

WHY AMERICA HAS A PROPERTY RIGHTS MOVEMENT[†]

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Despite being the most vigorous defender of private property rights in the world, the United States has given rise to a strong property-rights movement. In his lecture, Joseph L. Sax notes that the basis of discontent in the system is the way in which similar plots of land are treated differently because land-use rules are created after substantial development has occurred. However, it is most often the developers themselves that oppose setting out the rules for development at the start. While the developer perspective that equal plots of land should be permitted to be developed equally is initially attractive, Sax concludes that courts should consider the time in which lots are developed, as landowners have advance notice that the circumstances affecting development may change with time.

I have often pondered the paradox that the strongest property-rights movement in the world should have developed in the United States—the country that has been the world’s most vigorous defender of private rights and the private-property system. One would be hard pressed indeed to find another country where one’s bank account, securities holdings, and contracts are more vigilantly protected, and in which possessory interests in land and chattels are more jealously guarded against the whims of government and claims of public rights. Yet, not only do we have a potent property-rights movement, but it has achieved powerful affirmation from courts, academia, and legislatures. In light of this, it seems appropriate to ask: What is it that is bothering landowners so much? What is their profoundly felt, if not profoundly correct, sense that justice is not being done? For answers, we need to look to our many land-use disputes. Such disputes have been central to America’s property-rights controversy, and have supplied the primary fuel for the property-rights movement.

Almost everyone agrees that an owner does not have a right to use property in any way desired. Since colonial times, limits have been set

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on property rights not only when spillover harms, such as noise, smell, building height, and the like were felt by others, but also in terms of an affirmative obligation that landowners sometimes bear, such as the duty to plant shade trees along public sidewalks.¹ Land-use laws reflect and help define a community's standards as to what is acceptable between an owner and his neighbors and between an owner and the larger community. While originally dealt with case-by-case through nuisance litigation, for generations legislation has institutionalized communal land-use standards through zoning rules, including use-separation laws.² In the aggregate, these legal limits apply to almost everyone—though of course not everyone is affected, nor is everyone affected identically by each individual standard (e.g., laws limiting development of fragile hillsides), as Justice Brandeis observed many years ago.³ Given the historical pedigree of our land-use laws, I suggest that it is not their mere presence that is generating today's strong objections. Instead, I suggest that what energizes the property-rights movement is primarily a sense of unfairness arising because the rules of the land-use game often get changed late in the day, to the advantage of some neighbors (those who have already built) and at the expense of others (those who have delayed development).

In one form or another, most contemporary takings cases involve some version of downzoning, that is, a significant decrease in the type or extent of permissible development. Some new law is imposed on the claimant that had not applied to other landowners in similar physical situations. The great majority of recent takings cases (*Penn Central*,⁴ *Agins*,⁵ *Nollan*,⁶ *Lucas*,⁷ *Dolan*,⁸ *Del Monte Dunes*,⁹ and *Tahoe-Sierra*¹⁰) can be characterized similarly. In each of these, a landowner who wanted to develop, as his neighbors had already done, was barred from doing so. It is hardly surprising that takings claimants would want to characterize their cases as instances of late-in-the-game downzoning, for when they do so they focus attention on the differing ways neighboring landowners are being treated. After all, if the land-use standards in these cases had been set at the outset—that is, if they existed as what Justice Scalia has termed “background principles” of property rights¹¹—then any takings-type complaints by the owners would draw far less sympathy. All

1. This history, and much else regarding property rights and obligations, is spelled out in Professor Eric Freyfogle's splendid book, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 61 (2003).

2. See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding zoning ordinance as a legitimate use of the city's police power).

3. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting).

4. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

5. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

6. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

7. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

8. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

9. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).

10. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

11. *Lucas*, 505 U.S. at 1030.

owners then would face equal treatment. With his inequality claim gone, the property claimant would be forced to assert instead the infringement of some use-right to which he is inherently entitled, without regard to how the proposed development would affect others.

With the rare exception of *Pennsylvania Coal v. Mahon*,¹² takings cases hardly ever turn on inherent use-rights (that is why the diminution-of-value standard tried out in *Lucas*, and the claim against moratoria asserted in the recent *Tahoe-Sierra* case, were ultimately unable to succeed). The inherent use-rights claim is simply too radical for us to accept; it implicitly denies that land use exists within a social setting, and it challenges the community's power to decide how conflicts should be accommodated. The notion of background principles acknowledges the right of the community to set standards at the outset.¹³ And, of course, the more the rules of the game are set early in the developmental process, the less room there is for the sort of assertions that give takings claims the force they now have: (1) disappointed expectations; and (2) unfairness vis-à-vis neighbors who have been allowed to do exactly what the claimant cannot do.

But establishing the rules early is just another way of describing land-use planning. And, paradoxically, it is preeminently development-minded property owners themselves—the people who most often utter the above two complaints—who resist long-range planning most vigorously (largely, we can assume, because planning ordinarily means regulation, delays, and costs).¹⁴ So it happens that, the more one wants government to signal clearly what can and cannot be done in terms of future development, thereby protecting expectations and avoiding disparate treatment, the more the power to decide land uses shifts from private initiative to public decision making.

Development-minded owners resist planning and public control, and yet without the planning and control, differential treatment over time is inevitable. By resisting long-range planning, owners have chosen to play a game that inevitably carries big economic risks. That is, land uses that lawmakers view favorably at one (early) moment in time might well look very different later, after ongoing development has altered the landscape, the local community itself, and prevailing public sentiments. We thus have a system in which the economic and political energies of developers are devoted to holding off decisions about two critical matters, leaving them to be made as late as possible: (1) How much of what might be termed the common ambient resources within an area (e.g., open space and wildlife habitat) can be utilized in toto before too much

12. 260 U.S. 393 (1922). I have always thought this case turned on the court's sense that the regulation gave back to the surface owners a right that they had previously sold away, making them less sympathetic than they would otherwise have been. In any event, the case has been effectively overturned by *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

13. *Lucas*, 505 U.S. at 1030.

14. The private planned community is a special case that raises its own governance problems.

has been lost; and, (2) even more importantly, in terms of the usable total of that overall allowable development, how should the economic benefits those ambient resources generate be distributed among landowners in the area.

This delayed-decision approach almost guarantees conflict as time goes on. The day almost always comes when a particular community decides that the area has reached its limit in terms of the total amount of ambient resources that people are willing to have consumed. When that day comes, early developers end up as winners and late developers as losers. When a community sees its limit fast approaching, downzoning begins.

I have thus far tried to describe this process neutrally, to describe the sequence of events in developing communities as we all observe them occurring. However, from the landowner's perspective, later-in-time developers are dealt with unfairly because they alone are forced to bear a disproportionate share of the cost of protecting ambient resources (e.g., water quality, open space, wildlife habitat). Protecting such resources, developers admit, might be perfectly reasonable. But the burdens of protection should not be imposed only on the landowners slow to develop. They are not the only ones causing the problems. The reality is that by the time latecomers want to use their property, neighbors have already consumed all the ambient resources that can properly be used. Thus, to deny development opportunities to the latecomers alone amounts to unequal, and thus unfair, treatment in the allocation of public costs. This outcome can seem especially unjust because these latecomers, by delaying their development, effectively have contributed ambient benefits such as open space to their neighborhoods year-by-year. The slow-movers who protect their resources get punished; those who develop early, capturing more than their shares of ambient goods, get a windfall.

This perspective has taken on special force in the habitat-loss controversies arising under the Endangered Species Act (ESA).¹⁵ In the typical habitat case most landowners in an area have already altered their lands and degraded their habitat values. As a result, a species faces the danger of extinction. Only the nondeveloping owners are left with viable habitat, and they are now the ones called upon to bear the economic burdens of protecting it. The ESA, like other downzoning done to protect ambient resources, imposes the costs of protection in a distinctly unequal manner.¹⁶ Of course, here too the root problem is the failure of government to engage in meaningful planning at an early stage, and thus its failure to protect the species before it reaches the brink.

15. 16 U.S.C. §§ 1531–1544 (2000).

16. In practice, however, under current habitat conservation plans, the burden is often considerably mitigated.

This landowner perspective also fuels much of the criticism of NIMBY-ism. According to NIMBY critics, people who want to protect their neighborhoods against further development are merely selfish landowners. They are unwilling to shoulder their fair share of a problem—exhaustion of ambient resources—to which they have contributed no less than the landowners who now want to develop. The costs of protecting the neighborhood is unevenly spread.

These prodeveloper perspectives on downzoning—one focused on the unequal development rules, the other on the unequal sharing of conservation costs—carry considerable persuasive force. The notion that the benefit of ambient resources ought to be distributed in some equitable manner, among all who utilize them, seems reasonable enough. One may respond, however, that developers are trying to have it both ways: They want the benefits of minimal governmental control over land development, so they can be free to play the high-stakes game where big money goes to those who capture the most ambient resource benefits; and at the same time they want protection against the risks of losses that come with a system that rejects advance planning and the certainties that it affords.

Still, there remains a legitimate concern here. Those who develop early do get an unjust windfall. It would be fairer if the benefits of development, and thus the costs of protecting ambient resources, were shared more equitably among all owners. Yet, to get this kind of sharing would require some sort of long-range planning effort begun much earlier. Indeed, we could describe these downzoning takings cases as, in effect, after-the-fact efforts by landowners to get courts to force their neighbors to disgorge their windfall profits. Ironically, this way of looking at the problem, sharing costs and benefits equitably, has a distinctly communitarian cast to it, although communitarian rhetoric is hardly what one would expect to hear from takings-case plaintiffs, or from their property-rights-movement allies.

Another way of analyzing the developer perspective is to see it as viewing land and property rights in space, in the sense that each similarly situated acre ought to have the same land-use rights. But, there is another way of looking at land and property rights, one that gives us a distinctly different perspective on these downzoning cases. Instead of viewing property rights in space, with all lands holding similar rights, we can view them as existing in time. Thus, an acre proposed for development in 1954 is not the same as an adjoining acre slated for development in 2004. Or to put the point more simply: as landowner, you take the world as you find it, at whatever moment you choose to act. The world of 1954 in most of urban and suburban America was simply different from the world of 2004.

If we want to maintain private initiative (rather than government planning)—and let people decide for themselves when and how they

want to develop—then we opt for a risk-taking milieu, with both the benefits and uncertainties that such a system brings. In a world that favors private initiative until crisis time arrives, there can be no government guarantee of equal sharing of the benefits and costs associated with ambient resources. There is no notion of “to each according to his acreage.” Rather, the rule is, to each according to his initiative and his personal skill in predicting private tastes and public values, because the day will finally come when a line must be drawn, bringing the private-initiative game to an end.¹⁷

The view that we take the world as we find it strikes me as much more our common experience than is the idea of trying to work out some equal allocation of use opportunities that stays stable over time. Indeed, our notion of the very identity of natural things (what they are and how they are to be used) has been distinctly time-contextual. California’s Central Valley marshes, once viewed as valueless swamps,¹⁸ are today’s ecologically precious wetlands. The bounty-earning wolf-as-predator of the last century is now seen as an important link in the ecosystemic chain of being. Water as an essential household amenity—a view that generated nineteenth-century “natural flow” prohibitions on stopping-up flowing rivers—gave way to an industrializing society that depended on hydropower, and to new legal rights to more intensive, “reasonable” water uses.

In every sphere of life, in fact, the general rule has been that you take the world as you find it. If you happened to live in California in the 1930s you could get to work with far less traffic congestion and buy a house for a smaller percentage of your income. On the other hand, you might have been of draft age when World War II began (if a man); if a career-oriented woman, you would have lacked work opportunities available to women today. An industrial worker then may have benefited from protectionism of a type that is now washing away, eroded by the global economy’s free-trade demands.

In the context of property rights, landowners have typically wanted the power to choose the moment in time to develop or redevelop, the moment when it was most propitious to seize the day. They have wanted development patterns to reflect private initiatives and perceived consumer tastes (which are reflected privately by means of consumption patterns, and publicly through zoning and similar actions). From this perspective, of property rights in time, our downzoning cases appear in a much different light. Instead of viewing earlier users as gaining a wind-fall compared to later ones (the conception of property in space), we can

17. In this regard no distinction holds between the developer-entrepreneur and the individual (including widows and orphans), or between the individual who has long owned the land, and the person who bought it yesterday. If we are going to live in a nonplanning, private-initiative, world, we are all going to have to live by its rules.

18. 9 Stat. 519, 43 U.S.C. §§ 981–1000 (2000).

see each landowner as having received the gains reasonably available at the time he chose to develop (the conception of property in time), with the timing of development left to the owner to decide. As one reviews the last two decades of takings cases—though the recent *Tahoe-Sierra* decision may indicate an important turn in direction¹⁹—it is striking how much the space-dominated view of property seems to have captured a majority of the U.S. Supreme Court, and a number of lower courts. When judges focus on issues such as diminution of value and denominator problems, they implicitly begin with a view of fixity, of certain rights that are somehow inherent to a given space. It is revealing, in this regard, to go back to an earlier period, and recall how differently the courts once conceived the regulatory taking problem.

In looking back at old cases, one sees that property claimants invariably sought to persuade the Court of the legality of the use they wished to make at the time their property was acquired. The legality of a land use, at that moment in time, was the very essence of property. With almost equal invariability, the Court emphasized the centrality of changing values over time; no one, it announced, could vest rights against such change.²⁰ The earliest cases arose as impairment of contract claims.²¹ In them the Court acknowledged changing values by saying a legislature could not bargain away its police power.²²

As early as 1879, in the Mississippi lottery case, Chief Justice Waite said, “Any one . . . who accepts a lottery charter [the contractual property right asserted] does so with the implied understanding that the people, in their sovereign capacity . . . may resume it at any time when the public good shall require, whether it be paid for or not.”²³ Eight years later, in the much more celebrated case of *Mugler v. Kansas*,²⁴ Justice Harlan sustained a state liquor prohibition law against a claim that existing stocks, lawfully manufactured before the law was changed, had been taken without compensation. “It is true, when the defendants . . . purchased or erected their breweries, the laws of the state did not forbid the manufacture of intoxicating liquors. But the state did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged.”²⁵ Sustaining the law against the takings claim, Harlan relied upon the lottery case for the proposition that the police power is “continuing in its nature.”²⁶

19. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330–32 (2002).

20. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386–87 (1926); *Mugler v. Kansas*, 123 U.S. 623, 669–70 (1887).

21. See, e.g., *Stone v. Mississippi*, 101 U.S. 814 (1879); *Beer Co. v. Massachusetts*, 97 U.S. 25 (1877); *Holyoke Co. v. Lyman*, 82 U.S. 500 (1872).

22. See, e.g., *Beer Co.*, 97 U.S. at 32.

23. *Stone*, 101 U.S. at 821.

24. 123 U.S. 623 (1887).

25. *Id.* at 669.

26. *Id.*

These two cases are especially interesting because they do not deal with traditional sorts of harm or nuisances, but simply with changing public values. Thus, when Harlan—in what is perhaps the most famous line from *Mugler*—says “all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community,”²⁷ he is speaking in a context where “injurious” is a conclusion, to be determined by public authority as of the time the owner wishes to use the property. Something that was deemed appropriate at one time may be thought inappropriate, and therefore “injurious,” later. The question is not what use-rights inhere in beer, or in a lottery charter, or were recognized when those rights were acquired, but how beer and lottery gambling are perceived at the time the owner wishes to exercise its rights in them. As Chief Justice Waite put it, these are “matters . . . which . . . must vary with varying circumstances.”²⁸ Nearly half a century later, in the great zoning case, *Village of Euclid v. Ambler Realty Co.*,²⁹ Justice Sutherland picked up the same theme of change over time. “Until recent years,” he said, “urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands”³⁰ Does this mean that constitutionally protected property rights are nothing but what the state says they are? Sutherland’s answer: “the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.”³¹ Has anyone since added wisdom to that pithy and profound summing-up of the takings puzzle? I doubt it.

27. *Id.* at 665.

28. *Stone*, 101 U.S. at 820.

29. 272 U.S. 365 (1926).

30. *Id.* at 386.

31. *Id.* at 387.