

STATE PROPERTY RIGHTS LAWS

THE
IMPACTS
OF
THOSE
LAWS
ON
MY
LAND

Harvey M. Jacobs



STATE PROPERTY RIGHTS LAWS: THE IMPACTS OF **THOSE LAWS ON MY LAND**

This report is one in a series of policy focus reports published by the Lincoln Institute of Land Policy to address timely public policy issues relating to land use, property taxation and the value of land. Each report is designed to bridge the gap between theory and practice by combining research, case studies and personal experiences from scholars in a variety of academic disciplines and from professional practitioners, local officials and citizens in different types of communities.

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Executive Summary

During the 1990s, a new conservative land use movement has emerged to promote the interests of private property owners. The leaders of this movement are disaffected with what they see as the success of the land use and environmental movements generally, and land use and environmental policy and regulation in particular. Their primary critique is that the erosion of private property rights, through such land policy and regulation, undermines a fundamental social contract upon which the country was established, and thus represents a serious threat to the future of our democratic society.

This movement has pursued a vigorous legislative agenda at all levels of government, but has found its greatest success at the state level. Every one of the 50 state legislatures has introduced bills to protect private property rights, and 26 states have passed such laws since 1991.

There are three types of state-based private property rights laws:

Assessment Laws are based on the concept of environmental impact assessments. They require government to undertake a “takings impact assessment” (TIA) study prior to the adoption of any rule, regulation or law to determine its impact on private property rights. They are promoted as “look before you leap” laws.

Compensation Laws require government to pay compensation to landowners whose property values are lowered due to regulation. The extent to which regulation affects landowners is predetermined and defined in the law, ranging from 10 to 50 percent of the land’s value.

Conflict Resolution Laws require a formal dialogue process to resolve conflicts between a regulatory agency and affected landowners. The terms of dialogue—who gets to participate and the bases for discussion and resolution—are defined by the law. These laws are promoted as a “let’s all sit down together and talk about it” approach.

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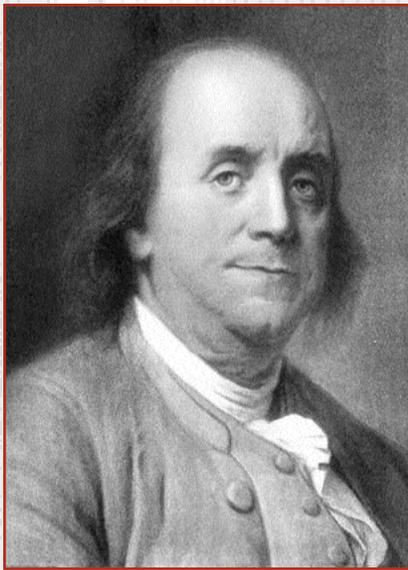
As of November 1998, seventeen states had adopted assessment laws; six states, compensation laws; two states, conflict resolution laws; and many of these states had adopted some combination or variation of property rights legislation. Nevertheless, the specific impacts of these laws have been minimal. In part this is because many of them are quite new, and they are often passed over the objections of governors, attorneys general and administrative agencies who are given the responsibility for their implementation. But these laws and their supporters have reshaped public perceptions about property rights and the balance between private and public rights in land.

The promoters of property rights legislation are strongly committed to their cause and will continue to pursue it with fervor. The future will see continued legislative activity at the state level, though it will probably shift in focus from past efforts. Advancement of assessment and compensation laws can be expected to decrease and new bills will instead follow Florida's model of conflict resolution and the definition of regulatory burden as something less than a formal takings. Following Arizona's experience, state legislative activity will also increasingly focus on revisions to the details of existing laws on state-local relations over land use and the rights of landowners within the regulatory process.

Opponents of these legislative efforts need to recognize the strong cultural appeal of private property rights and the ambivalent attitudes of many Americans about land regulation. In crafting responses to property rights proposals, opponents need to acknowledge that land use laws sometimes do ask too much of landowners, and that creative, responsible alternatives can and should be designed to address these situations.

The real challenge is to establish a middle ground in this debate—a middle ground that recognizes the need to regulate private property (as has been done since colonial times) while respecting the core concept of private property rights. Americans care about private property rights because they are such a central element in our history and culture. If we believe in the necessary role that private property plays in both establishing and continuing democratic societies, the political debate about the future of private property will be engaged enthusiastically.

Introduction: The Debate about Private Property at America's Founding



“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.” (1789, speaking in reference to provisions in the proposed constitution of the state of Pennsylvania).

— Benjamin Franklin

Americans have always cared deeply about their own land. Whether it is neighbors arguing over fence lines or legislators debating in statehouses, the American discussion about land is deeply passionate. Why? Because owning and using land goes to the very heart of what it means to be an American.

The conventional story about the founding and growth of the United States is about the desire among immigrants for religious and political freedom. This has always been and continues to be true. But it is also true that immigration to this country is about a desire for access to land, which was often unavailable in the immigrant's home country. 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 ownership of land were limited.

America offered an alternative. It was seen as the land of opportunity. Here was a place where freely admitted immigrants could own land, and with that land as capital could build a future. The cultural myth of 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 attribute. To be an American is to be able to own and control private property.

The existence of abundant land converged nicely with the new political theories of the colonial period. In particular, drawing from the work of contemporary political philosophers, such as Jean-Jacques Rousseau and John Locke, ideas circulated about notions of ownership and democracy. One came to own land through actively 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). Further, freely constituted governments (i.e., democracies) existed for the protection of individual liberties, including the liberty to own and use land.

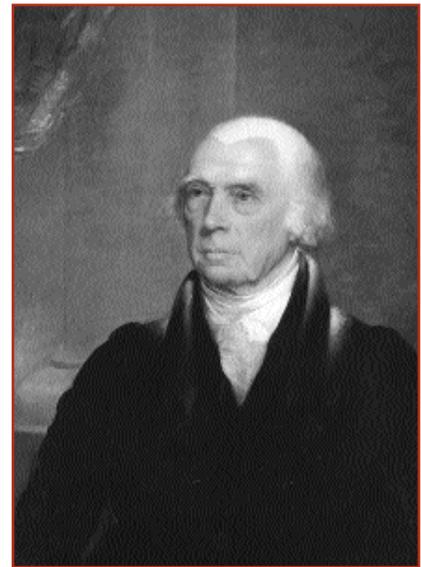
Among the country's founders these ideas were configured into a particular and specific relationship. Democracy required liberty (and vice versa), and both in turn required private property. It was Thomas Jefferson who articulated the notion of the yeoman, freehold farmer as the bastion of the new democracy, precisely because

his freehold ownership of land gave him 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 judgments that reflected the best decisions for the public interest.

Nonetheless private property has always been a confusing issue in America. While all of the country's founders were inspired by the writings of John Locke, they seemed to have taken two different messages from him. Figures such as James Madison, Alexander Hamilton and John Adams argued that one of the principal functions of forming a government was protection of property. As James Madison wrote in *Federalist* No. 54 "government is instituted no less for the protection of property than of the persons of individuals." John Adams 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."

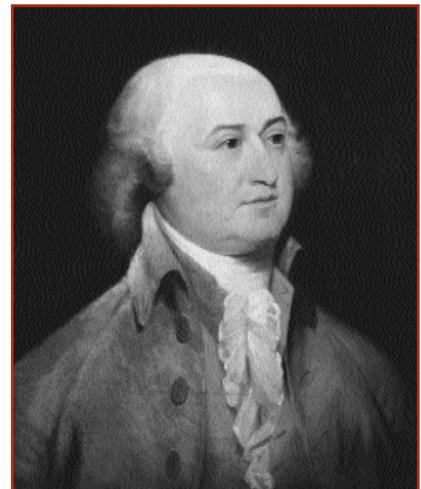
On the other hand, Thomas Jefferson and Benjamin Franklin believed that property was a socially defined concept that had to change in response to society's needs. Franklin noted with force "private property is a creature of society, and is subject to the calls of that society whenever its necessities require it, even to the last farthing."

What does this mean for us today? That there is no single "original" perspective on land and private property rights to consult in order to resolve our contemporary debates. We have been fighting about the meaning of land and the integrity of private property rights and their relationship to our democratic society throughout our history. Our founders appear to have given us ammunition for whatever perspective we may choose.



"Government is instituted no less for the protection of property than of the persons of individuals." Federalist No. 54. (1788).

— James Madison



"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." (1790).

— John Adams

Constitutional Precedent and Court Decisions

The Takings Clause of the Fifth Amendment

The U.S. Constitution of 1787 contains no specific mention of land or private property. It was not until the founders crafted the Bill of Rights in 1791 that private property took its place in our Constitutional framework. The final clause to the Fifth Amendment reads “. . . nor shall private property be taken for public use, without just compensation.” These words have come to be known as the Takings Clause.

With this clause the Constitution clearly establishes and recognizes four distinct concepts and a relationship among them. The four basic concepts in the clause are: a type of property that is deemed private property; an action denoted as taken (or takings); a realm of activity called public use; and a form of payment specified as just compensation. The relationship among 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 (e.g., the proposed use is not interpreted as public) then a takings may not occur. But the clause does not tell us exactly when a takings has occurred, what is a public use and what constitutes just compensation. In fact, it does not even define private property.

During America’s early history, confusions about how to interpret the takings clause were largely theoretical. 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. When government took property, the taking was usually complete, the public use was clear—land for a school, a road or other public facility—and the owner was usually compensated in cash at fair market value. It was not until the dawn of the twentieth century and the emergence of the era of modern land regulation that the ambiguities of the takings clause took on so much importance.

Social and Technological Challenges in the Courts

Beginning in the early part of this century, and gaining force since then, American society has moved to regulate private property with greater breadth and specificity. Zoning is the best known of these regulations, but a vast array now exists. From the federal level down to the local, these regulations impact on the free choices available to individual landowners as to how they may choose to use their land.

When the modern regulatory state first came into being there was no question about what it was doing and what this meant under the takings clause of the Constitution. A regulation was not considered a physical taking of property for another, public use. In fact, zoning by local governments was validated by the U.S. Supreme Court in 1926 in the case of *Village of Euclid v. Ambler Realty Co.*, in

“. . . nor shall private property be taken for public use, without just compensation.”

part, under the theory that it prevented public and private harms.¹ As the Court understood it, regulation was not an imposition on the private landowner but rather a reasonable restraint under modern interpretation of ancient nuisance rules.

However, in this same period the U.S. Supreme Court decided another case that laid the seeds for the dissenting view on this matter, and showed how the courts, the legislatures and the polity could be of two minds on the same subject. In 1922 Justice Oliver Wendell Holmes delivered for the Court a decision in the case of *Pennsylvania Coal Co. v. Mahon* in which he noted that “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.”² With this decision, the concept of regulatory takings entered the mainstream of American jurisprudence. But, what Justice Holmes did not say then, and what the Court has never said, is exactly what going “too far” means.

From 1922 until 1987 the U.S. Supreme Court had little more to say about the subject at all. In the last decade, however, a Court populated by more politically conservative jurists has heard a set of cases having to do with takings and regulation, and has sought to clarify some of the bounds of acceptable governmental activity.³

What the Court and Congress have recognized over time is that the concepts that make up the takings clause change as society itself changes. For example, for many decades the courts interpreted “public use” to mean immediate use. What if a local government wanted to take land for a legitimate public use (such as an airport) and pay just compensation, even though construction was not scheduled to begin for another five or ten years? The local government, wanting to make good use of public money, preferred to take land while prices were low and there were no conflicting land uses. For years the courts determined that this was not a legitimate “public use.” Even though this action might make public fiscal sense, to the courts “public use” meant immediate use, and so they would deny such a takings action. It took decades to change this perspective.

Likewise, the very idea of private property. Under the classic definition of private property, the definition taught to law students in their first year at law school, 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.

“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.”

— Justice Oliver

Wendell Holmes



This definition made perfect sense until 1903 when the Wright brothers got their machine off the ground on a beach in North Carolina, first for 12 seconds and then for 59 seconds. Within a very few years the airplane went from being a novelty to a commercial enterprise. 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 down the fence and kept walking. The old 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 thirty 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. That is, the courts reappropriated to the public sphere air space above a certain elevation so individual owners no longer owned *est usque ad coelum*. In effect, the courts created a new commons where one had not existed before. The creation of this new commons responded to changing social needs pushed by changing technology.

In the 1960s changing social values prompted another challenge to the concept of private property rights. In the popular mind, one focus of the civil rights movement was the practice of lunch counter owners in the American south who, reflecting their understanding of their private property rights, decided who they would serve and who they would not. They acted no differently than anyone else 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 who to serve!” However, 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 from them, and, as in the case of the airplane, we did it without compensation.⁴ The owners of these commercial establishments lost their private property right to choose who they would serve or not serve.

The trends reflected in these two examples have been largely supported by the state and federal courts. Regardless of the liberal or conservative makeup of these courts, their thrust has been to acknowledge the need for private property to bend and flex with society as society itself changes, technologically and socially.

The Rise of the Private Property Rights Movement

The private property rights movement, which has instigated recent state-based private property rights laws, emerged most prominently in the late 1980s, although the roots of its proponents' activities and critiques can be traced to the early 1970s.⁵

This movement is a diverse coalition disaffected with their perception of the success of the land use and environmental movements and land use and environmental policy and regulation. The primary critique of the private property rights movement is that a serious erosion of private property rights, through land policy and regulation, undermines a fundamental social contract upon which the country was established, and thus represents a serious threat to the future of our democratic society.⁶ From this point of view, the growth of land use and environmental policy and regulation is based on a flawed premise.

In contrast, as some environmentalists see it, land use and environmental problems arise precisely because property rights are privately held and managed. Individuals are making land use management decisions that do not take into account the broader public interest and a more expansive economic calculus. A litany of common land use and environmental issues—farmland loss in the peri-urban zone, wetland loss, suburban sprawl, downtown deterioration, etc.—have all been depicted as issues that arise from a version of Garrett Hardin's "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 sensible to the broader public.

Since the rise of the modern environmental movement, one solution to this conflict has been to take property rights from the private property owner's bundle of rights and shift them to the public bundle—to "public-ize" previously held private property rights. The rationale is that, by doing this, better land use and environmental decisions will result.

"The right and ability to use our land, utilize this nation's natural resources, protect and defend the Constitution of the United States and the liberty it harbors, must include to the maximum extent, the preservation of private property and all protections afforded by that end."

—American Land Foundation

In the 1970s the strength and direction of new land use and environmental policies gave rise to cries of a new feudalism emerging in America.⁷ According to critics, the basis of the American experiment was the special relationship among democracy, liberty and property. To the extent that private property was reformulated to become, in effect, social property, a modern form of feudalism was emerging in which there would be no freehold property. If what I owned was not what I thought I owned, but rather what the state said I owned, and I could only use property as a function of the state's rules, then how was my private property truly private or free? These fears were reinforced by state supreme court decisions of the period, notably a case in Wisconsin in 1972 in which the court

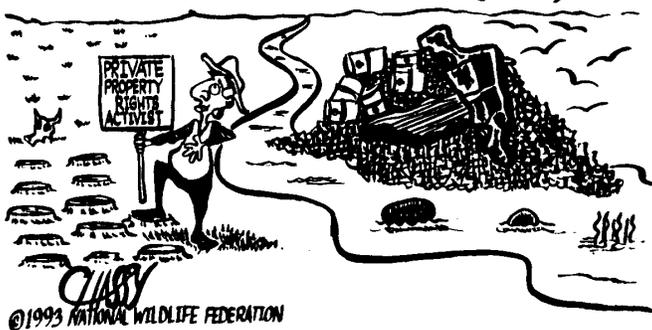
said that rural property owners could only expect to do with their land what the state said they could do; there were no inherent use rights with ownership.⁸ To critics, if freehold property disappeared then democracy itself was threatened.

It was not until the late 1980s that this criticism took root as part of a broad-based movement. Largely as a function of new federal initiatives in endangered species protection and wetland protection, private property rights advocates argued that the land use and environmental movements had become too radical.

The impact of this opposition has been substantial. Nationally, throughout the 1990s advocates of

private property rights have introduced legislation in every session of the U.S. Congress to protect the interests of private property owners.⁹ Opposition based on private property rights concerns prevented the elevation of the Environmental Protection Agency to a cabinet-level department in 1993 and 1994, as promised by then-candidate Clinton during his first run for the Presidency. Organized opposition also prevented the implementation of a proposed major integrated environmental resource management plan for national park, forest and wildlife refuge lands in the Yellowstone region, because of concerns for private property in-holders.

THIS LAND IS MY LAND, IT'S ALL JUST MY LAND...
FROM THE CLEARCUT FORESTS TO THE SOLID WASTE
ISLAND, FROM THE OVERGRAZED PRAIRIE TO POLLUTED
GROUND WATER... I'LL USE THIS LAND AS I DARN WELL PLEASE



At the sub-state level the movement is promoting the adoption of so-called custom and culture ordinances by rural counties. These ordinances clearly articulate the rights of private property owners and seek to retake control of federal and state lands to local communities and private landowners. There is widespread interest in these ordinances among counties in the West, despite a court ruling that finds them to be unenforceable under federal law.¹⁰

Perhaps most significantly, the private property rights movement has succeeded in reframing the debate about the relationship between private property rights and regulation. Prior to the ascendancy of the movement, regulatory activity was on the rise and public opinion polls showed that Americans supported the policies and programs that were the basis for these regulations. As the 1990s draw to a close, the private property rights movement has been able to get more and more legislators, members of the media and citizens to view the issue of land use and environmental regulation from the perspective of how it impinges on private property, rather than how it advances public goals. Thus, it is now more common for proposed regulatory activity to have to pass the test of whether its benefits outweigh its costs, when its costs are measured broadly as the actual and anticipated burden placed on property owners (including their investment backed expectations) and the benefits to the public welfare are construed narrowly.

The position of Benjamin Franklin and his modern supporters that private property is a social creation, and thus subject to reformulation based on changing social needs and circumstances, seems to be an increasingly difficult political stance to put forward and sustain.

“In too many cases, over-zealous bureaucrats join with well-funded extreme environmentalists to extend the reach of laws and regulations to take away the productive use of a piece of property—without any just compensation for the property owner. Too often, the Courts have allowed this to happen, or even broadened the authority of government.”

—Defenders of Property Rights

State-based Private Property Rights Laws

Because the property rights movement has been largely unsuccessful in pursuing its legislative strategy in the U.S. Congress, and because the federal courts have not yielded decisions in line with its perspective, the proponents have shifted their attention to statehouses across the country. Here their success is notable. Bills have been introduced in every state, often year after year, and 26 of the 50 states have adopted some form of private property rights legislation. The accompanying map illustrates that, while the states that have adopted these laws are concentrated in plains and mountain regions, the success of the private property rights movement is truly national, with adoptions of laws occurring in states from Maine to Florida, and Delaware to Washington.

State-based bills are generally one of three types: assessment laws, compensation laws or conflict resolution laws. Most are based on models developed by the American Legislative Exchange Council and then adapted to the state's legislative structure.

Assessment Laws

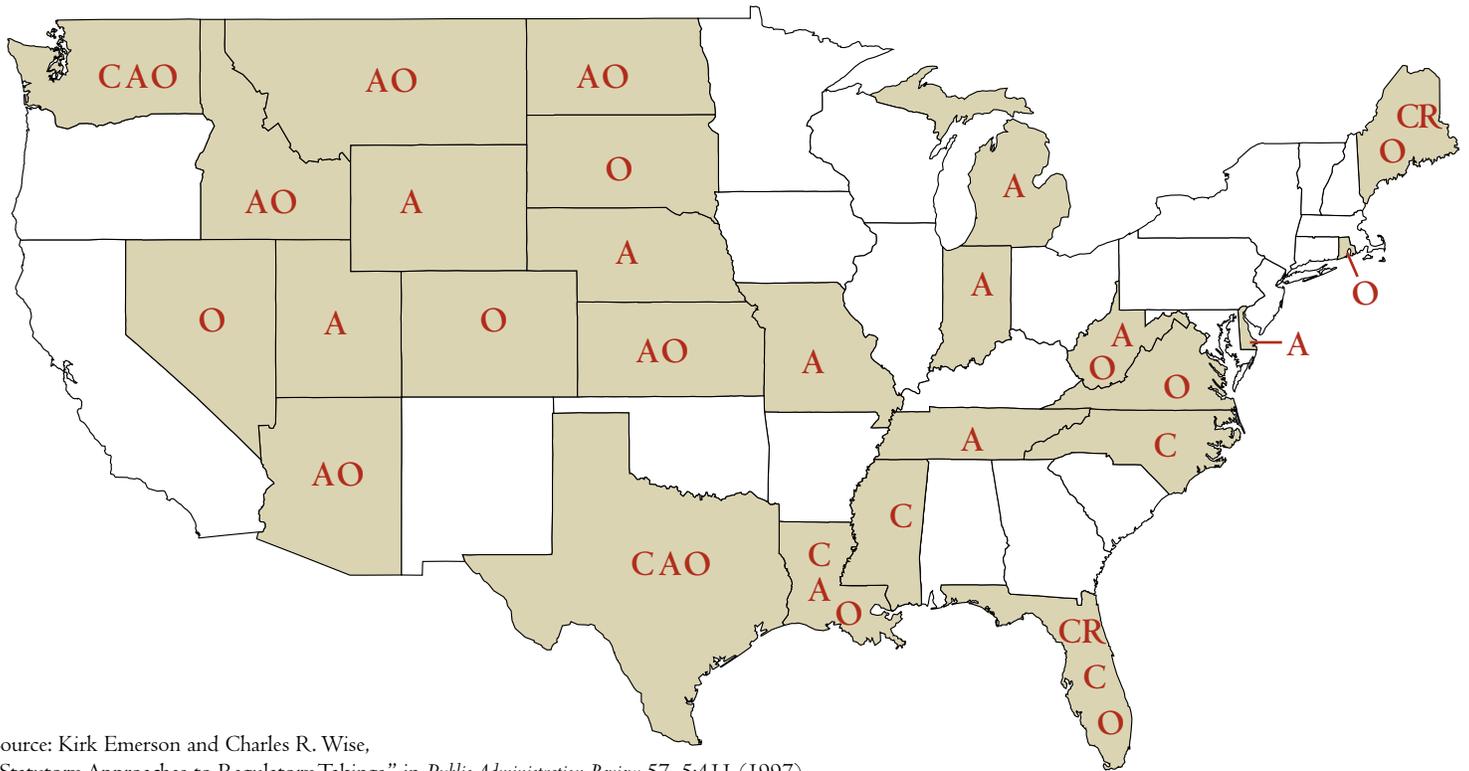
Also known as takings impact assessments (TIAs), assessment laws were the first developed and are most popular at the state level. Modeled on the environmental impact assessment provision of the National Environmental Policy Act, they found their first expression as an Executive Order developed during the last years of the Reagan Presidency, when they were directed at the workings of federal regulatory agencies.¹¹ These laws require a designated state agency to conduct an anticipatory analysis of the impact of proposed laws, rules and regulations on private property rights. They are promoted by the advocates as “look before you leap” legislation. That is, the stated intent of these laws is to clarify the impact of proposed governmental action so that legislators and agency heads can then decide if the social benefits of laws, rules and regulations outweigh their costs to private individuals.

According to skeptics, these laws are actually intended to (a) provide publicly researched data to the adversaries of new regulations so they can more effectively work to oppose them, and (b) cause the public machinery to slow down in its development and promotion of new rules, regulations and laws. Seventeen states have adopted assessment laws.

Compensation Laws

Taking a different and more direct approach, this type of property rights law requires government to pay compensation to landowners whose property values are lowered as a result of rules and regulations. The laws specify that when a rule or regulation negatively impacts a property by x percent (and x is enumerated to be a specific number between 10 and 50 percent), a landowner can claim compensation.

26 States That Have Enacted Property Rights Legislation, 1991–1996



Source: Kirk Emerson and Charles R. Wise, "Statutory Approaches to Regulatory Takings," in *Public Administration Review* 57, 5:411 (1997)

A Assessment	Arizona, Delaware, Idaho, Indiana, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, North Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming
C Compensation	Florida, Louisiana, Mississippi, North Carolina, Texas, and Washington
CR Conflict Resolution	Florida and Maine
O Other	Arizona, Colorado, Florida, Idaho, Kansas, Louisiana, Maine, Montana, Nevada, North Dakota, Rhode Island, South Dakota, Texas, Virginia, Washington, and West Virginia

Some of these laws even specify that the costs of compensation are to come from the budget of the agency promulgating the regulation. According to their promoters, these laws are necessary precisely because the courts have not reined in government regulation enough, because challenging regulations and rules is too costly for the average citizen, and because government needs to be aware of the direct consequences of its actions (through direct impacts on its budgets).

Opponents suggest that these laws are flawed for at least two reasons. First, they provide compensation to landowners under circumstances that the courts, even conservative courts, have found do not require compensation. So, these laws are, from the opponents' point of view, extending unnecessary and inappropriate compensation to landowners. Second, the full implementation of these laws will lead to the bankrupting of government; they are, in other words, budget busters. Opponents suggest, and proponents do not disagree, that the real purpose of these laws is to bring the regulatory machinery of government to a halt. Six states have adopted compensation laws.



Conflict Resolution Laws

The newest approach to state-based property rights legislation has appeared in the last several years. Borrowing the language and concepts of alternative dispute resolution and environmental mediation, these laws approach property rights conflicts by establishing a formal process for dialogue between regulatory agencies and affected landowners.¹² The laws are spawned, in part, because of the perceived failure of assessment and compensation laws. The appeal is that they are promoted as a “let’s all sit down together, talk amiably, and work things out to our mutual satisfaction” approach.

The key to these laws is the terms for dialogue and resolution specified in the law. As practical experience and the research literature in conflict resolution show very clearly, the success and neutrality of such an approach is determined by several factors: who gets to participate in the conflict resolution process; the bases for discussion; and the bounds that are established for settling conflicts. Critics suggest that while these laws are promoted as reasonable and neutral ways to address social conflicts over property rights, their design favors the individual landowner and private property rights interests. Two states have adopted conflict resolution laws to address private property rights issues.

Other Measures

A number of states have passed preliminary or procedural measures that express the sentiment of the state legislature for private property rights.¹³ These measures include establishment of joint legislative study commissions or provisions that limit state liability under specific conditions to try to prevent claims from rising to the level of an alleged takings. Many of the states that have adopted assessment, compensation and/or conflict resolution approaches to property rights conflicts also have adopted these preliminary or procedural measures, sometimes in the same year as the more substantive legislation.

In many instances, private property rights laws of all types are adopted without much awareness on the part of broader interest groups concerned with these matters. There may be a single legislator or group of legislators who have a strong commitment to the property rights issue and pursue its adoption. Once adopted, nothing much happens with the law, one way or the other. (See the expanded discussion of this point in the next section.)

In only a few states have these laws become major public issues. After legislative adoption the laws have become subject to referenda from the voters, based on campaigns organized by the laws’ opponents. For example, Arizona in 1994 and Washington in 1996 held referenda on property rights laws. Arizona had adopted an assessment law, and Washington a compensation law. In both states, voters rejected the laws on a vote of 60 percent to 40 percent.

The Impacts of Private Property Rights Laws

For a relatively new, conservatively based land use movement to have effected the adoption of laws in 26 states in less than a decade is impressive. Yet, much to the chagrin of the property rights movement, the impact of these laws has, to date, been much less than they had hoped for and anticipated. Why?

To answer this question, a detailed study examined the impacts of these laws in seven states: Arizona, Florida, Kansas, Maine, Mississippi, Montana and Wisconsin.¹⁴ Six of these seven states (all except Wisconsin) have adopted some form of private property rights legislation. Arizona has adopted several laws that modify the state's land use structure. Florida has a compensation and conflict resolution law; Kansas, an assessment law; Maine, a conflict resolution law; Mississippi, a compensation law; Montana, an assessment law; and Wisconsin, a proposed compensation law.

The states were selected to represent diversity in geographic location and in the type of property rights legislation. In each case a researcher familiar with the state conducted a detailed examination of the law and its impacts,¹⁵ including an examination of the law in the context of the state's constitutional and administrative framework, and held interviews with representatives of key interest groups concerned with and/or affected by the law.

The impacts of these laws can be discussed at two levels—in general (cutting across all of the states) and in specific (drawing from individual states).

General Impacts of the Laws

Perhaps the most important and honest thing that can be said at this time is that on the whole *not enough time has passed since the laws have been enacted to really know what their impact will be*. Many of these laws have been in place only a couple of years, and in some cases their implementation was delayed. In a very real sense, it is too early to tell whether they are going to have much of an impact, if that impact will be positive (as their proponents expect it to be), negative (as their opponents hope it will be), or more muddled and situational (a more likely outcome).

However, *there seems to be little relationship between the adoption of state-based laws and the existence or non-existence of on-the-ground problems in a particular state*. At the national level the private property rights movement is informed by a set of “horror” stories about the supposed abuse of administrative and regulatory power that comes from the implementation of a set of selected federal laws, specifically the Endangered Species Act and section 404 of the Clean Water Act (relating to wetlands). In many of the states in this study, and other states on which researchers had comparative information, there were no particular parallel alleged abuses that appeared to

prompt the introduction of these laws. That is, these laws do not appear to come about through a concerted effort on the part of aggrieved constituents. Instead, as noted above, these laws are often being promoted by individual state legislators based on their ideological commitment to the concept of the laws, and their own political sense of the law's necessity in their state.

The impact of assessment laws has been particularly disappointing for the advocates. As noted, seventeen states have adopted these laws, but their impact on the regulatory machinery of the states in which they exist appears to be minimal. This may be true because in many states these laws come into being without a strong constituent base, and there are few people paying attention to what happens to them after adoption. In addition, there is likely to be conflict over these laws within the administrative bureaucracy of state government. These laws work by assigning a state agency the responsibility of overseeing the preparation of the takings impact assessments. In several states, such as Montana and Kansas, the attorney general's office was given this responsibility after they had actively lobbied against the law's adoption.¹⁶

Guidelines for the law's implementation direct state agencies to certify that they are going to follow existing state and federal law and court decisions (which they are required to do anyway), and to fill out simple checklists before moving forward with a proposed rule or regulation. If anything, these laws have increased the cost of government by requiring more paperwork. But they have not, to any significant degree, provided the data that opponents need to oppose proposed rules and regulations, nor do they appear to have slowed down the regulatory machinery of government.

Property rights advocates will readily admit that their goal was not the adoption of assessments laws. Rather, assessment laws were supposed to be a wedge for the promotion of compensation laws. *For their advocates, the impact of compensation laws has proved to be equally frustrating.* First, it has proved to be difficult to move these laws forward at the state level: only six states have adopted these laws to date. The opponents' argument that these laws will be budget busters has proved effective in many statehouses across the country. Even in those states where they have been adopted, often there have been no actions taken under the law: that is, few if any landowners have sought to make claims for compensation based on the law. The reason seems to be, again, because there is no constituency pushing for and monitoring the laws' adoption.

Perhaps most important, the general impact of the movement to adopt these laws has been to reshape public understanding and debate about the very nature of the balance between private and public rights in land. The notable “success” of the private property rights movement is to have forced the policy debate to their side. Now it is increasingly common for private property-related issues to be debated from the point of view of having to justify why impositions on private property rights should be allowed.

This is in marked contrast to how these issues were viewed during the period from 1970 to 1990, when the private property rights debate was seen through the lens provided by environmental and related interests. From the point of view of these interest groups, private property rights needed to be constrained and reshaped to fit changing social values and social conditions. The environmental community argued, and the judicial system largely agreed, that most legislative and regulatory changes that impinged on private property were reasonable when viewed from the perspective of a necessary balance between the public interest and the private interest in land. For the debate to now be set up so that private property rights concerns are the starting point of evaluation shows the difference a decade can make.

Specific Impacts in the States

These comments on general impacts mask more nuanced impacts at the state level. Perhaps the most interesting of these has been the total non-impact of these laws in some states. For example, Kansas has passed an assessment law and Mississippi a compensation law (Mississippi’s being one of the first compensation laws in the country). In both states, no substantive actions have been taken under the laws. In fact, researchers who conducted the investigations in these two states were informed that they were the first people to ever ask to see files associated with the laws! Once these laws were passed, no one seemed to care that they existed.

Interest groups that “should” be proponents of these laws have ignored them. Again in Kansas and Mississippi, many of the representatives of these interest groups did not even know that the laws existed. This situation reinforces the point made above, that in many instances these laws are being promoted by individual legislators without an organized constituency of aggrieved landowners who are seeking relief from a particular situation. However, the concern in both states is that while there had been no impact to date, having the laws on the books allows an opportunity for substantial impact in the future, should advocates for these laws place themselves in stronger positions legislatively or administratively.

Another interesting outcome has been how, in certain instances, opponents of these laws have been able to reshape them to their purposes. For example, in 1995 Montana passed an assessment law that had been pushed by one of the chief activists in the property rights movement, the lobbyist for the Montana Farm Bureau. Several years later the property rights coalition promoted a compensation bill in the legislature. Opponents of this proposed bill used the existence of the assessment law to argue that a compensation bill was unnecessary. If the takings impact assessments called for under the assessment law were being done properly, why add another law into the mix? This argument was persuasive enough (along with substantive arguments against the bill) to carry the day and prevent passage of the compensation proposal. This defeat frustrated the property rights movement, which believes that the assessment law is not having any real impact on state administrative practices.

Kansas, Mississippi and Montana are states where, generally speaking, land development pressures are not strong (except in selected market regions) and they are not subject to high rates of growth. The opposite is true in Arizona and Florida, where there has been substantial growth through the 1980s and 1990s, and there continues to be strong pressure from the development community for a regulatory environment friendly to growth.

Arizona is an interesting case because, as noted above, its voters rejected an assessment bill by referendum in 1994. Despite this rejection, property rights proponents have continued to pursue a vigorous legislative agenda. They have passed a version of a compensation law that authorizes (but does not require) counties to provide for compensation due to regulation. They have established a form of a conflict resolution law, through the creation of an ombudsman's office for private property rights. And they have sought to solidify the rights of developers for subdivision approvals and the splitting of lots. All of these actions demonstrate the property rights movement's clear understanding of how government regulation of land works, and where it is necessary to "pull the levers" to achieve substantive change. So, in Arizona where the stakes and passions are high, the property rights movement has continued in its advocacy, focusing its efforts at state laws that reshape the authority of sub-state governments to impact the development process.



In many ways, Florida is the most interesting and important of the states because its approach to property rights laws seems to be emerging as a new model. Since the early 1970s Florida has been recognized as a leader in state-based laws affecting private property, but until recently this fame was for legislation that promoted state planning, intergovernmental cooperation and substantive environmental protection. The rise of a serious legislatively based property rights movement in Florida is important because it is the most clear presentation of a conflict between those promoting the protection of private property rights and those promoting planning and regulation by local and state government.

In 1995 Florida passed two laws—a compensation law for governmental actions that create an “inordinate burden” upon landowners, and a dispute resolution law. The compensation law is significant because (a) it does not approach the compensation issue by stating a percentage figure that triggers the law, and (b) it establishes a new concept that is distinct from takings, as defined by the Fifth Amendment and interpreted by the courts. The concept of “inordinate burden” is, quite specifically, intended to provide an avenue for relief for landowners whose burden from regulation falls short of what would be considered a takings. The dispute resolution law establishes new processes for landowners to pursue relief from the effects of governmental regulation, and is written to favor the interests of landowners over those of the regulating authority.

The impact of Florida’s laws are twofold—within Florida and nationally. Within Florida the initial reaction to these laws has been characterized as “chilling,” quite literally. Because the laws affect new actions by government, governmental bodies began to slow down what actions they took relative to land. While this did not mean that they stopped regulating land, it did mean that they seriously slowed their consideration of new plans and regulations, as well as amendments and revisions to existing plans and regulations, since it was these actions that opened government to claims under the acts. Thus, the ability of government to change with changing times, in response to changing social values and changing technology, is impeded as a result of these laws. Further, the laws, as intended, have strengthened the property rights interests of large-scale landowners and land developers. The unanswered question is whether they have done so at the expense of the more numerous, small-scale landowners.

Nationally, the importance of Florida’s newest innovation in land policy is to provide a model for how to address private property rights issues in a form other than assessment or compensation laws. Florida’s model of “inordinate burden,” and even more important its dispute resolution process, has drawn the attention of property rights activists throughout the country.

KANSAS:

An Assessment State



*On and to
it is the
of Kansas
planning
government
be sensitive
obligation
and the
constitution
and section
rights of the
state of Kansas
express purp
reduce the
inadvertent burdens on private
property rights resulting from
certain lawful governmental
actions.*

Kansas has not been a leader in land use planning and regulation. The state enabling statute for planning does not mandate that it occur, and the statute for zoning specifically exempts agriculture and related activities from all conventional land use regulation. Kansas is also a state with traditional respect for property rights and strong influence in the state legislature from organizations representing the interests of rural property owners, especially the Kansas Farm Bureau.

In 1995 Kansas adopted the "Private Property Protection Act," Chapter 170, Laws of 1995 (encoded in 1997 as Chapter 77 of Kansas statutes). This assessment law came about after the defeat in the 1994 legislature of a proposed compensation law, and the proposed adoption of a compensation law in the 1995 session. Opponents to the proposed compensation law included, among others, the Sierra Club, the Kansas League of Municipalities, the Kansas Association of Counties and the Kansas Attorney General's Office.

Chapter 170 requires that each state agency evaluate its activities relative to how governmental action might constitute a taking of private property, which was specified as real property. Governmental action is defined to include proposed legislation, proposed rules and regulations and proposed guidelines and procedures concerning issuance of licenses and permits. It excludes exercise of the power of eminent domain, repeal of regulations, law enforcement activities, and state agency actions authorized in response to a violation of state law. Agencies were to evaluate their activities based on guidelines issued by the Attorney General's Office within 20 months from the time of the law's passage (i.e., by January 1, 1997).

Attorney General Carla J. Stovall, an opponent of this law, has issued a set of guidelines packaged as a checklist that she characterizes as advisory. They include criteria as to whether the proposed action results in permanent or temporary physical occupation of private property; denies a fundamental property right; deprives a landowner of all economically valid uses of land; or substantially furthers a legitimate state interest. Each state agency is required to prepare a report that shows how proposed actions under its auspices do or do not meet the outlined criteria.

While most agencies are preparing these reports, they appear to have had no substantive impact on state administrative activities. The agencies assert that every action they undertake benefits the public interest and as such does not constitute a takings. To date these reports have received essentially no public attention or scrutiny from any party to the property rights debate.

MISSISSIPPI:

A

Compensation

State



The purpose of this Act is to establish the Mississippi property class agricultural or timber wood forest land or conduct forestry activities, or if the State of Mississippi prohibits or severely limits such forestry or agricultural activities, to compensate the owners for their loss.

Mississippi is, according to many measures, among the poorest states in the nation, with low per capita income and high rates of households living in poverty. From a land use perspective it has a landscape dominated by forested land and has experienced low rates of growth.

In the early 1990s the Mississippi Forestry Association founded a working group to draft legislation to protect forest landowners from being denied use of their lands without compensation. Their effort did not come out of any particular instance of perceived abuse within the state, but reflected concern over national trends in land and environmental regulation. In 1994 Mississippi adopted the "Mississippi Forestry Activity Act," MC (Mississippi Code) 49-33. A similar, though more broad ranging, bill was being promoted at the same time by the Mississippi Farm Bureau.

Both bills were opposed by a coalition consisting of the state chapters of the National Wildlife Federation and the Sierra Club, as well as the Mississippi Municipal Association, the Mississippi County Supervisors Association, and the state's Department of Environmental Quality and Office of the Attorney General. The 1994 bill sponsored by the Farm Bureau failed. In 1996 the Bureau, with the agreement of the Forestry Association, achieved an amendment to MC 49-33 so that it became the "Mississippi Agricultural and Forestry Activity Act."

MC 49-33 is intended to shield owners of agricultural and forestry land from what the legislation's drafters deem to be onerous governmental regulation. MC 49-33 provides for compensation to landowners when a 40 percent reduction in property value has occurred as a result of governmental regulation. Governmental regulation is defined to be regulation by the state or any of its political subdivisions, including counties, cities or any other authorities deriving powers from the state. However, MC 49-33 specifically excludes actions of the U.S. government, actions of the state taken to enforce water pollution control regulations, and any governmental actions taken to prohibit activities deemed to be noxious or harmful to public health or safety.

MC 49-33 is proactive; it does not apply to any governmental regulations in effect at the time of the law's adoption. Actions that fall under the law are deemed to be "inverse condemnations." Individuals affected by the law have the responsibility to bring action for relief through normal legal channels. If a claim under the law is found to be valid and the responsible governmental organization can not provide compensation, then the organization is required to rescind the regulation.

Since its adoption, there have been no causes of action brought under MC 49-33. Its promoters are not disappointed by this, as they see the law as primarily preventative in nature: it puts government on notice about an unacceptable level of regulation, which to date has not occurred. Many of the original opponents of the first Farm Bureau bill, such as the Attorney General's office and the Municipal Association, are not paying much attention to the law. They do not find it to be much of an impediment to the kind of land use planning and regulation that is typical in Mississippi.

FLORIDA:

A Compensation and Conflict Resolution State



The Legislature recognizes that some laws, regulations, and ordinances of the state and local entities in the state, as applied, may inordinately burden, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution.

The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens.

Florida is receiving a great deal of attention from those concerned about state-based property rights laws because it is a populous state with a significant and continuing history of rapid urban growth. Even more important Florida has been a leader in state-based legislation for planning, environmental management, intergovernmental cooperation and regional planning for over 20 years. Nevertheless, this leadership has always masked notable tensions over the basic issues underlying these innovations, including tensions about property rights. These tensions came to a head in 1995, when the state legislature passed two laws that have changed the regulatory climate in the state.

The Bert J. Harris, Jr., Private Property Rights Protection Act, FS Sec. 70.001, provides for compensation to landowners who suffer an “inordinate burden” as a result of any government law, regulation or ordinance adopted by any level government—state, regional or local. The concept of “inordinate burden” is intended specifically to provide relief to landowners whose burden does not meet the definition of takings as established and interpreted by the federal and state constitutions and courts.

To obtain the relief provided for under the Harris Act, a landowner must go through a negotiation process with the governmental body whose action creates the burden. The law is only proactive; it does not affect any laws in effect before May 11, 1995. However, amendments to existing laws, downzonings, etc., do fall within the purview of the Act. The Act provides for ten remedies to settle a claim brought by a landowner, including monetary compensation, issuance of the requested permit, land swaps, and increases in allowable densities on other portions of the landowner’s property.

The Florida Land Use and Environmental Dispute Resolution Act, FS Sec. 70.51, provides for a process of mediation and arbitration for landowners aggrieved by governmental regulations. It provides for an optional process separate from, though related to, the Harris Act and took effect on October 1, 1995. (The two acts have been referred to as non-identical twins.) The scope of the Dispute Resolution Act applies to development orders or enforcement actions by governmental bodies. A special master is appointed to resolve disputes brought under the Act, and may serve as both mediator and arbitrator at different stages of the dispute resolution process.

The same ten remedies available under the Harris Act can be used to settle a dispute brought under this law. Actions brought under this Act must only be “unreasonable” or create conditions that “unfairly burden” a landowner, a standard even less onerous than the one for “inordinate burden” under the Harris Act. Much to the surprise of many observers, the focus of attention in Florida has been the Dispute Resolution Act, presumably because it is both broader in scope than the Harris Act and has simpler requirements for bringing actions under it and moving toward a settlement. Several dozen causes of action have been brought under the Dispute Resolution Act, in contrast to only about one dozen or so under the Harris Act.

It is clear that these twin acts have changed how government is doing business in Florida. Especially at the local level, governments are much more cautious about undertaking actions that could bring them under the jurisdictions of these laws. There is some concern that existing programs and policies may be frozen in place, unresponsive to changing economic, technological and social conditions. While this is not quite the impact that private property advocates had hoped for, it is a pivotal shift for a state which for so long has been in the forefront of planning, environmental and growth management laws and programs.

ARIZONA:

**A
Modification
of
State-Local
Relations
State**



Private property shall not be taken for private use, and no private ways or easements shall be granted for drains, flumes, or across the land for mining, agriculture, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the state

Arizona is notable for at least two reasons: it has a large amount of non-privately owned land (83 percent of the land base, of which 62 percent are federal or Native American lands); and it has high rates of urban growth, mostly concentrated on the 17 percent of the state's total land area that is privately owned. Arizona is also notable for having a political tradition of leaders who are both boldly conservative (former Senator Barry Goldwater) and boldly conservation-based (former Representative Morris Udall and Bruce Babbitt, a former Governor and currently President Clinton's Secretary of the Interior).

The Arizona legislature adopted an assessment law in 1992 which, on a petition drive, was presented to voters for a referendum in 1994 and was defeated by a 60 to 40 percent vote. However, property rights interests in Arizona were not willing to take this defeat as a signal to stop their advocacy of their cause; rather they changed strategy. While defeat of the assessment law was a significant disappointment to property rights advocates, they turned their attention to a set of smaller, often discretionary laws that taken together have changed the institutional environment in Arizona.

Under the leadership of the Arizona Farm Bureau, a set of laws have been adopted that revise state-local relationships over land and property rights. In 1994 the legislature adopted a compensation law allowing, though not requiring, counties to provide compensation for actions that reduce private property rights (ARS 11-269.01). Also in 1994 the legislature created an ombudsman to represent the interests of private property owners in proceedings involving state governmental actions (ARS 41-1311-1313). In addition, a law was adopted to establish a special hearing process for exactions and dedications (ARS 9-500-12,13 and 11-810,811) and change basic state law on the matter of vested rights for land development (ARS 11-1203).

The exactions and dedications law is illustrative of the impacts of this strategy. The law requires, in part, a special hearing process to be conducted when exactions and dedications are contemplated by local governments. This process is conducted at no charge to the affected landowner. A special hearing officer is appointed and is empowered to modify or delete the proposed dedication or exaction. In addition, all local governments were required to file a report on their review of procedures for dedications and exactions by November 1, 1995.

The impact of this law is several-fold. First, local governments perceive this as an unfunded mandate from the state. In some cases it may lead to a lengthened permitting process. More important, it has led to local governments being much more careful in their approach to dedications and exactions, and more likely to cede to developers' challenges to them. As a result, some municipalities in Arizona estimate the on-the-ground impact to be the foregoing of substantial amounts of public improvements previously obtained through the prior permitting process.

This exactions and dedications law, along with the others, has changed the perception of property owners and developers in Arizona. It has emboldened property owners and encouraged more assertive behavior with respect to the status of their rights relative to public rights in the bargaining that goes on over development permission. As part of an overall strategy, it suggests that careful tinkering with the mechanisms of state law can do a lot to further the agenda of property rights interests.

The Future of the Private Property Rights Movement

The promotion of state-based private property rights laws has been one of the most significant land use activities in the 1990s. The success of proponents is notable: laws of one form or another adopted in 26 states, and advocates for these laws working in every state. As the twentieth century draws to a close, the private property rights movement has been able to get more and more legislators, members of the media and citizens to 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.

The question is, What next? The answer to this question is controversial. There are some who believe the property rights movement has gone as far as it can and we are about to see the decline of the movement. This argument claims that while it is true that Americans care deeply about their land and resonate over appeals to protect private rights in property, it is also true that Americans have consistently supported environmental protection as a governmental goal and activity. In fact, it is almost impossible for any candidate for political office to be credible without asserting support for the environment. Therefore, as this argument goes, we are on the cusp of a backlash against the agenda of the property rights movement as being too radical for what most Americans really want when they realize the actual impact of property rights legislation.

There seems to be some truth in this analysis. When property rights legislation was put to a vote before Arizona and Washington state voters it was soundly defeated. Most regulation does impinge on private property rights, but most regulation also serves to protect private property rights. Zoning, the most common tool of American land use policy, used by governmental bodies large and small (and vilified by right-wing property rights advocates), is in its very nature a conservative tool of social management, not a tool of radical social change.

Zoning 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. Zoning was ultimately defended before the U.S. Supreme Court as a reasonable exercise of governmental authority because it served the private property rights interests of landowners. The same can be said for many of the land use and environmental management tools developed since the 1950s. Zoning gained currency in the post World War II era with the growth of the American suburb. As real property (housing and land) has become the principal form of wealth and investment for America's middle class, zoning has become the tool to protect this investment.

Nevertheless, the people behind and supporting the property rights movement are people of passion. They believe strongly in their cause and are willing to work hard and creatively to realize it. Therefore, while the long-term future of the property rights movement may be unclear, in the short- and medium-term I believe it will continue to be a substantial force in land use policy. In particular, I expect three trends to predominate in the immediate future:

- 1) *The focus of property rights activities will remain at the state level.* While property rights advocates will continue to push for their legislative agenda at the national level, the more substantial actions will come in statehouses, as they have throughout the 1990s. This is not surprising, since it is in statehouses and local governments that land use policy has been centered for much of this century. As evidenced by the experience with state-based property rights legislation, the advocates of these laws have found statehouses a relatively open and fertile forum for the promotion of their proposals.
- 2) *One trend of state-based property rights activities will be to shift away from compensation and assessments laws and towards Florida's model of "inordinate burden" and conflict resolution.* This is likely to be true for at least two reasons. Compensation and assessment laws are proving too difficult to adopt because of concerns over their cost and/or complexities in their implementation. Florida's model provides a way around the technical-legal issue of what is a takings under the federal and state constitutions, and conflict resolution as a process has the aura of being more reasoned. Who can disagree with the premise that we should establish a process where we sit down together and work out regulatory problems to the satisfaction of all concerned parties? The problem is whether these bills are in fact neutral or if they only appear neutral. In the Florida model, the language of neutrality masks a law whose structure strongly favors property rights interests.
- 3) *Another focus of state-based property rights activities will follow in the Arizona model—piecemeal tinkering with the legislative mechanisms that affect state-local relationships over private property rights and land and the rights of landowners within the regulatory process.* This approach is in contrast to attempts to pass broad-based, clearly labeled property rights laws. As such, they will be harder to track, but they can have no less potential or real impact within a state. Pursuing this strategy shows the property rights movement's understanding of the limitation and strategic vulnerability of broad-based approaches and its increasing sophistication with the subtleties of the state legislative process.

Conclusion

What is to be done in the struggle over state property rights laws? In this battle what is often forgotten is that most laws and regulations restricting private property came about because other, often adjoining, private property owners were adversely affected by the relatively unconstrained private property use of other landowners. This is the origin of zoning: to restrict the private property rights of some landowners in order to secure the private property rights of other landowners. The U.S. Supreme Court, even in its most conservative incarnations, has found this to be a reasonable balancing act.

Opponents of these laws need to do several things to move the debate about private property rights protection away from the terms established by the property rights movement. First, they 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 property rights legislation, opponents need to recognize the ambivalent feelings of many Americans toward private property rights and regulation. Americans want both. We want freedom on *our* property and restrictions on *other people's* 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 the security of our property).

Second, opponents need to work on the substantive issues that underlie and prompt the introduction of property rights legislation. There are occasions of abusive administrative practices in the implementation of land use laws and there are instances where 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 undue burdens that may arise through the enforcement of land use laws.

This call is not unreasonable. There has long been an internal debate among those characterized by the private property rights movement as “regulators” about ways to, on the one hand, respect the integrity of private property, and, on the other hand, achieve public objectives in land and environmental planning and policy. The professional journals have offered 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 non-profit, public-interest land trusts, among others. More of these approaches need to be part of the regular way of doing business in the design and implementation of land use policy.¹⁷

Most important, opponents of these laws, those who view them as bad policy for any number of reasons, need to recapture the terms of public debate about land use. Opponents of private property rights laws can not be characterized as “un-American”; nor should they allow themselves to be tagged as watermelons (green on the outside, red on the inside—promoters of a creeping socialism).¹⁸ 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. Even Supreme Court Justice Oliver Wendell Holmes, the author of the *Pennsylvania Coal* case decision, which established the concept of regulatory takings in 1922, acknowledged, in that same decision, that: “government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change’ . . .”

The issue with private property laws, *those* laws, is that they are acts of social regulation that affect *my* land. They are a clear attempt by a well-focused interest group in America to impose its views of private property, and property-society relations, on us all. As the Defenders of Property Rights (a conservative advocacy organization that promotes these laws) says in one of its publicity brochures: “Private Property Matters to All of Us.” That is correct. It is precisely because private property matters in the most fundamental way to so many Americans that these laws are such bad public policy. If we believe in the necessary role that private property plays in both establishing and continuing democratic societies, then responsible arguments about private property rights laws and creative alternatives to such laws need to be part of our public discussion.

Notes

1. In fact, zoning by local governments was validated by the U.S. Supreme Court in 1926 in the case of *Village of Euclid v. Ambler Realty Co.* 272 U.S. 365 (1926) in part under the theory that it prevented public and private harms.
2. *Pennsylvania Coal Co. v. Mahon* 260 U.S. 393 (1922) at page 415.
3. Some of the most prominent and discussed examples include the decisions of the Court in the cases of *First English Evangelical Lutheran Church v. County of Los Angeles* 482 U.S. 304 (1987); *Nollan v. California Coastal Commission* 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992); and *Dolan v. City of Tigard* 512 U.S. 374 (1994).
4. This point does not deny the overt racism of individual property owners, but it does acknowledge the property rights issue, which often was 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* 518 U.S. 515 (1996), the case of the exclusion of women from the Virginia Military Institute.
5. The private property rights movement is referred to (by itself and others) 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).
6. This presentation of the private property rights movement does not ignore the significant influence of multi-national corporate capital, especially from resource extractive industries. However, I believe it is important to acknowledge what I interpret as the legitimate intellectual framework that ties the movement together.
7. See for example the work of John McClaughry (1975, 1976), a former member of the Vermont State legislature, and a member of the domestic policy staff during the first term of the Reagan Presidency.
8. *Just v. Marinette County* 201 N.W.2d 761 (1972); see the discussion of this case in (Large 1973). Recently the Wisconsin Supreme Court had the chance to revisit this case in light of the recent U.S. Supreme Court decisions on land use and takings noted above, and found no reason to change their basic doctrine (*Ohm* 1996, 1997; writing about *Zealy v. City of Waukesha*, 548 N.W.2d 528 (1996)).
9. Bills have been introduced in both houses of Congress in every session during the 1990s. However, no bill has passed both houses. Most recently, in July 1998, the Senate voted 52 to 42 to cut off debate on takings legislation which would have undercut traditional local land use authority. H.R. 2271 (formerly H.R. 1534) the "Property Rights Implementation Act of 1998," which was introduced by Senator Orrin Hatch, chairman of the Judiciary Committee, would have allowed developers to haul local officials into federal court without first allowing the local appeals process to play out (Tabin 1998). For a discussion of the federal bills, from an environmental advocate's point of view, see the discussion in Sugameli (1997).
10. *Boundary Backpackers, et al. v. Boundary County, et al.* 913 P.2d 1141 (1996). See the discussion of this sub-state activity in Arrandale (1994) and Hungerford (1995).
11. Executive Order 12,630 of 1988. See the discussion of this Order by one of its co-authors in Pollot (1989), and a more critical discussion of it in Folsom (1993).
12. A general resource on negotiation and mediation as applied to land use planning can be found in RuBino and Jacobs (1990). Two critical examinations are Caton Campbell and Floyd (1996) and Amy (1987).
13. See the discussion of state legislation in Emerson and Wise (1997).
14. The initial phase of this research was funded by the North American Program of the Land Tenure Center at the University of Wisconsin-Madison. This Program was established with funding from the Ford Foundation, the W. W. Kellogg Foundation, and the Otto Bremer Foundation for the purpose of examining the changing nature of land and natural resource ownership in North America, and to conduct research and public education about these changes.
15. The states selected, the researchers and their papers were as follows:

Arizona: Kirk Emerson, Udall Center for Studies in Public Policy, University of Arizona. "Evaluating the Impacts of Arizona's Private Property Rights Legislation on the Security of Individual Land Tenure."

Florida: Richard G. RuBino, Department of Urban and Regional Planning, Florida State University. "The Chilling Effect of Florida's Private Property Rights Protection Acts on Growth Management and Environmental Regulation."

Kansas: Eric Strauss, Graduate Program in Urban Planning, University of Kansas. "The Kansas Private Property Protection Act: A Success Story for Environmentalists."

Maine: Tadlock Cowan, Department of Sociology, Dartmouth College. "Property Rights Legislation in Maine: The Not-So-Quiet Revolution in Land Use Control."

Mississippi: Rhonda Phillips Culp, Department of Geography and Area Development, University of Southern Mississippi. "The Mississippi Agricultural and Forestry Activity Act: An Analysis of the Impacts on Individual Land Tenure and Property Rights."

Montana: Bruce Farling, Montana Council, Trout Unlimited, Missoula, Montana. "Look Before You Leap Private Property Assessments: An Evaluation of the 1995 Montana Private Property Assessment Act and the 1995 Amendments to the Montana Environmental Policy Act."

Wisconsin: James A. Kurtz, Bureau of Legal Services, Wisconsin Department of Natural Resources, and Stacey L. Swearingen, Institute for Environmental Studies, University of Wisconsin-Madison. "Property Rights and the Security of Land Tenure in Wisconsin: An Analysis of Wisconsin Assembly Bill 521, 1995 Legislative Session."

Commentary: Ann Louise Strong, Department of City and Regional Planning, University of Pennsylvania. "A Commentary on Seven Papers Addressing State-Based Property Rights Legislation and Its Impact on Security of Land Tenure."

16. This is not surprising, since proposed federal property rights legislation drew opposition from a coalition of 33 state's attorneys general.

17. See for example the extended discussion of these alternatives as applied to the protection of farmland in Daniels and Bowers (1997).

18. Richard Epstein, the University of Chicago law professor and author of the foundational legal treatise on the property rights view on land use matters, has said in one of his articles: "The system of land use planning is a form of socialism in microcosm." (Epstein (1985) is his principal work; the quote is from Epstein (1992) at page 202.)

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Resources

ALEC: American Legislative Exchange Council

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www.alec.org

ALEC is a broad-based legislative resource organization oriented toward conservative legislators. The group holds regular meetings for members to share information and strategies, and serves as the source of the model assessment and compensation laws which have been promoted throughout the country.

American Land Foundation

400 15th Street, Suite 300
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The American Land Foundation is a national advocate for property rights, representing over 160,000 landowners across the nation. It coordinates and implements national strategies for property rights by identifying and funding critical projects of the most effective organizations in the country. The American Land Foundation has produced and offers three videos, "Who Owns the Land? When the Environment Collides with the Constitution," "Standing Ground: People, Property & Power" and "Why Liberty Matters."

CLEAR: Clearinghouse on Environmental Advocacy and Research

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phone: 202/667-6982
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email: clear@ewg.org

CLEAR is a national clearinghouse for information on the property rights movement. It maintains an extensive library of materials for opponents of the movement to use in fighting property rights advocates. The library has a database of over 2,100 "wise use" groups and subscribes to many of their newsletters. CLEAR publishes a regular update on wise use activities, which is distributed monthly by email.

Competitive Enterprise Institute

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This think tank is oriented toward market-based solutions for public policy issues. The Institute publishes a newsletter, has a unit that examines and documents private, non-governmental efforts to advance environmental objectives, and publishes a number of reports and bibliographies on the subject of free market environmentalism.

Defenders of Property Rights

1350 Connecticut Ave. NW, Suite 410
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Defenders of Property Rights is a private, public-interest law firm. One of its founders worked in the Reagan Administration and was one of the co-authors of Executive Order 12,630, which became the model for state assessment laws. The firm brings lawsuits on behalf of property owners who are aggrieved by regulatory actions, and it maintains a strong public presence through speeches, articles and testimony on property rights matters. The web site has many links to other property rights groups.

Environmental Policy Project

Georgetown University Law Center
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This group was founded recently to undertake research and education on legal policy issues relating to the environment. Its major concerns are takings laws and the property rights movement. In addition to conducting research and education, it provides legal counsel to public interest organizations and local units of governments that may be involved in precedent-setting cases.

Land Tenure Center (LTC)

University of Wisconsin-Madison
1357 University Ave.
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LTC is a university-based research, training and technical assistance organization that has existed for over 35 years. It works on issues relating land ownership and use to social structure, economic development and political organization. Since 1995 LTC has had a major North American initiative, which includes a significant state-based property rights component. LTC publishes reports, holds national conferences and conducts training. Its faculty and staff serve as resources for community, state and national organizations and legislatures.

National Wildlife Federation

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The National Wildlife Federation is the nation's largest member-supported conservation group, with regional, state and local affiliates. One of the organization's programs is on the takings issue, and it has taken a strong position against property rights legislation. NWF tracks national legislative activity, informs members and interested others of the need to take action against proposed activity, and has a staff member who concentrates his time on education about takings through testimony, speeches, articles, etc. NWF has prepared a video on the takings issue, *A Question of Rights*, which can be ordered directly from the headquarters office.

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