy need to recapture the terms of public debate about land use. Land use regulation laws are as old as the American system of government, and as much a part of it as any aspect of our democratic system. In the same decision that established the concept of regulatory takings in 1922, the Court noted that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change . . ." (*Pennsylvania Coal Co. v. Mahon*, 1922, p. 413).

Private property rights and land are socially contentious because they mean so much to us as Americans. I am glad that we care. What's important now is to be certain that the debate is not one-sided and that all perspectives, including those of future generations and the nonhuman species, are accounted for. If we believe in the promise of democracy and the role that private property and land play in establishing and continuing democratic societies, we will not shy away from the necessary political debate about property's future in our lives.

NOTES

1. The private property rights movement is referred to by a variety of labels including the private property rights movement, the land rights movement, the wise use movement and (by the environmental community) the anti-environmental movement. Excellent sources on the movement include Brick and Cawley (1996) and Yandle (1995).
2. This presentation of the private property rights movement does not ignore the significant influence of multinational corporate capital, especially from resource extractive industries. However, what I am doing is acknowledging what I interpret as the legitimate intellectual framework that ties the movement together.
3. Locke, whose writings inspired Jefferson, wrote about life, liberty, and property. Some scholars have argued that in the context of the 18th century, the pursuit of happiness was understood to include ownership of property (Ely, 1992).
4. This point does not deny the overt racism of individual property owners, but it does acknowledge the property rights issue that was often masked by the social conflict over racism. The fundamental property rights issue at the base of the matter has continued well into the 1990s with resistance by male-only membership clubs and male-only colleges to the admission of women. See, for example, the controversy over the latter in *United States v. Virginia* (1996),

the case of the exclusion of women from the Virginia Military Institute.

5. However, this interpretation of the social nature of property is contested by the property rights movement. Epstein (1985) provides the foundational legal perspective on the property rights view of the matter. He does not disagree with the historical events as I have presented them, but suggests that in all such instances, owners should have been compensated for the taking of their property.
6. *Pennsylvania Coal Co. v. Mahon*, (1922): "The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" (p. 415).
7. Some of the most prominent and frequently discussed examples include the decisions of the Court in the cases of *First English Evangelical Lutheran Church v. County of Los Angeles*, (1987); *Nollan v. California Coastal Commission*, (1987); *Lucas v. South Carolina Coastal Council*, (1992); and *Dolan v. City of Tigard*, (1994).

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