



2022

**PROPERTY RIGHTS
PLAYBOOK**

SECURING FUNDAMENTAL PROPERTY RIGHTS

KEYPOINTS

- Montana’s Supreme Court has treated property rights as inferior to environmental rights.
- Expanding protections for property rights will enable more safe, clean and peaceful economic activity in Montana.
- Securing the right to use property will help provide lasting protection against government abuse and radical activism.
- Montanans should consider amending Montana’s constitution to restore and protect the fundamental right to use property.

TABLE OF CONTENTS

| | |
|----|---|
| 3 | History of Property Rights The Importance Of Property Rights The Founders' Vision for Property Rights The Subordination of Property Rights |
| 5 | Status of Property Rights in Montana Background Property Rights in the Montana Supreme Court Case Study: Property Rights Under Attack |
| 9 | Solution: Protect the Fundamental Right to Use Property |
| 10 | Proposal: Montana Constitutional Amendment |
| 11 | End Notes |

HISTORY OF PROPERTY RIGHTS

THE IMPORTANCE OF PROPERTY RIGHTS

America's founders understood that guaranteeing private property rights is the cornerstone of a free society, unlocking a virtuous cycle of prosperity that makes everyone better off.¹ Securing property rights ensures entrepreneurs have more certainty in their investment decisions. Greater investment means more jobs.² More jobs create a stronger and more specialized workforce that will bring greater investment. Thus, the virtuous cycle continues.

THE FOUNDERS' VISION FOR PROPERTY RIGHTS

When James Madison originally introduced the Bill of Rights to Congress in 1789, he suggested that the U.S. Constitution needed a "pre-Preamble" to outline the fundamental role of the new American government, which included the right of the people to "**acquir[e] and us[e] property.**"³ While Congress did not adopt Madison's "pre-Preamble," his vision for safeguarding property rights was eventually incorporated into the Bill of Rights ratified by Congress.

The Fifth and Fourteenth Amendments' Due Process Clauses and the Fifth Amendment's Takings Clause enshrine Madison's property safeguards. These clauses ensure 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 compensation."⁴

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 compensation.

The government can take your property in two ways. Traditional takings occur when the government, through eminent domain, takes outright ownership of property for "public use." However, what qualifies as "public use" can be incredibly vague, opening the door to potential government abuse.⁵ The second, called regulatory takings, is when the government regulates or limits the use of an individual's property without taking ownership of the property.⁶ Often times, the regulation is so burdensome that it deprives the owner of most or all the property's beneficial use and destroys the property value.⁷ When a regulation is considered this burdensome, courts are supposed to justly compensate the property owner.

HISTORY OF PROPERTY RIGHTS

THE SUBORDINATION OF PROPERTY RIGHTS

For the United States' first full century, property owners' rights were consistently granted high regard in U.S. courts due to the understanding that the protection for property and liberty were intertwined.⁸ However, by the early 20th Century, fundamental protections for owners' property rights began to erode. During the 1920s, the Supreme Court became more receptive to fledgling land use regulation and municipal zoning pushed by the progressive movement.⁹

“For the United States' first full century, property owners' rights were consistently granted high regard in U.S. courts due to the understanding that the protection for property and liberty were intertwined.”

By the Great Depression, the Supreme Court eventually acquiesced to President Roosevelt's pressure to uphold aspects of the New Deal's economic regulations.¹⁰ As a result, the Supreme Court began to give less regard to the security of private property.

The subordination of property rights during the New Deal Era was made crystal clear in the 1938 case *United States v. Carolene Products Co.*, which specified that economic regulations of private property rights would only receive the lowest standard of review called “rational basis” instead of “strict scrutiny.”¹¹ In other words, as long as the government could demonstrate a legitimate state interest and a rational connection between a regulation's means and goals, Courts would side with the government over the rights of property owners.

In contrast, strict scrutiny requires the regulation further a “compelling governmental interest” while also being “narrowly tailored.”¹² Examples of a compelling state interest are public health, public safety, and national security. Narrowly tailored generally means the regulations be the least restrictive option available.¹³ Up until this New Deal legal framework, government needed to demonstrate a compelling, or very serious interest, referred to as strict scrutiny, before they could use regulations to infringe on an individual's property rights.¹⁴ The New Deal constitutional interpretation persists today.

STATUS OF PROPERTY RIGHTS IN MONTANA

BACKGROUND

States have the opportunity to enact clearer recognition and protections for rights than the U.S. Constitution, including property rights. Like most states, Article II, Section 3 of Montana's Constitution recognizes that "acquiring, possessing, and protecting property" is an inalienable right of its citizens.

Section 3. Inalienable rights.

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, **acquiring, possessing and protecting property**, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

This clause affirms the right of Montanans to acquire (purchase), possess (own), and protect (defend) property, but conspicuously does not include the corresponding right to actually use property according to one's wishes.

As discussed below, without the explicit right to use property enshrined in Montana's constitution, Montana courts have consistently subordinated private property rights to the ever changing interests of the state.

STATUS OF PROPERTY RIGHTS IN MONTANA

PROPERTY RIGHTS IN THE MONTANA SUPREME COURT

Even though the right to “acquire, possess, and defend” property and the right to a “clean and healthful environment” are both considered inalienable rights under Montana’s Constitution, Montana’s Supreme Court has treated property rights as inferior to environmental rights.

In *Montana Environmental Information Center v. DEQ (MEIC)*, the court held that actions that implicate the right to a clean and healthful environment require strict scrutiny, which is considered the highest level of review: “the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights . . . which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest.”¹⁵

By applying strict scrutiny, the Montana Supreme Court established in MEIC that a “compelling state interest” must be proven to do something that merely “implicates” the right to a clean and healthy environment. One legal scholar claims that by following MEIC to its logical conclusion, an owner planning to use their land for crops, housing or energy would have to show a compelling state interest before proceeding.¹⁶

the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights . . . which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest.

In direct contrast, we discuss below how Montana’s Supreme Court has failed to apply the same strict scrutiny to actions that implicate the right to use private property.

STATUS OF PROPERTY RIGHTS IN MONTANA

CASE STUDY: PROPERTY RIGHTS UNDER ATTACK

Kafka v. Montana Department of Fish, Wildlife, & Parks (2008)

One of the most egregious cases of the Montana Supreme Court's minimization of property rights is Kafka v. Montana Department of Fish, Wildlife, & Parks (Kafka).¹⁷

In Kafka, the Supreme Court held that I-143, a 2006 Ballot Initiative which prohibited alternative game farms from charging a fee to shoot their livestock within the confines of their property, did not qualify as a regulatory taking. The Supreme Court even acknowledged that by prohibiting fee-shooting, I-143 eliminated the most profitable use of alternative livestock and thereby destroyed the profitability of alternative game farms in Montana. Despite these facts, in a 4-3 opinion, the Montana Supreme Court sided against property owners.

In summary, the court effectively held that:

- The government has to effectively eliminate 100% of the value of property through regulation before there can be a takings.
- Highly regulated businesses such as alternative game farms likely do not have merit to bring a regulatory takings claim.

STATUS OF PROPERTY RIGHTS IN MONTANA

CASE STUDY: PROPERTY RIGHTS UNDER ATTACK

Kafka v. Montana Department of Fish, Wildlife, & Parks (2008)

Underpinning the Kafka decision was the failure to treat property rights as fundamental rights deserving of strict scrutiny and the highest standard of judicial review.

In a blistering dissent, Justice Jim Nelson called the majority's decision "fundamentally flawed."¹⁸ In his conclusion, Justice Nelson warned against the precedent Kafka set:

“ I am very concerned that the Court's decision here will be used - and, more likely, misused - in government's ever-expanding reach to regulate - and, ultimately, take - Montanans' broadly-defined property rights, without having to assume and spread amongst all taxpayers the economic burdens of that regulation and taking. Similarly, I am concerned that today's decision will encourage more 'carefully crafted' initiatives and legislation which end-run constitutional guarantees and mislead voters with smoke and mirrors. Finally, I am concerned that, recognizing 'If they can do it to them, they can do it to me,' citizens will propose and enact initiatives of the recent 1-154 ilk - poorly drafted, overbroad, and underinclusive. **Indeed, we invite the Legislature to enact laws to protect constitutional rights when this Court refuses to define and enforce those rights.** ”

SOLUTION

PROTECT THE FUNDAMENTAL RIGHT TO USE PROPERTY

Policymakers should advocate for the right to use property to be explicitly considered a fundamental right. This would elevate our private property rights from being treated as a second-tier right by Montana courts, to standing equal with other fundamental rights.

A fundamental right to use property would transform Montana government in the following ways:

1. HIGHER SCRUTINY OF REGULATIONS

By strengthening the property owner's rights through a higher level of scrutiny, it would fall on the government to provide compelling reasons for new regulations that harm the safe, clean and peaceful use of private property in Montana and to ensure that regulations are narrowly tailored to accomplish their goals.

2. PROTECTION FROM POWERFUL, BIG-MONEY INTERESTS

When controversial activist groups with big money backing from out-of-state seek to impose harmful land use regulations via the ballot initiative process, Montanans can rest assured that their rights will remain protected. A right to use property might even be enough to dissuade radical groups from proposing ballot initiatives for extensive land use regulation out of concern for the sheer cost of justly compensating all property owners impacted by regulatory takings.

3. STRENGTHEN PROTECTIONS FOR HEALTH, SAFETY, AND THE ENVIRONMENT.

Higher scrutiny of regulations may even strengthen protections for health, safety and the environment by forcing policymakers to eliminate frivolous regulations and fully evaluate whether land use regulations are truly necessary to accomplish their goals.

4. RESTORE THE ORIGINAL VISION OF AMERICA'S FOUNDERS

By formally recognizing the fundamental right to use property, Montanans will be the first state in the nation to truly reinstate the founder's vision of strong property rights. No other state explicitly considers the peaceful use of private property as a fundamental right.

PROPOSAL

MONTANA CONSTITUTIONAL AMENDMENT

Policymakers should recommend a simple update to Article II, Section 3 of Montana's Constitution to voters to protect the fundamental rights of Montanans to engage in the safe, clean and peaceful use of their property:

Section 3. Inalienable rights.

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing, **using** and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

END NOTES

- 1 https://ia600606.us.archive.org/15/items/WhyNationsFailTheOriginsODaronAcemoglu/Why-Nations-Fail_-The-Origins-o-Daron-Acemoglu.pdf
- 2 <https://www.econstor.eu/bitstream/10419/184501/1/danb-2015-0014.pdf>
- 3 <https://constitutioncenter.org/blog/on-this-day-james-madison-introduces-the-bill-of-rights>
- 4 https://www.law.cornell.edu/constitution/fifth_amendment#:~:text=It%20also%20requires%20that%20%E2%80%9Cdue,private%20property%20for%20public%20use.
- 5 <https://supreme.justia.com/cases/federal/us/545/469/>
- 6 <https://mrsc.org/home/explore-topics/legal/planning/regulatory-takings.aspx>
- 7 <https://www.law.cornell.edu/constitution-conan/amendment-5/regulatory-takings-general-doctrine>
- 8 <https://www.hillsdale.edu/educational-outreach/free-market-forum/2008-archive/property-rights-in-american-history/>
- 9 Id.
- 10 Id.
- 11 <https://supreme.justia.com/cases/federal/us/304/144/>
- 12 <https://www.mtsu.edu/first-amendment/article/1966/strict-scrutiny#:~:text=Under%20strict%20scrutiny%20the%20government,means%20available%20to%20the%20government.>
- 13 Id.
- 14 <https://www.hillsdale.edu/educational-outreach/free-market-forum/2008-archive/property-rights-in-american-history/>
- 15 <https://elaw.org/content/us-montana-environmental-information-center-et-al-v-mdec-296-mont-207-988-p2d-1236-mt-1999>
- 16 <https://i2i.org/wp-content/uploads/The-MT-Supreme-Court-VS-The-Rule-of-Law.pdf>
- 17 <https://cite.case.law/mont/348/80/>
- 18 Id.



frontierinstitute



Facebook.com/frontierinstitute



frontiermontana

