



In 1978, when New York City prevented Penn Central Transportation Co. from constructing offices on top of Grand Central Station because of the city's Landmarks Preservation Law, the Supreme Court ruled it did not constitute a government taking in violation of the Constitution.

## Legitimate Land-Use Planning, Policy, and Regulation

### LAW

**LAND-RELATED ACTIVITIES**—comprehensive planning, zoning regulations, subdivision controls—are a major part of what planning commissioners do. And it is common as part of these activities to hear landowners make a variety of claims about their land, about planning, and about planning regulation: “It’s my land and I can do what I want with it!” “The right to do what I want with my land is what it means to be an American!” “My property rights are guaranteed in the Constitution!”

But planning and land-use regulation are as American as those claims. While zoning and environmental regulation are 20th century inventions, they have clear links to actions taken by colonial cities and states. The history of the meaning of the “takings clause” of the Bill of Rights actually favors planning and planners’ proposals. Land—especially the private property that so many Americans cherish—is not what many think it is. And in fact, it never has been.

### An age-old American tradition

Land-use regulations—what many would often consider onerous land-use regulation—were commonplace in colonial times. Colonial Virginia regulated tobacco-related planting practices to require crop rotation and prevent overplanting. Colonial Boston, New

York City, and Charleston all regulated the location of businesses such as bakeries and slaughterhouses, often to the point of excluding them from their city limits. Colonial-era laws allowed residents’ land to be flooded (over their objections) to promote economic development (for waterwheels).

Land-use regulation is an integral part of American history, culture, and law. We have always actively managed our land-use relationships.

Why? While as Americans we prize individualism, we have always lived with a paradox: I trust myself to be a good and responsible land manager; I just don’t trust you. Land-use regulation is our response to a lack of trust in each other.

To ensure public order and security of property values, I agree to restrictions on my property because the same restrictions keep you from using your property as you please. Ultimately, I benefit more from the guarantees I get from the restrictions to your property than the costs I bear from those same restrictions on my property.

What about the takings clause? Land-use and environmental regulation are often subject to accusations of “you’re taking my property, and the Constitution doesn’t allow that.” This isn’t true. The takings clause is the final 12 words of the Fifth Amendment of the Bill of Rights: “. . . nor shall private property be taken for public use, without just compensation.” Landowners argue that certain types of regulatory actions—especially those that substantially reduce the economic value of their land—are precisely those that require compensation. Alternatively, if the public is not willing to compensate, then the landowner expects the regulation to be repealed.

That landowners can even make this argument is itself a 20th century development. From the time of its adoption in 1791 until the 1920s, the takings clause was only about one thing: the physical expropriation of land by government. It was not written to deal with the issue of regulation, and was not understood as having any relationship to government’s right to regulate. Through the early part of the 20th century, the U.S. Supreme Court placed virtually no limit on government.

This changed in 1922 when the Court introduced the idea of regulatory takings. In the case of *Pennsylvania Coal v. Mahon*, the Court found that, “The general rule . . . is, that while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking” (emphasis added). So now a regulation could be equivalent to a physical taking. If it was, then compensation was required. But the Court did not say where the line was between regulation that “goes too far” and regulation that does not. A few years later, in 1926, the Court made clear that zoning was not a regulation that went too far.

Are irate landowners correct when they argue for limited and compensated government regulation? Rarely. For all practical purposes, most of what governments do is legitimate, reasonable, and necessary, given the complex balancing act of the greater public interest and individual burden.

And what of land itself? The way we own and control land reflects 18th century ideas that democracy and market economies require a strong and enforceable set of privately owned property. This form of property treats the natural world as a bundle of rights: What is in actuality a whole can be fragmented. A property owner is entitled to its soil, trees, air, water, minerals, plus the right to control access and use and transfer land through gift (inheritance), lease, or sale. The rights to use or transfer apply to land as a whole as well as individual rights within the bundle. This is the basis of the idea that water rights, air rights, mineral rights, etc., can be separated from the bundle—and it gives rise to our ability to create conservation easements and transferable development rights.

What is less understood is that there has long been controversy over what is and should be included in the bundle, and that the bundle is not static, but has changed radically. What I own in 2017 is different from I would have owned in 1917 or 1817.

At the time of the American Revolution, founder Benjamin Franklin declared, “Private property is a creature of society, and is subject to the calls of that society whenever its necessities require it, even to the last farthing.” To Franklin, there was no sacrosanct private property bundle, and there were no limits to society’s need to change that bundle for social purposes. And change it did, most often in response to changes in technology or changing social values.

In the early 20th century, landowners lost their air right “to the heavens above” because of the invention of the airplane. Suddenly, we needed air highways. A part of everyone’s air right was “taken” for a

“public use”—but nobody was compensated. In the 1960s, commercial property owners lost their right to exclude consumers on the basis of race, gender, ethnicity, etc. Home owners can still do this, but not commercial property owners (even though they had for hundreds of years). Were they compensated when society changed their property bundle? No! This process continues, as technology and social values (for example, values about environmental goods) evolve. Will it ever end? Probably not.

Is your job difficult? Yes. Will people be mad at you? Yes. But are you on solid ground, with a strong basis in American history, culture, law, and policy practice as you engage in land-related activities? Most definitely. ■

—Harvey M. Jacobs

Jacobs is a professor in the Department of Planning and Landscape Architecture (Urban & Regional Planning Program) at the University of Wisconsin-Madison, where he teaches courses and does research on land policy and social conflict over property rights.

## RESOURCES

Property rights are an evolving concept; learn how they developed and what is most germane to contemporary planning.

## APA RESOURCES

*Lucas at 25*, Michael Allan Wolf Planning, July 2017: [planning.org/planning/2017/jul/legallessons](http://planning.org/planning/2017/jul/legallessons).

*2017 Planning Law Review*, On-Demand Education: [planning.org/events/course/9130408](http://planning.org/events/course/9130408).

*2016 Planning Law Review*, On-Demand Education: [planning.org/events/course/9109264](http://planning.org/events/course/9109264).

## OTHER RESOURCES

*Land Use and Property Rights in America*, Lincoln Institute of Land Policy, 2017: [tinyurl.com/yc792w98](http://tinyurl.com/yc792w98).

*Who Owns America? Social Conflict over Property Rights*, ed. Harvey Jacobs, University of Wisconsin Press, 1998: [uwpress.wisc.edu/books/0492.htm](http://uwpress.wisc.edu/books/0492.htm).