COMMENTARY

The Politics of Property Rights at the National Level

Signals and Trends

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The private property rights movement was one of the most consequential land use and environmental movements of the 1990s. It first emerged on the national sphere in the latter years of the Reagan administration. Advocates shifted their focus to the state level during the Bush and Clinton presidencies. In 2000 they provided strong support for George W. Bush's candidacy, with high expectations from his administration. This commentary examines the national-level property rights activity of the Bush administration in 2001 and 2002 and speculates on the prominence and success of this policy sphere in this administration's future.

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Since the beginning of the 1990s, I have concentrated my domestic research on the rise and impact of the so-called private property rights movement (Jacobs, 1995, 1996, 1997a, 1997b, 1998a, 1998b, 1998c, 1999a, 1999b; Jacobs & Ohm, 1995).[1] My central arguments are that (1) since its emergence, the private property rights movement has been one of the most prominent and consequential land use and "environmental" movements in the U.S., and (2) its theoretical grounding in colonial-era historical and founding Constitutional/legal debates about the central role of unencumbered (by regulation) land ownership to American democracy is legitimate and justified, though not wholly correct (Jacobs, 1999a, 1999b).[2] This movement should never have been summarily dismissed, as it was when it first arose, and it is not about to go away quietly.

Background

The movement's policy activity originated in the Reagan administration's latter years as a national-level effort to utilize the power of the president, via executive orders, to shape how government agencies undertook their activities (Jacobs, 1995). Specifically, through the 1988 Executive Order 12630 "Government Actions and Interferences with Constitutionally Protected Property Rights," the administration sought to initiate a national-level process analogous to environmental impact assessments (EIAs) called takings impact assessments (Folsom, 1993). Under this procedure, all government agencies were required to conduct an analysis of the anticipated impact of proposed laws, rules, and regulations on private property rights. This order was promoted by its advocates as a prudent "look before you leap" action, like EIAs. Its advocates maintained that the intent of the order was to clarify the impact of proposed governmental action so that legislators and agency heads could then decide if the social benefits of laws, rules, and reg-

ulations outweighed the costs to private individuals. According to skeptics, the order was actually intended to (1) provide publicly researched data to the adversaries of new regulations, and (2) cause the public machinery to slow down in its development and promotion of new rules, regulations, and laws.

Despite this policy activity at the national level, little of *proactive* substance emerged after the first flurry of activity.[3] This seems confusing. The founding volume of the movement, *The Wise Use Agenda* (Gottlieb, 1989), carries a photo endorsement on the back cover by then Vice President George H. W. Bush, who by the time of publication had been elected to the presidency. And the policy goals and specific legislative proposals of the movement were championed during the 1990s in the U.S. Senate by then majority leader (and future presidential candidate) Robert Dole and in the House by then majority leader Newt Gingrich as part of his *Contract with America* (Gillespie & Schellhas, 1994) after the 1994 midterm elections.

One explanation for the national inaction during the 1990s was that this was the era of the two terms of President Clinton.[4] Whatever the judgement on his environmental record overall, he and his advisors sent out clear signals that any national-level property rights legislation faced certain veto upon arrival at the White House.

As a reaction to inaction at the national level, movement strategists turned their attention to the states, and here they appeared to find the success that was eluding them. During the 1990s, every state in the nation considered significant legislation to support the policy position of the private property rights movement, and 26 states in the lower 48 passed these laws (Emerson & Wise, 1997; Jacobs, 1998a, 1999b; White, 2000).[5]

Recent changes

Something significant changed in 2001: George W. Bush assumed the presidency. This event seemed significant and symbolic with regard to property rights for at least three reasons: (1) Bush's general sympathies to the arguments of the property rights movement while governor of Texas and his support for state-based legislation supporting the movement's goals; (2) as president, his selection of a Secretary of the Interior and a Solicitor General with explicit ties to the property rights movement and commitments to the property rights agenda; and (3) renewed and apparently heightened interest by the U.S. Supreme Court in cases related to property rights, within the context of an initially unified U.S. Congress that appeared sympathetic to this renewed interest. In addition there is the phenomenon of renewed activity at the state level, most prominently the passage by initiative of Measure 7 in Oregon during the 2000 elections. If allowed to go into effect, Measure 7 would have been the most stringent of the state-based property rights laws.[6] Given the state's prominent role in the state-based growth management/smart growth movement, the fact that this type of legislation was passed in Oregon brought the legislation more than the usual amount of attention afforded these proposals (Abbott et al., 2001; Echeverria, 2001b; Ohm, 2000).

In this commentary I focus on an understanding and analysis of the first and second of these phenomena during the first year of the current Bush administration and speculate and project how the issue might evolve during the remainder of his term. This analysis was undertaken through an examination of administration activity, commentary upon this activity on the Web sites of prominent property rights advocacy groups and their opponents, and commentary and analysis in the national print media.[7]

The property rights issue gets to the core of planning's justification and especially the ability of land use and environmental planners to practice. While state-based activities have been prominent, they do not appear, as of yet, to have had much impact on professional practice or, seemingly, public attitudes. A renewed attention to these matters by a president with his famed bully pulpit has the potential to shift the underlying terms of the planning debate and trigger significant change.

National-Level Signals and Trends

Property rights conservatives were early and strong supporters of the candidacy of George W. Bush. They saw in Bush a candidate who, as Texas governor, understood the nature of their arguments, what they were trying to achieve, and why it was so important to them. Upon winning the presidency, Bush indicated that he would return the favor of their support through the appointment (and refusal to appoint) a set of key individuals. In the first weeks of his new administration, President Bush advanced the nomination of Gale A. Norton to serve as Secretary of the Interior.

Throughout January 2001, a series of articles and email postings appeared about the proposed appointment. Then on January 31, the *New York Times* (*NYT*) ran an article under the headline "Conservative Land-Use Groups Gain in Vote" (Risen, 2001). It was reported that the Senate had confirmed Ms. Norton for the position by a 75-24 margin, and this vote could be "seen as a victory for several conservative environmental groups with which Ms. Norton has been connected in her career" (Risen, 2001, p. A15). The article also noted that the

groups, identified as "the Mountain States Legal Foundation, the Political Economy Research Center, the Defenders of Property Rights and the Coalition of Republican Environmental Advocates," had "been pressing for the rights of property owners against the federal government in response to what they view as overly cumbersome federal environmental regulation . . ." (p. A15). It was stated that prior to her appointment, Secretary Norton had served on the board of the Defenders of Property Rights, a group whose founders served in the Reagan White House and were behind the original Executive Order 12630.

Two weeks later the *NYT* reported the selection by President Bush of Theodore Olsen for the position of Solicitor General (the attorney who officially represents the position of the U.S. federal government in cases before the U.S. Supreme Court). It was noted that Mr. Olsen had spent much of his career "trying to get courts to fashion new, conservative rulings that limit the reach of environmental regulation . . ." (Lewis, 2001, p. A20). In describing Olsen, the *NYT* highlighted his close personal relationship to other prominent conservative legal scholars and activists, especially Kenneth Starr (who directed the Congressional investigation into President Clinton's impeachment) and Robert Bork (who had been denied a position on the U.S. Supreme Court by anticonservative lobbying). As the article stressed, what was key about this appointment was what it might mean for how the U.S. government approached cases before the U.S. Supreme Court. As an example, the article discussed a case waiting for review by the court that involved the Endangered Species Act. The article noted, "the theory in the case . . . is at the heart of contemporary conservative legal philosophy, namely that federal regulations that limit the use of land sometimes constitute an illegal 'taking' of property" (p. A20).

If these two appointments were the most visible actions by the new administration, there were also significant decisions not to appointment certain individuals. The one that drew the most attention involved an early contender for the position of Norton's top deputy at the Department of the Interior—John Turner. Mr. Turner had served as head of the U.S. Fish and Wildlife Service during the administration of George H. W. Bush (1988–1992). He was being promoted for this key position in the Interior Department by Vice President Dick Cheney. However, he had garnered a reputation as a moderate in environmental affairs. The article reporting the administration's decision not to appointment him noted, "administration officials said Mr. Turner lost out in large part because conservative property rights advocates tarred him as being too closely aligned with environmental interests" (Jehl, 2001a, p. A16).

By mid March, conservatives were in a form of policy heaven. The *NYT* ran a front-page, boxed story with the title "Conservatives Savor Their Role as Insiders at the White House" (Toner, 2001a). As April began, a substantial article appeared lamenting the state of the national policy environment for moderate Republican Party elected officials, from the point of view of these officials (Toner, 2001b). Appointments and decisions not to appoint, taken together with resignations of key holdovers, began to paint a very bold picture of the national administration's priorities.[8]

So by late spring 2001, what was going on seemed clear. The *NYT* ran an article on the front page of its business sections titled "Bush is Putting Team in Place for a Full-Bore Assault on Regulation" (Labaton, 2001). As the article noted in its second paragraph, "well beyond the intersecting spheres of energy and environment, where the shifting policies have been apparent for months . . . the scaffolding of a new regulatory framework is taking shape" (p. C1).

But even then the scaffolding was not as sturdy as the Bush administration may have wanted it to appear. A week before the Labaton article, administration officials announced the direction they planned to take with national energy policy. The reaction from their "friends" was most unwelcome. On the front page of the *NYT* an article headline read, "In Energy Plan, Property Rights May Be an Issue" (Egan, 2001). Property rights activists expressed outrage and indignation that Vice President Cheney, a westerner, would propose to expand the authority of the federal government to take property for energy development purposes. As Egan noted, ". . . government plans to expand freeways, military installations or nuclear waste sites have scrambled traditional political positions" (p. A20).

So summer 2001 began with the broad outlines of national level signals and trends in place, but some uncertainty about what they might really mean in practice.

A Renewed Politics of Property Rights?

The year 2001 had begun with high expectations on the part of the property rights movement. After a decade of activity at the state and local levels that was significant (although ambiguous as to its impact), the presidency of George W. Bush seemed to indicate that the elusive opportunity for national-level policy activity had finally arrived. Here was a president who had served as governor in a state with a longstanding, strong "cowboy-western" property rights tradition. During his tenure, the state had adopted property rights legislation (White, 2000). But several things changed on the path to prop-

erty rights nirvana: Bush and his team ran into a version of Republican environmentalism that is wary of vesting too many rights in the hands of landowners, power in the U.S. Senate switched, and then the September 11, 2001, terrorist attacks occurred.

Put simplistically, the property rights movement comes out of the extreme right wing of the Republican Party. Starting at least with the presidency of Theodore Roosevelt at the turn of the 20th century and continuing through to the presidency of Richard Nixon in the early 1970s, a strong, even dominant, element of the Party has supported bipartisan action for land use and environmental management. It is this dominant wing of the Party that supported President Nixon in the passage of many of the modern era's environmental laws and the establishment of key environmental programs and agencies. It is the continuing strength of this wing of the Party, and the constituency it represents, that until now has frustrated many of the national-level initiatives of the property rights movement (Leo, 2001).[9] This was true even during the 1990s when the Republicans held majorities in the Senate and House under President Clinton and the majority leaders (Senator Dole and Representative Gingrich) aligned themselves with this issue.

To a large extent, nothing has changed under the Bush presidency. The electorate, including the constituency of the Republican Party, has not substantially changed its views. The same electorate that split the election between Bush and Gore in 2000 promoted and largely supported state and local votes in dozens of places on conservation and growth management measures.

This centrist, even slightly progressive, environmental orientation of the U.S. population, including the constituency of the Republican Party, was reinforced by the seismic shift in the U.S. Senate when Senator James Jeffords of Vermont "abandoned" the Republican Party to become an independent, giving the Democratic Party formal control of the Senate (Goldberg, 2001). Senator Jeffords represents one of the smaller states in the Union. It is a state with both a very strong property rights tradition and some of the most progressive land use and environmental laws in the country. Many things were said at the time about Senator Jeffords's rationale, but he made it clear in his own statement that his action originated from the difficulty of continuing to be a moderate in the Republican Party and his commitment to long-standing moderate ideals (Jeffords, 2001). Commentators on all sides also made the point that one of the "prizes" Senator Jeffords was to receive for this action was the chairmanship of the Senate environmental committee—a committee near and dear to his heart where he was being marginalized under the Bush presidency and the more conservative Congress (Goldberg, 2001).

Finally, there is the aftereffect of September 11. Now, more than a year later, one of the mantras that seems to be repeated by people of many persuasions is that "everything has changed in America." How true this is overall is not for this essay to judge, but for property rights advocates, the statement seems true for at least two different, though related, reasons.

The first reason has to do with the shift in focus in the Bush presidency. President Bush entered office with an almost arrogant disregard for global and international affairs and a serious lack of exposure in this arena. While he and his advisors understood that no American president could ignore global and international events, the expectation was that his presidency would be more focused on domestic than international issues. As a result of the attacks on September 11, the Bush presidency has undergone a dramatic reorientation. Since then the administration has mounted what it identifies as a war on terrorism. This included the near-immediate commitment of the U.S. military to Afghanistan, with a continuing presence, and the threat of unilateral military action in Iraq. Global events have taken over the plans for the Bush presidency, and the president and his advisors have been forced to give overwhelming attention to these events.

The second reason has to do with domestic affairs. To the degree that the president's attention has been on domestic issues, it has been on the state of homeland security, the necessary promotion of economic resurgence, and the wave of corporate bankruptcies and scandals. The promotion of economic resurgence could be seen as potentially converging with the interests of the property rights movement, through the advancement of an argument for the lessening of public regulatory constraints on private action. Part of this lessening would apply to government regulations that impact the use of private property (land use and environmental regulations), because of an argument that these regulations increase the cost of land and thus the provision and cost of housing, sites for commercial and industrial development, and the availability and cost of natural resources. But the ability to carry forth this argument is hampered by the aftermath of the corporate bankruptcies and scandals. These phenomena, and the pension fund collapses that accompanied them, have created a climate of public opinion that is at least wary of further deregulation, and possibly clamoring for increased regulation of corporate affairs. While this is neither a direct defense of land use and environmental regulation nor a call for more of it, it does contribute to a climate which makes it more difficult for the property rights movement to advance its agenda at the national level.

However, the most difficult aspect of the September 11 attacks for the property rights movement is the

way the president's office has engaged a national dialogue about the need to reframe civil liberties in a time of crisis. The strongest argument the property rights movement has is rooted in property rights as a foundational civil liberty, central to the schema of the country's framers, and guaranteed under the Bill of Rights. What has been coming out of the White House since September 11 is the argument that during a time of national crisis, civil liberties need to be understood in a different context. So the Bush administration has argued that civil liberties (e.g., the right to due process, equal protection under the law, and lawyer-client privacy)—which are usually afforded more deference than the individual's rights in and with private property—have to be reframed and substantially constrained (Glaberson, 2001; Toner, 2001c).

This shift in President Bush's focus and the rhetorical tone supporting the erosion of foundational civil liberties is, I believe, going to substantially hurt the ability of the property rights movement to mount a national legislative or administrative program in support of its agenda.[10] The attention of the Bush administration is elsewhere, and it is difficult to suggest that a particular Constitutional right, especially one over which there is substantial disagreement in scholarship, policy, and legal precedent, should be preferenced in the national domestic policy agenda, when other Constitutional rights more widely recognized and popularly supported are being modified.

A 2002 Postlude

From the vantage point of mid-year 2002, I am interested in how these issues have played out, as the most immediate furor over the aftermath of September 11 has died down.

The basic promarket/antiregulatory orientation of the Bush administration has not changed. In March the *NYT* ran an article titled "U.S. Acts to Shrink Endangered Species Habitats" (Winter, 2002) detailing the administration's position of "urging federal judges to roll back legal protections for nearly two dozen populations of endangered species around the country" (p. A16). The article noted that "the administration is also questioning whether to preserve the 'critical habitat' designations that safeguard millions of acres for about 10 other endangered species . . . signaling a widespread shift in environmental policy that has consoled developers and incensed environmentalists" (p. A16).

April, with the celebration of Earth Day, is usually a big month for environmental news, or at least a month when environmental advocacy organizations across the political spectrum try to use the occasion of the day to highlight perspectives on the environment. Politicians do likewise—Earth Day generally provides wonderful photo opportunities.

April 2002 turned out to be an especially full month. In mid April there were stories about the impending insolvency of the trust fund to clean up Superfund sites and the administration's proposal to address this through use of general tax revenue funds rather than reinstating a special tax on chemical, oil, and other polluting businesses (Hernandez, 2002). A few days later the longstanding battle over oil and gas exploration and drilling in the Arctic National Wildlife Refuge came to a head. The Bush administration lost in its bid to open this area up (Rosenbaum, 2002). As noted in the *NYT*, "Mr. Bush made oil and gas exploration in the wildlife refuge the central element of his energy policy in his campaign two years ago and in his proposals as president" (Rosenbaum, 2002, p. A16). Opening of the Refuge for drilling has been one of the longstanding goals of the property rights movement; it is identified as such in the founding document, *The Wise Use Agenda* (Gottlieb, 1989; Jacobs, 1995).

As Earth Day approached, the Bush administration engaged in the political jockeying normal to all administrations. Secretary of the Interior Gale Norton published an opinion column in which she lauded the wisdom of freeing and empowering individual landowners to make conservation decisions unimpeded by governmental rules and strictures, and questioned the utility of command and control approaches for environmental management (Norton, 2002). The president himself used the occasion to deflect criticism of his approach to environmental policy and his lack of success in promoting this approach through congressional action (Bumiller, 2002; Seelye, 2002).

Conclusion

This article was first conceptualized during the early months of the Bush administration. Property rights groups were excited by the change in national leadership, and eagerly awaited the opportunity to bring their policy agenda back to the national level. Early signals from the administration suggested a clear understanding of this agenda, a strong sympathy for it, and a desire to move it forward through the means available to a national administration. Environmental organizations and their sympathizers cast dire predictions about what might come.

But, as the saying goes, life is what happens when you are making other plans. First, national-level political events (the restructuring of power in the U.S. Senate), combined with an ambivalent constituency, and now in-

ternational events have had at least two impacts on the agenda of the property rights movement. One is that the property rights issue seems less pressing in light of other issues. Even before September 11, the administration was concentrating its attention on education and a set of other domestic issues over which it felt it could win in the politically divided Congress and with the public's support. Second, it is not clear that the foundational argument for moving forward with their issue is as strong as it was prior to September 11. Public discourse and initial action from the administration and the Congress about civil liberties has focused on the need to constrain and redefine liberties, not respect them. While the discourse is not directly about private property rights per se, its tone spills over from the discussions and considerations of privacy, national identity cards, the length of time someone can be held before being charged with a crime, and the initiation of new military-style courts for trying alleged terrorists.

So how is the private property rights issue likely to unfold under the Bush administration? While one can not really know, the crystal ball is a lot murkier than it was in the beginning of this administration or any time in 2001 before September 11.

I offer the following forecast: a situation not dissimilar from that of the years of the Clinton administration. What do I mean by this? First there will be minimal substantive policy activity at the national level.[11] The forces that prevented any proactive national activity during the middle 1990s are likely to continue. This political stalemate is even truer when the environmental sentiments of the American public, including the mainstream Republican public, are considered. It is not clear that the majority of national-level politicians, unless they are strongly ideological, want to move beyond rhetorical support with regard to this issue.[12]

The second aspect of this forecast is that there will continue to be substantial policy activity at the state level, especially in terms of state-based legislation (Jacobs, 1999a, 1999b). Why is the situation different at the state than at the national level? The most important reason is porosity. State legislatures have proved to be accessible. It is easy to find sponsors to introduce legislation (there is always someone aggrieved about property rights issues), it is harder to organize opposition to legislation that is proposed (environmental organizations have to keep tabs on multiple activities and often don't even know about a bill until late into its legislative progress, and can themselves be small and volunteer dependent), the nature of the legislatures themselves (often made up of part-time members, with small or no professional support staffs) can mean less scrutiny is paid to particular bills, and the fact that property rights issues can have a heavier "weight" in selected states, especially rural states, than when it is engaged nationally.

Finally, it is important to note that there will be important national activity with regard to the property rights issue, but that it will originate from the U.S. Supreme Court. The Court will continue to grapple with the issues that underlie the political and policy agenda of the property rights movement, issues expressed in the provisions about private property in the Fifth and Fourteenth Amendments. The last two years have given us two important court decisions.

The decisions in *Palazzolo v. Rhode Island* (2001) and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002) seem to provide opposite signals about the Court's thinking on land use, private property rights, and governmental authority. *Palazzolo* impinges on a longstanding principle of land use policy practice—that if a landowner acquires a property over which a regulation applies, he or she may not claim a takings for the effect of the regulation. But *Tahoe* affirms a longstanding principle—that a temporary moratorium on development, even a long lasting one, is not a takings. Even more than that, though, is the strong language throughout *Tahoe* (2002) asserting the importance and social utility of planning at the community level.

Much to the surprise (and delight) of many planners and planning legal scholars who follow the Court's activities closely, the *Tahoe* decision seemed to step back or aside from the direction the Court had been taking over the last decade plus. The decision was 6-3, with only Chief Justice Rehnquist and Associate Justices Scalia and Thomas, the most ardently conservative members of the court, in dissent.

In the language of the majority, the Court affirmed its reticence about establishing formulaic rules for deciding land use cases:

> In our view the answer to the abstract question whether a temporary moratorium effects a takings is neither "yes, always" nor "no, never"; the answer depends upon the particular circumstances of the case. (p. 1478)

> We . . . resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine a "a number of factors" rather than a simple "mathematically precise" formula. (p. 1481)

They also recognized the pervasive nature of land use policy in modern society: "Land use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways" (p. 1479). These two points represent significant victo-

ries for land use and environmental planning supporters, and setbacks for property rights proponents.[13]

I will leave it to others to provide detailed commentary on the cases (see Echeverria, 2001a, for an early commentary on *Pallazzolo* and Kayden, 2002, for an early commentary on *Tahoe-Sierra*). My point is that even with strong, acknowledged conservatives on the Court, the Court as a whole seems wary about moving forward in the land use/private property arena except in a slow, careful, and incremental fashion. They reflect a longer-term trend of the Court's general reticence to set firm rules with regard to government actions for the regulation of private property, unless such an action clearly crosses a constitutional line. And even here, the Court is wary of saying precisely where that line lies (Ely, 1992).

What is interesting for this discussion is that beyond the Court's precise discussion of *Tahoe* (2002) is its acknowledgment that in the land use arena there are limits to its scope of activity, and that much of substance in the field needs to be debated in legislatures. Commenting directly on the issue of the case—land use moratoria—the Court addressed the matter twice:

> A rule that required compensation for every delay in the use of property would render government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication. (p. 1485)

The Court also made it clear that it understood that such action was likely to be taken at the state, not federal, level, the level where most property rights laws have originated during the last decade: "... we could not possibly conclude that every delay over one year is constitutionally unacceptable. Formulating a general rule of this kind is a suitable task for state legislatures" (p. 1489). So while the Court should not be expected to shy away from important constitutional matters, at this time, given its particular configuration, it does not appear to define itself as having a dominant role in the land use arena. Instead, it appears to be signaling that the appropriate arena for resolving social conflicts over these matters is exactly where it has been for the last decade—at the state level, in state legislatures, and on referenda and initiatives (for those states that permit these).

Property rights will continue to be an issue of great social contention in the U.S (Jacobs, 1999a). However, it is unlikely that this contention will take clear and definitive form under and during the Bush administration, despite the administration's strong inclinations to support it. Instead, the politics of property rights at the national level in the future will likely be much as it has been in the past.

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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. Two excellent sources for arguments from the property rights points of view are Bethell (1998) and DeLong (1997).
3. The term *proactive* is used specifically to distinguish the focus of national-level activity from reactive efforts. On the reactive front, the movement was quite effective in preventing a number of initiatives from moving forward. Most prominently, this included the elevation of the Environmental Protection Agency to a cabinet-level department by the then newly elected President Clinton in early 1993, and the realization of an internationally prominent integrated environmental management plan for the greater Yellowstone ecosystem in the same period (Jacobs, 1995, 1998b).
4. Though this doesn't fully explain the inaction during the earlier Bush presidency.
5. I say "appeared to find the success that was eluding them" because there is debate about the actual impact of these laws (Jacobs, 1998a; White, 2000). To date, few of them have altered land use and environmental planning practice in their states. A primary reason is that these laws are often adopted over the objection of those agencies given the authority to implement them, so the agencies seek to blunt their impact (see, for example, the discussion of the Kansas law in Jacobs, 1998a, 1999b). A notable exception may be Florida, though White (2000) and I (Jacobs, 1998a) disagree on this. My broader point (Jacobs, 1998a) is that the very existence of these laws "on the books" allows aggressive implementation if the political/administrative politics of a state changes.
6. On October 29, 2002, the Oregon Supreme Court ruled that Measure 7 was invalid, because it had been put before the voters in a way that violated the state's constitutional requirements for initiatives.
7. Since the beginning of 2001, I have monitored regularly the following: from the property rights movement perspective, the monthly newsletter of the Competitive Enterprise Institute, the monthly and occasional environmental briefings and notes of the Heritage Foundation, and the at least weekly e-postings of the American Land Rights Association—Land Rights Network; from the environmental perspective, e-postings of the Environmen-

tal Policy Project; and from the national media perspective, the *New York Times* (*NYT*). In addition, I became aware of materials from other sources, though these were not accessed in any systematic way. For the purposes of this commentary, I present as my primary data material from the *NYT*. I do this because the *NYT* fairly captured the tenor and tension of the evolving issues, and it is a source readily accessible to all.

8. The most prominent resignation of spring 2001 was that of Michael Dombeck, chief of the Forest Service and a career Forest Service employee. He was credited with crafting the Clinton administration policy for putting nearly 60 million acres of federal land off limits to road building, often in opposition to strongly voiced opinions from industrial, community, and political interests in the western states (Jehl, 2001b).
9. Leo is a columnist for *U.S. News and World Report*, a conservative-leaning publication. In his opinion column, he cites Republican-affiliated polling firms whose recent work finds extremely strong support for environmental values and policies among Americans in general and Republican primary voters in particular.
10. This doesn't mean that there will not be significant events at the national level. In October 2001, the *NYT* carried an article (Seeyle, 2001) noting how the Bush administration had just reversed a Clinton administration ruling on mining, making it

    > easier for companies to mine gold, copper, zinc and lead on public lands. It (the Bush administration) also reversed a legal opinion that could clear the way . . . to dig an open-pit gold mine in a part of the California desert considered sacred by the local Indian tribe. (p. A12)

11. I offer this prediction despite the results of the November 2002 election, which has provided Republican Party majorities in the U.S. House of Representatives and U.S. Senate, allowing President Bush a much easier time to move forward with his policy agenda.
12. And even among those who are strongly ideological, support for action related to the property rights issue is weighed against the costs of engaging the issue. When he was Speaker of the House, Newt Gingrich provided strong rhetorical support for the property rights issue; it was included in the *Contract with America* (Gillespie & Schellhas, 1994). But from his position of power he proved unwilling to move the issue onto the national stage in any substantive way. Likewise, while Robert Dole was the principal sponsor of property rights legislation when he was in the U.S. Senate, when he undertook his race for the presidency in 1992 he allowed the issue to fade away, much to the frustration of property rights advocates.
13. The *NYT* article announcing the Tahoe decision (Greenhouse, 2002) was placed on the front page and carried the headline "Justices Weaken Movement Backing Property Rights," though in substance the article focused more on the takings issue than the political/social movement.

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