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Social conflict over property rights: the end, a new beginning, or a continuing debate?

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Social conflict over property rights: the end, a new beginning, or a continuing debate?

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The ownership and control of private land is a core social value in the United States. Public planning can be seen as conflicting with this value. The long-standing tension between private property rights and public planning was heightened in the 1990s with the emergence of the so-called private property rights movement. This movement seeks to limit governmental authority over privately owned land through a multi-level strategy of legal, policy, political, and public relations actions. This paper explores the historical basis for this conflict, the legal framework within which it functions, and contemporary policy battles.

The paper concludes that there may be no final outcome to this debate. Property rights activists are impassioned and believe their view of history and law is correct. I argue that it may be best to see debate about land use and property rights as one of the central vehicles for a continual reframing of core values in the American experience.

Keywords: land use; legislation; policy; property

That there is, at this time in the United States, 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 in the United States, had a cover depicting a Long Branch, New Jersey family of five (couple with three young children) next to a headline titled “Will the Government Take Your Home?” and a sign “Eminent Domain Abuse” circled in red with a slash through it (stop eminent domain abuse). The story, following by a year-plus the US Supreme Court decision in *Kelo v. New London, Connecticut*, captured as well as anything the extent to which this social conflict had become part of the mainstream consciousness in the United States.

However, this was not the first time the national print media had found itself paying attention to what has become a rising tide of social conflict. For example, in 2005, soon after the Supreme Court decision in the *Kelo* case, the *New York Times* noted in a front page article the increasing conflict (Egan 2005 – “Ruling Sets Off Tug of War Over Private Property”). This followed a similar front page article in the *New York Times* in 2002 about the Court’s decision in the Tahoe-Sierra case (Greenhouse 2002 – “Justices Weaken Movement Backing Property Rights”). The *New York Times* and other media outlets have also followed with strong interest the

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impact of Measure 37 in Oregon, and have been aware of this growing controversy for over a decade (for example, in the mid-1990s *Time* magazine carried a cover story – “Don’t Tread on Me: An Inside Look at the West’s Growing Rebellion” – examining the increasing strength of the so-called county movement).¹ These are only a few of many examples.

In this paper, I place the current social conflict in broader historical context, in part by providing an interpretation of twentieth-century legal decisions on the balance of public and private rights in property and in part by discussing the rise and impact of the late twentieth-century property rights movement.

Property rights conflict – the colonial era

In the United States, governmental management of private property rights is as old as the country itself (e.g. Bosselman, Callies, and Banta. 1973; Ely 1992; Treanor 1995). Even before the United States emerged as a new country, colonial governments passed local laws which seem to be clear antecedents to modern land use and environmental regulations. For example, colonial Virginia regulated tobacco-related planting practices to require crop rotation and prevent over planting, and colonial Boston, New York City, and Charleston all regulated the location of businesses such as bakeries and slaughterhouses, often to the point of excluding them from existing within city limits (Treanor 1995).

The role and place of private property rights was a subject of intense interest and debate among the founders. For a variety of reasons – philosophical, historical, and contemporary – there was a clear sense that the right to hold and control property rights was an important element of a democratic governmental structure.

First, there was the reality of the settlement process. Colonial America was settled by Europeans searching for religious and political freedom (the rights guaranteed in the First Amendment), and for access to land (Ely 1992). In America’s early years, European countries were still structured under the vestiges of feudalism. An elite owned most of the land, and the prospects for the ordinary person to obtain freehold (obligation free) ownership was small. America offered an alternative. America was a place where any white male immigrant could, in theory, get ownership of land, and with that land as capital, make a future for themselves. America was, quite literally, the land of opportunity.

In America’s colonial past, the existence of land converged nicely with the new political theories of the period. In particular, drawing from the work of John Locke, ideas circulated about notions of ownership and democracy. One came to possess property through using it (which provided the justification for taking land from America’s native inhabitants, who were not using it in the European sense of active agricultural and forest management) and freely constituted governments (i.e. democracies) existed for the protection of individual liberties, including the liberty to hold and control property.²

¹I use the *New York Times* as an example of a reputable national print medium; other sources (the *Wall Street Journal*, the *Los Angeles Times* and the *Washington Post*) paid similar and parallel attention to the events and phenomena.

²Cronon (1983) is commonly cited as a pioneering study documenting the attitudes of Puritans toward the Native Americans use of their land in the colonial settlement period, an attitude which, either sincerely or cynically, understood Indians to not own property because they were not engaged in what Europeans saw as active agriculture and forestry practices.

The country's founders configured these ideas into a particular and specific relationship. Democracy required liberty (and vice versa), and both in turn required freehold property. Using John Locke's ideas some of America's founders saw that one of the principal functions of forming a government was protection of property. In the debate over the ratification of the proposed US Constitution, James Madison wrote in *Federalist No. 54* in 1788, "government is instituted no less for the protection of property than of the persons of individuals" (Hamilton, Madison, and Jay 1961, 339). Others, including Alexander Hamilton and John Adams concurred. Adams (1851 [1790], 280) 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 perhaps Thomas Jefferson who left modern Americans with their most enduring image of this perspective – that of the yeoman farmer. For Jefferson, the idea of the yeoman farmer linked the individual's right to own and control property with the very existence and viability of democracy. 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.

But this view of the relationship of property to democracy, and the fact of asserting property's primacy, was not unchallenged. Also drawing from Locke, others saw the need for private property ownership to bow to social needs. As John Locke himself wrote (1952 [1690], 68–9):

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

Echoing these sentiments were Thomas Jefferson (a founder whose opinions can be cited by all sides to this debate), Benjamin Franklin, and others. Benjamin Franklin is perhaps the most articulate proponent of a counter-position to that of Madison, Adams, Hamilton, and others. For example, in the debate over the ratification of the Pennsylvania state constitution, Franklin (1907 [1789], 59) 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." In other words, Franklin did not see property rights as sacrosanct.³ Instead, he appeared to view as legitimate the public's right to create, re-create, take away, and regulate property as it best served public purposes.

³These sentiments by Franklin were not isolated. As noted by Brands (2000, 623) "Franklin took a striking socialistic view of property." Brands (2000, 623) provides these other examples of Franklin's opinions: "All property . . . seem to me to be the creature of public convention." "All the property that is necessary to a man for the conservation of the individual and propagation of the species is his natural right, . . . but all property superfluous to such purposes is the property of the public, who by their laws, have created it, and who may therefore by other laws dispose of it whenever the welfare of the public shall demand such disposition."

Property – 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.” What is telling about this phrase is that Thomas Jefferson, the Declaration’s author, borrowed it from Locke. Locke’s phrase was life, liberty, and property. This is what Jefferson wanted the Declaration to say, as a way of furthering his vision of a nation of yeoman farmers. Jefferson’s ideas, however, did not hold sway.

Eleven years later, in 1787, the US Constitution was adopted as a replacement for the Articles of Confederation. What did it say about land-based private property? Nothing! It was not until 1791 with the adoption of the Bill of Rights that the now infamous and contentious so-called “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.”⁴

With the adoption of this phrase, the Constitution formally recognized four concepts: the existence of private property, an action denoted as taken, a realm of activity which is public use, and a form of payment specified as just compensation. The interrelation of these concepts is such that where private property exists, it may be taken (i.e. seized by the government without the landowner’s permission) but only for a denoted public use and when just compensation is provided. If any of these conditions are not met, then a takings may not occur. But the clause does not say and colonial commentary does not clarify what constitutes private property, exactly when a taking has occurred, what is a public use, and what makes up just compensation.

In the colonial period and for a century afterward, disagreements about the place of private property in a democracy and the exact meaning of the takings clause were largely theoretical (though this presentation of policy and legal history is itself challengeable; see, for example, Siegan 2001). There was little regulation of land as we currently understand it. And 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 little social conflict over private property rights. 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 (Gates 1968). It was not until the twentieth century that this changed.

The twentieth-century legal framework

The twentieth century ushered in an entirely different period in American land use policy history, and thus social conflict over property rights. The “frontier” was settled (Turner 1893, Gates 1968). Public policy focus shifted from the disposition of

⁴The US Constitution does speak to private property, but just not about land-based private property. What the Constitution recognizes are slaves as property under Section 2 of Article IV, where it establishes the right of owners to have escaped slaves returned to them. Also under Section 2 of Article III, the Constitution establishes a procedure for how conflicting claims to state-based land grants by individuals would be resolved.

It is also worth noting that in the Fifth Amendment the phrase preceding the takings clause states “No person shall . . . be deprived of life, liberty or property, without due process of law,” making explicit the Locke-inspired link between liberty and property.

America's public lands to the management of its land resources. With this shift, America experienced a significant re-configuration of its demographic and spatial make-up. The 1920 US Census officially recorded the shift from a rural to an urban nation (Scott 1969). The turn of the century (1880–1920) was a period of intensive immigration, industrialization, and urbanization. It was in response to these conditions that modern land use and environmental planning and policy and the modern relationship of the state to the individual via private property rights was born. Cities and states began to pass regulations to manage public health and safety conditions. The impact of these regulations was to burden individual landowners – both private landowners and corporate landowners. Out of these new spatial and economic conditions arose a concern about the appropriate limits to government regulation.⁵

In this context, and throughout the century, the US Supreme Court found itself called upon to interpret the meaning of the takings clause in conditions very different than those in which it had been written. There is a huge body of scholarship about how to understand and approach the jurisprudence of the Court (two examples written for the non-specialist audience include Bosselman, Callies, and Banta (1973) and Meltz, Merriam, and Frank (1999)). For the purposes of this discussion, I rely heavily on the analysis and interpretation of Kayden (2004).

At first, the Supreme Court's answer to the question of whether there were limits to government management – regulation – of private property was simply and strongly no. As the century began, the Court affirmed the right of government to regulate absent any obligation for compensation. In language that now seems quite sweeping, the Court in 1915 examined the matter of government regulation and its impact on the individual. Its conclusion:

It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining . . . There must be progress, and if in its march private interests are in the way they must yield to the good of the community (Hadacheck v. Sebastian 239 US 394 (1915): 410).

But the conditions of the period were to keep the issues before the Court for another decade-plus. Within less than a decade, the Court, examining the issue again, seemed to completely change its mind about the reach of government power.

The key case in this regard is that of *Pennsylvania Coal v. Mahon* in 1922 (260 US 393 [1922]); subsequently referred to as *Penn Coal*. It was here that the Court defined the twentieth-century concept of regulatory taking. In this case the Court was asked to determine the validity of a state-based regulation that impacted the usability and integrity of mining-based private property rights. As noted above, they were operating in a context in which they themselves had validated a wide range of government regulations, some quite onerous, as long as the landowner was left with some property rights. In a decision that has echoed down through the years, the Court said in *Penn Coal*: “The general rule . . . is, that while property may be

⁵Zoning as a police power regulation was preceded by a variety of other, related public nuisance managing regulations, such as those for building codes, height limits, tenement laws, industrial districts, and so on. But prior to zoning these were adopted in an ad-hoc, reactive, and localized manner (see the discussion in Kolnick, 2008).

regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking” (260 US 393 (1922): 415; emphasis added). In other words, a regulation can be equivalent to a takings under the Fifth Amendment. If it is, however, then compensation is required. But what the Court did not say is exactly where the line is that distinguishes regulation that “goes too far” from regulation that does not.

The second case of importance from this period was the Court’s ruling on the validity of zoning. New York City is credited with inventing zoning in 1916. Within a few years, zoning had spread across the country as a way for cities to manage growing populations, industrialization, and property values (Scott 1969; Revell 1999). In 1926, the Court examined whether the idea of allowing a local government to regulate land use by designating land use zones, which provided for different levels of development opportunities, was acceptable (*Euclid v. Ambler Realty* 272 US 365 (1926)). The Court decided yes, such an approach to the management of private property rights was acceptable.

So, as the Depression loomed, the Court said: regulation that “goes too far” is unacceptable, but that regulation of private property rights through zoning is acceptable. So where was “too far?” The Court was not to define this in advance.

In practice, this was not a problem, as most governmental bodies did not use their authority to impose onerous requirements upon landowners.

After *Euclid*, the Court largely left the property rights arena for 50 years. During this quiescent period, however, there was one important case to take note of. In 1954 the Court took up the meaning of the “public use” phrase in the Taking Clause in the case of *Berman v. Parker*. (348 US 26 (1954)). The Court’s decision ushered in the era of urban renewal.

The question before the Court was the right of government to take private property, paying compensation, when the goal was to consolidate property for redevelopment often by another profit-making owner, all under the justification of “blight.” The Court upheld government’s right to do this. And in so doing the Court substantively rewrote one aspect of the takings clause, so “public use” could now be understood as “public purpose,” a decidedly less stringent standard for government to have to fulfill (while also ceding to legislative bodies the essential decision about project design and implementation): “It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch” (348 US 26 (1954): 35–6).

In 1978 the Court re-entered the property rights arena with renewed vigor, by seeking to establish boundaries to governmental authority. In the ensuing nearly 25 years since *Berman*, many things had changed – the composition of the Court and America’s attention to and involvement with private property rights. Since about 1970, the United States had experienced a literal explosion of laws, policies, and regulations at the national, state, and local levels that affected private property. The Clean Air Act, Clean Water Act, Coastal Zone Management Act, National Environmental Policy Act were all examples at the national level (Moss 1977 provides one then-contemporary chronicling of these). Among state governments, a so-called “quiet revolution in land use control” had occurred, where nearly a dozen states re-asserted their Constitutional authority to regulate private land use activities at the state level (Bosselman and Callies 1971). And local governments across the

country were beginning what has become decades-long experiments in public policy approaches to protect and manage farmlands, wetlands, open spaces, watersheds, threatened habitats, urban sprawl, etc.⁶

Between 1978 and 1994 the Court heard a series of cases in which they began to redefine the rules of interaction between government and private property owners.⁷ While the Court did not eviscerate the right of government to regulate private property, the Court did begin to more clearly say when the line of “too far” articulated in *Penn Coal* had been crossed. Of the cases decided in this period, one that received a great deal of attention was *Lucas*. Here the Court ruled that when all economically viable use has been taken by regulation, this was a case of regulation going “too far”, and compensation was owed by the landowner.⁸ The outcome of these cases was ambiguous, however. As commonly understood by private property owner-advocates and government officials, regulation was still acceptable, but a regulating body needed to be precise in the formulation and administration of regulations.

The twenty-first century began (and the twentieth century ended) with two major cases being decided by the Court, both of which seem to take a step back from the boundary-setting tone of the immediate prior period. In the 2002 case of *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (535 US 302 (2002)), the Court took up the matter of a nearly three-year moratoria on development in light of some of its prior boundary-setting decisions. In a decision strongly in favor of government, the Court found that planning and regulation are normal and expected governmental functions and that the Court had no reason to interfere with regular planning activity (Kayden 2002). In other words, planning and government regulatory action received a strong “green light.”

Then, in June 2005, the Court issued its closely watched decision in the case of *Kelo v. City of New London* (545 US 469 (2005)). Pressed by property rights advocates (see the section that follows), the Court agreed to clarify its thinking about the “public use” phrase in the Takings Clause, revisiting what was for some its controversial 1954 decision in *Berman v. Parker*. In the *Kelo* case, there was not even an assertion of “blight” by the city. Instead, the city asserted its right to take private

⁶Daniels and Bowers (1997) is an example of these approaches applied to farmland protection; Nelson and Dawkins (2004) is an example of these approaches applied to urban containment.

⁷Some of the most prominent and discussed examples include the decisions of the Court in the cases of *Penn Central Transport. Co. v. New York City* 438 US 104 (1978); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 US 304 (1987); *Nollan v. California Coastal Commission*, 483 US 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992); and *Dolan v. City of Tigard*, 512 US 374 (1994). It is interesting to note that immediately preceding this period the Court in the case of *Village of Belle Terre v. Boraas*, (416 US 1 (1974)) acted to further expand the concept of public purpose, as expressed in *Berman*, to include life style. So one way of reading the legal history of this period would be to see the Court allowing government to increase its authority over land use while at the same time clarifying the boundaries at which such action would be understood as improper or inappropriate.

⁸However, even in *Lucas* the Court provided government with an “out.” That is, the Court noted that its ruling was made with the proviso that the individual’s use of land could not violate state-based background principles of nuisance which governed property use (505 US 1003 (1992): 1029). Reflections published on the *Lucas* case at the time of its issuance include, for example, Callies (1993) and Protos (1993). Within a few years, skepticism emerged as to the case’s real impact, see, for example, Cerundolo (1998) and Sugameli (1999). Huffman (2008) is one of many continuing meditations on the case’s meaning and influence, in law and policy.

property, with compensation, for a public use, when the public use was defined to be consolidation of the land for distribution to another private owner in order to facilitate and further economic development in the city through new jobs and increased property tax revenues from the land. By a one-vote margin, the Court affirmed the public's right to do this.

In summary, one way to view the United States twentieth legal history of the relationship of government to private property and its owners can be characterized as a story that goes like this:

- 1915 – there is no limit to government regulation; the individual's property rights must yield to the needs of the community;
- 1922 – government regulation can go “too far” and if it does, owners are entitled to compensation or the regulation must be revoked;
- 1926 – zoning – local government's division of land into districts and the listing of acceptable uses for that land – is an acceptable form of regulation that does not go too far;
- 1954 – government can take private property land from one private party and then transfer it to another private party to further the public interest, when the original property is classified as “blighted;”
- 1978–1994 – there are limits to overzealous government regulation; government needs to be careful and precise in what it does. But it is not clear how much these limits really challenged the way government practiced its management of private property;
- 2002 – land regulation is a normal and expected function of government;
- 2005 – government can take private property land from one private party and then transfer it to another private party to further the public interest in the name of economic development, regardless of whether the original property is classified as “blighted.”

The property rights movement

The themes come together in the formation and subsequent activism of the so-called property rights movement.

From the perspective of the property rights movement, the intent of key American founders and the principles embodied in the founding documents of the United States make the protection of private property rights a key element of the American political and social contract (Jacobs 1995, 1998b; Marzulla 1996). One of the factors that make the United States so unique is how the right to own property and the protection of that property provide a buffer from the power of the state (Ely 1992). Through the ownership and control of property – land – the owner has the material conditions which allow him to be literally free. Following from Jefferson's idea of the yeoman farmer, ownership provides the conditions upon which liberty and the exercise of democratic citizenship are based. Without the availability of property, liberty, and democracy – in the American configuration – are not feasible. Thus, what is needed is a national state strongly committed to the ideal and the reality of private property, the protection of this property, and the integrity of this property. Why? Because the state understands that if there is a serious erosion in property and property rights, then there is a consequent erosion in the very viability of liberty and democracy.

This framing of American history comes together with an alarmist view of twentieth-century public policy and law. From the perspective of the property rights movement, the last 100 years present a story that appears to move away from a view of property rights as integral and central to liberty and democracy. Instead, what appears is a story in which government is allowed ever increasing authority to intrude upon, reshape, and take away property without respecting the protections afforded property by the Constitution (for public use and just compensation). Despite the promise contained in *Penn Coal* (1922) that regulation that “goes too far” will be recognized as a takings, in practice legislatures and the Court seem to continuously affirm the right of government over the rights of individuals with regard to property (Bosselman, Callies, and Banta 1973; Salkin 2001). Even the Court’s decisions of the late 1980s and early 1990s that appeared to hold promise for reigning in governmental practices seem to have had little real impact on those practices at the local, regional, and national levels (Roddewig and Duerksen 1989). With the 2002 decision in *Tahoe-Sierra* and the 2005 decision in *Kelo*, those activists concerned with the integrity of private property rights find little promise and solace in the arena of the Court.

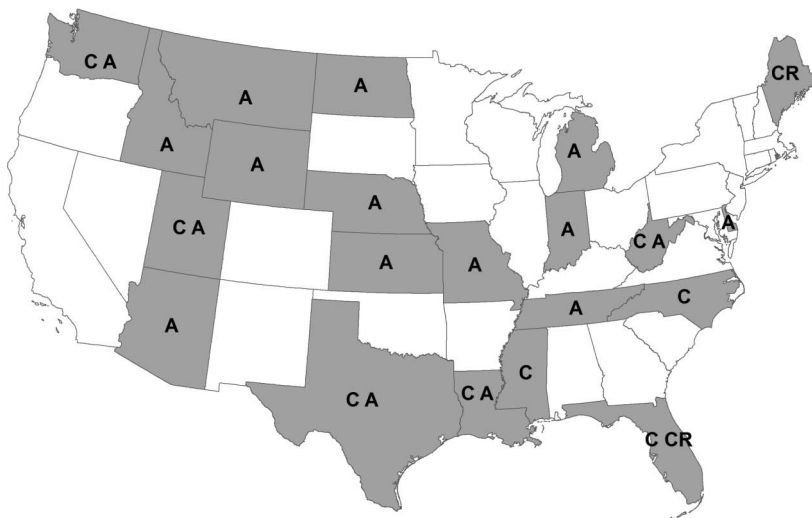
It is in part because of this that the political–social movement for private property rights protection was born (Gottlieb 1989, Miniter 1994). The movement was formally born in 1988 with a focus on western US land resources and labeled itself as the wise use movement (Gottlieb 1989).⁹ However, its intellectual and geographic antecedents originate at least with the rise of the modern environmental movement (e.g. McClaughry 1975, 1976). What exists today is a national coalition targeting national, state, and local land use and environmental laws, policies, and programs, such as those for endangered species protection, smart growth, farmland and wetland protection, etc. (Jacobs 1995; an early listing appears in Deal 1993). This coalition argues that these attempts at the management and restriction of private property are un-American, inefficient, and ultimately, ineffective.

The property rights movement has pursued a multi-level strategy to achieve their objectives – judicial, legislative, policy, and public relations (Jacobs 1999b). While they approach the judicial strategy skeptically (and the outcome of the *Tahoe-Sierra* and *Kelo* cases suggests their skepticism to be well founded), they will not forego this option since they see the property rights issue as fundamentally Constitutional. So, for example, they have assisted in the formation and funding of (non-profit) law firms to develop and pursue property rights cases; they have helped to develop a line of legal thinking consonant with their perspective on property rights; they have engaged in targeted education of law faculty, judges, and others; and they have worked to network likeminded intellectuals and activists (see the discussion on these and related points in Teles 2008). However, in conceptualizing an approach for engaging this issue they decided early on not to rely on legal decisions alone. They supplemented a legal strategy with a policy and legislative strategy. In their early years, this 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 US Congress (Pollot 1989; Folsom 1993). But much to their

⁹Since then it has gone through a variety of labels – wise use movement, land rights movement, property rights movement – settling on a version of the latter as the most generic (Brick and Cawley 1996; Yandle 1995).

frustration, there was little outcome for this activity. Quickly, therefore, the movement's strategy shifted toward state legislatures. And here they found fertile ground for their arguments and their ideas.¹⁰

Beginning in 1991, every state in the United States considered state-based legislation in support of the policy position of the property rights movement, and by the decade's end, 27 states have passed such legislation (Emerson and Wise 1997, Jacobs 1998a, 1999b; see figure). These states are on both sides of the Mississippi, are "red" and "blue" states, and extend from Maine to Washington, the Dakotas to Texas, with 11 of these states east of the Mississippi River. The property rights movement has offered three basic types of state-based laws to address what they believe to be the necessary corrective for law and policy.¹¹



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

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

Figure 1. 1990s state-based property rights laws.

¹⁰The states have always been central players in the land use drama. It is they who have residual authority under Article X of the Bill of Rights for land use, which in turn leads them to adopt enabling legislation passing this authority along to sub-state governments. Even under the *Kelo* decision (see the discussion below) the Court made explicit that its decision applied to an interpretation of eminent domain authority as authorized by the US Constitution, but that states could further interpret and restrict this authority as they felt it to be appropriate and as it fit within state constitutions and law: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power" (545 US 469 (2005), 489).

¹¹The following paragraphs draw heavily from Jacobs (1998a, 1999b). See White (2000) for one updating of this research.

Compensation laws grow out of frustration with what courts have not delivered in terms of “justice” to owners. They are designed and intended to by-pass courts and give owners a precise cause of action against government for laws, regulations, and policies that impact upon private property. What these laws do is establish by legislation the precise percentage at which an individual property owner is entitled to compensation (rather than leaving it up to a court to decide if any compensation is due at all and forcing the landowner to initiate an action). These laws, adopted in six states, establish percentages that range from 10 to 50; that is, if a state or local law reduce property values by the amount set in the state-based law, the landowner has a legislative basis for claiming compensation, or having the burden of the legislation removed.

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. Conceptually, this approach is modeled on the requirement for environmental impact assessments required under the National Environmental Policy Act (NEPA). These laws are put forth as “look before you leap” laws. They are intended to make the public sector do the research that the property rights movement can then use to fight proposed private property rights “impinging” proposals. TIA requirements have been adopted in 17 states and follow the model first promulgated as an Executive Order under President Reagan (Folsom 1993).

These two legislative approaches – compensation and taking impact assessment – represented the first wave of state-based laws and a majority of these laws. Most were passed in the period 1991–1995. However, much to the surprise and frustration of the property rights movement, these laws did not yield the results that the movement had expected. Why not? For three prominent reasons. One, these laws were often promoted by a committed single legislator (or small group of legislators) without a base of supporters who actively cared about the issue and were committed to monitoring its implementation. As a result, once implemented, no one used the law’s mechanism as a basis of agency-forcing action. Two, as state-based actions, these laws (especially the TIA laws) were assigned to state agencies to implement, agencies which often actively opposed the intent and mechanism of the laws, and thus undermined the laws implementation. Three, the compensation laws established a “too far” for compensation which local land use laws, in fact, never crossed.¹²

In the mid-1990s, the property rights movement adopted a second-wave approach to state-based laws: conflict resolution laws. These were presented as “let’s sit down and talk about it reasonably” laws. They were framed within the language of conflict resolution and alternative dispute resolution. However, given that they were intended to further the policy strategy of the property rights movement, they were written in such a way as to grant the landowner a strong cause of action against government, to precisely prescribe the terms under which dispute resolution would occur, and to pre-determine the basis (favorable to the landowner) under which resolution of asserted conflicts could be achieved. Florida and Maine adopted this approach.

¹²These lessons are drawn from the national study funded by the Lincoln Institute of Land Policy and reported in Jacobs 1999b, and summarized in Jacobs 1998a. A state which exemplifies point number two is Kansas; a state which exemplifies point number three is Mississippi.

In addition to a state-based strategy, the property rights movement also pursued a more local strategy, focused at the county level, primarily in the American west. Based on an obtuse interpretation of language in NEPA, the movement promoted what they deemed as “culture and custom” ordinances (Hungerford 1995; Budd-Falen 1996; Reed 1996). These ordinances were so-called land use plans. What they did was assert the primacy of the county as the lead governmental agency for all aspects of land use and environmental planning and policy, even when county-based policy conflicted with state or federal planning and policy. Even though this approach has been found to be blatantly illegal – a violation of the supremacy clause of the US Constitution – it was actively promoted in over 300 counties, adopted by scores of counties as far east as Michigan, and actions based on it became prominent in national media coverage of the movement in the mid-1990s.¹³

By the late 1990s the property rights movement had come to a policy standstill. They had been effective in passing state-based laws; they had been effective in promoting county-based laws; they had been effective in garnering significant media attention to their cause; but they had been ineffective in changing the fundamental way government – at the national, state, and local levels – acted toward and upon property.

With the dawn of the twenty-first century, the movement had an opportunity to revise their strategy. Largely this came about because of the election of George W. Bush to the White House (Jacobs 2003). With a sympathizer occupying the president’s office, the movement decided to try again for nationally based action, through the President’s office and through Congress. Initially, it appeared that they were going to have a great deal of influence. Patterns of appointments and non-appointments in the administration suggested this (Jacobs 2003). However, several factors – principally the systemic impact of 9/11 on Administration priorities and Congressional realignments – forced the movement back to a state-based strategy. The outcome of this move appeared to yield more than was anticipated.

In November 2004, the property rights movement sponsored an initiative in the state of Oregon directly intended to undercut the influence and impact of Oregon’s 30-year-old and model approach to land use and environmental planning and urban sprawl management (Oliver 2004; Rohse 2004). The initiative was a form of compensation law. It was closely watched nationally, because of Oregon’s role as a leading state in the area of land use and environmental planning (Ozawa 2004). The initiative was similar to one put before the voters in November 2000 (Abbott, Adler, and Howe 2003). The 2000 initiative passed, but it was subsequently found to not meet procedural requirements spelled out in Oregon’s constitution. The November 2004 initiative – Measure 37 – passed by a 61% majority. The measure forced the state of Oregon and local governments to either remove the requirements of their 30-year-old land use 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. In early 2006 the Oregon State Supreme Court upheld the legality of the initiative, after it had been challenged

¹³ *Boundary Backpackers, et al. v. Boundary County, et al.* 913 P. 2d 1141 (1996) is the legal case; the county movement was profiled on the front cover of *Time* magazine on 23 October 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.

by the environmental community on state constitutional grounds, and found to be unconstitutional by lower state court (*Macpherson et al. v. Department of Administrative Services et al.* 340 Ore. 117 (2006)).

The adoption of Measure 37 by such a strong majority in Oregon has emboldened the property rights movement. Their thinking – if they can shape citizen attention and grab citizen support in Oregon, they can do this anywhere. Parallel efforts began bubbling in other states – for example, Colorado, Florida, South Carolina, Washington, Wisconsin, and Wyoming – and were scheduled to spread to even more states (states with either the initiative option or sympathetic legislators) (Harden 2005). In addition, the US Supreme Court decision in *Kelo* engendered a spate of state-based reactions, reactions intended to blunt the potential impact of *Kelo* in implementation (Egan 2005; Pristin 2006; see the discussion that follows). Together these two actions – the success of the property rights movement in Oregon and the opportunity for state-based laws in reaction to *Kelo* – has, I believe, launched a third-wave approach for state-based action.

Post measure 37 and *Kelo*

As noted, the private property rights movement found themselves at a loss as to how to proceed with a political, policy, and legal strategy in the period after 9/11 (2001). This event changed the domestic policy landscape in several ways. First, the Bush administration, which had come in to office with an almost dismissive attitude toward international events found itself necessarily pre-occupied with international affairs. And, perhaps most importantly for the property rights movement, the Bush administration approached this new policy climate with an attitude that suggested the need to curb and/or reconfigure fundamental and foundational Constitutional rights and protections (Jacobs 2003). Therefore, not only was the national administration no longer necessarily responsive to proposals for national-based action with regard to property rights (for example, actions analogous to those taken by President Reagan with the Executive Orders which ushered in the experimentation with takings impact assessment laws and procedures), but a political-policy strategy which relied on an argument on the need to protect foundational Constitutional rights seemed less compelling in the new policy environment.

What to do?

Unexpectedly, the answer seems to have come from the very structure of American government. As noted, in 2000, the property rights movement sponsored a citizen initiative in Oregon (Measure 7) designed to (based on who is telling the story) either blunt the impact of Oregon's longstanding program for comprehensive land use planning as it unduly and unreasonably affected individual property owners, or dismantle this program (Abbott, Adler, and Howe 2003). Measure 7 passed. But in the wake of its passage, the anti-Measure 7 community (those supporting: smart growth, Oregon's longstanding land use planning program, many local government officials, environmentalists) challenged the legality of the initiative based on the procedural requirements for such actions. Ultimately, the Oregon Supreme Court agreed with this challenge and found Measure 7 invalid and unenforceable.

This outcome incensed the property rights movement. From their point of view, the citizens of the state had spoken clearly on the substance of the matter, and yet, their will had been thwarted by legal wrangling and maneuvering. They vowed to not

let the issue die, and returned with Measure 37 (the so-called “son of 7”) in 2004. Much to their delight and the disappointment (and shock) of Measure 37’s opponents, Measure 37 passed with a 61% majority. Indeed, it did appear that the people of Oregon had spoken with regard to their frustration with Oregon’s land use planning program.¹⁴ Appeals that were made by Measure 37’s proponents spoke to issues of fundamental fairness to individual landowners, owners such as Dorothy English, the public face of the Measure 37 campaign. Dorothy English was a very appealing spokesperson for the campaign. A widower in her nineties, she and her husband had purchased land in 1953 (40 acres) in Portland’s West Hills, one mile from the city’s boundary. Their plan was to subdivide the property, live on a portion of it, and use the income from the remainder for their retirement. The advent of the Oregon’s statewide program prevented this.

Once Measure 37 was passed and ultimately affirmed, after challenges to it were presented to and rejected by the Oregon Supreme Court, the property rights movement seized on the success in Oregon as one potential model for advancing their agenda. In states with the initiative option (primarily in the western US), the strategy used to advance Measure 37 seemed to provide a model for how to talk to citizens about the property rights issue in an era when the issue had once again been pushed back to the states.

The potential of Measure 37 was limited, however. Few states have the type of state-wide land use planning program that Oregon has (had?), and the strategy for advancing similar measures was only viable in states with the initiative option.

For the property rights movement, however, their fortunes were bolstered by the seemingly unfavorable decision from the US Supreme Court – the *Kelo* case.

As in Measure 37, the *Kelo* case was, according to its critics, carefully orchestrated. A sympathetic plaintiff, Susette Kelo, was the case’s spokesperson. The case centered on the Fort Trumbull neighborhood in New London, Connecticut, an area of about 90 acres (364,000 m²) and containing about 115 parcels. The owners of 15 of those parcels did not want to accept a governmental offer to sell their property. Susette Kelo was one of those residential owners; she had purchased a small, Victorian-style cottage in 1997 and restored it, painting it salmon pink. Her attorneys were an activist, self-identified libertarian legal think-tank with a particular focus on property rights issues (the Institute for Justice, <http://www.ij.org/>).

The *Kelo* case posed the question of whether government could take private land under the takings clause when just compensation is paid, and the purpose is public use for increased economic development opportunities and increased land taxation, even though the land is not identified as “blighted.” From the decision and subsequent commentary, it is clear that the justices found this case confounding. The case was decided by a one-vote margin (5–4) in favor of government’s right to act in this way. It would appear that in making this decision, the Court struck a blow against the property rights movement (Greenhouse 2005). But subsequent state-based actions make one wonder which way the Institute for Justice hoped the case would be decided.

The *Kelo* case established what was permissible under federal law. But it did not mandate that it be how states behaved (see footnote 9). Instead, the decision made

¹⁴It must be noted that whether or not the people of Oregon have indeed spoken with regard to their frustration seems to be belied by subsequent public opinion surveys which suggested many voters did not know what they were voting on, or what its impacts would be for land use activity in Oregon.

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 since.

Under the banner of rapacious government activity, property rights activists are using the *Kelo* decision to initiate a public conversation about property rights. Given their perspective and objective, the conversation is decidedly one sided, but it is a conversation. The property rights movement wants citizens to talk about the issues of (a) when is it reasonable and legitimate for government to take property under the authority of the takings clause, and (b) whether there are limits to reasonable government regulation, beyond which the individual property owner is entitled to a degree of compensation (a la *Penn Coal*).

The property right movement's success in bringing this conversation into the public realm has been breath-taking. They have managed to put the issue into the most mainstream of media fora (e.g. *Parade* magazine), and they orchestrated a set of votes on anti-*Kelo* measures in nearly all 50 states. Over 40 states have adopted these laws (Castle Coalition 2007; Jacobs Hannah 2007; Echeverria and Hansen-Young 2008; Jacobs and Bassett 2010a). Yet, what impact these laws are having (or might have) is much less clear.¹⁵

Kelo (largely and Measure 37 secondarily) has allowed the property rights movement to give their issue (and perspective) public visibility, to make it a national issue, and, importantly, to establish the issue as one of (oppressive) government and vulturous big corporations versus the (working class) common person (thus "stealing" a long-standing perspective from the "liberal-left").

Via the public "outcry" that has been orchestrated in reaction to *Kelo*, the property rights movement has been able to establish in the public mind what they are for: strong property rights, reduced government regulation, and a system that entrusts people to make their own decisions about their own land. Most fundamentally, the property rights movement is arguing that nothing has changed in America's social contract over property rights; they are for linking contemporary institutional structures around property rights to their interpretation of long-standing "guarantees."

The property rights movement pursues their agenda through a linked network of national, regional, state, and local think-tanks and activists organizations which proffer their message and offer models of how to organize and what to organize around (e.g. Institute for Justice, Competitive Enterprise Institute, etc.). In this way, they are no different than, for example, the environmental movement. This network provides a vehicle for mutual learning, through discussion about political, legislative, legal, and media strategies, a mutual support network for activists who may feel isolated in their particular locale and importantly potential access to funding for the implementation of political, legislative, legal, and media strategies (Teles 2008). So, for example, a telling aspect of the 2006 state initiatives was the broad involvement of Howie Rich and his libertarian-oriented Fund for Democracy organization, which paid for petition gatherers in several of the states (Ring 2006).

¹⁵Research suggests that these laws have neither substantively changed public administrative practice nor seem to fundamentally matter to the public and its representatives. What these laws have done is push the planning process to be more transparent and more participatory. However, at the same time, survey results suggest that respondents perceive the property rights movement to have continuing and enduring strength (Jacobs and Bassett 2010b).

The future of the property rights conflict

In the fall of 2006, the property rights movement had the opportunity to demonstrate the strength of their apparent support. Following their victory in the state of Oregon with Measure 37 in 2004 and the public outcry over the US Supreme Court's 2005 decision in *Kelo*, the movement orchestrated a set of votes about property rights issues in six states (Arizona, California, Idaho, Montana, Nevada, and Washington). Largely using the initiative provision, citizens petitioned to have so-called *Kelo* and *Kelo-plus* laws passed. (*Kelo* laws seek to take up the opportunity offered by the US Supreme Court for states to implement restrictions on eminent domain more stringent than allowed under *Kelo* [see footnote 9]; *Kelo-plus* laws use the public furor over the *Kelo* decision to appear to be about eminent domain but are more substantively about regulatory takings.) Much to the surprise of the property rights movement – and to the delight of planning's supporters – these measures failed in five of the six states in which they were proposed, including some states with long-standing, well-known, strong property rights traditions; only Arizona's passed (Jacobs Hannah 2007). Then in 2007, the citizens of Oregon had the opportunity to re-consider their 2004 vote. Again, much to the delight of planning's advocates, by a nearly two-third's margin, voters approved Measure 49, which was touted as turning back many of the more anti-planning, pro-property rights components of 2004's Measure 37.¹⁶

What does all this mean? How does an observer make sense of what appears to be a pendulum swing of voter actions and opinions?

Let me say what I think it does not mean. Votes in 2006 and 2007 do not mean that social conflict over property right is over in the United States. Conflicting concepts about the rights of the individual and the right of government *vis-à-vis* property is a multi-century issue in the United States, whose character changes with the social conditions of the times (Jacobs 1999a).

In the short term, the property rights movement has shown itself to be very adept at learning from its experiences in the courts, in the legislatures, and with the media. Theirs is a long-term project. While they may be frustrated by short-term setbacks, they are impassioned by their perspective on property rights, and the need, from their perspective, to restrain government power and reframe public discourse (Jacobs 2007).

In 2008, property rights as an issue was inconsequential as part of the US presidential campaign. But that is not really surprising. Even the condition of cities had minimal discussion (Haberman 2007).

Reflective of the structure of US government, it is largely at the level of the states that power and action for planning and property rights occurs. I expect that the property rights movement will continue to promote actions in states across the United States to further its vision of the proper (restrained) relationship of government to the individual regarding property rights. And planning's advocates will continue with their argument that planning and government regulation are

¹⁶Clearly, some of the bases for the ability to overturn Measure 37 were its land use and fiscal impacts. By the fall of 2007, more than 7700 claims had been filed under Measure 37, seeking land use development permission for a total of 800,000 acres, and claiming potential damages from state and local government in the area of \$17 billion!

fundamentally American, consonant with American values, and in fact protective, rather than threatening, of property rights.

As I write, the nature of national public discussion is quite different from that of the 2004–2006 period. Today, the focus is on the aftermath of the sub-prime mortgage collapse and its systemic impacts on the domestic (and international) economy. Communities nationwide are having to have unexpected and uncomfortable discussions about the provision of local services as the property tax base which supports those services softens, even collapses. And given the fiscal condition of states and the national government, it is not at all clear they will be in a position to assist, as income tax revenues also stagnate.

In this context, it is possible that planning in general and regulation and eminent domain in particular may be reexamined at the local level, and even witness a resurgence in support. In the future, communities severely affected by the credit, housing, and mortgage-finance crises may choose to reexamine eminent domain and related powers as ways to address abandoned housing and facilitate economic and social redevelopment. And as communities do this, it is not at all clear what, if any, resistance they will experience from a citizenry wanting (and needing) real solutions to real and seemingly evermore complex problems.

So what will be the “ultimate” or “final” outcome of this debate about property rights? As I have argued elsewhere, I do not believe it will ever be settled.

The balance point between individual and social rights in property will continually be renegotiated, as technology and social values change. As Americans continue to reinvent their concept of freedom, of what it means to have liberty, they will come to understand anew what it means to hold private property while living in a democratic society. . . . Private property rights and land are socially contentious because they mean so much to us as Americans. I am glad that we care (Jacobs 1999a, 147).

But even this is true, is there anything planners and planning’s advocates can and should do? In a recent article, a colleague and I argued that there are at least three strategies that can be pursued (Jacobs and Paulsen 2009).¹⁷

Planners must tell their own story about planning and property rights. The perspective of the property rights movement is strongly one-sided, and yet, its rhetoric seems to have captured the public mood because, in part, as a simplified story, it is culturally and politically compelling. Rather than avoiding a public conversation about property rights, planners need to stress how planning, regulation, and even the taking of land for economic development purposes are as American as America itself, though never without controversy.

Planners need a new language to discuss property, especially private property. Planners must develop a way of talking about property which highlights both rights *and* duties of private owners *and* the community. At least since the 1970s, there have been repeated calls to rethink what property means, what ownership means, and how to balance private and public rights and duties in property. Planners need to take a lead in helping to articulate and refine this language.

Third, the planning community should take up the challenge posed by the first generation of state property rights laws, and embrace the idea of preparing something like a property rights impact statement as part of the planning process. A planning-based approach would highlight both the costs and the benefits, and the

¹⁷The following three paragraphs draw from parallel text in the noted article.

short- and long-term consequences of both action and inaction on the proposed plans or policies. Such an exercise has the potential to clarify public discussion in the best tradition of applied planning research. How will planning proposals modify or create property rights? How will the effects of these modifications be distributed? Who will gain and who will lose? How will future generations and the environment be affected? While the answers to these questions will not be obvious, if such questions are not asked and answered, planners themselves remain unaware of the real consequences of what they propose, and their proposals may seed social conflict rather than foster community consensus.

Continually talking about, even fighting, over conflicting concepts of property rights is one of those processes that is both central to and necessary for the American experience. But planners do not need to be passive in this experience. And the more active they are, the more likely they are to affect an outcome in line with a planning perspective.

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