

“In every civilized society
property rights must be carefully safeguarded;
ordinarily and in the great majority of cases,
human rights and property rights are
fundamentally and in the long run, identical.”
—*Theodore Roosevelt*

INTRODUCTION

Since the late 1980s, many Americans across the country have found that they cannot farm, ranch, or build homes on portions of their land. Why? They are blocked by state and federal regulations designed to protect endangered species, reduce conversion of wetlands, preserve historic districts, or accomplish any number of other social goals. With such regulations, owners retain title to their property but have little or no control over how their property can be used. Yet the government pays no compensation.

Professor Richard Epstein of the University of Chicago Law School describes such regulation as taking all of the juice, pulp and seed from the orange (the property) and leaving the property owner with the rind.¹ Epstein and others argue that such takings violate the constitutional right to own property without fear of confiscation by the government. The Fifth Amendment states that “no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just

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compensation.” The last clause is known as the “takings” clause.

A growing number of people have joined together to oppose this government encroachment. Today, experts say, there are more than five hundred property rights groups in the United States, with a total membership in the millions. A sampling of these groups includes:

Alliance for America, Oregon; Adirondack Fairness Coalition, New York; American Environmental Foundation, Florida; American Forest Alliance, D.C.; California Outdoor Recreation League, California; Citizens for Responsible Zoning & Landowner Rights, Wisconsin; Fairness to Landowners Committee, Maryland; Hill Country Landowners Coalition, Texas; Iron County Multiple Use Coalition, Utah; Madison County Preservation Coalition, Virginia; Maine Freedom Fighters, Maine; New Hampshire Landowners Alliance, Inc., New Hampshire; S.T.O.P. (Stop Taking Our Property), Indiana; and national organizations such as the National Cattlemen’s Association; the National Inholders and Multiple-Use Land Alliance; and the American Farm Bureau Federation.²

These grassroots groups, along with many others, loosely network with one another on the state and national levels.

To protect individual liberties, this movement has adopted as one of its strategies the introduction of property rights protection bills in state legislatures and Congress. In the past few years, advocates of property rights have introduced 100 bills in 44 states, as well as several bills in Congress. Thirteen states have passed property rights legislation (although legislation in one of those states, Arizona, was defeated in a public referendum in November 1994). Other states are currently considering bills.

Advocates have addressed property rights at both the federal and state levels because both levels of government have increased their regulation significantly. State laws address action in the states, while congressional action is required to address federal laws and regulations. State law does not apply to federal laws, and a federal law would not apply to state laws.

Property Rights Legislation in the States

This pamphlet will discuss the effort to pass protective property rights legislation in the states. It will explain the reasons behind the campaigns for property rights legislation and the kinds of state property rights bills that are being proposed. It will review the kinds of arguments made against such legislation and the experience in states that have addressed such legislation. It will also highlight keys to successful passage of property rights bills, and present model property rights bills as appendices.

WHY PROPERTY RIGHTS LEGISLATION?

Contrary to some claims, property rights laws will not wreak havoc on environmental regulations. Most traditional environmental regulations reflect the police power of governments. Under the police power, a government may stop an action that violates the rights of others. The government does not have to compensate the person who causes a nuisance because the individual has no right to create a nuisance to begin with. Most pollution regulations fall under this rule.

The regulations that endanger private property rights are those that require property owners to shoulder burdens that properly belong to society as a whole. For example, such regulations have stopped people from logging their property because it may contain

***“Through passage of private property rights legislation,
the state can in one fell swoop, provide a means
for achieving important government objectives,
protect taxpayers’ pocket books,
and preserve the property rights of all of its citizens.
Isn’t that what good government is all about?”***

—Nancie G. Marzulla, Defenders of Property Rights

endangered species. They have prevented people from improving property because it may be a wetland. They have forced people to give up property for parks and paths. In such cases, the government

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is making individual landowners bear the costs of providing public goods.

One reason for this government encroachment is the fact that placing the financial burden on private citizens makes the jobs of government officials easier. Governments can accomplish their objectives at a lower cost, perhaps without ever having to go to the taxpayers and seek funds. If these agencies must pay to obtain a bicycle path or pay to keep wetlands from being filled, they will undoubtedly run into budget constraints.

In recent years, advocates of property rights legislation have gained an important ally in the courts, including the Supreme Court. Since 1987, courts have begun to reaffirm the principle that regulations can be takings that require compensation. This can happen when government regulation destroys the owner's economically viable use of the land.

In the Supreme Court's most recent property rights case, *Dolan v. City of Tigard*,³ this position was stated very clearly. In that case, petitioner Florence Dolan, a property owner in Tigard, Oregon, sought to expand her plumbing-supply business. The city attached conditions to the building permit, requiring Dolan to dedicate 7,000 square feet of her property to public use. The city planned to use a portion of the set-aside for pedestrian and bike paths, and the rest for stormwater management.

Dolan took the city to court. She lost in the Oregon courts, but won in the U.S. Supreme Court, which held that the demand made on Mrs. Dolan was out of proportion to the problems, if any, caused by the expansion of her store. She was being forced to bear a special burden for the community's good. In a 5-4 decision, Chief Justice Rehnquist wrote for the majority: "One of the principal purposes of the Takings Clause is to bar government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole."⁴

Justice Rehnquist also stated that a desire to improve the public condition does not justify circumventing the "constitutional way" of paying for what the government wants.⁵ If a government wants property for the public good, the public must pay for the property. Judge Rehnquist's opinion should provide fertile ground for future

takings challenges.

In another celebrated case, the Supreme Court found a taking by regulation in *Lucas v. South Carolina Coastal Council*.⁶ In 1988, the South Carolina Coastal Council arbitrarily drew a line on the beach and said that nobody could build on the waterfront side of the line. The council claimed that it wanted to avoid beach erosion.

The line went through a 15-year-old subdivision that had only four undeveloped lots. David Henry Lucas owned two of them. Even though the lots on either side already had houses, the Coastal Council said that he could not build.

Lucas appealed his case. In 1992, the Supreme Court agreed with him. The state of South Carolina was required to pay Lucas \$1,575,000 for the property it had taken. (The state subsequently sold the property to a private individual to build houses on the lots.)

PROPERTY RIGHTS BILLS: TWO KINDS

While the courts are restoring property rights to the U.S. Constitution, action is taking place on other fronts. The effort to pass property rights legislation on the state level, the chief subject of this pamphlet, is one of the most important.

Advocacy groups have taken two approaches to protect property rights through state legislation: “Look before you leap” bills and takings compensation bills. We will discuss both.

Look Before You Leap

“Look before you leap” legislation is usually patterned after federal Executive Order 12630, signed by President Reagan in 1988. The Executive Order required federal agencies to review their actions to avoid unnecessary takings and to budget money to pay for necessary takings.⁷ The review it required was similar in scope to the environmental impact analysis required by the National Environmental Policy Act of 1970. However, Executive Order 12630 has been ignored and, in effect, rescinded by the Clinton administration.⁸

At the state level, “look before you leap” legislation requires

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state agencies and/or local government to assess the takings implications of state regulations before they are adopted. Most bills require the state attorney general to develop guidelines—based on principles enumerated in the statute—for the government to use in determining whether its actions have constitutional takings implications. The guidelines are usually updated annually.

Using the guidelines, the government must determine the likelihood that the action will result in a constitutional taking; identify alternatives that would reduce the impact on private property and reduce the risk of a taking; and estimate the financial cost for compensation if the action is determined to be a taking. Such legislation is purely procedural and does not alter or expand the standards that determine when compensation is due under the U.S. or state constitutions.

The benefits of this legislation are twofold. It can save property owners from having to go to court to challenge regulations that they believe are takings, and it can save taxpayers' money that the government would have to pay if the regulation turned out to be a taking.

According to Nancie G. Marzulla, President and Chief Legal Counsel for the Washington, D.C., public interest legal foundation, Defenders of Property Rights, “This healthy approach to government decision making, requiring agencies to ‘look before they leap,’ will reduce the likelihood of state citizens having to pay for the taking of private property by avoiding adopting regulations for which the Constitution requires the payment of just compensation. In short, this legislation will save money.”⁹

Governments have been hit with a few big takings costs in the last few years. In *Whitney Benefits, Inc. v. United States*,¹⁰ a property owner in Wyoming was awarded close to \$160 million in damages and interest for the taking of private property rights. Invoking the Surface Mining and Reclamation Act of 1977, the federal government had denied the plaintiffs access to mine their coal because the coal was located under an alluvial valley floor. The Chief Judge of the United States Court of Federal Claims, Loren A. Smith, held that the law had totally eliminated the economic value of the plaintiff's coal. This total loss of value constituted a

taking under the Fifth Amendment.

The previously-mentioned case of *Lucas v. South Carolina Coastal Council* was also an instance where a state ended up having to pay for a taking; in that case, \$1.5 million. Had South Carolina realized that it would be liable for such costs, the Coastal Council might have made a different decision in the Lucas case and perhaps

***“This is not about the environment. . . . It is about control.
The environmental movement is a Trojan horse.
This is the same mentality that our forefathers fought
to get away from—central government,
central control, big government, the king.”***

—David Henry Lucas

budgeted the money to condemn the property for public use. A prior assessment can save the taxpayers the cost of a lawsuit, as well as save the individual landowner from litigation costs.

“Look before you leap” legislation does have a weakness: The takings analysis it requires will inevitably be based on unsettled constitutional law. Some legal commentators call takings law “a muddle.”¹¹ No set legal formula exists to determine what constitutes a taking.¹² The Supreme Court will easily recognize a taking if there has been a physical invasion of the property or if a regulation denies all economically beneficial or productive use of land.¹³ Beyond that, it is difficult to conclusively determine whether or not a government action will be a taking. Most takings analysis is done on an ad hoc case-by-case basis.¹⁴

Nevertheless, a sufficient amount of established takings law exists to enable the government to perform a useful takings assessment of a government regulation. At the very least, an analysis can outline the possible ramifications of regulatory action and can identify the groups, sectors and individuals who are likely to bear the brunt of the regulatory burden.

States that have passed “look before you leap” legislation include: Arizona (although the law was rejected in a referendum

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vote), Delaware, Idaho, Indiana, Missouri, Tennessee, Utah, Washington and West Virginia. “Look before you leap” legislation has been introduced in many other states.¹⁵

Takings Compensation

Takings compensation bills define a taking. By statute, they create a trigger-point at which a regulation is presumed to have become a taking. Such bills entitle a property owner to automatic compensation upon proof that a government regulation reduced the value of his or her property by a certain percentage.

Defenders of Property Rights has drafted model legislation for states and Congress that would define a taking as a diminution in value of 50 percent or more (see Appendix A). In other words, if a property owner can prove that a government regulation reduced the value of his or her property by 50 percent or more, compensation will be required. This bill would not prevent property owners who suffer a taking of less than 50 percent from challenging the regulatory action in court.¹⁶

Takings compensation bills have been introduced in Arizona, California, Delaware, Florida, Georgia, Idaho, Iowa, Kentucky, Maine, Maryland, Nevada, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, and Washington. The most common trigger-point has been 50 percent.

So far, no state has enacted this legislation. However, Delaware may be close. Introduced during the 1994 legislative session, a bill passed in the Senate, where supporters had expected strong resistance, and is scheduled for consideration in the Delaware House when the legislature reconvenes in 1995. One reason for the smooth passage, say supporters, was that “look before you leap” legislation has been on the books in Delaware for several years. This law has not created the havoc that opponents had predicted.¹⁷

A combination of a takings compensation bill and the “look before you leap” bill has been introduced in three states: Idaho, Texas, and Washington.¹⁸

RESPONSES TO OPPONENTS’ CLAIMS

Environmental lobbying groups have been major adversaries of property rights legislation. One group wrote that “under the guise of protecting private property, these bills threaten civil rights, public health and worker safety, and the environment. . . .”¹⁹ Such arguments are not based on logic and seem to be aimed at generating fear rather than sound public policy.

In a widely distributed media mailing, 15 major environmental organizations joined ranks, for the first time ever, in what they called a “wakeup call” for action against the “triple threat” or the “unholy trinity.”²⁰ The July 6, 1994, letter says that “polluters have blocked virtually all our efforts to strengthen environmental laws.” The message alludes to a grassroots movement, but claims that the real pressure is from polluters—big industry, large farmers and others who simply want to make more money by polluting.

According to this mailing, the property rights movement is part of the new anti-environmental forces, and their message—“the unholy trinity”—has three simple parts. The first is opposition to regulatory takings. The other two anti-environmental arguments, according to the mailing, are arguments for cost-benefit analysis and comparative risk assessments and an end to unfunded federal mandates, which require state and local governments to meet costly new environmental rules without federal funding.

This grand statement from the environmental establishment mischaracterizes the property rights issue. Property rights owners are not asking to be paid for not polluting. They want to be compensated when their property is taken.

Environmental lobbying groups use a host of phrases and buzzwords to stir up opposition to property rights legislation. Often these phrases completely misrepresent current legislation and should be countered. Most of the following charges are taken from an Alliance for Justice position statement.

Takings bills threaten civil rights.²¹

This argument, made in a press release by an environmental lobbying group, is designed to generate public

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outcry. It is meaningless. How can legislation requiring the government to consider justice to individual landowners be contrary to civil rights? Civil rights *is* justice to individuals. The main reason people are clamoring for property rights legislation is that they feel that they are a minority group being forced to shoulder the burden of providing public benefits. Civil rights is about equity. So is property rights legislation.

Takings bills are a back-door, stealth attack on the government's ability to regulate for public welfare.²²

Opponents suggest that property rights legislation will cause agencies to delay implementing laws while studying the ramifications of those laws on individual landowners, and that this delay will have a detrimental effect on public welfare.

Governments have the ability to regulate for public welfare through police power and eminent domain regardless of whether a state passes property rights legislation. Paying for property may chill some government regulations because it will expose the true cost; however, such exposure is appropriate. Taxpayers should be aware of how much policies cost so they can weigh whether or not they want to pay the cost.

Property rights bills will interfere with normal zoning regulations; they will allow pornography shops next to homes, and liquor stores next to churches.

The Supreme Court has held that normal zoning is not a “taking” under the Fifth Amendment.²³ The Court has reasoned that even though the value of a lot within a zoned area may be diminished by height and density restrictions, the lot owner is compensated by the fact that the neighbors are also subject to the same zoning restrictions. So, while there may be some instances where property rights laws

could affect zoning, generally zoning does not have takings implications. Under current law, zoning would not trigger the procedural requirements of the state property rights bills unless it harmed a landowner for the benefit of others.

Takings bills threaten the environment.²⁴

No, they do not. A state may impose environmental regulations under its police power or under the law of nuisance, whether the state passes property rights legislation or not. These government powers stand alone and will not be affected by current property rights legislation.

Takings bills will undermine environmental equity efforts.²⁵

Opponents of property rights legislation suggest that such laws would prevent government from regulating the location of waste facilities and would increase environmental degradation in minority and low-income communities.

No matter how many property rights bills passed, the government would still be able to regulate hazardous waste that causes off-property damage or undue risk. The legal theory of nuisance has and will continue to provide a basis for such regulation, which is intended to protect people from harmful pollution. Nuisance law will not be affected by property rights legislation.

***Why should the government pay for takings?
Property owners do not compensate the government
when regulations enhance property values through “givings.”***

It is true that a regulation can increase *or* decrease property values. However, this is not the same as saying that government regulations that increase property value somehow balance out the regulations that take private property.

The Constitution guarantees compensation when the

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government takes property. The Constitution requires the upholding of individual rights of every property owner, not an overall balancing of how regulations affect all property owners.

Furthermore, if a regulation adds value instead of decreasing value, there will be no takings challenge. Takings cases arise when government regulations take property value, not when regulations increase value.

RECENT HISTORY OF PROPERTY RIGHTS BILLS

Successes in Some States

By August 1994, Arizona, Delaware, Florida, Idaho, Indiana, Mississippi, Missouri, North Carolina, Tennessee, Utah, Virginia, Washington, and West Virginia had passed private property rights laws. The legislation and the process used to pass these measures vary from state to state. Here is a chronology of the successful battles.

1992: Three States Pass Protective Legislation. Prior to 1993, three states—Washington, Delaware, and Arizona—had passed some type of property rights legislation. The Washington property rights measure, signed into law in 1992, was added as an amendment to the state’s 1991 Growth Management Act. It requires the attorney general to establish a checklist by which state agencies and local governments can evaluate proposed regulatory or administrative actions.

The first “stand alone” property rights bill that had real teeth was Arizona’s, signed by Governor Fife Symington on June 1, 1992. The bill required the attorney general to adopt guidelines to assist state agencies in identifying government actions that may be constitutional takings. The bill required state agencies to analyze: 1) the likelihood of an action resulting in a taking; 2) other alternatives to the action; and 3) an estimate of the state’s cost of compensation.

This was a “look before you leap” law. Opponents of the

Property Rights Legislation in the States

legislation were able to get enough signatures to require a referendum vote on the measure in November 1994. It went down to defeat in that referendum.

Although the defeat by the voters indicates that much more education is needed to obtain widespread support for property rights legislation, initial passage by the legislature offers some positive lessons for those trying to achieve statehouse victories. A governor who strongly backed the bill was perhaps the major factor behind its passage. In addition, a strong coalition, including agricultural, business, and labor groups, supported the bill. This broad coalition provided enough support to pass the legislation over the opposition of environmental groups. However, environmental groups subsequently lobbied hard and were able to kill the measure.

In 1992, Delaware passed a “look before you leap” law that requires the attorney general to review rules and regulations promulgated by state agencies to determine their effect on private property rights. The bill was opposed by environmental groups, but the coalition supporting the bill had a working relationship with the environmental groups; this softened the opposition. The biggest assets for passage were a strongly supportive agricultural coalition and support from the governor and attorney general. Also, the bill did not have a fiscal note (an estimate of the cost of the bill) attached to it. Such notes can kill bills if the estimates are high. According to Delaware sources, the hostile rhetoric about the law has died down since its passage, and the bill has protected the taxpayer. According to one estimate, the law has saved the state from takings challenges involving 150 new regulations.²⁶

1993: A Diverse Array of Laws. In 1993, Florida, North Carolina, Virginia and Utah passed property rights legislation. However, the Florida and North Carolina bills will not have much impact on property rights. The Florida bill established a committee to study the issue. North Carolina’s law is limited to compensation for land under navigable waters.

Virginia’s property rights measure was weak. It established a joint subcommittee to study Virginia governmental actions that might result in a taking of private property. Since the passage of this

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bill, the subcommittee has been fairly inactive. However, in 1994 supporters of property rights protection took another tack, creating through a combination of legislation and administrative rules a requirement that an economic impact analysis of any proposed regulation be conducted. This measure was supported by the governor, who in 1994 also signed an executive order requiring all agencies to review all previous administrative rules under the economic impact analysis. Property rights advocates in Virginia accomplished the same goal as takings analysis legislation would have by using different language and avoiding inflammatory “buzzwords.”²⁷

Supporters of property rights legislation in Utah faced strong opposition from environmental groups. However, according to one property rights advocate, these environmental groups undermined their credibility by making claims that simply were not accurate.²⁸ Furthermore, a strong coalition supported the legislation. It included realtors, manufacturers, taxpayers, mining, petroleum interests, and the Chamber of Commerce.

Aiding the bill’s passage was a low fiscal note (cost estimate), support from the governor, and an attorney general who agreed to be neutral. Initially, the Utah bill was saddled with a high fiscal note; however, the sponsor of the bill got all parties—proponents and opponents—involved, and the fiscal note disappeared after studies and evaluations indicated that the law would not be expensive to implement. In fact, many government officials admitted that they should be doing the property rights assessment regardless of whether the legislation passed.

The biggest obstacle in Utah was convincing urban legislators that the legislation would not create new property rights. Supporters had to make clear that the bill would only safeguard existing property rights. So far, the bill has not had much impact on government regulations. It may be making agency officials a little more cautious and more attentive to private property rights.

Utah amended the 1993 bill in 1994 to extend the reach of the earlier law to include local government. The original bill only requires state agencies to do a takings assessment. The Utah bills also apply to both “real” and “personal” property. Most of the other

passed bills only apply to “real” property.

1994: More Accomplishments. In 1994, property rights laws were passed in Indiana, Idaho, West Virginia, Mississippi, Tennessee, and Missouri. In Indiana, property rights legislation encountered little or no resistance. Environmental groups never really opposed the legislation. Property rights advocates mainly emphasized the benefits of saving the state’s treasury by reviewing takings implications before there was a compensable takings as in the *Lucas* case.

The Indiana law requires the attorney general to consider the impact on property rights of every proposed rule. It also requires the attorney general to alert the governor and the head of the agency proposing a rule if the rule could result in a taking. The bill puts the burden of action on the attorney general.

Success was the result of several key approaches. Proponents always emphasized that the bill was pro-private property rights; they never allowed rhetoric to portray it as anti-environmental. They emphasized the *Lucas* case and the reduction of the state’s potential liability if the law passed. According to supporters of the bill, this argument was especially persuasive because of the budget battle going on at the time, which made all legislators eager to appear fiscally aware and sensitive.²⁹

Also contributing to Indiana’s success was a broad coalition supporting the bill. It included the Indiana Farm Bureau, the Indiana Manufacturers’ Association, the Indiana Chamber of Commerce and other groups. The bill became a bipartisan effort in which a great number of senators could claim ownership. Eventually, 16 of Indiana’s 50 senators signed on as co-sponsors. The bill passed the Senate by a vote of 49–0 and the governor signed the bill into law on May 7, 1993.

In contrast to Indiana, passage in Idaho came about only after four years and a high-profile campaign. The governor vetoed property rights legislation three times. The Idaho bill was a “look before you leap” bill that places the burden of action upon the Attorney General to establish guidelines to assist state agencies and local governments to evaluate proposed regulatory or administrative

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actions for takings implications.

Sixteen organizations formed the Idaho Private Property Coalition in 1992. They included ranching, mining and other business groups. The coalition faced major opposition from environmental groups, and it had to win enough votes to derail the governor's veto.³⁰ It managed to do this.

In West Virginia, the takings issue surfaced as a result of the state government's creation of mandatory buffer zones on certain streams. At first, the West Virginia Department of Environmental Protection (DEP) was unwilling to discuss the takings implications of mandated buffer zones. But as takings liability became more of a national issue, the West Virginia Farm Bureau was asked to intervene. It began to research the issue with a delegate of the state legislature, who assigned a staff attorney to draft a proposal. The proposal developed into "The Private Property Protection Act."

West Virginia's bill requires the DEP to evaluate the possible effect on private property of actions taken by the DEP that are "reasonably likely" to require compensation. DEP acknowledged that it could handle the assessment requirement without hiring new staff, so that the agency would feel little financial impact from implementing the law.

Opponents included the United Mine Workers, AFL-CIO, West Virginia Environmental Council and the West Virginia Wildlife Federation. Success in passing the bill was in large part due to the effort of a few members of the House and Senate who took the time and effort to become educated on the issue.³¹

Mississippi passed limited legislation that was really not what property rights supporters wanted because the law applies only to forestry. The law requires compensation for any government action that takes 40 percent or more of the value of forest land property. Property rights proponents are expected to introduce a broader bill in the next session.

Also in 1994, Tennessee passed a bill that was less than property rights advocates had desired. The final version was an agreement negotiated with environmental groups, who had actively opposed the property rights measure.³² The law requires the attorney general to review current court decisions and to publish a

description of what he or she thinks would constitute a taking. The law provides property tax relief for property that is diminished in value due to regulation. It also requires the government to pay the property owner's attorney fees and expenses if the property owner is successful in a takings case.

Missouri is the latest state to enact property rights legislation. A "look before you leap" bill was enacted in May 1994. A bill passed in 1993, but the governor vetoed it. The second time, he signed it. It has a 3-year sunset provision; that is, it will expire in three years.

Unsuccessful Efforts in Some States

Besides the bills passed in 13 states, almost a hundred property rights bills were introduced in 42 states during the 1993–94 legislative year.³³ In 11 states, bills have passed at least one house. The experience of the following states illustrates the problems encountered by groups seeking to enact property rights legislation.

In Nevada and Montana, proponents of property rights legislation ran into opposition from local government and state agencies. State agencies attached major fiscal notes, which slowed the bills down, because legislators are hesitant if it seems a bill will cost taxpayers money.

In Nevada, supporters of property rights legislation went to the association of counties and asked what the association would support. The result was a resolution that directs the attorney general and local governments to develop a checklist for evaluating government actions for possible impacts on private property. The resolution requires the attorney general's office to train its staff and hold workshops for agency people to help them understand the checklist.

While the Nevada effort did not result in legislation, the process of coming to agreement about the resolution resulted in better communication between property rights proponents and county officials.³⁴

In Florida, property rights advocates started out with a bill that quantified a taking by establishing a trigger point at 40 percent.

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That is, if a regulation reduced the value of property by 40 percent, the property owner would be entitled to automatic compensation. This was not popular with the cities and counties. Although the bill passed the House, environmental groups would have killed the bill in the Senate, sources say. Instead, proponents established a commission to study the private property issue. However, environmental opposition to the commission was so strong that Florida's governor vetoed the legislation creating a study commission. In turn, the governor received so many phone calls and letters about his veto that he created his own commission to study the property rights implications of regulations.³⁵

In New Mexico, the state government opposed property rights legislation. State agencies came up with estimates in the millions for the cost of administering the bill. Property rights proponents tried to turn the high-cost arguments against the state agencies,³⁶ arguing that if the cost was as high as opponents claimed, the state must be vulnerable to many takings cases. This argument was somewhat successful, but the combined opposition of the environmental community and state agencies was too great to pass property rights legislation. Another problem was that other legislation supported by property rights proponents was held hostage until they backed off the property rights bill.

In Maine, the major opponents to passing legislation were environmental organizations, state regulatory agencies, and municipal associations. They objected to the financial obligations that state and local governments would incur if their actions took away property rights.³⁷

Summary of Political Action

This review of state political action offers insight into why property rights legislation has succeeded or failed. In states where property rights legislation has passed, the fiscal impact was seen as negligible, and opposition from environmental groups was either weak or was offset by a populist movement in support of the legislation. In states where it failed, the chief reasons appear to be opposition from environmental groups, fear that the laws would

interfere with local zoning, and high fiscal notes. (Opponents of property rights legislation often did what they could to attach a high fiscal note, knowing that legislators would be wary to pass any costly legislation. However, experiences in states that have passed such laws suggest the fiscal impact is negligible.)

As more state legislative bodies took up the issue, environmental groups became a more powerful force. At the national level, a strong coalition of environmental lobby groups banded together and sent out the “wakeup call” mentioned earlier opposing property rights legislation.

Such concerted action on the national level is an obstacle to passage of state property rights legislation, even when there is strong local grassroots support for legislation. In addition to these groups, local organizations that frequently oppose property rights bills include state wildlife and parks agencies, The Nature Conservancy, the Conservation Voters’ Alliance, and local bar associations.

CONCLUSION

The movement to obtain protective state legislation is a populist movement. Ordinary citizens are making themselves heard in their home states and at the national level in opposition to overreaching government regulations. Many of these regulations spring from environmental statutes, but that does not mean that property rights groups are against environmental protection. They do not want public benefits to be provided at the expense of private property owners. The galvanizing issue is stated clearly and elegantly in the Fifth Amendment: “[N]or shall private property be taken for public use without just compensation.”

ENDNOTES

1. Nancie G. Marzulla, “A Two-Front Battle for Property Rights,” *Christian Science Monitor*, September 18, 1994, at 19, citing Professor Richard Epstein.
2. “The 1992 Citizen’s Guide to the Property Rights Movement,”

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- published by the *Land Rights Letter*, Gloversville, NY.
3. *Dolan v. City of Tigard*, Vol. 114, Supreme Court Reporter, 2309 (1994).
 4. *Dolan* at 2316.
 5. *Dolan* at 2322.
 6. *Lucas v. South Carolina Coastal Council*, Vol. 112, Supreme Court Reporter, 2886 (1992).
 7. Roger J. Marzulla, *Environmental Law Reporter*, Vol. 18, July 1988, 10254.
 8. Office of Management and Budget Circular No. A-11 (revised July 1994).
 9. Nancie G. Marzulla, "Who Benefits from State Private Property Legislation? You, the Taxpayer and Citizen," *Land Rights Letter*, June 1993, at 4.
 10. *Whitney Benefits, Inc. v. United States*, Vol. 18, U.S. Claims Court, 394 (1989).
 11. Carol M. Rose, "Mahon Reconstructed: Why the Takings Issue is Still a Muddle," *Southern California Law Review*, Vol. 57, 561 (1984).
 12. Justice Brennan noted the Court's failure to "develop any 'set formula' for determining when 'justice and fairness' require economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Pennsylvania Central Transp. Co. v. New York City*, 438 U.S. Reports 104, 124 (1978).
 13. *Lucas* at 2893.
 14. *Penn Central* at 124.
 15. More details on the legislative history of these bills can be found in the section entitled Recent History of Property Rights Bills.
 16. Nancie G. Marzulla, "The Property Rights Movement: How It Began and Where It is Headed," forthcoming in *The Land Rights Rebellion*, edited by Bruce Yandle (Lanham MD: Rowman & Littlefield).
 17. Telephone interview with G. Wallace Caulk, Administrator of the Delaware Farm Bureau Federation (September 7, 1994).
 18. More information about the legislative history can be found in

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- the section entitled Recent History of Property Rights Bills.
19. Position paper from Alliance for Justice, Washington, D.C. (on file with author; no date).
 20. Statement issued to the press by combined leadership of the nation's largest environmental groups, signed by Ted Danson, President of the American Oceans Campaign, et al. (July 6, 1994; copy on file with the author).
 21. Alliance for Justice position paper (on file with author; no date).
 22. *Idem*.
 23. *Village of Euclid v. Ambler Realty Co.*, Vol. 272, U.S. Reports, 365 (1926); *Agins v. City of Tiburon*, Vol. 447, U.S. Reports, 255 (1980).
 24. Position paper from Alliance for Justice, Washington, D.C. (on file with author; no date).
 25. *Idem*.
 26. Telephone interview with G. Wallace Caulk, Administrator of the Delaware Farm Bureau Federation (September 7, 1994).
 27. Telephone interview with John Johnson, Assistant Director for Public Affairs of the Virginia Farm Bureau Federation (September 7, 1994).
 28. Telephone interview with Tom Bingham of the Utah Farm Bureau Federation (August 11, 1994).
 29. Letter from Robert D. Kraft, Legislative Director, Indiana Farm Bureau, Inc., to Lorna Frank, Legislative Director, Montana Farm Bureau Federation (August 9, 1993, on file with the author).
 30. Telephone interview with William Brown, Executive Vice President, Idaho Farm Bureau Federation (August 1994).
 31. Marc Harman, "Private Property Protection in West Virginia," *West Virginia Farm Bureau News*, June 1994.
 32. Telephone interview with Julius Johnson of the Tennessee Farm Bureau Federation (September 7, 1994).
 33. See Appendix B.
 34. Memo from Doug Busselman, Executive Vice President of the Nevada Farm Bureau Federation, to Lorna Frank, Legislative Director of the Montana Farm Bureau Federation (August 30, 1993; on file with the author).
 35. Telephone interview with Phil Leary, Governmental Affairs

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Director for the Florida Farm Bureau Federation (August 1994).

36. Memo from Jeff Witte, Director of Governmental Affairs of the New Mexico Farm & Livestock Bureau, to Lorna Frank, Legislative Director of the Montana Farm Bureau Federation (August 16, 1993; on file with the author).

37. Memo from Jon Olson of the Maine Farm Bureau Federation to the author (August 17, 1993).