

Social Conflict



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That there is social conflict over property rights is clear to anyone with even passing attention to the national media. In August 2006 *Parade* magazine, an insert to many local Sunday newspapers across the United States, had a cover depicting a family of five next to a headline titled “Will the Government Take Your Home?” The story, about a year after the U.S. Supreme Court decision in *Kelo v. New London, CT*, captured as well as anything the extent to which this conflict has entered the mainstream.

This was not the first time the national media has found itself reporting on the controversy over

property rights. In 2005, soon after the Supreme Court’s *Kelo* decision, many newspapers covered the story, and a front-page article in the *New York Times* was titled “Ruling Sets Off Tug of War Over Private Property.” As early as 1995 *Time* magazine carried a cover story about property rights—“Don’t Tread on Me: An Inside Look at the West’s Growing Rebellion.”

The Property Rights Movement and Its Policy Strategy

In the United States this conflict is tied to the emergence of the so-called property rights movement, which traces its founding to 1988 (Brick and Cawley 1996). What exists today is a national

over Property Rights

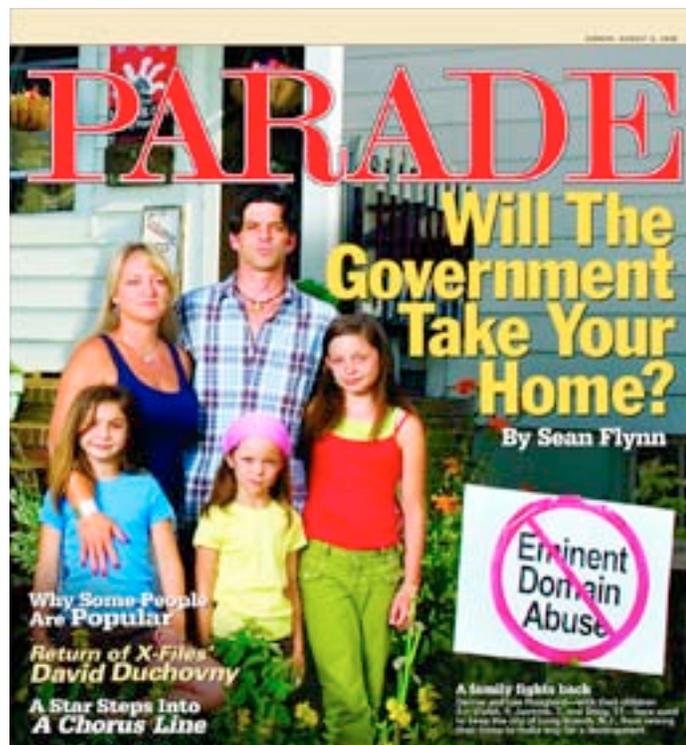
coalition targeting national, state, and local land use and environmental laws, policies, and programs, such as those for endangered species protection, smart growth, and farmland and wetland protection (Jacobs 1995). This coalition argues that these attempts at the management and restriction of private property are un-American, inefficient, and ultimately ineffective.

Property rights advocates decided early on to combine a legal strategy with a policy and legislative strategy (Jacobs 1999). In the early years, this strategy was focused at the national level, exploring what could be accomplished through the President's office and Congressional legislation (Folsom 1993). The strategy quickly shifted to the states, however, where it found fertile ground.

Since 1991 every state has considered state-based legislation in support of the property rights movement's position, and by 1996 26 states had passed such legislation (Emerson and Wise 1997; Jacobs 1999). These states are on both sides of the Mississippi; they are "red" and "blue" states; and they extend from Maine to Washington and from the Dakotas to Texas.

The property rights coalition initially offered up two types of state-based laws. Compensation laws, adopted in six states, establish the precise percentage at which an individual property owner is entitled to compensation. Takings impacts assessment (TIAs) laws require a unit of state government to prepare a report on the likely impact of a proposed law, policy, or program on private property rights, and TIAs have been adopted in 17 states. These two legislative approaches represented the first wave of state-based laws, and the majority of these laws. Most were passed between 1991 and 1995. However, much to the surprise and frustration of the property rights movement these laws seemed to have had little impact (Jacobs 1999).

In the mid-1990s, property rights activists adopted a third approach to state-based laws and crafted conflict resolution laws as "let's sit down and talk about it reasonably" laws. Two states (Maine and Florida) adopted this approach. But by the late 1990s some in the property rights movement began to question its strategy. Its leaders had been



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effective in passing state and county laws and in garnering significant media attention to their cause, but ineffective in changing the fundamental way government acted upon private property. With the 2000 election, advocates saw an opportunity to return to nationally based action through the President's office and Congress. However, several factors—principally the systemic impact of 9/11 on administration priorities and Congressional realignments—again forced the movement back to a state-based strategy (Jacobs 2003).

In November 2000 and 2004, property rights activists sponsored a compensation law ballot initiative in Oregon, directly intended to undercut the influence and impact of the state's nationally recognized 30-year-old approach to planning and urban sprawl management (Ozawa 2004). The November 2004 ballot initiative—Measure 37—passed with 61 percent of the vote. It forces state and local governments to either remove the requirements of the 30-year-old planning law on properties owned by people who owned them prior to the adoption of the law and have owned

them continuously since then, or to provide compensation to these owners for the burden of the law.

The adoption of Measure 37 by such a strong majority in Oregon has emboldened the property rights movement and led to efforts to pass parallel laws in Colorado, Florida, South Carolina, Washington, Wisconsin, and Wyoming. However, the potential for duplicating Measure 37 is limited because few states have a statewide land use planning program like Oregon's, and this approach is most viable only in states that allow citizen initiatives.

Nevertheless, the property rights movement was bolstered by the seemingly unfavorable decision from the U.S. Supreme Court in the *Kelo* case in 2005. This case, decided by a one-vote margin (5–4), posed the question of whether government has the right to expropriate private land when the land will be used for increased economic development opportunities and increased land taxation. It would appear that in making this decision the Court struck a blow against the property rights movement, but subsequent state-based actions make one wonder.

The *Kelo* case established what was permissible under federal law, but it did not mandate how states were to behave. The decision made clear that states could refine the range of allowable governmental activity within the bounds of state constitutions and state law, and this is precisely what has happened.

Property rights activists are using the *Kelo* decision to initiate a public conversation about property rights. They want citizens to talk about two questions: 1) When is it reasonable and legitimate for government to take property under the authority of the takings clause? and 2) Are there limits to reasonable government regulation, beyond which the individual property owner is entitled to a degree of compensation?

The movement has been successful in bringing this conversation into the public realm by publicizing the issue in the most mainstream of media, such as *Parade* magazine, and they have orchestrated a set of votes supporting their positions in 34 states (see figure 1).

Kelo (largely, and Measure 37 secondarily) has allowed property rights activists to give their issue national visibility and to establish it as a struggle between the government and developers on one side and landowners on the other. Together these two actions have, I believe, launched a third-wave approach for state-based action in this century.

Some Historical Perspective

The property rights movement draws strongly on America's founding period for its justification. Property rights was a subject of strong concern among the founders, who saw the protection of property as one of the principal functions of forming a government (Ely 1992). In the debate over the ratification of the proposed U.S. Constitution, James Madison wrote in *Federalist* No. 54, "government is instituted no less for the protection of property than of the persons of individuals."

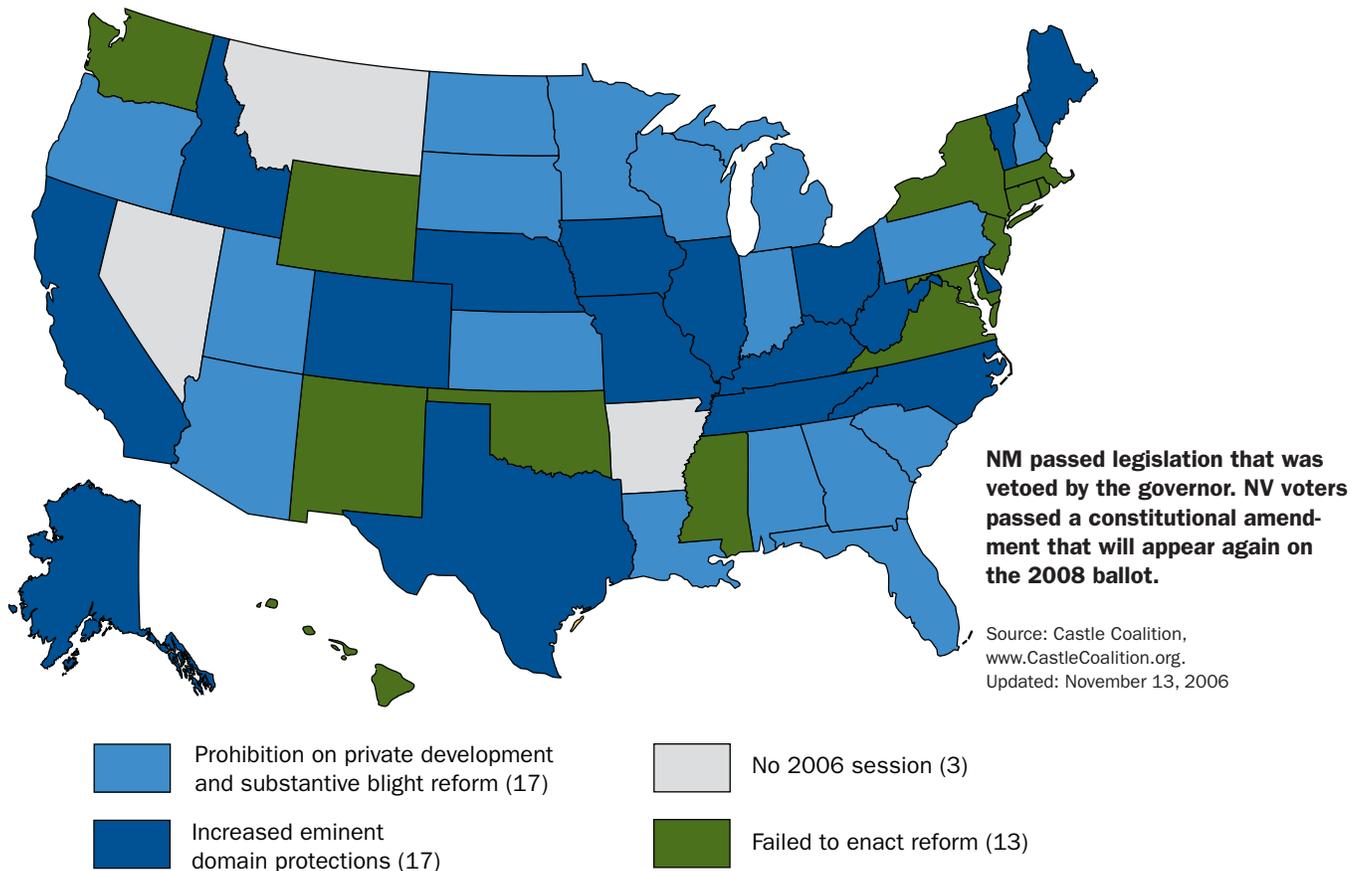
Others, including Alexander Hamilton and John Adams, concurred. Adams noted that "property must be secured or liberty cannot exist. The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."

But it was Thomas Jefferson who left modern Americans with their most enduring image of this perspective—the yeoman farmer. According to Jefferson, because the yeoman farmer owned his own farm and could produce food and fuel for himself and his family, he was obligated to no one; he was literally free to exercise his political views as a democrat. For Jefferson it was the very act of ownership that created the conditions that allowed democracy to exist.

The most prominent skeptic on this issue was Benjamin Franklin. In the debate over Pennsylvania's state constitution he said, "Private property is a creature of society, and is subject to the calls of the society whenever its necessities require it, even to the last farthing." Franklin appeared to view as legitimate the public's right to create, recreate, take away, and regulate property as it best served public purposes.

Private property was thus a confusing issue for the founders. How were these disparate positions resolved? With ambiguity. In 1776 the Declaration of Independence promised each (free, white, male) American "life, liberty and the pursuit of happiness" not 'life, liberty and property' (which is what Jefferson wanted the Declaration to say). Eleven years later when the U.S. Constitution was adopted it also said nothing about land-based private property. It was not until 1791, with the adoption of the Bill of Rights, that the "takings" phrase appeared as the closing clause to the Fifth Amendment to the Constitution: ". . . nor shall private property be taken for public use, without just compensation."

FIGURE 1
Eminent Domain Legislation Status (2006)



In the colonial period and for a century afterwards, disagreements about the place of private property in a democracy and the exact meaning of the takings clause were largely theoretical. There was little regulation of land as we currently understand it. When government determined that it needed to take property, the public use was generally clear—land for a school, a road, or other public facility—and the owner was compensated. For much of the eighteenth and nineteenth centuries there was limited social conflict over private property rights. The new country had land in abundance. It was the disposition of public land, not the management of private land, that dominated the public agenda.

The twentieth century ushered in a new period for American land use as public policy concerns shifted from public lands to more pressing issues of immigration, industrialization, and urbanization. The 1920 U.S. Census officially recorded the shift from a rural to an urban nation. It was in response to these changes that modern planning and a new

relationship between the state and the individual via private property rights was born. As cities and states began to pass regulations to manage public health and safety under changing spatial and economic conditions, concern rose about the appropriate limits to government regulation.

The U.S. Supreme Court was called upon to interpret the meaning of the takings clause under conditions very different from those when it had been written. At first the Court's answer to the question of whether there were limits to government regulation of private property was a simple and strong "no." In 1915 the Court affirmed the right of government to regulate absent any obligation for compensation (*Hadacheck v. Sebastian* 239 US 394 [1915]).

Within less than a decade, however, the Court seemed to completely change its mind. In *Pennsylvania Coal v. Mahon* (260 U.S. 393 [1922]) the Court issued its famous dictum, defining the twentieth-century concept of *regulatory taking*. In a decision that has echoed down through the years,

2006: The Year of Property Rights

Property rights moved from the courts to the ballot box in 2006, as voters were presented with numerous initiatives for restrictions on the use of eminent domain, compensation for regulatory takings, and in some cases combinations of the two.

Voters in Washington state rejected Measure 933, an initiative similar to Measure 37 in Oregon, which passed in 2004 and requires compensation for loss of property value due to statewide land use regulations dating from 1972. Similar measures offering landowners relief for regulatory takings also failed to pass in California, where the proposed law would have extended to all property affected by regulation, and Idaho, where the measure failed by a 3-1 margin, partially due to dissatisfaction with out-of-state financing behind the initiative.

Two other compensation questions never got to the ballot box in Montana and Nevada, due to successful court challenges. Arizona voters, however, did approve a ballot measure that both restricts eminent domain and provides compensation for regulatory takings. Voters in eight other states passed restrictions on the use of eminent domain, as the backlash continues following the 5-4 *Kelo v. City of New London* Supreme Court decision in 2005, which affirmed states' rights to use eminent domain in economic development projects.

At the federal level, Congress considered but did not pass two property rights bills: H.R. 4128, a blanket restriction on the use of eminent domain for economic development; and H.R. 4772, which provides fast-track access to federal courts for regulatory takings claims.

Planners and policy makers across the country anticipate that these types of ballot measures and proposed legislation will continue to be a prominent feature on the political landscape. The margin in California and Washington was only a few percentage points, encouraging ballot backers to return with fresh campaigns.

The common themes in the battleground states included explosive growth, planning combined with limitations on development through regulation, and land assembly for primarily urban redevelopment. A better system for mediating land use disputes—before the tension they generate erupts at the ballot box—is one alternative being explored at the Lincoln Institute.

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the Court said: “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” (page 415; emphasis added). A regulation can be equivalent to a takings under the Fifth Amendment. If it is, then compensation is required. But the Court did not say exactly where the line is that distinguishes regulation that “goes too far” from regulation that does not.

The twenty-first century began with two notable cases. In 2002 the Court took up the validity of a nearly three-year moratorium on development. In a decision favoring government, the Court found that local planning and regulation are normal and expected governmental functions and that the Court has no reason to interfere with regular planning activity (*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (535 U.S. 302 [2002]); Kayden 2002). Then, in June 2005, the Court issued its closely watched decision in the case of *Kelo v. City of New London* (125 S. Ct. 2655 [2005]).

To the property rights movement the message seemed clear—even though the Court in 1922 said there was a line where governmental activity would be recognized as going “too far,” in reality little that government does is recognized as crossing that line.

The Current Global Context

Americans think they are especially attuned to property rights issues and may be particularly engaged with them. Yet, property rights and social conflict over them is one of the hottest issues in international public policy as well. The fall of communism in much of the former Soviet Union's sphere of influence more than 16 years ago set off a chain reaction in which dozens of nations rushed to adopt western-style political and economic systems. But how do you jump-start democratic governance and market-based economic systems? According to both political and economic theory, both systems require a foundation of secure private property rights.

The 1990s was a period when private property was actively promoted by bilateral and multilateral international development aid organizations, such as the U.S. Agency for International Development, the United Nations, and the World Bank, and countries as diverse as Albania, South Africa, and China actively sought assistance.

The Chinese case is especially interesting. For the last decade China has been grappling with

how to reform its constitution to acknowledge the existence of private property, even though doing so is a violation of fundamental Marxist-Leninist theory. But Chinese government leaders have realized they cannot attract international investment without property reform. Investment will not occur without a guarantee that government is not going to arbitrarily confiscate land and real estate.

This issue has even come back around to the developed world. For much of the twentieth-century American planners looked to the social democracies of Western Europe as a model for how to plan cities, control urban sprawl, manage landscapes, and protect critical environmental resources. Europeans—through a tradition of strong government and weaker individual property rights (compared to the United States)—seemed to have a solution.

But now Europeans are looking to the United States as a model of a strong economy and a strong democracy. While European countries have the latter, they do not have the former. And if the advice for creating strong market economies and strong democracies is good enough for Africa, Asia, Latin America, and Central and Eastern Europe, why is it not good enough for Western Europe (Jacobs 2006)?

An Uncertain Future

The United States offers one lesson in this area: individuals cannot have unfettered property rights. The invention of zoning in the 1920s and development of environmental laws in the 1960s and 1970s are rooted in the metaphor popularized by the Garrett Hardin: “The Tragedy of the Commons.” Hardin sought to demonstrate that there was a mismatch between the logic individuals pursued in making their own land and resource decisions and the logic that even they would recognize as sensible from a social point of view. So, for example, it is logical for me to sell my urban fringe farmland to a developer for the highest market price I can receive, but if every farmland owner behaves like me then we lose all our farmland. In the United States we have developed a very complicated relationship between the rights of the individual and the rights of society over property, a relationship we are always renegotiating.

It is precisely because property is so central to political and economic theory, and in the case of the United States our founding history and cultural myths, that we fight about it as we do. I think fighting about it is actually a good thing. Why?

Because it is in fighting about the very notion of property—what it means, what role it serves, what prerogatives belong to neighbors, communities, future generations—that we, as Americans, come to understand who we are and what we believe about ourselves and our society. **L**

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