

1. Introduction: Is all that is solid melting into air?

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What is it that you own? How do you know what is yours? How do you protect what is yours from the assertion by others, including the government, that what is yours is theirs? Is what is yours, what you own, the same as what your parents, grandparents or great-grandparents considered their ownership rights? And if what you own is not the same as what prior generations owned, why has this changed, and most importantly how is it likely to change into the future? These and related questions are those that this book seeks to answer.

THE ISSUE OF PROPERTY RIGHTS

During the 1990s private property took center stage on the international and national policy and political scene. Internationally its re-emergence was tied to the fall of Communism in the eastern bloc in the early 1990s, and the subsequent push by developed countries to move the formerly socialist countries of Central and Eastern Europe into democratic governance and market capitalism. Establishing secure, exchangeable private property was identified as a necessary precondition for these two social transformations (de Soto, 2000; Singer, 2000). But this book largely (though not completely) leaves this aspect of private property aside. Instead it concentrates on the re-emergence of private property as an issue of social conflict within US policy and politics.

Within the US it is the rise of the so-called private property rights movement that is responsible for the focus on private property.¹ The movement, formally existing only since 1988, comprises a broad coalition of those dissatisfied with the growth of land-use and environmental regulation. The overt agenda of the property rights movement is to halt the spread of new regulations and where possible weaken the impact of existing regulations. From the point of view of movement proponents, these regulations are prob-

lematic because of how they erode the core bundle of private property rights (Gottlieb, 1989; DeLong, 1997).² Proponents believe that through public policy and regulation one of the more foundational social contracts upon which the country was established is being undermined, seriously threatening the future of democratic society.³

For a new social movement the private property rights movement has had impressive, and to many land-use and environmental advocates surprising, success in its short life. Proponents have succeeded in keeping their agenda before the US Congress throughout the 1990s. In addition the movement has succeeded in having bills introduced in every US state. And proponents have promoted significant parallel activity in over 300 counties.

At the federal level, in every legislative session of the 1990s the private property rights movement has facilitated the sponsorship of bills with titles like The Private Property Rights Protection Act for the purpose of directing federal agencies to behave in ways highly respectful of the property rights of private landowners (Sugameli, 1997). These bills, despite often powerful sponsors, have largely languished (Jacobs, 1995, 1998c). However, the movement has been more successful with specific efforts to block selected federal actions. Most notable was its success in the early 1990s in derailing efforts among an interagency group to create and implement an integrated environmental management plan for the greater Yellowstone ecosystem, and its success at preventing the elevation of the Environmental Protection Agency to cabinet level status as promised by then-candidate Clinton during his first presidential campaign.

But it has been at the state level that the property rights movement has had the most visible and substantive impact. Since 1991, every state in the US has introduced legislation in support of the movement's political and policy agenda and 27 states (27 of the lower 48 states) have adopted these laws (Jacobs, 1998a, 1999b; Marzulla, 1995). Beyond the mere numbers is the pattern of this activity. While state activity is heavily concentrated in those western states with large amounts of federal land, it is not restricted to them. State activity includes large and small eastern states, southern states, and most importantly two of the states most consistently recognized for their progressive land and environmental policies (Florida and Oregon).

Finally, the movement has more quietly pursued a program focusing on getting counties to adopt land-use planning ordinances whose substance starts from the premise of respect for private property rights, and then goes further by asserting the right of the county to supersede the authority of any state or federal land or environmental agency where it interferes with private property rights (Hungerford, 1995). These so-called culture and custom ordinances have been found to be a blatant violation of federal constitutional and statutory law and yet this has not prevented over 300 primarily large western

counties from either adopting or giving serious consideration to their adoption.⁴ So while this action is largely unsuccessful in implementation, its strength is in its strong symbolic value for its supporters.

All of this political/policy activity at all levels came about in part because of the dissatisfaction and frustration of the property rights movement with the outcome of federal judiciary processes. For the 12 years of the Reagan and Bush presidencies, substantial numbers of political conservatives had been appointed to all levels of the court system. Yet, despite this, the decisions that emanated from the judiciary continued to allow the growth of federal, state and local regulation, and in fact seemed, with relatively minor exceptions, to continue to legitimize the right of government to adopt law, rules and regulations and so on that could often have substantial negative impacts on private property owners. So the property rights movement undertook a broad-scale campaign – both policy/political and public relations – to redirect public discourse about land and environmental policy so that more and more legislators, members of the media and the American public would view the issue of land-use and environmental policy from the perspective of how it impinges on private property, rather than on how it furthers public goals. It is now more common for proposed regulatory activity to have to prove that its benefits outweigh its costs, when these costs are broadly measured as the actual and anticipated burden placed on property owners (including their investment-backed expectations) and the benefits to the public welfare are narrowly construed (Jacobs, 1999a).

To some extent the rise and impact of the private property rights movement is perplexing. Since the first Earth Day in 1970 there has seemed to be an ever-growing social consensus about land-use and environmental issues in America. At the national and state levels many innovative approaches for land and environmental management were adopted (Bosselman and Callies, 1971; Popper, 1981, 1988; Porter, 1997). In fact, public opinion polls over the last few decades show the American polity providing a consistent level of support for environmental protection programs and activities at all levels of government (Dunlap, 1991).

So how to explain this dissonance? It could be suggested that it is an outgrowth of the anti-environmental rhetoric and administrative appointments of the early Reagan administration. Thinking this was the case, in 1994, the so-called Republican Revolution swept to electoral victory with a strong anti-environmental/pro-property rights platform reminiscent of that put forth by the Reagan administration (Gillespie and Schellhas, 1994). Within a few years, however, the leaders of the Revolution found themselves having to soften their stand for the 1996 elections, portraying the party as defenders of the environment out of their concern about becoming alienated from the mainstream of voters.

How is it then that the private property rights movement was and is able to mount its perspective in this climate of opinion and belief? In part the answer has to do with its recognition of how deeply the private property issue sinks into the American psyche and how important it is in the American character. American character is hard to summarize; one important element has to do with feeling for the ownership and control of land. And this quality goes deep into American history itself.

PROPERTY RIGHTS IN AMERICAN HISTORY

The early political history of the US is often portrayed as migrations spurred by the issues captured in the First Amendment of the Bill of Rights – a search for political and religious freedom. It was this, but it was as much a migration history for access to freehold land unavailable in Europe. The US was settled by people, first Europeans but continuing through to today, searching for religious and political freedom, *and* for access to land (Ely, 1992). In America's early years Western European countries were still structured under the vestiges of feudalism. An elite owned most of the land, and the prospects for the ordinary person to obtain freehold (obligation-free) ownership was nil. America offered an alternative. Here was a place where any white immigrant could get ownership of land, and with that land as capital make a future for themselves. America was the land of opportunity. To be an American was (is) to own and control private property. So, while public opinion polls show environmental protection (of which land-use planning is a part) is supported by most Americans, many of these same citizens can be deeply disturbed by the public regulatory programs that achieve this goal by impinging on private property rights.

In America's colonial past, the existence of land converged nicely with the new political theories of the period, coming together into ideas about ownership and democracy. James Madison, writing in the *Federalist Paper* No. 54, during the debate about the ratification of the US Constitution, argued that '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, in a fiery set of words (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.' According to this perspective, one came to own land through using it, and freely constituted governments (that is, democracies) existed for the protection of individual liberties, including the liberty to own and use land.⁵

For these founders these ideas were configured into a particular and specific relationship. Democracy required liberty (and vice versa), and both in turn required freehold property. It was Thomas Jefferson who articulated the notion of the yeoman, freehold farmer, as the bastion of the new democracy, precisely because freehold ownership of land gave economic and thus political freedom. Because the yeoman farmer could produce for himself on land he owned, he was encumbered to no one, and thus was free to make political judgments which reflected the best for the public interest (Gilreath, 1999).

But this view of the relationship of property to democracy, and the fact of asserting property's primacy, was not unchallenged even in its own time. Perhaps the most articulate spokesman of an alternative (environmental?) perspective was Benjamin Franklin. In the same period, during the debate on the ratification of the Pennsylvania state constitution, Franklin (1967 [1789]: 59) noted with force that 'private property is a creature of society, and is subject to the calls of that society whenever its necessities require it, even to the last farthing.' Franklin was not alone in these sentiments; he shared them with Thomas Jefferson and others.⁶ And what we see when we look at this issue closely is that the meaning of land and private property and their relationship to citizenship and democratic structure are contentious issues – issues on which Americans have not and do not hold consensus. Rather these are issues central to how we fight over the very nature of what it means to be American (Ely, 1992; Jacobs, 1998b, 1999a).

To some extent this lack of consensus is reflected in our founding national documents. In 1776 Thomas Jefferson's first draft of the Declaration of Independence contained the phrase 'life, liberty and property;' in the Declaration's final form this was changed to reflect disagreements about the implications of what was being promised to citizens of the new country (life, liberty and the pursuit of happiness). Eleven years later, in 1787, the Constitution was adopted without any specific mention of land-related property. It was not until the adoption of the Bill of Rights in 1791 that the disagreements among the founders found a degree of consensus in the wording for the taking clause, the final 12 words of the Fifth Amendment 'nor shall private property by taken for public use, without just compensation.' But as has been noted by countless scholars, our understanding of the exact meaning of these words to those who crafted them is unclear (for example Ely, 1992; Treanor, 1995; Jacobs, 1999a). The clause defines neither private property, takings, public use nor just compensation.

The private property rights movement has succeeded by reminding the American public that private property is a core issue for Americans and that fighting over its form is key to a fundamental set of American social values. The takings clause is a touchstone for many, and it does appear to provide a set of clear protections for the individual's private property rights.⁷ There-

fore, regardless of one's perspective on the worthiness of this movement's policy and political agenda, proponents of the movement end up raising an important and perplexing set of theoretical questions that underlie land-use and environmental planning and policy – what is private property and what are the limits on the state's actions towards it?

Conceptually land-use and environmental planning and policy are premised on the need for individual property rights to yield to a collective definition of the public interest. Such planning and policy argue that an unfettered right to exercise individual property rights does not serve the greater public good. As some environmentalists see it, land-use and environmental problems arise precisely because property rights are privately held and managed. Individuals are making land-use management decisions which do not take into account the broader public interest, and a more expansive economic calculus. A litany of common land-use and environmental issues – farmland loss in the peri-urban zone, wetland loss, suburban sprawl, downtown deterioration and so on – have all been depicted as issues that arise from a version of Garrett Hardin's (1968) 'tragedy of the commons.' In these instances, the tragedy is that individual landowners make decisions that are economically and socially sensible to them, but are not judged to be as sensible to the broader public. To put the same point in the terms of classical economics, each individual pursuing their own self-interest does not yield the greater social interest.⁸

But the private property rights movement does not see it this way. It argues that by seeing modern society as a series of Hardin-style tragedy-of-the-commons situations, society (government) is able to continually justify a restriction/removal of property rights every time a new land-use and environmental problem is identified; there is no reasonable end in sight. There are at least two problems with this: when what I own and control is only what the government says I own and control, does private property really exist? And what about the literal and figurative property-democracy social contract which forged and underlies the nation?⁹

According to the private property rights movement interpretation of history, it is the right to own and control property which is the driving force behind (almost) all free and prosperous societies throughout history (Bethell, 1998). Thus the rise of an approach to land-use and environmental policy which relies on a diminution of property rights is problematic because it diminishes freedom, restricts a fundamental condition for economic growth and liberty, and is fundamentally un-American.

Having said all this, the private property rights movement does not deny the reality of a set of land-use and environmental problems. Rather it argues that there are alternative economic and legal ways to address these that do not abrogate property rights, and thus impinge on foundational principles and result in such significant negative consequences for individuals and society

(Ellickson, 1973; Epstein, 1985; Anderson and Leal, 2001). The goal is to have a secure set of private property rights.

THE AMBIGUOUS FUTURE FOR PRIVATE PROPERTY

But there is a paradox and a problem with this conceptualization, and it is this paradox and problem which led to the idea for this book. The paradox is that there is a strong element of truth in the way property conservatives want to present and understand the role of property in American history and in the American character; this cannot and should not be denied. The problem is that there is no time and place in America's past when private property was not subject to significant social pressures and forces.

While some Founding Fathers did appear to want to afford property a central place in the constitutional/social contract schema, there was no consensus among the founders; their ultimate crafting of language in the Declaration of Independence, the US Constitution and the Bill of Rights reflected this lack of consensus and acknowledgment of compromise (Bosselman *et al.*, 1973; Ely, 1992). In addition, and perhaps as important, is that fact that even during colonial times, pre- and post-independence, individuals did not hold an unassailable body of property rights. During colonial times local governments exercised land-use regulatory control analogous and clearly traceable to modern land-use and environmental zoning regulations. For example, colonial Virginia regulated tobacco-related planting practices (to prevent overplanting and require crop rotation), and Boston, New York City and Charlestown regulated the location of businesses such as bakeries and slaughterhouses, often (for the latter) to the point of exclusion (Treanor, 1995).

But the problem is more, greater and deeper than this. The takings clause of the Bill of Rights seems to provide a clear set of guidelines for the integrity of the right of ownership, especially in the situation when government seeks to undertake possession of land or land rights – this was/is precisely the point – to avoid arbitrary action by government. But not only is there a long history of (uncompensated) regulatory action by government in its relationship to individuals, there is also a history of substantial reconfiguration of the foundational property rights bundle reflective of changing social values and changing technology (Bosselman *et al.*, 1973).

Many examples of this can be given; I offer just a few.

First, as noted, until the adoption of the takings clause of the Fifth Amendment of the Bill of Rights in 1791, despite the passion held by some founders, there is little mention of private property in the founding documents of the US. The one mention there is, is oblique. In the Constitution in Article 1,

Section 2 there is recognition that ownership extended to slaves. In 1863, with the issuance of the Emancipation Proclamation, President Lincoln freed the slaves, thus taking this property from these owners. When the Civil War was won by the north, a set of these owners sued in federal court for compensation over the taking of their property by the federal government. Under the terms of the takings clause their assertion seemed reasonable. Their private property had been taken for a public use but they had not received just compensation. The result of the legal action, however, did not affirm their position. Instead, the courts argued that new social values – a new view of the right of one human being to own and control another – overrode a prior, legitimate definition of property. And in fact, the codification of this view in the Thirteenth Amendment, which specifically outlawed slavery, reinforced this point.

Second, under a classic definition of private property – the definition taught to first-year law students in their property class – owning property means *cuius est solum eius est usque ad coelum et usque ad inferos*: whoever owns the soil owns all the way to heaven and all the way to the depths.

This definition was exactly how most owners treated their possession through the eighteenth and nineteenth centuries. It made perfect sense until 1903 when the Wright brothers got their first airplane airborne. Within a very few years the airplane went from a novelty to commercial development. What was the property consequence? Under the commonly understood definition of private property, every time an airplane flew over someone's property it was guilty of trespass. The airplane had entered that property without permission as surely as if the pilot had walked up to a fence, smashed it and kept walking. The problem was this – as air travel expanded, the pre-twentieth-century definition of private property no longer appeared socially functional. If individual landowners could claim trespass of and demand compensation for their property by airplanes, air travel would become either too cumbersome or too expensive.

What happened? During the first half of the twentieth century, the US courts scratched their heads over this problem. Eventually they solved it by 'public-izing' air rights above a certain elevation without requiring compensation under the Fifth Amendment (Jacobs and Ohm, 1995). That is, the courts reappropriated airspace to the public sphere so individual owners no longer owned *est usque ad coelum*. In effect, the courts created a new commons where one had not existed before. The creation of this new commons responded to changing social needs pushed by changing technology.

Third, in the 1960s, a century after the freeing of the slaves, further changes in race relations had similar impacts upon private property. In the popular mind, a focus of the civil rights movement was the practice of lunch-counter owners in the American south. These owners, reflecting their

understanding of their private property rights, decided whom they would serve and whom they wouldn't. They acted no differently than anyone does in deciding who may come into his or her home. These owners said, in effect, 'it's my business, I built it with my capital and my labor, I get to decide who to serve!' But during the 1960s, as a result of social struggle, owners of these commercial establishments lost their private property right to choose whom they would serve or not serve (Hecht, 1964). Reflecting changing social attitudes on race and human relations, we decided as a society that the greater social interest was better served by taking this right away, and to do so without compensation.

Fourth, this dialogue between changing social values and the changing nature of what is in the property rights bundle continues through to today. During the 1990s it was perhaps best expressed through the resistance by male-only membership clubs and male-only colleges to the admission of women. The claim of these clubs and colleges was that the premises were their private property and they could and should decide who had access. Again, however, society asserted the primacy of changing social values over private property rights, and changed the property rights bundle (eliminating the ban on female access) without providing compensation for a change/diminution/loss of private property rights.

THE PLAN AND STRUCTURE OF THIS BOOK

Based on all of the above – the rise and impact of the private property rights movement, the controversy over interpreting colonial debates about private property and its relationship to liberty and democracy, the reality of property being subject to regulation in one form or another since colonial times, and the significant reshuffling of the property rights bundle to reflect changing technology and changing social values – a number of questions framed this book.

- Given that what anyone owns now (in the bundle of rights) is not what was understood as what was owned 200, 150, 100 or even 50 years ago, that is, if we accept the premise that the rights in the individual's bundle of rights have changed over time in response to social and technological conditions, how will they change over the present century? What social, technological and legal forces might structure that change?¹⁰
- Is there a logical conclusion to this 'restructuring'/'erosion' of private property rights? Is there any point at which society's assertions of its legitimacy goes too far? Are the ideals and principles of the

Madison–Adams wing of the Founding Fathers about the relationship of land ownership to liberty and democracy still relevant in a world of urban wage earners, in contrast to the world of farmers, foresters and ranchers for which they were formulated? Does land-use and environmental planning policy undermine the American-democratic social contract?

These questions are central to land-use and environmental planning, law and economics. These questions and their answers are interdisciplinary. They intersect the intellectual and academic fields of economics, geography, history, law, political science, public policy, and urban and regional planning.

These questions and their answers matter because of the political power of the property rights movement in the past, its continued push to further and deepen its agenda under the Presidency of George W. Bush, the real consequences for the management of landscapes, ecosystems and ecological resources, and the fact that these questions get at an issue key to understanding the nature of American society and governance.¹¹

In addition, to the extent advocates of land-use and environmental planning want or need to refute the arguments of the private property rights movement, and/or others whom the environmental community groups together as ‘anti-environmentalists,’ it is the issue of private property which is most difficult and troubling. What *is* the environmentalists’ position on private property? Are the private property critics correct in asserting that land-use and environmental planners want a continual winnowing away of private property rights? Do environmental advocates see any reasonable limit to the extent of the community’s and state’s reach?

These questions are addressed in different ways by the authors of this volume. Several things are important in selecting them, though. First, much of the published and public debate about these questions has had a histrionic tone to it. Proponents of the two sides (anti- and pro-regulation, pro- and confused about-property rights) have had little interest in talking *with* one another and more in talking *at* one another. Much of the debate has been posturing to get at what proponents see as their ‘real’ audiences – the media, legislators, the public. There has been little interest in real dialogue.

In contrast, participants in this project and volume agreed to a set of preconditions: preparation of a paper outlining their thoughts on the key questions (primarily the first one noted above), and a willingness to engage one another openly in dialogue (even if it is heated) on these matters. Under direction from the Lincoln Institute the key additional condition was that the participants be, as much as possible, representative of a political spread – simplistically speaking from liberal, moderate and conservative camps (though readers will have to judge who is who, based on their work).

Here I offer brief comments on and directions to the papers that follow (without prematurely revealing the author's analyses and conclusions).

- Daniel W. Bromley, an economist, opens this volume with a philosophical exploration of the meaning of property in the American experience. He seeks to challenge some common understandings about the fixedness of property, and instead offers his assertion that property rights are a function of what he terms to be 'volitional pragmatism.'
- Jerold S. Kayden, a lawyer and city planner, is the first of three authors to explore specifically legal issues in property rights. He takes his task to be to speculate on the twenty-first century direction that the US Supreme Court might take with regard to property rights cases, by asking what lessons can be taken, if any, from the history of the court's jurisprudence in the twentieth century.
- William A. Fischel, an economist, asks why judges seem so wary of regulatory takings. In top-ten style, he offers a set of possible reasons (from number ten to number one) to explain a situation that to him seems paradoxical and illogical.
- Gregory S. Alexander, a lawyer, builds on the work of his 1997 award-winning book by taking note of a movement in legal thought and policy practice that he did not anticipate – that environmentally oriented legal scholars and activists seem to have embraced market-based solutions as the best strategy to achieve environmental goals. He sets out to understand this shift, and speculate on its durability.
- Robert H. Nelson, an economist and public policy analyst, shifts the focus of the volume to a set of issues. His issue is the twenty-first-century future of local government in America. Swimming against the tide, he suggests the future for a governmental form many wish to pronounce as outdated can be robust, especially if it begins to act more like a form of private property.
- Donald A. Krueckeberg, an urban planner, asks some questions about the property tax system and its relation to notions of property and entitlement. Specifically, he challenges, in a mode similar to Nelson, some conventional wisdom. For Krueckeberg the challenge is to the right of a wide range of non-profit organizations to be tax-exempt, and thus be treated as in possession of special, non-taxable forms of property.
- Ann Louise Strong, a lawyer and city planner, brings an international perspective to the topic of this volume. Drawing on her 1990s research in Australia, New Zealand, Eastern Europe and the former Soviet Union, she asks some questions about the future of property for those who have not had access to it. One suggestion is that the interest and desire

for property is more universal, and less country-specific, than it is sometimes understood to be.

- Finally, I (an urban planner) bring this volume to closure. Drawing from both the contributions of the chapters and the spirited debate that occurred over the two days we were all together in May 2002, I offer some speculations on the future of private property – legally, politically and socially.

NOTES

1. The private property rights movement is referred to by a variety of labels, including the private property rights movement, the land rights movement, the wise use movement and (by the environmental community) the anti-environmental movement. Excellent general sources on the movement include Brick and Cawley (1996) and Yandle (1995). A brief discussion of their organization and composition is contained in Jacobs (1995, 1998c).
2. In most western countries, including the US, land is conceptualized, fictionalized, as a bundle of rights – or as it is commonly discussed in the legal literature, a bundle of sticks. When one owns land, ownership does not mean only the possession of the physical soil within a defined set of boundaries, though it does mean this. For the purposes of the law and the economy, ownership means the possession of a recognizable, fungible bundle of rights which the owner may use, sell, trade, lease and/or bequeath. It is this bundle of rights that is socially recognized as ownership. In theory, this bundle comprises rights such as the air right (the ownership of the airspace above the legally defined parcel), the water right (the ownership of the water sitting under or flowing over and under the legally defined parcel), the right to control access to the property (more commonly known as the right of trespass), the right to harvest natural resources (such as trees and minerals), and the right to develop, sell and lease the land in its entirety or to develop, sell or lease selected rights.

If an owner has complete possession of these rights, that is, if an owner owns all the rights in the bundle, s/he is said to have fee-simple ownership or freehold property. However, no owner ever has all of the rights in the bundle. Society, as government, always reserves some of these rights, or some portion of these rights. So, for example, few owners expect to own the wildlife (fish, deer, bear and so on) on their property, and thus the right to harvest at any time and in any amount they please. Wildlife ownership and harvesting seasons have long been a right reserved to and regulated by the state (government). Government also reserves the right to enter onto property (to violate the right to control access) to carry out necessary social functions. However, even given these reservations, private property ownership has long been thought of as consisting of a robust bundle of rights, relatively free of obligations to the state or others (that is, held free – freehold). And, in fact, the classic Latin phrase describing this state of fee-simple/freehold property is *cuius est solum eius est usque ad coelum et usque ad inferos* – whoever owns the soil owns all the way to heaven and all the way to the depths.

3. This presentation of the private property rights movement does not ignore the significant influence of multinational corporate capital, especially from resource-extractive industries, which see the private property movement as their best avenue of access to large segments of restricted public lands in the American west. However, what I am doing is acknowledging what I interpret as the legitimate intellectual framework that ties the movement together and which provides its legitimacy in making its argument to legislators, the media and the American public.
4. *Boundary Backpackers, et al. v. Boundary County, et al.*, 913 P.2d 1141 (1996).
5. It was this idea of active use that the colonists used to provide the justification for taking

land from America's native inhabitants. From the point of view of the Europeans, they did not understand the American natives to be using land in the European sense of active agricultural and forest management.

6. Jefferson's place in this debate is claimed by both sides. This appears to be legitimate, as he made statements which can be interpreted as supportive of both positions.
7. What we do understand about the takings clause is that in its original formulation it was intended to address the physical taking of land – when government took land for a school, a road, a hospital and so on, often by act of eminent domain. The issue which arose in the early part of the twentieth century with the growth of regulation over private property was whether there could be a non-physical taking. Could a regulation deprive an individual of enough property rights so as to be equivalent to a physical taking? In 1922, the US Supreme Court said yes. In the case of *Pennsylvania Coal Co. v. Mahon* (260 US 393 (1922) at 415) Justice Oliver Wendell Holmes wrote: '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.' It is this sentiment, perhaps more than any other, that fuels the political and policy activity of the property rights movement. Unfortunately, Justice Holmes did not specify the precise place where the unacceptable limits of the regulation occurred, and political, policy and judicial practice since then has been to largely (though not completely) back public regulatory activity as not crossing the line that Justice Holmes identified.
8. Land-use and environmental advocates want to make an additional point though: they want to turn this usual formulation on its head and point out the property rights gain from regulatory action. That is, they want to argue that there are many instances where the unfettered use of private property does not serve the best interest of the individual. Regulation restricts my right to do what I want with my land, but it also restricts my neighbor's rights. My neighbor's restrictions actually become my benefit, because they add to the security of the property rights bundle through predictability over adjoining land-use activity.
9. This is a line of argument and analysis first pursued in the early days of the modern environmental movement by those who can be understood as intellectual predecessors to the private property rights movement. Most prominently, McClaughry (1975, 1976), a former Vermont state legislator and policy analyst in the first Reagan administration, argued that the trend in land-use and environmental regulation was such that its end result was a form of property relations analogous to feudalism – that specific property form that colonists left Europe to escape. If, as a result of land-use and environmental policy what I owned was not what I thought I owned but what the state says I owned and I can only use property as a function of the state's rules, then how is my private property private or free? These fears were reinforced by state supreme court decisions of the period, especially a notable case in Wisconsin in 1972 (*Just v. Marinette County*, 201 N.W.2d 761 (1972)), in which the court said that rural property owners could only expect to do with land what the state said they could do, and that there were no inherent use rights with ownership (Large, 1973).
10. A principal point made in this chapter is how changing technology and changing social values have been major forces changing the property rights bundle over the course of the the last two centuries. For the future, one of these values that has to be considered is new ecological understandings of the human-land relationship. Going back at least 50 years, but gaining ever-more rapid currency with the growth of the modern environmental movement, land ethicists have been calling for a new view of land, a view which is less commodity based and more community based, a view which gives to the land a right to existence on its own terms (for example Leopold, 1968 [1949]; Stone, 1974). The question is what impact this call will have for the property rights bundle of the twenty-first century.
11. One exploration of the way the property rights movement may (or may not) advance its policy strategy is contained in Jacobs (2003).

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