The Particulars Of Owning

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I. PROPERTY AND THE POPULAR WILL

Among the peculiar traits of the United States is its pronounced preoccupation with individual rights and its tendency to discuss social problems in individual terms. Other countries struggle with similar problems—abortion, health care, public education. But only the United States routinely frames these problems as issues of individual rights—the student’s right to a quality education, the fetus’s right to life, the taxpayer’s right to resist paying for this or that welfare program. Many asserted rights, of course, really are no such thing in the eyes of the law. The fetus possesses no right to life, and will not until laws are changed. In talk like this, rights rhetoric is used prescriptively. The fetus ought to have such a right, given already-recognized rights like a newborn child’s right to life.¹

One problem with this rhetorical form is that people often do not explain where rights come from. True rights are protected by law, but it is awkward to say that rights are created by law. Rights perform a counter-majoritarian function by protecting the individual against the majority. Given this role, it is hard to see how rights can derive from the very law-makers who are suppos-

¹ The American tendency to focus on rights is thoughtfully assessed in MARY ANN GLENDON, RIGHTS TALK (1991).
edly constrained by them. Either the people are sovereign, in which case they can change rights as they see fit, or there is some other source of law, above the people and constraining them.

To the extent that Americans worry about this problem they typically turn to the Constitution as the legitimating source. The problem with this approach is that the Constitution often stands mute on an issue, as in the case of a right to education, or it speaks vaguely, as in the case of the right to life. Property rights provide a special case, for the Constitution expressly recognizes and protects private property. But the property rights themselves largely arise elsewhere, from independent sources, and only then gain protection from the Constitution's text.

Three centuries ago, John Locke had no trouble identifying the original source of private property. It came from God, who gave the Earth to humankind in common and who put in place the labor theory of individual acquisition. Nineteenth-century theorists, influenced by Darwin, were more inclined to see property's origins in the inexorable forces of historical evolution. Karl Marx believed that history stumbled along, conflict-ridden, toward a socialist property regime. Sir Henry Maine; in contrast, argued that societies inexorably moved from communal ownership toward a capitalist system based on individual private property. Neither Marx nor Maine, however, were rigorous philosophers, and their prognostications carried little weight with theorists seriously grappling with natural-law justifications of property. By Sir Henry's day, philosophers had pretty much agreed that private property was a social creation, lacking any serious basis in natural law. As Bentham so famously put it, property was a creation of law, and rose and fell with the actions

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of lawmakers. Private property was justified, Mill and others concurred, not by natural law, but because of its utility in promoting social goals.

In recent years, stimulated in part by Richard Epstein's book, *Takings*, the legal community has asked yet again how private property fits into the political order and what the Constitution means when it talks about property as a protected right. Attention has focused, appropriately enough, on the matter of regulatory takings. If, as Jeremy Bentham concluded, private ownership rises and falls with the law, then a change in the law could not logically take a person's property right. If property exists only to the extent supported by law, when the law changes, the property right does not pass to the government; it simply ceases to exist.

Bentham, of course, did not write about the U.S. Constitution with its protections for private property, and few American scholars have followed his lead to the logical endpoint: that there simply are no regulatory takings. Epstein dodged this conclusion by turning to the common law and claiming that, when the Constitution spoke of property rights, it meant property as embodied by the simple rules crafted by common law courts. Epstein's argument elicited cheers from fellow libertarians, but other scholars largely panned it, in part for its decidedly weak historical analysis. Epstein's narrative was too plainly influenced by economic thought from the late twentieth century. He

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10. Epstein reaches this conclusion in a two-step process: property as used in the Constitution is defined "from ordinary usage," and ordinary usage in turn means property as understood in "basic legal conceptions" and the "classical common law." Epstein, supra note 8, at vii, 23, passim.
ignored the common law's substantial evolution over time, as well as the vigorous Anglo-American tradition of local land use regulation.

In his own efforts to reinvigorate the takings clause, Justice Scalia has acted more circumspectly, speaking generally about background ownership principles and ill-defined historical compacts among the people.\footnote{12 For a review of Justice Scalia's decisions, see generally Fred Bosselman, Scalla on Land, in After Lucas: Land Use Regulation and the Takings of Property Without Compensation 82 (David Callies ed., 1993), and Fred Bosselman, Four Land Ethics: Order, Reform, Responsibility, Opportunity, 24 ENVTL. L. 1439, 1485-1506 (1994).} Scalia's history, though, has encountered nearly as much criticism as Epstein's.\footnote{13 E.g., sources cited supra, note 11; Bruce W. Burton, Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation, 72 OR. L. REV. 603 (1993); Myrl L. Duncan, Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis, 26 ENVTL. L. 1095 (1996); Louise A. Halper, Why the Nuisance Knot Can't Undo the Takings Muddle, 28 IND. L. REV. 329 (1995); Louise A. Halper, Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings, 8 YALE J. L. & HUMAN. 31 (1996); John A. Humbach, Evolving Thresholds of Nuisance and the Takings Clause, 18 COLUM. J. ENVTL. L. 1 (1993). For the leading study of property in American legal thought, a study that roundly undercuts Justice Scalia's view of property, see Alexander, supra note 11. Another study more focused on regulation during the first half of the nineteenth century also presents a far different view of property. See William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America (1996). The rich colonial tradition of land use regulation, overlooked by Justice Scalia, is surveyed in John F. Hart, Colonial Land Use Law and Its Significance for Modern Takings Doctrine, 109 HARY. L. REV. 1252 (1996). An earlier work that looks at ideas about property, also showing vastly more variety and dynamism than Justice Scalia admits, is William B. Scott, In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century (1977).} The appeal to history, it turns out, remains as problematic as it was when Marx and Maine tried it generations ago. History can tell us where we have been; it can tell us what property has meant and how property rights have evolved in response to shifting circumstances and values. What it cannot do is avoid what philosophers term the naturalistic fallacy, the jump from the "is" to the "ought."\footnote{14 See J. Baird Callicott, In Defense of the Land Ethic: Essays in Environmental Philosophy 117-27 (1989) (considering the dichotomy in the environmental land use context).} To describe property's past or present — the "was" and "is" — is not to prescribe its appropriate future.

It is foolish, of course, not to learn from the past, but the past's prime lesson has as much to do with change as with stability. Private property is an evolving, organic institution, slowly mutating in response to changing needs. Certain core ownership norms, like the right to exclude, display remarkable vigor over time. But even the most durable ownership norms depend for
their justification on continued public support of particular public values, like liberal individualism, economic growth, and anthropocentric morality. Values like these change slowly, but they do change, and so do the institutions that spring from them.

Epstein's libertarian argument was taken seriously by legal scholars in part because it drew upon the familiar-sounding idea that property rights largely arise out of the common law and are understood reasonably well by looking to the common law. As a descriptive legal claim, that summary has never been accurate, and it has become even less accurate over time. Property, to be sure, is a creation of law; but the mix of laws that define property is far more diverse than the old common law. Laws and regulations from all levels of government play important roles. Federal law often gives rise to property rights, as users of public lands so often proclaim. Statutes give rise to property rights and in indispensable ways keep common law norms up to date.\footnote{15. See Eric T. Freyfogle, The Owning and Taking of Sensitive Lands, 43 UCLA L. REV. 77, 103-06 (1995).}

What legal scholars sometimes have trouble seeing is plain enough to any land developer. Ownership norms originate from all government levels, including the ubiquitous zoning boards. And they come, not from God, natural law or history's inexorable flow, but from present-day legal institutions, staffed and guided by flesh-and-blood lawmakers. Ownership norms arise out of distinctly political processes, and appropriately so, given that private property is predominantly a tool that communities use to achieve various goals. Property helps achieve desired ends, and it is justified to the extent it does so.

Several conclusions arise out of an attentive study of property— one that pays attention both to its substantive variations from place to place and to the processes by which it changes over time. First, property as institution includes both substantive ownership norms and various processes by which rights are enforced and ownership norms shift. The categories of substance and process, however, are far from distinct. Generally, substance and process blend together easily in the law, and property law is a typical case.

A second point, relating to the process side of property, is that no sharp lines exist among the various types of process activities. It is sometimes useful to distinguish among the processes of defining rights, allocating rights, regulating uses, enforcing rights, and legislating new substantive norms. But these
processes are far from separate and the distinctions among them are not all that important. Common law courts, for instance, alter ownership norms as they go about adjudicating disputes and enforcing rights. Statutes regulating particular land uses tailor ownership norms, and hence are functionally indistinguishable from the processes of defining and redefining what ownership means.

A third point, relating to property's substantive side, is that ownership norms are forever wrought with internal tensions. To own land is to possess both rights to use it and rights to be free from conflicting uses by neighbors.\(^\text{16}\) When the law protects one owner against disruptive land uses by neighbors, it necessarily restricts the land use options of those neighbors. When instead it permits intensive land uses, it inevitably leaves sensitive users at risk, thus diminishing their rights. Equally important is property law's tension between the individual owner and the community. Private property exists to serve communal needs, but community needs are often served by recognizing strong individual property rights. Then again, once such rights are created, they can bump up against majority wishes, causing conflict and sometimes stimulating legal change.

A final point is that the ownership of land necessarily draws the owner into the community that includes the land; or, more aptly, it draws the owner into the multiple communities of varying sizes that encompass the land. Whether recognized or not, land ownership entails community membership; it means belonging to the various communities whose values and goals are reflected in the ownership norms and processes that apply to a given parcel.\(^\text{17}\) A landowner charged with nuisance, for instance, is subject to the values and determinations of local community members drawn together to form a jury. He is also subject to local values when his actions are constrained by local regulations. The larger, state-level community has an important say in what the landowner can and cannot do; and, increasingly, so does the

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national community, acting through Congress, federal agencies, and the federal bench.

II.
LEVELS OF COMMUNITY

Over the past generation, environmental laws have achieved reasonable success in dealing with many pollution and toxic-waste problems. They have had less success addressing land use problems like runoff water pollution, disrupted ecosystem processes, and losses of wildlife habitat. Land use issues are hard to address through regulations issued at the federal level. The federal government can draft goals, offer money, and otherwise push and cajole. But it cannot come up with rules that are specific enough and sufficiently tailored to each landscape so as to provide effective guidance to individual landowners.

If land use problems were entirely local matters, they could be left to local governments to handle. But bad land uses often have widespread effects. Plowed slopes in Illinois kill fish off the Louisiana coast; timber harvesting in Kentucky cuts bird populations in Ontario. Despite these widespread harms that can result from local decisions, local people need to be involved in environmental land use decisions, as the recent private-property rights movement has made clear. Land use rules have been around and drawn criticism for centuries. But rules emanating from Washington, D.C., telling landowners in Florida and Texas how to use wetlands and endangered wildlife habitat, have not. Some of the local resistance to environmental regulation stems from ecological ignorance and disputes about the values of things like wet meadows and rare butterflies, but a good part of the resistance has to do with the level of government calling the shots. Land use regulation at the state level is bad enough. Direct federal regulation, for many citizens, is simply taking things too far.

Local resistance to high-level regulation stems from more than just parochial regard for local prerogatives. Sensible land use decisions require knowledge of the land itself, in its many variations. One can categorize land parcels based on slope, soil type, drainage, and vegetation, but no list of factors can ever capture the land's full diversity. Local people typically know the land better than outsiders. For land planning to prove successful, their knowledge is needed just as much as their cooperation. Then, too, there is the reality that many land use impacts are primarily local, however widespread their furthest ripples. The
long-term residents of a region live with the consequences of land use choices, including scars of development and industry, polluted waterways, and disrupted wildlife populations. Local people are simply too implicated not to have a major voice.

While conservation writers like Wendell Berry have known this all along, the crafters of environmental policy have been slow to realize and act on this wisdom. That is changing now, as agencies and states rush to embrace various forms of community-based conservation, sometimes working through existing political entities, sometimes stimulating new entities like watershed planning groups and regional conservation bodies. When these new entities are formed, they typically pay at least some attention to nature's own boundaries. For example, watershed lines are starting to count for something in the line-drawing process, and aquifer boundaries, where known, are being put to use as well. Ecosystem types are notoriously hard to categorize, but jurisdictional lines are nonetheless being drawn in ways at least roughly responsive to vegetative communities and to habitats of high-profile animals.

Community-based conservation measures have several aims. One of them, not much admitted, is the simple aim of blunting criticism and getting locals to buy into programs by letting them have their say. Better processes go beyond this mere "dialogue" to give local residents chances to study their landscapes and learn about slow-developing problems. For community-based programs to work well, however, they need to go even further, drawing upon local wisdom and giving locals chances, not just to learn from experts, but to talk among themselves about the kind of landscape they want to inhabit and the kind of legacy they want to leave. Community-based efforts ought not displace the conservation programs of higher government levels, if only because local people are typically inclined to ignore external harms that fall beyond the local horizon. Instead, local efforts should supplement higher-level programs, tailoring regional and national goals to the terrain and biological features of the local

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If environmental policy is going to succeed in dealing with nagging land use problems, action will be needed at various levels of government. Higher levels can consider wide-ranging problems and craft standards of acceptable conduct for local areas. When water leaves a small river, for instance, it ought to be reasonably clean, and the people who live in the river’s watershed might rightly be expected to keep it clean. Communities can be held accountable for maintaining populations of particular species, leaving it to the communities themselves to decide how to do it. Action taken at higher levels will have various aims: to hold lower levels accountable for their conduct; to address large-scale problems; to push lower levels that are performing poorly; to provide scientific expertise and incentives; to make standards more uniform when uniformity is desirable; and otherwise to express the values and aspirations of the larger communities themselves. Action at lower levels can focus on more detailed choices and methods of implementation, responding to guidance from above and otherwise implementing values and visions generated at the local level.

Generalizations about this process inevitably leave out the important details as to how various concentric communities might work together to promote responsible land uses. By and large, power should be exercised at the lowest level that can responsibly exercise that power, realizing, however, that local communities acting alone often lack the wherewithal to act responsibly, even when they wish to do so. At each level, the aim is essentially the same: to set forth the expectations of community membership and to explain, and translate into ownership norms, what it means to be a responsible, contributing member of that community. As this happens at each level, ownership norms are reformulated; the meaning of private ownership shifts; and property law is kept alive.

III.
PRIVATE PROPERTY AND PUBLIC POLICY

How, then, does the pervasive private ownership of land affect environmental policy, particularly with regard to the level of government that might address land use issues?

An initial point to be made, emphatically, is that property law is not somehow the exclusive domain of states. Federal rules appear throughout the bundle of laws prescribing ownership norms. Federal law, it is sometimes said, regulates property
rights that arise at the state level. But laws that are regulatory in form differ little in function from laws that define ownership and that grant power. The Search and Seizure Clause of the Fourth Amendment, for instance, is very much a federal property law, defining ownership and empowering owners. The Clean Water Act gives downstream landowners a chance to complain about upstream pollution; in doing so, it protects property and thus expands landowner rights. Local law, at the other end, also plays important roles, both restricting land use options and prescribing ways for landowners to accomplish what they want. A drainage district that compels owners to participate in a regional drainage plan has a role in defining ownership rights, as does a state oil and gas commission that authorizes a compulsory pooling or unitization plan.

The institution of private ownership, it turns out, does not constrain environmental policy by limiting norm-setting activities to one level of government. Instead, it imposes policy constraints by requiring all levels of government—any government body that tinkers with ownership norms—to remain attentive to all of the institution's aims, including aims having little to do with the environment. Land health is a vital goal, and property law, increasingly, is used to promote it. But it is nonetheless only one goal out of many. Governments that tinker with ownership norms need to be aware of these multiple aims and not unthinkingly promote one goal at the expense of others.

For centuries lawmakers have used private property as a tool to stimulate individual enterprise and economic growth. That aim is still very much around; landowners who can reliably harvest in the fall are far more likely to plant crops in the spring. Private property encourages investments by protecting them, and investments will slow if protections are inadequate. Private ownership also has a lot to do with individual privacy, particularly in the case of homes, as well as with the division of power within civil society. Ideally, private ownership promotes civic engagement by citizens, encouraging them to perceive communal problems and step forward to deal with them. These goals are every bit as central to private property and the common good as are goals relating to land health. Not all levels of government need to attend equally to all of property's built-in aims, but environmental-policy work at each level of government needs to remain

sensitive to those goals and, at the least, not seriously undercut them.

The point to emphasize here is this: private ownership serves multiple aims, and efforts to promote one aim, like land health, cannot focus on it so exclusively that other goals are short-changed. Community-based conservation groups, in their rush to heal the land, cannot act in ways that materially undercut property's roles in protecting investments, promoting enterprise, and sustaining settled, satisfying lives. The upshot, paradoxically, is that private property is both a potent tool for communities promoting a healthy land as well as a potent restraint on measures used to achieve that very goal.

When anti-environmental forces unfurl the private-property banner, employing the rhetoric of individual rights in good American style, they implicitly assert that land health has become too dominant a goal. They feel that it is pushing too hard against property's other goals, particularly its economic ones. By promoting land health, the complaint goes, regulators are failing to protect investments adequately. In their form, these anti-environmental claims are legitimate. It would indeed be wrong for governments at any level to alter ownership norms so significantly that the institution could not longer achieve its core aims. But property is sufficiently flexible that it can promote its core goals in varied ways. Moreover, the goals themselves can be recast and redrawn, and over time they inevitably evolve. Private property, in reality, is by no means under siege.

What one sees today, in the case of many environmentally motivated laws, are efforts to achieve property's core values in ways that are more respectful of the health of nature. Lawmakers make mistakes—of that there is no doubt. But the complaint that environmental laws trample on core property values is greatly exaggerated. As a people, Americans remain respectful of private property. What is happening is that land health has joined the ranks of widely embraced communal goals. It is an important new goal, and with its arrival it is only appropriate that property's other, older aims move over some to make room.

Many environmental laws do nothing more than require landowners to internalize some of the harms that they have traditionally shoved on neighbors. Laws of this type do diminish landowner options, but hardly to a degree that personal privacy

is threatened or investments are likely to end. Other environmental laws have the effect of tailoring individual rights so that land use patterns are respectful of the land's natural features. Examples here include familiar laws restricting the uses of wetlands and regulations protecting wildlife habitat. Other examples are laws protecting sensitive aquifer-recharge areas and restricting timber harvesting on erodible soils. These laws, by and large, are designed to deal with particular problems, considered in isolation. Taken as a whole, however, such laws do evidence a distinct new trend, probably the most important trend now taking place in property law.

A century ago, landowner rights were largely conceived in abstract terms. There was the hypothetical Blackacre and the abstract bundle of rights that its owner possessed. In thinking this way, the law paid little attention to the land itself, as if the natural features of a land parcel had no impact on the owner's land use options. Thankfully, that kind of ecological blindness is slowly coming to an end. Slowly, painfully, people are coming to think that landowner rights should somehow depend on the natural features of the parcel owned. They are finally giving nature a chance to participate in the lawmaking process. Before land is put to an intensive use, certain questions are becoming essential: How is nature using the land? For what uses is the land naturally suited? How can human uses better respect nature's ways?

This new tendency to tailor property rights to the land is not all that well understood. It is therefore misinterpreted as a wide-ranging attack on landed property rights. If the law can ban house-building on a fragile barrier island, critics wonder, can it ban houses everywhere? The question is a sensible one, but only if one fails to recognize why barrier islands are ill suited for houses and why the property rights of an island owner might rightly differ from the rights of an owner of stable, drier land. This trend of tailoring rights to the land poses little real threat to the core values of property. Once people see what is going on, once they realize that property rights now depend in part on the land itself, expectations can be adjusted and life can go on, with as much economic growth, personal privacy, and civic harmony as ever before.

Just as property-rights advocates often fail to see how wetlands and barrier islands are naturally different from other lands, so too there is the tendency to mix together the cases of vacant land and already developed land, raising groundless fears in the process. Most regulatory takings cases have dealt with re-
strictions on vacant land, or with owners wanting to expand their development footprints. Such regulations are often portrayed, wrongly, as serious threats to the security of all manner of existing land uses, including factories, houses, and farms. If the government one day bans a person from building a house—the common thinking goes—perhaps the next day it will tell a person to tear down an existing house. If the owner of vacant land is at risk, all landowners are at risk.

This reasoning, it should be obvious, has little merit. When development restrictions are newly imposed, landowners cannot do what they wanted to do. But when the restrictions apply only to vacant land or to significantly new land uses, then there is little reason for fear among landowners who merely want to continue existing activities. Property law has always granted considerable protection for existing uses, and it still does today. Environmental regulations mostly affect developers, whose investment largely takes the form of simply buying land. Investments in land, to be sure, do deserve protection, but such investments differ in kind from improvements made to the land. The hypothetical farmer who plants in the spring in hopes of harvesting in the fall is protected, not because he owns the land, but because he mixed his labor tilling the soil. Locke's labor theory protected owners because they added value to land through their labors. It did not protect owners of vacant land, nor did it protect gains arising from speculation. The point is of trivial practical value, but it is nonetheless worth noting that Locke's theory did not protect ownership rights in vacant land, nor did it logically protect a landowner's right to shift to a different land use in circumstances where land is scarce.

The point here is that environmental regulations have their greatest impacts on vacant land and on plans to change or expand existing uses. People who improve land are every bit as protected as ever. The wisdom of any particular restriction, of course, is always ripe for debate. But property's various aims are not impaired when developers are sometimes told to find some other land to develop, more naturally suited for what they want to do.

It is precisely because property law remains so attentive to investment security that environmental regulations are frequently applied only to new land uses and not to existing ones. Laws often ban new construction in a flood plain, for instance, while leaving existing structures alone. Existing structures might cause every bit as much harm as new ones, but a law that removes existing structures disrupts property rights more
acutely than a ban on new construction. If land health were the only concern, then the two cases might rightly be viewed alike. But it is not the only goal, and when other goals are taken into account, the two cases become far different.

Another trend in property law, one that shows further how property's core values are being accommodated by environmental laws, is the trend illustrated by the use of transferable development rights (TDR) as a means of controlling development impacts in rural areas. While urban areas have used TDRs for decades to control building density and congestion, rural uses are new. A TDR scheme offers a useful means of allocating fairly the economic benefits of development among all landowners in a region, under circumstances where limits are needed on how much development can take place and where. The old method of dealing with the land's carrying capacity was simply to allow development to occur until problems became undeniable and further development had to halt. That first-in-time approach was used in the case of wetlands; it was also used with endangered species habitat. TDRs offer a more fair alternative. All landowners in a region have limited rights to develop. Some can use their rights directly; others can only sell them. But all participate in the economic rewards of development, even if they can benefit only by selling their rights to others.

TDRs are appealing because they can interject fairness into an environmental scheme that would otherwise have markedly disproportionate impacts. The fairness concern that they address is not related to land health; rather, it is a concern that relates to and helps promote property's other goals. For the institution of property to serve its economic ends, landowners need chances to use their lands productively. Land health, on the other hand, often requires significant limits on the wheres and hows of development, thus creating a conflict. TDRs reflect a good compromise. The right to develop is still around, but it has moved over a bit and undergone a degree of reformulation, all in

22. The question of how TDRs fit together with private property rights was presented to the Supreme Court in Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997). While deciding the case on ripeness grounds, the Court intimated that TDRs were a legitimate reformulation of a landowner's rights, rather than part of the compensation paid to an owner whose rights had been taken. The background of the case is thoughtfully considered in Richard J. Lazarus, Litigating Suitum v. Tahoe Regional Planning Agency in the United States Supreme Court, 12 J. LAND USE & ENVTL. L. 179 (1997).

23. I comment on the unfairness of the first in time rule and the need to remedy that unfairness in Eric T. Freyfogle, The Owning and Taking of Sensitive Lands, supra note 15, at 132-35.
the name of making room for property's newer, equally vital goal. TDR schemes, one might note, build upon a diverse range of reputable legal precedents that involve similar, area-wide reformulations of land use rights. In the realm of oil and gas law, there is the precedent of pooling and unitization schemes, where development of an oil field is transformed into a shared enterprise by all overlying landowners.\textsuperscript{24} From water law there is the sensible civil law rule governing the surface use of nonnavigable lakes; in that case, too, individual property rights are mingled and shared, without diminishing their value.\textsuperscript{25}

IV.
CODA: VALUING THE PARTICULARS

Given the many aims that private ownership promotes, it only makes sense that the addition of a new aim to the list requires adjustments in existing ownership norms. Norms changed considerably during the course of the nineteenth century as intensive economic development became a dominant national aim. Today, norms are continuing to change, encouraging land uses that are more consistent with the land's long-term health.

Today's environmental restrictions are easily categorized in terms of two tensions that have always existed within property law. In the tension between the individual and the community, environmental laws tend to push property norms back toward the community side of things and away from the individual. And in the tradeoff between rights to use land intensively versus protections for sensitive land uses, environmental laws weigh in on the protective side, curtailing intensive, polluting land uses and giving sensitive land users greater grounds to complain.

In the inflamed rhetoric of the past decade, these laws are portrayed as invasions of individual property rights. But rights talk like this needs to be understood for what it is: a rhetorical means, so typically American, of challenging the wisdom of new laws. Wetlands restrictions are attacks on property rights only in the eyes of people who do not view the loss of wetlands as particularly disturbing. Environmentalists, for the most part, have not responded to this rights-rhetoric in kind, but they certainly could do so. If they did, exchanging rights claim for rights


\textsuperscript{25} See Beacham v. Lake Zurich Property Owners Ass'n., 123 Ill.2d 227, 526 N.E.2d 154 (1988) (embracing the rule).
claim, it might well be easier to see how rhetorical form so often clouds the underlying policy issue. Environmentalists could frame their arguments in terms of the rights of downstream property owners to complain of flooding, or the rights of riparian landowners to enjoy clean water and abundant aquatic life, or, more ambitiously, the rights of citizens generally to enjoy a healthy environment. If that were to happen, today’s environmental debate might turn into something more like the abortion debate—a matter of individual rights clashing with individual rights. It is hard to see, however, how the real issues at stake would be much illuminated by such a rhetorical shift.

In the end, environmental laws are not so much an attack on property rights as a reformulation of them. And this reformulation is taking place, appropriately, at all levels of government. Environmental laws promote community health and increase protections for sensitive land uses. As they do so, they also push people to pay more attention to the particulars of things, shifting property norms back toward the middle of yet another longstanding tradeoff within property law—the tradeoff between the abstract and the particular. Property norms reached their most abstract form in the late nineteenth century, pushed on by Christopher Columbus Langdell and other legal explorers who were anxious to make law as scientific as possible, like chemistry, math, and physics. Today, as more attention is paid to the land, the land’s particulars are counting for more. And if environmental policy continues moving along as it has, they will count for even more in the future.

There is a good deal to applaud in this increasing awareness of the land itself. To pay attention to the land’s natural features is to act more humbly toward it. To live in a way that respects the land is to live more maturely, to settle in as if one intended to stay in a place and depend on that place for generations. In a provocative 1994 essay, agricultural reformer Wes Jackson criticized universities for not offering students majors in what he called “homecoming.” His point was that students rarely are trained in skills that they can take back home and put to use to solve local problems. Universities impart portable skills that a person can use without ever sinking roots in a place and getting to know it.

Like the university, the institution of ownership needs to en-

26. See generally Horwitz, supra note 20; Alexander, supra note 11; Novak, supra note 13.

27. Wes Jackson, Becoming Native to This Place 3 (1994).
courage people to pay more attention to the particulars of their chosen homes. Property law needs to promote, indeed it is already beginning to promote, a heightened concern for place. It is promoting senses of commitment and belonging. This work is best accomplished through coordinated efforts of lawmakers at all community levels. And it can be done, it is already being done, without undercutting the continued satisfaction of private property's other vital aims.