

## Commentary

# What is Land? A Broad Look at Private Rights and Public Power

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### INTRODUCTION

A lot of Americans are plainly worried about private property these days. Not many of them may pay dues to property-rights organizations but they nonetheless sympathize with the movement and its complaints. To see this we only need to look at the situation in Oregon and the public approval of Measure 37. A lot of people are worried. Why is this so? How legitimate are their fears? And how might we respond to them?

As for the source of the concerns, the temptation is to assume that landowners are simply selfish and want to keep their land values high. But that's hardly it alone. The current conflict has deeper roots, having to do with the ideas people have about private property—ideas that are incomplete, even flawed. Not understanding the institution of private property very well, people have trouble understanding the changes going on and fear them. People's worries, that is, probably have as much or more to do with confused thinking about the institution of private property than they do with bad values.

America today needs a new understanding of private property rights in land, both to deal with current squabbles and to lay a foundation for sensible regional planning. It needs new ways to think and talk about this vital, flexible institution. It also needs, in

order to address current worries, something like a bill of rights for property owners—a charter that respects their legitimate interests while at the same time reflecting the complexity of property as an institution and protecting the important, competing entitlements of communities, taxpayers, and citizens.

On the surface, private property seems to divide up nature itself—the land—into pieces; an owner here, an owner there. But it really doesn't do that. Nature remains an integrated whole. What private property does is divide up control over nature. It delegates to particular people special powers to manage particular parts of the land. The problem with this allocation of power, of course, is that planning is possible only if the government maintains some level of managerial control over the land. So who gets to manage a particular parcel of land? The individual owner? Some governmental body? The two together? Maybe neighbors have some role? The issue is about managerial control, about how we divide up power to manage nature. That's what our country is debating today.

At the moment we are confused about this basic issue of power. We've always displayed a deep current of distrust over public power, and that distrust has now focused on government's role in constraining private land uses. Most everyone realizes that the public

deserves a role here; we can't just let landowners do whatever they want. But by the same token, the government can't take control and push the owner out of the picture. Somehow we need to find a middle ground. And we're having trouble doing that, finding this middle ground where the owner has clear powers, protected and secure, while the public has just enough power to protect the public's interest in land.

Private property is in bad shape today, not economically or politically, but rather *intellectually*. We're having trouble making sense of it as an institution, in terms of how it works, why it exists, and how the rights of one owner fit together with the rights of other owners and of the community as a whole. The world is changing, our landscapes included. Allocations of power that might have made sense in the past make less sense today. What we lack is a principled way of deciding how to make adjustments that are fair to landowners and communities alike.

A big part of our confusion about private land comes because we keep looking to the U.S. Supreme Court to chart out a middle ground on the issue, and it isn't doing so. Indeed, it has failed at the job completely. What the Supreme Court has done, really, is just to pass this hot potato back to the political branches, which is fine; indeed, it's entirely appropriate. But the Court has done this without

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announcing what it is doing and has failed to give any guidance to other political branches on how they might address the issue.

Private property as we know it largely arose out of the judicial decisions of common-law courts over centuries. For various reasons, our common-law courts—that is, our state supreme courts—decided to get out of the business of keeping property law up to date. For decades now people have looked to the U.S. Supreme Court for guidance, but the Court is in charge of interpreting and crafting federal law, and private property is a product of state law. Really, no level of government today is paying attention to private property as a whole. No one is keeping the institution up to date. The Supreme Court isn't helping us. State supreme courts are pretty much keeping their hands off. State legislatures could take up the job but they're not particularly good at systematic thinking—they deal with matters on an issue-by-issue basis and aren't giving private property as a whole much thought. We are adrift, with no one tending the private-property ship.

Private property is a vastly more complex institution than most people realize. Our public discourse about it is taking place at an extremely simplistic level. That's our biggest problem today, and we need to address it head-on.

#### POPULAR IDEAS AND POPULAR COMPLAINTS

To the average American, what does it mean to own land? Judging from popular rhetoric, ownership includes five key elements.

First, the common view is that a landowner has wide latitude to use her land as she pleases, so long as she doesn't engage in activities that are harmful. Landownership is basically about the right to use land. More particularly and second, landownership includes a right to develop the land and to build on it, as well as a right to exclude outsiders from coming on and making any use of the land. Third, private property is essen-

tially an individual right; it is a private right and a private power, existing in the private realm of life apart from the public realm. Fourth, while government possesses power to regulate land uses and development, regulation cannot cut too deeply into what landowners do on their lands. It cannot render land uses unprofitable nor reduce land values too far.

Fifth and finally, private property is viewed as one of the central pillars of American society. It is one of the institutions that define our nation, in contrast with nations that don't have secure private property. Property is also a check on state power in that it protects the individual against an overreaching state. To challenge private property, then, is to threaten the nation; it is to challenge a central element of what America is all about. This is what private property means to most people.

So why are many people upset with the state of private landownership in America today? Why do we have a property rights movement? Why did so many voters in Oregon, of all places, approve a measure that severely limits the powers of the state to regulate land uses? The public's worries, complaints or angers—however they show up—basically come down to four.

The most obvious complaint is that land use regulations can reduce land values. They can keep landowners from building and making money. And this reduction in land value is considered unfair because the land value, we assume, belongs to the landowner. When we reduce land values, we've unfairly taken something that belongs to the owner.

There's no doubting the influence of this first complaint, but it's important to note that support for the property rights agenda extends well beyond the landowners who have suffered losses in land values. If these were the only people complaining, Oregon would not have passed Measure 37. Something more is going on. Now, it might be that the other people supporting the movement are simply afraid that they might be next in line—their property will be the next to go down in

value. This may be true, but again it seems inadequate to explain the worries and anger.

A second complaint is that landowners today are being treated unequally. Some people get to develop or already have developed, and now some people can't. People in one place get to build, people in another don't. The treatment is disparate and unfair, without regard for the economic decline involved.

A third complaint is of more recent origin. Some land use regulations seem to demand that particular landowners use their lands in ways that provide benefits to the public. The public, it seems—or so it is alleged—is unfairly extracting benefits from landowners without paying for them. Thus, when the public insists that landowners leave land open, or keep vegetation in place, or avoid draining lands, it is doing this because the public will benefit. But if the public benefits, why shouldn't the public pay? That's the argument. Implicit in this complaint is a distinct image of conflict—the individual landowner vs. the government. When the government regulates property, it seemingly does so on behalf of the public interest and thus gains public benefits. The individual vs. the government—that's the situation, as the average person sees it.

Fourth, we have a worry that is harder to measure or even to prove but that I suspect is present nonetheless. That's the worry that property as an institution, as an embodiment of American culture and society, is under attack. When government fails to respect private property, it is cutting away at our nation's foundations. The former Soviet Union didn't respect private property and it collapsed. Maybe we too will collapse if we don't treat the institution with respect. A specific fear here is that the alleged attack on private property is also an attack on individual liberty, and we are, of course, the land of liberty. So to protect private property is to protect liberty, which is to say to protect the core American value.

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These are the four complaints today, leveled at land use regulations and thus at the people who produce and implement them: Government is reducing land values, taking economic gains that properly belong to individual owners; it is treating landowners unequally and thus unfairly; it is extracting benefits for the public that the public should pay for; and it is threatening a key American institution that is at the heart of who we are. No wonder people are worried. No wonder Measure 37 passed.

#### DIGGING BENEATH THE SURFACE

To move ahead on this issue, searching for some sort of middle ground, we need to dig into these widely held assumptions about private property and the alleged assault on it. We can do so by probing the institution at 10 key points.

First, one cause of our conflict today is that people have widely differing ideas about what types of land uses are harmful. Most everyone agrees that landowners should not use their lands in ways that cause harm. But what actions are harmful? Answers vary and the variations create conflict. A lot of harms today aren't particularly visible. Ecological harms might be recognized only to those who understand ecological interconnections. Many people can't grasp hydrologic cycles, for instance, and the ways land uses affect waterways. The needs of biodiversity are also poorly understood. And the list goes on. Particularly hard to see are the harms that come from land uses that become harmful only when too many people engage in them—what might be called “carrying capacity” harms. Some people see harm and propose laws to address it, while others don't see the harm at all and view the laws as misguided and threatening.

A second point: In our public discussions about regulations, we too often use anecdotes involving a single landowner pitted in battle against the state. Only one landowner is in the picture, and the role of the state is to promote the public interest at the expense

of the private landowner. Owner vs. state, private vs. public. You've heard the anecdotes. The truth is, though, landowners are surrounded by other landowners, and the rights and activities of neighboring owners are intertwined. In most settings, the government's role is to adjudicate or to avert disputes among landowners. A more apt description of the situation is landowner vs. landowner, with the state called upon to resolve the dispute—or to act in advance to avoid it. When we add neighbors, the whole situation shifts. No longer is it public vs. private. No longer is the state promoting a public interest apart from the private interest of landowners.

By adding neighbors to the equation, we often see that private property rights are on both sides of a land use dispute, and that there really is no private-property position that the government can take in the dispute. Either the government allows the huge hog farm to operate, or it protects landowning neighbors against the resulting smell and pollution. There are property rights on both sides, and the government must decide what type of property rights to protect.

Third, our simplified public view of land ownership routinely overlooks the fact that land parcels can differ widely in their physical features. They differ in ecological terms, as well as in social and economic terms. We need to interject this reality because it greatly affects the ways we think about the ideal of equal landowner treatment, so important in our society. Land use regulations don't really treat *landowners* differently. They treat land *parcels* differently. And that's a much different matter. Unequal treatment of people as people can be wrong. But when we realize that laws operate on land and that land parcels differ, suddenly the problem is much different.

Fourth, let's consider the common assumption that private property is basically a private power, something existing in the private realm. This common view is simplistic and, frankly, wrong. Landowners may say they want

the government to leave them alone, but they really don't. What landowners really want is for the government to be on their side. They want the police, the courts, and even the prisons to be at their beck and call, if someone trespasses on their lands or commits a burglary. They want the legal right to call upon the government to protect them in disputes with other people.

Fifth, and related here, is that our simplistic image of ownership routinely overlooks the way that private property is itself a severe *restriction* on citizens' liberties. That is, when the law grants private property rights to one person, it necessarily curtails the liberties of other people. This reality was once widely understood in the United States. It is astonishing how we have almost forgotten it.

Think about this. What happens when landowner A puts up “no trespassing” signs, and B, C, and D can no longer enter a tract of land? The liberties of B, C, and D have all been reduced. In a nutshell, that's the way property works, as generations of writers about property have understood. Landowner A gains rights only at the expense of everyone else. Imagine for a moment how property first arose. A common story is that property arose when party A came along in the wilderness and grabbed a piece of land, proclaiming it as his own. But that really isn't how it happened; property is inherently a social relationship. Landowner A didn't gain ownership of land when he seized it and claimed it. He became a landowner only when parties B, C, and D came along, and announced that they would respect A's ownership rights. Only when nonowners agree to respect the rights does property come into being.

When we see this simple, yet vital, truth, we can also see why private property is, in fact, a morally problematic institution—another truth once widely known but now pretty much overlooked. Private property is morally problematic because it gives to landowner A the power to call upon the police and courts to curtail the lib-

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erties of B, C, and D. When one citizen can have another citizen arrested, there must be a good, morally legitimate explanation to uphold the action. And we can't just say that A has the power to do this as landowner, because it is A's ownership that itself needs justification.

The sixth point: Property rights are defined by law and exist only to the extent authorized by law. Take away the laws, take away the courts and police, and property rights come to an end. It is as simple and confusing as that. Property is a creature of law, despite our mythology about property rights in a state of nature. Property arises when *the law* allows landowner A to exclude other people and to call on the police and courts to enforce his rights. The law doesn't just *protect* A's rights as landowner; it *creates* those rights.

There are two important corollaries of this link between property and law. All of our laws change over time, property laws included. So if property is a product of laws, and laws periodically change, then this means that property rights change. And they have, often and considerably. The meaning of land ownership today is far different from what it was 100 years ago, and the rights of 100 years ago differed from the rights of 100 years before that. Property is an evolving institution. Another corollary: Laws in our country arise indirectly out of the sovereign power—the demos, or people collectively—and all of our laws, property laws included, are supposed to promote the public good. Property exists because it supposedly promotes the public good, and it is legitimate only when it continues to promote the common good.

During the 19th century, the rights of American landowners shifted considerably, mostly to promote economic development, to allow more intensive land uses, and to give landowners greater control over their lands.

Change in landowner rights continued during the 20th century and it

continues today. Legal change, of course, can be good or bad, but some types of change in landowner rights are not just good, but essential. They are essential because property is a coercive institution. It restricts liberties and can put people in jail. Coercion is legitimate only when the laws authorizing it are morally legitimate, which means, at a minimum, that they promote the common good of landowners and the landless alike. As times change and circumstances change, our ideas about the common good also change. As this happens, property law needs to change as well. If it fails to do so, it can become illegitimate. It is simply not right for the law to give power to landowners under circumstances that allow them to disrupt the common good.

Private property as an institution largely serves three functions. That is, if we think of it as a human-created social tool (as we should) there are three benefits we get by using this tool. Primarily, it is an engine of economic development. When a person owns land, she can plant crops in the spring knowing that the harvest will be hers in the fall. No one will come along and steal the crops. A person can construct a building, knowing that he'll have the use of it. It's hard to get people to improve land without security. Property is also valuable in that it provides people a sphere of privacy. It gives owners a realm in which they can express themselves and develop and live as individuals. And then we have property's role in providing stability for the civic society. Ownership gives people a stake in society, providing an incentive to promote good governance. Widespread ownership provides stability in the community, helping to support the state.

So, with these three functions in mind, let's think for a moment about the complaints leveled by the property rights movement. No one's really worried about property's role in protecting privacy and individual personal growth. Nor is anyone really worried about the

decline in land ownership and the role of property in stabilizing society. The property-rights complaint is really pretty narrow—landowners are being disrupted in their ability to develop land or to initiate new or expanded uses of land. So the complaint is limited to the first of the three functions. When people worry about private property, it's about the ability of owners to build on their land or otherwise engage in economic activities. That's the worry. Is it true?

Unfortunately, we need to bring in yet another complication to answer this question. Land parcels vary greatly in value. A one-acre parcel might vary in market value from \$100 to \$1,000,000 or more. So why do land parcels differ so much in value? There are a number of factors at work, of course. Parcels vary in value based on their physical features: Is the soil fertile? Is the land flat? Does it overlook the ocean? and so on. But let's ignore these physical factors and think for a moment about two land parcels that are physically identical. Why might these parcels vary greatly in value? Roughly speaking, there are two reasons. One is that the landowner has improved the land—mixing labor with it, to use John Locke's language from the 17th century. This increase in value is due to action by the landowner or some preceding owner. Land value can also go up for reasons unrelated to the landowner. A landowner might stand back, do nothing, and watch a city rise up around his property. As the city is built, the land skyrockets in value. The value of land is due to the surrounding land uses. In other words, the value of one parcel is due to what other people have done on surrounding lands. A land parcel can rise greatly in value because of the efforts of the surrounding community. One of the main sources of our intellectual confusion about private land and private property in the United States today arises because we fail to distinguish between these two types of land value. One value is created by the owner, the other by the community.

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Why is this distinction important? An obvious point is that the distinction seems pertinent when a landowner complains about regulations that decrease property values. When we hear this complaint, we might just want to ask: What value has gone down? Is it value that the landowner has created through her own efforts, or is it instead value that the community has created? Maybe we'll be much more sympathetic if the value is due to the effort of the owner than if the community has created the value. After all, if the community created the value, why can't the community claim it? That is a serious question.

The other reason why we might distinguish between these two sources of value—the value created by the landowner and the value created by the community—relates to the role of property in stimulating economic enterprise. When we want to stimulate enterprise, what we mean is we want to encourage people to mix labor with land and improve it, to plant crops or construct buildings or open mines and the like. To get people to mix labor with land in this way we need to protect the value they create with their labors. We need to protect their buildings, crops, and mines.

But what about the community-created value? How important is it to protect that value? If we want to encourage a landowner to plant corn in the spring, we need to protect his right to harvest the corn in the fall. But in order to encourage corn planting, do we also need to say to the landowner that we will protect his right, 10 years from now, to build condominiums on the land? Why is that important? The answer is hardly obvious. To get people to mix labor with the land we need to protect the value of their labor. There is far less need to protect the land's speculative value for future development. This conclusion may seem surprising, harsh, or even un-American. Yet many observers have reached these economic and moral conclusions. Among them was the late 19th-century

economist Henry George, who based his enormously popular writings on this line of reasoning. Google "Henry George" today and you'll be surprised at the continuing interest in his economic ideas.

We can go back even further in time, to our nation's founding. Most everyone knows that private property was important to our nation's founders. What they don't realize is that our founders had quite different ideas about property than we do. When they talked about the right to property, they often meant easy access to property. Americans in the late 18th century tended to be mighty suspicious about property rights for undeveloped land—or as they put it, unimproved or unenclosed land. In most of the country, in fact, owners of land only had the right to exclude outsiders if they enclosed the land in a sturdy, expensive fence. The public had legal rights to use all unenclosed land, regardless of land titles.

This once-widespread rule about public access was apparently based on natural-law reasoning. According to natural-law theorists, a person only really became the owner of land by improving it—by mixing labor and cultivating or fencing it. Until then his property rights were limited. This reasoning, we might note, supplied one of the justifications frontier people used to take lands from Indians. The Indians didn't really own the land because they hadn't improved it—they didn't fence it and put on livestock. Unimproved land was really second-class property.

The natural-law theory of property isn't talked about much today. Few recall that it only granted ownership of property to the extent of the value added by the landowner's labor. What does remain relevant is the related matter of fairness and the ability of private property to serve its function of stimulating economic enterprise. The truth is, fairness doesn't require us to let landowners capture the value in their land created by the surrounding community. Indeed, we might say just the

opposite. As a matter of fairness, if the community creates land value, community members ought to benefit from it. In addition, we can stimulate economic enterprise simply by protecting the improvements people make to land—the depreciated cost of what they have added to the land. There's no reason to promise the farmer that he can build condominiums in 10 years to get him to plant corn today.

In light of these observations, what are we to make of the popular complaints about government and private property—taking economic value away from landowners, unequal or disparate treatment, landowners claiming that they are being forced to confer benefits on the public without getting paid, and, finally, the sense that the institution of private property is threatened?

For starters, there just isn't much reason why we should protect the land's full development value. Other industrial countries often do not. The development value of land has a lot to do with public investments in infrastructure; that fact people know. But there's more. John Locke might well have had it right: What we need to protect is the labor an owner has added to land—the replacement cost of improvements minus depreciation, when the improvements are taken. Why protect development value when it represents no labor by the owner? Laws change, and legitimately so. Development rights change. The right to develop should be defined and limited by the laws in effect when the development occurs.

As for the complaint that land use regulations force landowners to confer benefits on the public—a few do, of course, and they shouldn't. But the vast majority of laws do not. This claim is overstated because many people just don't see the harms that land uses cause. The public does not benefit when a landowner is told to halt a harmful activity. This, of course, is the familiar "polluter pays" principle. Pay for the harms you cause. To implement the principle, lawmakers need to

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decide what types of land uses are legitimate and what types are harmful. When the law then bans a land use deemed harmful, payment to landowners is not right. When the law halts a legitimate land use, a benefit is being extracted and payment probably makes sense.

What about the claim of treating landowners unequally? Again, landowners do get treated unequally, and that's sometimes unfair. But we need to be clear about what equality requires. Land parcels differ widely. When we write laws that take into account legitimate differences in land parcels we aren't treating landowners differently. We're treating land parcels differently. A wetland is not the same as land that is high and dry. A flat field is not the same as a sloping, unstable hillside. It is also the case that landowners are different when they seek to develop at different times, given the legitimate course of legal change. A landowner who proposes development today is not the same as a landowner who developed 20 years ago, when circumstances and laws were different.

The final complaint, again, is that land use regulations are putting property as an institution under attack, threatening this vital pillar of American society and culture. The claim is much exaggerated. Of property's prime functions, only one is at all being threatened, and that's the ability of property to promote economic development. But laws rarely threaten the stability of development after it has taken place. What is disrupted are the hopes people have to develop land in the future, or to expand some existing use. This is a much different kind of disruption, and it is hard to prove that it has much social cost. Of course landowners don't like it, but it really doesn't hurt society in a major way.

Here then is the bottom line. Private property is not under attack today. What's under attack are the abilities of landowners to develop land and make money in ways that other citizens view as inconsistent with the common

good. It's a political fight. And the way to resolve it is to focus attention on the public good and figure out which laws would best promote that public good. It is simply not right for some relatively small group of citizens—the holders of development land—to contend that their personal desires are paramount, and that their hopes to make money off their land should trump the desires of citizens collectively to promote well-planned landscapes.

#### THE ELEMENTS OF A RESOLUTION

American society today very much needs a new set of ideas about landownership, a new way to think about private property rights in nature. It also needs, given widespread worries, some sort of landowner bill of rights, an express statement of protections that landowners can enjoy. And maybe professional planners are better situated than anyone to respond to that need.

Private property is an important American institution. It provides us many benefits, and we need to see them clearly. It provides owners with a stake in society, making them better citizens and thus helping the common good. It diffuses power, it protects personal privacy, and it provides a useful engine for economic development. Private property is legitimate when and to the extent it promotes the common good. And it often does. Or at least it does when property rights are properly tailored to promote the common good. And that's the point. When we talk about private property and the powers landowners possess, we need to talk about whether the recognition of the contested landowner rights do or do not serve the collective good.

Upon this foundation, let's add the reality that the property rights of landowners are necessarily intertwined. The actions of one landowner can interfere with another landowner's quiet enjoyment of the land. And so we are forced to decide, again and again: should the law authorize the intensive land use, despite the disruption it causes, or should the law instead protect an owner's

quiet enjoyment of land by banning the intensive land use? Do we let upstream landowners drain their lands, or do we give downstream landowners the legal right to halt the flooding? Lawmakers don't threaten or take away private property when they answer these unavoidable questions. Our popular images of private property need to include this lawmaking function. Whenever we talk about a landowner's rights, we need to bring neighboring landowners into the picture. It is positively misleading to talk about property rights using only anecdotes about a single landowner battling against the state. Bring in the neighbors. Add some realism. The debate will improve.

Going further in our new vision of ownership, let's plug in the piece labeled "do no harm." And let's make very clear—much clearer than it is today—that harm is an evolving concept. It changes over time; it changes with the circumstances and new ecological knowledge. Lawmakers can legitimately redefine harm, generation upon generation. We're not bound by ideas of harm from a century ago. Landowners today cannot engage in activities that lawmakers view as harmful. It's that simple. Harms can include ecological degradation. They include harms being imposed on future generations and even on future owners of the same land.

When we put these points together, here's where we end up. Landowner rights can be, and really should be, tailored to the circumstances, prohibiting landowners from imposing harm, taking context into account, and otherwise allowing only those land uses that are consistent with the common good. Put otherwise, the public needs to regain control of this important institution. Through its lawmakers, the public needs to reassert its power and duty to alter the rights of ownership, wisely and carefully, to keep them up to date.

But what does this all mean for the individual landowner? What protections should the owner enjoy? At the moment, popular thinking tends to dis-

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play an all-or-nothing approach. Either government can restrict land uses severely, cutting land values to almost nothing, or else landowners get paid for pretty much any drop in value. Frankly, neither side makes sense. We need an intermediate position. And while my comments might seem pretty slanted toward the government's side of things, my ideas in fact would lead to greater protections for landowners than they currently enjoy under the constitutional decisions of the U.S. Supreme Court.

So what rights should a landowner have?

First, there is the right to equal treatment under the law with other landowners similarly situated. An owner should not be singled out for different, harsh treatment. This is a vital right. If I were interpreting the Constitution it would be the central right that the Constitution protects.

Second, a landowner should have an entitlement to compensation when a law goes beyond halting a harm and requires a landowner to confer a benefit on the public—keeping in mind, though, that a landowner must accept and comply with any law that halts a harm and harm can be broadly defined. Beyond that, lawmakers can't just come up with some pretext of harm to justify a restriction. To stand up to scrutiny, a state needs to offer clear evidence that a law really is aimed at halting actions that lawmakers deem harmful.

Next, a landowner should enjoy near total protections for existing land uses. There is a vast difference between a law that interferes with a current land use and a law that restricts future land uses. The former is highly problematic, the latter is much less so. At present, many people don't grasp the difference between a law that restricts development and a law that interferes with a current land use. They fear that if government can restrict development today then it can come along tomorrow and halt a current land use. The two cases are much different and our

laws treat them differently. Rarely are current land uses halted unless they really are harmful. That's the message people need to hear because they are confused and thus wrongly fearful. Land use regulations pose no real threat to the labor landowners have mixed with the land.

Last, but not least, landowners can fairly insist that all land-related laws serve the public interest, rather than some private interest. This is true of all laws, or ought to be, property laws included. It's a simple point, but bears repetition.

#### **CONCLUSION: THE LANDOWNER'S BILL OF RIGHTS**

These concluding points might usefully be turned into some form of landowner charter or bill of rights, setting forth the kinds of protections landowners possess against an overreaching state. Taken together, that is, they stake out a middle ground that could enjoy enough support to calm today's political waters. The elements of the bill of rights could be these:

First, there's the landowner's right to equal treatment with owners of similar lands who want to engage in the same activity.

Second, there is the right to get compensation if a law goes beyond halting a harmful activity and demands that a landowner confer a benefit on the public, realizing through the broad powers of government to redefine harm, keeping it up to date.

Third, there's a near total protection for current land uses, unless a land use really is causing obvious harm. If you mix labor to improve land, your labor is protected.

And fourth, there's the right to insist that all land use limits foster the public good and not some private good, and that the laws apply broadly to landowners similarly situated.

Those are the elements. Do they sound strong enough? In truth, they would protect landowners far more than the rulings of the U.S. Supreme Court. At the same time, they'd leave

planners and regulators free to undertake any land planning that really serves the public interest—particularly if planners go the extra step to try to broadly spread out the economic gains of development thought TDR schemes and the like.

Our nation is crying out for new ideas about private property, well-wrought ideas that chart a middle ground between landowner independence and nearly unlimited governmental power. Some organization needs to step forward and speak thoughtfully on the issue. Why not the American Planning Association? What about a task force specifically charged with coming up with a statement about private property as an institution and a landowner's bill of rights? What about a 20-page pamphlet on the subject to give out to city councils, zoning officials, conservation groups, private property organizations, and journalists—all to shift the discussion about private property to a more sophisticated level? It could help immensely.

Whether or not that idea makes sense, let me urge each of you, if you haven't done so, to take time to study private property as an institution. Yes, it's familiar. But most of us hardly understand it at all. The subject is fascinating, in terms of its history, its operation, philosophic justifications, its economics, and the ideas about it expressed over time—some sound, sound distinctly not. If I'm correct that our main problem today is muddled thinking, then the answer is to have more people who think and talk about it clearly. For us collectively, that's the next step.

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