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New Actions or New Arguments over Regulatory Takings?

Hannah Jacobs's note seeks to establish a basis for balance among the competing parties to the renewed social conflict over regulatory takings.¹ I argue that she is misled in this search. Proponents of regulatory takings initiatives are not interested in balance. They are interested in winning. Proponents want to delegitimize and dismantle the current system of local and state regulation. Instead of seeking balance, which concedes the validity of regulation's critics, I argue that the task is for regulatory taking opponents—planners, environmentalists, neighborhood activists—to find a language and a strategy that presents a persuasive case for the social utility and functionality of regulation and the social disruption of regulatory takings.

In the land-use arena, one of the most significant events of the last two decades has been the rise and impact of the so-called private property rights movement. The movement was formally born in 1988 with a focus on western resources and labeled itself as the wise-use movement.² However its intellectual antecedents originate at least with the rise of the modern environmental

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1. Hannah Jacobs, Note, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 YALE L.J. 1518 (2007). N.B. There is no personal connection between this author and the author of the note.
 2. THE WISE USE AGENDA (Alan M. Gottlieb ed., 1989). Labels have included wise-use movement, land rights movement, property rights movement, private property rights movement. The latter two are now used interchangeably and as the most generic. For a prominent book using an alternative label, see A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE (Philip D. Brick & R. McGregor Cawley, eds., 1996).

movement.³ Today it is a national coalition targeting land-use and environmental laws and policies, such as those for endangered species protection, smart growth, and farmland and wetland protection.⁴ This coalition argues that restricting private property is inefficient, ineffective, and un-American.

The property rights movement has pursued a multilevel strategy to achieve its objectives—judicial, legislative, policy, and public relations.⁵ In its early years, its strategy was focused at the national level, exploring what could be accomplished via Executive Orders issued by the President, and through legislation proposed in the U.S. Congress.⁶ But much to its frustration, its activities had little effect. Thus it shifted toward the states, and here it found fertile ground for its ideas.

Since 1991, every state in the United States has considered state-based legislation in support of the policy position of the property rights movement, and twenty-seven states have passed such legislation.⁷ These states are on both sides of the Mississippi River; they are “red” and “blue” states and extend from Maine to Washington, the Dakotas to Texas, with eleven located east of the Mississippi.

The property rights movement has offered three basic types of state-based laws.⁸ Compensation and taking-impact-assessment laws are the majority of the laws passed by the states. Most of these laws were passed in the period 1991–1995, and represented the first wave of state-based laws. In the mid-

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3. See, e.g., John McClaughry, *Farmers, Freedom, and Feudalism: How To Avoid the Coming Serfdom*, 21 SAN DIEGO L. REV. 486 (1976); John McClaughry, *The New Feudalism*, 5 ENVTL. L. 67 (1975).
 4. Harvey M. Jacobs, *The Anti-Environmental, ‘Wise Use’ Movement in America*, LAND USE L. & ZONING DIG., Feb. 1995, at 3. For an early listing of these groups, see CARL DEAL, *THE GREENPEACE GUIDE TO ANTI-ENVIRONMENTAL ORGANIZATIONS* (1993).
 5. HARVEY M. JACOBS, LINCOLN INSTIT. LAND POLICY, *STATE PROPERTY RIGHTS LAWS: THE IMPACTS OF THOSE LAWS ON MY LAND* (1999).
 6. Robin E. Folsom, *Executive Order 12,630: A President’s Manipulation of the Fifth Amendment’s Just Compensation Clause To Achieve Control over Executive Agency Regulatory Decisionmaking*, 20 B.C. ENVTL. AFF. L. REV. 639 (1993); Mark L. Pollot, *The Effect of the Federal Takings Executive Order*, LAND USE L. & ZONING DIG., May 1989, at 3.
 7. Kirk Emerson & Charles R. Wise, *Statutory Approaches to Regulatory Takings: State Property Rights Legislation Issues and Implications for Public Administration*, 57 PUB. ADMIN. REV. 411, 412 (1997) (discussing the twenty-six states that passed legislation prior to Oregon’s Measure 37); Harvey M. Jacobs, *The Impact of State Property Rights Laws: Those Laws and My Land*, LAND USE L. & ZONING DIG., Mar. 1998, at 3, 3 (same); JACOBS, *supra* note 5, at 10 (same); see also Measure 37, OR. REV. STAT. § 197.352 (2005) (making Oregon the twenty-seventh state to pass such legislation).
 8. JACOBS, *supra* note 5, at 10; Jacobs, *supra* note 7, at 3, 4; Stacy S. White, *State Property Rights Laws: Recent Impacts and Future Implications*, LAND USE L. & ZONING DIG., July 2000, at 3.

1990s, the property rights movement promoted a form of conflict resolution law as a second-wave approach. However, these laws did not yield the results that the movement had expected.⁹

In addition to a state-based strategy, the property rights movement also pursued a county-based local strategy. In the American West, the movement promoted “culture and custom” ordinances that asserted the county’s primacy for all aspects of land use and environmental policy, even when county-based policy conflicted with state or federal policy.¹⁰ Though one state court has found this approach to be illegal,¹¹ over three hundred counties have actively considered the approach, scores of counties as far east as Michigan have adopted it, and actions based on it became prominent in national media coverage of the movement in the mid-1990s.¹²

But by the late 1990s the property rights movement had come to a policy standstill. They had been effective in passing state-based laws, promoting county-based laws and garnering significant media attention to their cause, but they had been ineffective in changing the fundamental way government acted upon land.

With the 2000 election the movement had an opportunity to revise its strategy.¹³ It decided to try again for nationally based action. Initial patterns of appointments and non-appointments in the Bush Administration suggested it was going to have a great deal of influence.¹⁴ However, several factors—including the systemic impact of 9/11 on Administration priorities and congressional realignments—forced the movement back to a state-based strategy.

9. JACOBS, *supra* note 5, at 13-15; Jacobs, *supra* note 7, at 3, 4.

10. Karen Budd-Falen, *Protecting Community Stability and Local Economies: Opportunities for Local Government Influence in Federal Decision- and Policy-Making Processes*, in *A WOLF IN THE GARDEN*, *supra* note 2; Andrea Hungerford, “Custom and Culture” Ordinances: *Not a Wise Move for the Wise Use Movement*, 8 TUL. ENVTL. L.J. 457 (1995); Scott W. Reed, *The County Supremacy Movement: Mendacious Myth Marketing*, 30 IDAHO L. REV. 525 (1993-1994).

11. *Boundary Backpackers v. Boundary County*, 913 P.2d 1141 (Idaho 1996).

12. The county movement was profiled on the front cover of *Time* magazine on October 23, 1995, under the title *Don’t Tread on Me: An Inside Look at the West’s Growing Rebellion*, focusing on the resistance and defiance activities of a group of residents in Nye County, Nevada. Erik Larson, *Unrest in the West: Welcome to Nevada’s Nye County, Whose Angry Residents Are Spearheading the Region’s Charge Against Washington*, *TIME*, Oct. 23, 1995, at 52.

13. Harvey M. Jacobs, *The Politics of Property Rights at the National Level: Signals and Trends*, 69 J. AM. PLAN. ASS’N 181 (2003).

14. *Id.* at 181.

This is where Hannah Jacobs's note picks up this story.¹⁵ The note proceeds in two parts. Part I provides details on the 2006 regulatory takings initiatives – how they originated, where they were proposed, what the outcomes of the votes were, how failed efforts might evolve in the next election cycle, etc. This part is well conceptualized, covers all the appropriate ground, and identifies many of the key issues attending these efforts.

However, this is the groundwork for identifying ways to balance the competing forces doing battle over regulatory takings. And here Jacobs falls prey to a conceptual flaw – that the competing forces are amenable to the very idea of balance. They are not. Regulatory takings proponents are not interested in constructive dialogue about nuances within the current regulatory system. Rather they are interested in a wholesale attack on that system because they consider its very foundations illegitimate and unnecessary. What about regulations' defenders? It is likely that they are amenable to a dialogue over balance. But as they are, it has to be in a context where those across the table actually want to listen to opposing views, and creatively (not unilaterally) develop solutions. This does not seem to be the case with regulatory takings' advocates.

As Jacobs details, the proposed regulatory takings provisions have a number of potential “negative” impacts – stifling government regulation,¹⁶ being unsuitable to class actions for compensation,¹⁷ confusing the appropriate basis for compensation,¹⁸ and creating burdensome administrative costs and tasks.¹⁹ Jacobs writes as if these outcomes were surprising. But they are not. In fact, these are the outcomes the initiatives are designed to achieve. These initiatives are engineered specifically to gum up the works of governmentally based land-use action. Why? Because at base the regulatory takings movement is not about tweaking government regulations that “go[] too far”²⁰ but is instead a frontal assault on the rights of the community vis-à-vis the rights of the individual. The rationale for this is simple. According to Richard Epstein, the intellectual guru of the property rights movement who is best known for

15. Jacobs, *supra* note 1.

16. *Id.* at 1512-22.

17. *Id.* at 1531.

18. *Id.* at 1531.

19. *Id.* at 1532.

20. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

his 1985 book on regulatory takings, “the system of land use planning is a form of socialism in microcosm.”²¹

Property rights advocates do not accept the legitimacy of government regulatory activity. From their point of view, *Euclid*,²² with its one-vote majority validating zoning, was as wrongly decided as was *Kelo*.²³ What weaves their perspectives together is a view that strong private property is central to the viability of democratic and market (capitalist) systems.²⁴ Therefore, their objection is not about compensation for regulations that are too burdensome. They want the actual dismantling of regulation. Thus, the negative impacts of the regulatory takings initiatives identified by Jacobs are precisely the point. The property rights movement wants the outcome of regulatory takings initiatives to be so complex and difficult that government essentially walks away from the regulatory task.²⁵

So is regulatory change necessary, as Jacobs suggests?²⁶ Maybe, but maybe not. Maybe the issue is not a general level of inequity in the current regulatory regime. Maybe it is instead the inability of planners, environmentalists, neighborhood residents, and others to clearly articulate the value of current regulatory approaches to the property rights of most landowners. In *Euclid* the Court noted that the problem with market-based decisions, and the justification for regulation, was that the result could be “a pig in the parlor instead of the barnyard.”²⁷ A compelling and easily understood metaphor. In the early years of contemporary environmentalism, regulation’s defenders and advocates talked about the real negative impacts on property owners downwind and downstream. At a time when some urban industrial users visibly belched pollution into the air and rivers caught fire, this argument was

21. Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187, 202 (1992); see also RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

22. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

23. *Kelo v. City of New London*, 545 U.S. 469 (2005).

24. See, e.g., TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES (1998); HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998).

25. This is what appears to be the outcome of Measure 37 in Oregon. See SIGHTLINE INSTITUTE, TWO YEARS OF MEASURE 37: OREGON’S PROPERTY WRONGS (2007), http://www.sightline.org/research/sprawl/res_pubs/property-fairness/measure-37-report/two-years-m37-report; SHEILA A. MARTIN & KATIE SHRIVER, PORTLAND STATE UNIV., DOCUMENTING THE IMPACT OF MEASURE 37: SELECTED CASE STUDIES (2006), http://www.pdx.edu/media/i/m/ims_M37brainerdreport.pdf.

26. Jacobs, *supra* note 1, at 1558.

27. *Euclid*, 272 U.S. at 388.

again both easily understandable and compelling.²⁸ Regulatory takings advocates present a case of the aggrieved property owner – literally the little old lady in tennis shoes.²⁹ Regulatory takings opponents, regulation’s defenders, need equally compelling spokespeople and situations. In the early years of regulatory takings, some critics of these proposals labeled them “The Pornography Shop Owners Bill of Rights” to point out the potentially negative impact such laws could have on local land-use relationships.³⁰ Maybe the problem with regulatory takings is the way the property rights movement has hijacked the policy discourse over property and shaped it to be on its terms so as to advance its agenda. Maybe the necessary balance is for those who find the current level of regulation acceptable (and oftentimes even too light) to identify the language that allows them to talk about the issue in as clear, provocative, and effective a way as those who advance the cause of regulatory takings.

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28. See, for example, the entry “Cuyahoga River Fire,” about the 1969 fire that was profiled in *Time*, *National Geographic*, and other publications, in the online encyclopedia of the Ohio Historical Society, <http://www.ohiohistorycentral.org/entry.php?rec=1642>.
29. Dorothy English presented such an example in the case of Measure 37 in Oregon. For example see the *Washington Post* cover story in February 2005 in which the writer notes, “On ubiquitous radio ads, the frail, woebegone voice of Dorothy English . . . explained . . . ‘I’m 91 years old, my husband is dead and I don’t know how much longer I can fight.’” Blaine Harden, *Anti-Sprawl Laws, Property Rights Collide in Oregon*, WASH. POST, Feb. 28, 2005, at A1.
30. Jacobs, *supra* note 7.