In Site Matters: Design Concepts, Histories, and Strategies
C. J. Burns and A. Kahn, eds.
New York: Routledge, 2005

2

Claiming the Site: Evolving Social–Legal Conceptions of Ownership and Property

Harvey M. Jacobs

When we think and talk about "the site," allowing the concept to form in our minds, we associate it with two ideas. The first is the idea that an isolatable site is owned, and that ownership is identifiable. Whether the ownership unit is a private or public entity (an individual, corporation, government, or some combination of these) is immaterial; what matters is the assumption that a legal someone has control over the site. The second idea is that the owner has a set of rights that may be freely exercised as a function of their ownership: for example, the right to keep others off the site, the right to use the site for the owner's own enjoyment, the right to develop the site, the right to extract profit from the site, and so on.

Commonly understood to be static, these two base ideas have in fact always been issues of intense social contention in the United States. What it means to own and what comprises the rights of ownership have evolved in response to changes in technology and changes in social values and relationships over the course of the nation's existence.

This essay seeks to explicate how we, as owners of, neighbors to, and people concerned about a site, claim it, given changing ideas about ownership and rights. I start deep in American history, with the debates over ownership and rights during the time of the American Revolution. Despite a popular rhetoric that often seeks to simplify this history, what I show is that any contemporary ambiguity about the ideas of ownership and rights is encapsulated in the country's founding

national documents. Tracing the ebb and flow of our national social-legal dialogue about ownership and rights through to the present day, the essay closes with some speculations as to how this debate might unfold in the future.

Our ability to claim a site—to act on and toward it—is conditioned on resolving conflicting stakes upon it. Claims are proxies for expressions of ownership and understandings about rights. To the extent that ownership and rights are becoming more fragmented, more social, with more claims by more parties, the ability to act becomes ever more compromised.

The ownership and control of a site—be it an urban or rural property, a place for commercial development or the family farm homestead—is an issue embedded deeply into the American psyche and one that helps to shape and define the American character. American character is hard to summarize, but one important element has to do with the opportunity and the right to own and control land. This quality goes deep into American history itself.

The early political history of the United States is often portrayed as migrations spurred by the issues captured in the First Amendment of the Bill of Rights—a search by oppressed peoples for political freedom (of speech and assembly) and religious freedom. Though these issues were key to colonial immigrations, it is equally true that migration was spurred by a desire for access to freehold land unavailable in Europe. The United States was settled by people, first Europeans but continuing through to immigrants today, searching for religious and political freedom *and* for access to land.[1] It was the promise of land that lured people to risk crossing the ocean and to leave the communities and people that were so dear to them.

In America's early years, western European countries were still structured under the vestiges of feudalism. An elite owned most of the land, and the prospects for the ordinary person to obtain ownership were small. America offered an alternative. Here was a place where any white male immigrant could get ownership of land and use that land as capital to make a future for himself. America was the land of opportunity. To be an American was to own and control private property.

In America's colonial past, the existence of land converged nicely with the new political theories of the period, coming together into ideas about ownership and democracy. As the revolutionary period

took shape, influential framers argued that it was as much for the right to own and control land as anything else that the new political experiment—American democracy—was coming into being. James Madison, writing in the *Federalist Paper* No. 54 during the debate about the ratification of the U.S. Constitution, argued that "government is instituted no less for the protection of property than of the persons of individuals."[2] Others, including Alexander Hamilton and John Adams, concurred. Adams, in a fiery set of words, noted that "property must be secured or liberty cannot exist. The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."[3]

According to this perspective, rights to landownership accrued through use, and freely constituted governments (i.e., democracies) existed for the protection of individual liberties, including the liberty to own and use land. The colonists utilized this idea of active use to provide the justification for taking land from America's native inhabitants. They did not understand the American natives to be using land in the European sense of active agricultural and forest management.[4]

For these founders these ideas were configured into a particular and specific relationship. Democracy required liberty (and vice versa), and both in turn required ownership and control of property. It was this sentiment that gave rise to Thomas Jefferson's idea of the yeoman farmer, one of the most enduring images from America's revolutionary period. According to Jefferson, the yeoman farmer (the family farmer who owned and controlled his own land) was the foundation and bastion of the new American democracy. Why? Because ownership of land gave the owner economic and thus political liberty. When a farmer could produce food and fuel for himself and his family on land he owned, no one could buy his vote. Thus, it was the rural landowner (in contrast to the urban wage earner) who was in the best position to make political judgments that reflected the greater public good.[5]

But this view of the relationship of property to democracy, and the fact of asserting property's primacy, was not unchallenged even in its own time. Perhaps the most articulate spokesman of an alternative perspective was Benjamin Franklin. During the constitutional period Franklin noted with force that "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."[6] Franklin was not alone in these sentiments; he shared them with Thomas Jefferson and others. (Jefferson's place in this debate is claimed by both sides; this appears to be legitimate, as he expressed statements that can be interpreted as supportive of both positions.) And in fact, if anything, what we see when we look at this issue closely is that the meanings of land and private property and their relationship to citizenship and democratic structure were and remain contentious issues—issues on which Americans did not and do not hold consensus. Rather, these are issues central to how we fight over the very nature of what it means to be American.[7]

To a large extent this lack of consensus is reflected in the country's founding national documents. In 1776 the Declaration of Independence promised Americans "life, liberty, and the pursuit of happiness." What few recall is that Thomas Jefferson drew this idea from the work of political philosopher John Locke, who called for life, liberty, and property. In the first draft of Virginia's founding documents, which Jefferson prepared and from which he drew for the Declaration of Independence, he included this phrase. Jefferson's idea was to give each free man fifty acres, to create the nation of yeoman farmers he saw as necessary for the new democracy. Jefferson lost this debate in Virginia and in Philadelphia. In its final form, the Declaration's language reflects disagreements about what was being promised to citizens of the new country.

Eleven years later, in 1787, the Constitution was adopted without any specific mention of land-related property. It was not until the adoption of the Bill of Rights in 1791 that the disagreements among the framers found a degree of consensus in the wording for the so-called takings clause, the final twelve words of the Fifth Amendment: "nor shall private property be taken for public use, without just compensation."

With the adoption of this phrase, the Founding Fathers formally recognized four concepts: the existence of private property, an action denoted as taken, a realm of activity that is public use, and a form of payment specified as just compensation. The interrelation of these concepts is such that where private property exists, it may be taken by government, but only for a denoted public use and when just compensation is provided. If any of these conditions are not met, then a taking may not occur. This constitutional provision allows for condemnation of private land for public highways, schools, parks, and other public activities, but requires that the public pay fairly for the land taken. But, as has been noted by countless scholars, our understanding of the exact meaning of these words to those who crafted them is unclear.[8] The clause does not tell us precisely when a takings has occurred, it does not define a public use, and it does not explain what constitutes just compensation. In fact, it doesn't even tell us what is considered private property.

Although some Founding Fathers did appear to want to afford property a central place in the constitutional/social contract schema, there was no consensus among the founders; their ultimate crafting of language in the Declaration of Independence, the U.S. Constitution, and the Bill of Rights reflected this lack of consensus and acknowledgment of compromise.[9] In addition, and perhaps just as important, is that the on-the-ground reality in colonial America, pre- and postindependence, was something less pure than either of the polar positions. Something akin to what we would recognize as land use and environmental regulation was common. For example, colonial Virginia regulated tobacco-related planting practices to prevent overplanting and require crop rotation, and Boston, New York City, and Charlestown regulated the location of businesses such as bakeries and slaughterhouses, often to the point of excluding their location within city boundaries.[10]

However, despite the land use and environmental regulation of colonial times, most citizens were free to use their land as they pleased, and they continued to enjoy this freedom through the eighteenth and nineteenth centuries. It was the twentieth century that brought real change to the status of property in America. This was the period when new technological developments changed how Americans lived their lives, and held and used property. In the early twentieth century, America went from a rural to an urban nation. The mass immigrations from Europe combined with the explosion of industrialization to bring waves of new citizens to the cities. As this occurred, ideas about land and ownership—management of the site—began to change.

To a large extent, new technology was responsible for a rethinking of what it meant for the individual to own land and manage a site. Under the classic definition of private property (the definition still

taught to first-year law students) ownership means *cuius est solum eius est usque ad coelum et usque ad inferos*—whoever owns the soil owns all the way to heaven and all the way to the depths. This is where the idea of mineral rights, water rights, and air rights going with physical ownership of the land is articulated.

In most Western countries, and most especially the United States, land is conceptualized, fictionalized, as a bundle of rights—or, as it is commonly discussed in the legal literature, a bundle of sticks. When one owns land, ownership refers to more than the possession of the physical soil within a defined set of boundaries. For the purposes of the law and the economy, ownership means the possession of a recognizable, fungible bundle of rights. This bundle of rights is socially recognized as ownership. In theory, this bundle is comprised of rights such as the air right (the ownership of the air space above the legally defined parcel), the water right (the ownership of the water sitting under or flowing over and under the legally defined parcel), the right to control access to the property (more commonly known as the right of trespass), the right to harvest natural resources (such as trees and minerals), and the rights to develop, sell, trade, lease, and/or bequeath the land in its entirety, or to do the same with selected rights.

If an owner has complete possession of these rights—that is, if an owner owns all the rights in the bundle—the owner is said to hold the property free of obligation, to have fee-simple ownership or freehold property. However, no owner ever has all of the rights in the bundle. Society, as government, always reserves some of these rights, or some portion of these rights. For example, wildlife ownership and harvesting seasons have long been a right reserved to and regulated by the government; few owners expect to own the wildlife (fish, deer, bear, etc.) on their rural property, and thus the right to harvest at any time and in any amount as they please. Government also reserves the right to enter onto property (to violate the right to control access) to carry out necessary social functions. However, even given these reservations, private property ownership has long been thought of as consisting of a robust bundle of rights, relatively free of obligations to the state or others.

This conception made practical sense until 1903, when the Wright brothers invented the airplane. Within a very few years of its invention, the airplane went from a novelty to commercial development.

What was the property consequence? Under the commonly understood definition of private property, if I owned air rights to the heavens above, then every time an airplane flew over my property it was guilty of trespass. The airplane had entered my property without permission as surely as if the pilot had walked up to my fence, smashed the fence, and kept walking. As technological change expanded the possibilities of air travel, the pre-twentieth-century definition of private property no longer appeared socially functional. If individual landowners could claim trespass of and demand compensation for their property by airplanes, air travel would become either too cumbersome or too expensive.

What happened? During the first half of the twentieth century, the U.S. courts scratched their heads over this problem. Eventually they solved the problem by "public-izing" air rights above a certain elevation without requiring compensation under the Fifth Amendment.[11] The courts reappropriated airspace to the public sphere so individual owners no longer owned *est usque ad coelum*—all the way to heaven. In effect, the courts created a new commons where one had not existed before. The creation of this new commons responded to changing social needs pushed by changing technology.

Continuing through the twentieth century, landowners saw the very definition of property change, bend, and flex in response to new inventions and changing social values. As society understood the impact of individual land use decisions upon neighbors and society at large, and as new ideas about ourselves and others developed, Americans continued to reconfigure the foundational property rights bundle.[12] Many examples of this can be given; I offer just a few.

The first is from the Civil War period. Until the takings clause of the Fifth Amendment of the Bill of Rights in 1791, despite the passion held by some framers, there is little mention in the founding documents of the United States of private property. The one mention there is, is oblique. In the Constitution—in Article 1, Section 2—there is recognition of slaves as property. In 1863, with the issuance of the Emancipation Proclamation, President Lincoln freed the slaves, thus taking this property from these owners. When the Civil War was won by the North, a set of these owners sued in federal court for compensation over the taking of their property by the federal government. Under the terms of the takings clause their assertion seemed reasonable. Their

private property had been taken for a public use but they had not received just compensation. The result of the legal action, however, did not affirm their position. Instead, the courts argued that new social values—a new view of the right of one human being to own and control another—overrode a prior, legitimate definition of property. And in fact, the codification of this view in the Thirteenth Amendment, which specifically outlawed slavery, reinforced this point.

In the 1960s, one century after the freeing of the slaves, further changes in race relations had similar effects on private property. In the popular mind, a focus of the civil rights movement was the practice of white lunch-counter owners in the American South. These owners, reflecting their understanding of their private property rights, decided who they would serve and who they wouldn't, generally refusing service to African-Americans. We have dramatic photographic images of this period, when young African-Americans sat in at lunch counters only to have food dumped on their heads. Despite the racism of these actions, these owners acted no differently than anyone does in deciding who may come into his or her home. These owners said, in effect, "It's my business, I built it with my capital and my labor, I get to decide who to serve!" But during the 1960s, as a result of social struggle, owners of commercial establishments lost their private property right to choose who they would serve or not serve.[13] Reflecting changing social attitudes on race and human relations, Americans decided as a society that the greater social interest was better served by taking this right away, and to do so without compensation to the owner.

This dialogue between changing social values and the changing nature of what the property rights bundle includes, continues through to today. During the 1990s it was perhaps best expressed through the resistance by male-only membership clubs and male-only colleges to the admission of women. What was the claim of these clubs and colleges? That the premises were their private property and they could and should decide who has access. Again, society asserted the primacy of changing social values over private property rights and changed the property right bundle (eliminating the ban on female access) without providing compensation.

In addition to the twentieth century's bringing forth a substantial reconfiguration of the property rights bundle itself, this was also the period of the rise of modern land use and environmental regulation,

which themselves significantly impacted the options for site owners to exercise their property rights. As noted, the open borders and industrialization of the early twentieth century brought waves of immigrants and migrants to America's cities. In 1920, for the first time, the U.S. Census recorded more people living in cities than in the countryside. These migrations caused significant land use problems, as individual site owners sought to maximize the potential of their sites while the city found itself pressured to exercise its traditional authority to protect the public's health, safety, and welfare. This was the period of muckraking journalism, which chronicled the poverty of immigrants crowded into tenements in New York City neighborhoods with densities exceeding even that of Calcutta, India, often absent of access to sanitation facilities, clean water, light, and air. Out of these conflicts grew zoning.

Today, zoning is common. But at the time of its invention, it was revolutionary. Why? For at least two reasons. It established a public sector framework of standards for land use that proscribed the property rights of site owners absent compensation, and it did so by treating site owners differently (the very idea of establishing residential, commercial, and industrial zones). The concept was so revolutionary that the U.S. Supreme Court barely validated it in their 1926 landmark case of *Village of Euclid, Ohio v. Ambler Realty*.[14]

New York City is credited with inventing zoning in 1916. Within a decade it had spread across the United States, because it filled a need that cities had for rationalizing land use management. Until the second half of the twentieth century, most land use regulations looked similar to zoning in its initial form. But then things changed again. As America began to suburbanize, zoning was stretched to fit new land use circumstances, and new forms of site management came into being to reflect changing social values about land and natural and environmental resources. This became especially pronounced with the rise of the modern environmental movement.

Conceptually, land use and environmental planning, policy, and management (through devices such as zoning) are premised on the need for individual property rights to yield to a collective definition of the public interest. Such planning and policy argues that an unfettered right to exercise individual property rights does not serve the greater public good. As some environmentalists articulate it, land use and

environmental problems arise precisely because the site and property rights inherent to it are privately held and managed. Individuals are making land use management decisions that do not take into account the broader public interest and a more expansive economic calculus—that is, their arguments update and restate those that led to the very invention of zoning.

A litany of common land use and environmental issues—farmland loss in the urban fringe, suburban sprawl, destruction of historic buildings, downtown deterioration, to name just a few—have all been depicted as issues that arise from a version of Garrett Hardin's "tragedy of the commons."[15] In these instances, the tragedy is that individual landowners make decisions that are economically and socially sensible to them, but are not judged to be as sensible to the broader public. To put the same point in the terms of classical economics, each individual pursuing his or her own self-interest does not yield the greater social interest.

For many, the legal pinnacle of this perspective was reached in the early 1970s, when the modern environmental movement was brand new.[16] A landmark case was argued before the state of Wisconsin Supreme Court: *Just v. Marinette County*.[17] The Justs had chosen to fill in a wetland in violation of state law. They argued that it was their land and they could do what they wanted with it. The supreme court disagreed; they said, you bought a wetland, you can use it as a wetland. Any other use, other than the natural use, is not something you can assume to be within your bundle of property rights; it is something that you must acquire from the community to which you belong. In the late 1990s the Wisconsin Supreme Court affirmed that this continues to be the law of the state.[18] This is one of the most dramatic examples available, but it shows the diversification and fragmentation of claims to the site.

Critics of this evolution of social control of the site ask us to take a deep breath and step back.[19] They argue that the fallacy in seeing modern society as a series of Garrett Hardin–style tragedy-of-the-commons situations is that society (government) is continually able to justify a restriction/removal of property rights every time a new land use and environmental problem is identified. Government can reconfigure who has a claim on and to the site, and there is no reasonable end in sight. From the critics' point of view there are at least two problems

with this: when what I own and control is only what the government says I control, does private property really exist? And what about the literal and figurative property–democracy social contract that forged and underlies the nation?[20]

There is an additional way to frame these two phenomena: as the reconfiguration of property rights in response to changing technology and changing social values, and as the continuous expansion of regulation. Framed that way, we see that throughout the twentieth century the parties that have had claim to any particular site have been expanding. If in the eighteenth and nineteenth centuries sites were largely the purview of owners to do with as they pleased, the story of the twentieth century is that a variety of interests laid claim to the site and argued that the owner's traditional rights were to be reshuffled to include their interests and claims. Most obviously, this expansion included government (in its various forms and layers) asserting its claim upon the site through the need to protect the public health, safety, and welfare. Modern land use and environmental policy also includes a formal and informal place for parties such as neighbors, community and neighborhood organizations, and special interest organizations when the site has a special characteristic (such as historic character or unique ecological characteristics).

But this is not a one-sided story. Early in the twentieth century, at the time zoning was being born and affirmed as a legitimate exercise of governmental control, the U.S. Supreme Court took up a related issue: is there a limit to how much the government can regulate private land? In 1922, in the case of *Pennsylvania Coal Co. v. Mahon,* Justice Oliver Wendall Holmes wrote, "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."[21] This sentiment would seem to support the concern of the critics of the evolution of social control of private land. Unfortunately, Justice Holmes did not specify the precise place where the unacceptable limits of the regulation occurred. Political, policy, and judicial practice since then has been to largely (though not completely) back public regulatory activity as not crossing the line that Justice Holmes identified. As recently as the spring of 2002, in the case of *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* the U.S. Supreme Court recognized the legitimate and important role of public regulation over

sites where there are conflicting claims between owners, neighbors, environmentalists, and the government.[22]

If this is where claims upon site stand at the beginning of the twenty-first century, how is all this likely to evolve into the future? We know that property is a complex social institution. People and communities have strong emotional attachments to particular places, and, for many people in industrialized countries, the ownership of private property is still one of the (if not *the*) primary economic assets acquired and managed in a lifetime. As such, individuals tend to have strong interest in the integrity of their property rights bundle. But at the same time, many people seem to have an inherent understanding of the need to limit the exercise of property rights through the use of public mechanisms (such as those used in land use and environmental management). How will these tendencies be balanced?

One prediction I offer is that the differences of policy and political opinion about the integrity versus malleability of property rights is going to deepen, rather than heal; fighting over the site will be intensified, rather than lessened.[23] Why? One reason has to do with the spread in America over political and social values and social and economic circumstances. This has been expressed and talked about in a number of ways. After the 2000 presidential election the national print media published a map that coded by red and blue the counties that voted for the Republican and Democratic Party candidates (George W. Bush and Albert Gore), respectively. The map showed a nation whose political opinions were divided largely between those who resided in the coastal (more liberal) states and in the heartland (more conservative states).[24] To some extent this division reflects social and economic circumstances. It was largely (though not exclusively) the residents of the blue states who enjoyed the economic boom of the 1990s, who were able to reposition their economic circumstances upward, and thus participate in further dividing America's economic classes.[25]

All of this has effects on property rights issues. How? While property matters to all of us, as an individual gets wealthier, the component of that person's financial profile directly tied to property decreases. This is only logical. As one's wealth increases, one tends to diversify one's holdings, and wealth is represented by real estate and other wealth instruments (stocks, bonds, art, precious metal, etc.). So it is not that the upper middle class and wealthy do not own larger homes, second homes, and so on, but rather that the proportion of one's wealth represented by this property decreases in the total wealth profile. So, while for the middle and lower middle class, the ownership of property (a house and lot) is the primary form of wealth, for the upper middle class and wealthy, property is only one part of how they own and invest to secure their wealth.

The impact of all this for claims upon the site is profound. If a proposed land use or environmental program is going to impact upon property rights, it matters how important those property rights are to those being impacted. If those being impacted are wealthier, they can, quite literally, afford the impact; it matters less to them. If those being impacted have only their landed property, then land use regulations that propose to take the value of that property for larger social values become more important to the individuals, who have significant incentive to resist such regulatory efforts and work to preserve the integrity of their property rights bundle.

Social scientists have long noted this phenomenon. That is, they have noted that those who tend to support the development and implementation of land use and environmental policies and programs are those who can, quite literally, afford them. And they have noted that an upward shift in economic circumstances, leads to a focus on the promotion of a set of quality-of-life values that can become (often become?) translated as regulatory efforts to shape the use of other people's private property in the interest of pursuing larger social values such as environmental protection, growth management, and smart growth.[26]

So if the observations and predictions offered about the way America's social and economic classes are developing are correct, what we can expect is ever more social conflict over property rights, as one group with resources seeks to secure more quality-of-life values (controlled growth, undivided farmland, pure trout streams, vibrant downtowns) and one group with some but marginal resources seeks to protect that sliver of investment they have in the American dream through investment in property (whether these be farmland owners, ranchers, wetland owners, or the owners of "blighted" downtown neighborhoods slated for redevelopment even when these neighborhoods and homes may be socially and economically viable).[27] To emphasize the point, an era of intensified social conflict over claims to the site is upon

us, and one of its expressions will be heightened conflict over property rights.

The bulk of this essay tells an American story about property rights. A way to characterize the story is that, starting at some mythical point in the pre-twentieth-century period, the property bundle was fuller, thicker, and stronger than it is today. Then, beginning at some undetermined point, but taking clear shape in the early part of the twentieth century, the property rights bundle came under assault from the state, as government was pressured to make the bundle narrower, leaner, and weaker to fulfill public goals at the expense of the private property bundle.

The twentieth century was a century in which the property rights bundle experienced waves of assault. At first the assault was a function of new technology and rapid urbanization. These phenomena continued through the century and were then joined in the century's last half by an assault born of changing social values, rooted in new attitudes about racial, gender, and then environmental relationships. With each wave of assault, the property rights bundle diminished.

What is interesting about this story is that each of these assaults was a change driven by a threat. In the early part of the century city spaces were changing as a function of international and intranational immigration; traditional ideas about property did not seem to work as these changes occurred. In the midcentury, property seemed to be a barrier to ever-mounting calls for legal and social change in racial relationships. In the late century, claims to property's integrity appear to clash with new scientific findings about ecosystem functioning and maintenance.

The question is: what's next? Will there be new challenges to property analogous to those that reshaped it in the twentieth century? The answer has to be "yes." We continue technological development, and it continues to present challenges to our ways of living and our concepts of property. Exactly what these developments will be, I won't venture. But they will come, and as they do property will be asked—we will demand—that it bend and flex in response, just as we have done throughout the twentieth century. And we will continue to do the same in the social arena. As a society we will insist that property be reshaped as we discover ways in which old conceptions of property hold back the liberation and social integration of peoples and others

(animals, landscapes) once deemed invisible or irrelevant, or at least less deserving than property itself. One likely trend for the future will be an increasing focus on the implications of new ecological understandings of human–land relationships. Going back at least fifty years, but gaining ever more currency with the growth of the modern environmental movement, land ethicists have been calling for a new view of land that is less commodity based and more community based, a view that gives to the land a right to existence on its own term.[28]

But as a broad set of predictions, these are uncomfortable for at least two reasons. One, it seems to suggest that there is no logical end to the reshaping of property, that instead property is always subservient to technology and social values. If this is true, then how can the premise, the promise, of property as an establisher and enabler of the individual in a democracy be realized? That is, if technology and social values always trump property (and always do so absent compensation), then what is property's value? What value does it serve as a bastion against the arbitrary power of the state? How does one prevent the tyranny of the majority? Are there first principles that are inviolate?

Also, these predictions fall into the trap of many predictions: assuming that the future will unfold as has the past. Instead, what we know about technological and social change is that there are periods of disjuncture, when something(s) happens to completely reshape our worldview and our abilities to live in the world as we have to that point. The difficulty is that few of us can imagine what these disjunctures might be and what changes they might bring. Yet we know these disjunctions have happened in the past; they will happen again. These changes, whatever they will be, will impact property and thus claims upon the site. So, for example, it is interesting to note that in this present period of history property is again dominant on the world stage as a result of one of these disjunctures. In 1989 the Berlin Wall fell, and within a few years the world experienced the dissolution of the Soviet Union and its political–economic block. Since then, the Western countries have been actively promoting democracy and capitalism throughout the second and third worlds. Often the first step in this process is assistance in the creation of private property, property registration and transfer institutions, and property markets. Private property—strong private property—is a premise of current international development policy.[29]

So, is there a future for private property in America? Yes. Private property is central to the very essence of the American experience, and it will continue to hold an important place in American economics, politics, law, and social debate. The desire to own and control a site seems to be a nearly universal human motivation. For many reasons, conflict over site management has been and will continue to be central to our dialogues—as neighbors, as members of special interest communities, as part of the larger community to which we belong, proximately, socially, and legally.

So how does any one of us make a legitimate claim to a site? To whom does a site belong? Who owns a site? It turns out that these are not easy questions to answer. If the site was ever the purview of the owner, it is no longer. In modern times, the site belongs to the owner of record *and* it also belongs to all of us. When we look at the legacy of the Founding Fathers and the documents they left us, we see a confusion about land and property, a confusion that is still with us and even more acute. Site ownership is more fragmented than we commonly acknowledge. The site has more claims upon it, and we, society, have ever more difficulty sorting out the legitimacy of conflicting claims.

So how do we—as owners, neighbors, concerned appreciators, and users—go about claiming the site? Who has the rights to act upon the site? The only way we have learned to answer these questions is to continually come together and argue it through, to use a social, dialogical, democratic process to address an issue with complex legal, economic, and cultural roots. There is no simple economic or legal formula to which we can turn. Each community in each generation decides on the balance point that respects the rights of the site owner and those of other claimants to the site. Is this is messy process? Yes. Does it guarantee that everyone will be satisfied? No. Is there is any other alternative? There doesn't appear to be.

We do know something about the future: private property will not stagnate. It never has, and it will not now. Private property will continue to evolve in America; it has to. As it does, so too will claims upon the site. Private property is a social contract. It establishes the rights of the individual *and* it binds society. The balance point between individual and social rights in property will continually be renegotiated. Each time it is renegotiated, the claimants to a site will be reshuffled.

As Americans continue to reinvent their concept of freedom, of what it means to have liberty, they will come to understand anew what it means to hold private property while living in a democratic society. Claims upon the site become one of the most obvious expressions of this ever-changing dialogue.[30]

Notes

1. James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York: Oxford University Press, 1992).
2. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Mentor Books, 1961 (1788)), 339.
3. John Adams, "Discourses on Davilia: A Series of Papers on Political History," in *The Works of John Adams*, Vol. 6, ed. C. F. Adams (Boston: Little Brown, 1851 (1790)), 280.
4. William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 1983).
5. James Gilreath, ed., *Thomas Jefferson and the Education of a Citizen* (Washington, D.C.: Library of Congress, 1999).
6. Benjamin Franklin, "Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania," in *The Writings of Benjamin Franklin*, Vol. 10, ed. A. H. Smith (London: Macmillan and Co., 1907 (1789)), 59.
7. Ely, *The Guardian of Every Other Right*; Harvey M. Jacobs, "Fighting over Land: America's Legacy...America's Future," *Journal of the American Planning Association* 65 (1999): 141–149.
8. For example, Fred Bosselman et al., *The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control* (Washington, D.C.: United States Government Printing Office, 1973); Richard A. Epstein, *Takings, Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1985); Ely, *The Guardian of Every Other Right*; William Michael Treanor, "The Original Understanding of the Takings Clause and the Political Process," *Columbia Law Review* 95 (1995): 782–887; Jacobs, "Fighting."
9. Bosselman et al., *The Taking Issue*; Ely, *The Guardian of Every Other Right*.
10. Treanor, "The Original Understanding of the Takings Clause and the Political Process."
11. Harvey M. Jacobs and Brian W. Ohm, "Statutory Takings Legislation: The National Context, the Wisconsin and Minnesota Proposals," *Wisconsin Environmental Law Journal* 2 (1995): 173–223.
12. Bosselman et al., *The Taking Issue*.
13. Neil Hecht, "From Seisin to Sit-In: Evolving Property Concepts," *Boston University Law Review* 44 (1964): 435–466.
14. 260 U.S. 393 (1926).

15. Garrett Hardin, "The Tragedy of the Commons," *Science* 162 (December 1968): 1243–1248.
16. Donald W. Large, "This Land Is Whose Land? Changing Concepts of Land as Property," *Wisconsin Law Review* 4 (1973): 1041–1083.
17. 201 N.W.2d 761 (1972).
18. Brian W. Ohm, "The Wisconsin Supreme Court Responds to Lucas," *Land Use and Zoning Digest* 48, no. 9 (1996): 3–7.
19. Tom Bethell, *The Noblest Triumph: Property and Prosperity through the Ages* (New York: St. Martin's Press, 1998); Epstein, *Takings, Private Property and the Power of Eminent Domain.*
20. Harvey M. Jacobs, "The Anti-Environmental, 'Wise Use' Movement in America," *Land Use Law and Zoning Digest* 47, no. 2 (1995): 3–8.
21. 260 U.S. 393 (1922) at 415.
22. 532 U.S. 302 (2002).
23. The thrust of the comments that conclude this essay are drawn from Harvey M. Jacobs, "The Future of an American Ideal," in *Private Property in the 21st Century: The Future of an American Ideal*, ed. H. M. Jacobs (Northampton, MA: Edward Elgar, 2004), 171–184.
24. David Brooks, "One Nation, Slightly Divisible," *Atlantic Monthly* 288, no. 5 (2001): 53–65.
25. Paul Krugman, "For Richer: How the Permissive Capitalism of the Boom Destroyed American Equality," *The New York Times Magazine* (October 20, 2002).
26. One set of examples focusing on a set of cases in New York State is laid out in Michael K. Heiman, *The Quiet Evolution: Power, Planning and Profits in New York State* (New York: Praeger Publishers, 1988).
27. One relatively recent and highly publicized example of the phenomenon of displacement for reinvestment is the case of the Poletown neighborhood in Detroit, Michigan, a viable ethnic working-class neighborhood whose owners had their properties condemned by the city's governing authorities to pursue an agenda of manufacturing investment-based economic development. See the documentation of this case in J. Wylie, *Poletown: A Community Betrayed* (Urbana: University of Illinois Press, 1989).
28. Aldo Leopold, *A Sand County Almanac* (London and New York: Oxford University Press, 1968 (1949)); Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* (Los Altos, CA: W. Kaufmann, 1974).
29. Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).
30. The interpretation of American history presented here, including the forces that shape property's form, would be characterized as "liberal" by those with a differing point of view. These opponents, self-described "conservatives," view property as the foundational base of American democracy. From this point of view, property is not subject to reshaping as a function of technological and social changes. Instead, property is *a priori* and immutable, and any challenges to or assaults upon it by society and government must be compensated under the provisions of the takings clause of the Fifth Amendment to the U.S. Constitution. From this conservative point of view, the regulatory takings doctrine articulated in *Penn. Coal* (see note 21) should be understood as requiring compensation except under the most extreme of conditions. The leading scholar of this position is Epstein (see note 8); for similar arguments see also Bethell (note 19) and Bernard H. Siegan, *Property Rights: From Magna Carta to the Fourteenth Amendment* (New Brunswick, NJ: Transaction Publishers, 2001).