Commentary

Private Property—Correcting the Half-Truths

Eric T. Freyfogle

Copyright ©2007 by Eric T. Freyfogle, by permission of Beacon Press, www.beacon.org

Editor's Note: Since 1922, when Justice Oliver Wendell Holmes opined that a regulation might “go too far” and constitute a taking, land use lawyers, planners, judges, and landowners have scratched their heads wondering how far is too far. The answers have usually not been very satisfactory for anyone, in large measure because the field of land use law and property rights is strewn with a great deal of “intellectual and cultural clutter,” says the author of this month’s commentary, Eric Freyfogle. Perhaps we’ve been asking the wrong questions for more than 85 years. This month’s provocative commentary is an excerpt from Freyfogle’s forthcoming book, On Private Property: Finding Common Ground on the Ownership of Land. Professor Freyfogle and Professor Harvey Jacobs (authors of numerous books and articles about private property) will share their thoughts on private property rights during the Bettman Symposium at the APA National Conference in April 2008 in Las Vegas.

INTRODUCTION
In December of 2006, newspapers around the country carried stories about an unusual property rights dispute simmering in rural Kansas. The site was semiarid Logan County, population 3,100. According to the New York Times account, it was a “red corner of a red state, where the sanctity of property rights is seldom questioned and the sanity of government is questioned all the time.” Larry and Betty Haverfield, owners of a large ranch, were intentionally allowing a prairie dog colony to expand on their ranch. As the colony grew, it provided food and habitat for a wide variety of once-common but now rare wildlife species, including burrowing owls, badgers, ferruginous hawks, and golden eagles. The Haverfields enjoyed watching as the rodent town expanded and wild creatures arrived. Most local people, though, viewed the prairie dogs in a different, darker light. Their ancestors had spent decades trying to eliminate them throughout the region, with near total success. Indeed, a 1901 Kansas statute authorized government agents to enter private land to poison prairie dogs, without the landowner’s consent and at the landowner’s expense, if neighbors swore out complaints.

In the case of the Haverfields, the formal complaint about the prairie dogs finally came from neighbor Byron Sowers. His adjacent 900-acre property included a 10-acre prairie dog town when he purchased it. Since then the rodents had proliferated despite his control efforts, taking over half of his land. Sowers wanted the county to exercise its power under the century-old statute. The county’s commissioners were prepared to move. Larry and Betty Haverfield, though, objected strongly, offering as a compromise—quickly rejected—that rodent control efforts take place only near the boundary line. When the Haverfields got wind that poison pellets had shown up near prairie dog holes on another ranch, managed similarly to their own, they moved some of their cattle to the contested location, knowing that federal laws prohibited applying the poison near cattle. And so the standoff continued.

Newspaper accounts noted that prairie dog towns provided much-needed habitat for the black-footed ferret, an endangered species. As dismayed as they were by the rodents, Logan County residents were particularly fearful that government agents might introduce the predatory ferret into the town as part of a ferret-recovery effort. Along with the black-footed ferret would come an array of legal protections under the federal Endangered Species Act, which could disrupt how local ranchers did business. Omitted from the news stories was the signifi-

Eric T. Freyfogle teaches property, land use, natural resources and environmental law at the University of Illinois College of Law, where he is the Max L. Rowe Professor. He has written widely on private property and land conservation for scholarly and popular audiences. His works include a major study of private rights in land—The Land We Share: Private Property and the Common Good (Island Press, 2005)—and a critique of the national environmental movement: Why Conservation is Failing and How It Can Regain Ground (Yale, 2006).

Making the Logan County standoff more awkward was the high regard local people had for private property rights.

A significant fact that ferrets, like prairie dogs and other wild animals, were property of the state; they were not owned. Kansas held title to all free-ranging wildlife as trustee on behalf of the people under a legal doctrine of ancient lineage. What that meant was legally unclear, aside from a vague duty on the part of the state to take care of wildlife populations. Off to the side wildlife advocates watched the controversy closely, hoping for a compromise but ready to interfere if wildlife seemed to suffer.

Making the Logan County standoff more awkward was the high regard local people had for private property rights. They usually let landowners act pretty much as they pleased. The 1901 state law left many of them uneasy. As much as they disliked prairie dogs, the state law seemed heavily-handed, authorizing government agents to enter private land without permission, take action, and then send a bill to the owner. How could state action like this accord with the institution of private rights in land? On the other side of things, though, neighbor Byron Sowers had private property rights of his own and the expanding rodent colony was reducing his land value. Try as he might, Sowers couldn’t keep the rodents out. Where did his property rights fit into the equation? Could he, in the name of asserting his own rights, restrict what his neighbors could do, even if that meant physically invading his neighbors’ space? In short, the Logan County confusion had as much to do with property rights as it did with rodents and predators. It was little wonder that county officials sought guidance from their lawyers and insurers before they did move.

While the Kansas dispute was coming to a head, another property rights saga was unfolding along the East Coast, in the floodplain of the Hackensack River just outside New York City. Ronald Mansoldo owned land along the river, which he had purchased more than 40 years earlier. Under local zoning ordinances he could build two single-family homes on the land, even though it lay in the floodplain and was subject to flood damage. While he owned the land the state department of environmental protection imposed limits on floodplain construction. In Mansoldo’s case, the DEP rule prohibited home construction entirely. He could use his land only for parkland, open space, or a parking lot.

Mansoldo sued the state, contending that the ban on construction deprived him of property rights in violation of the Constitution. He insisted that he get paid the full value of the land as home sites.

In the ensuing lawsuit, the trial court and then the intermediate appellate court agreed that the law infringed on Mansoldo’s property rights, but they disagreed over whether he deserved compensation for the value the land would have for home construction. Home construction, they determined, would threaten the public interest, because of the danger of flood damage and the risk that homes might break up in a flood and cause harm to other landowners. Mansoldo did not deny the dangers yet nonetheless insisted that he get paid full value.

In 2006, Mansoldo’s case made it to the Supreme Court of New Jersey (Mansoldo v. State, 157 N.J. 50, 898 A.2d 1018 (2006)). The case raised obvious questions about the nature of private property rights in land within a floodplain. Similar issues were arising elsewhere in legal disputes involving other ecologically sensitive lands also ill suited for development, such as wetlands and barrier islands. The New Jersey court in its ultimate ruling had little to say about private property directly or about the best way for the law to tailor landowner rights to promote the common good. Instead, the court looked to the leading opinions of the United States Supreme Court construing the provision of the Constitution that required governments to pay “just compensation” whenever they took private land. As the New Jersey court interpreted key Supreme Court precedents, a landowner deserved payment for any land use regulation that left land without any economically viable use, as happened on Mansoldo’s land.

The court ruled, following the Supreme Court’s lead, that Mansoldo deserved full payment for his land, including payment for its value if homes were built on it. The only case in which payment would not be required was if the state could properly ban construction of homes in a floodplain under “background principles” of the state’s property law, which meant, in essence, banning them as a nuisance. The lower court had not made a factual ruling on the nuisance issue. The high court therefore reversed the judgment and returned the case to the trial court to make that determination. What was conspicuous about the state supreme court’s ruling was its determination that, in deciding whether money was owed, it could largely ignore the public policy reasons for the home-building ban. The state’s policy reasons made no difference, the court announced, nor did the public interest generally. Mansoldo deserved payment unless nuisance law or some other background principle of property law supported the ban.

The ruling of the New Jersey Supreme Court carried important implications while raising a number of questions that seemed to cry out for answers. Most significantly, the ruling implied that the state law banning construction in floodplains was not a part of the body of law that prescribed the rights of landowners in the state. Property law was one thing, the court seemed to say, while environmental protection laws were something different. But why was this so? The court also suggested that a landowner should not have his land use options taken away by a new statute or regulation.

There was something wrong with such a law, something that required the government to pay the landowner for the lost value. But again, why was this so? Lawmakers have wide freedom generally to change laws in the state, and citizens must abide by any new laws. Why should the situation be different in the case of property laws? Why shouldn’t the legislature have just as much authority to update property laws as it did all other laws? In the end, the court sent the case back to the trial court to decide whether construction
Yet half-truths, in law as in life, can be as bad as or worse than falsehoods in the confusion they sow and the passions they arouse.

was sufficiently like a common-law nuisance for lawmakers to ban it without paying the landowner. But hadn't the state government already decided that construction in a floodplain was distinctly harmful, as the trial court and appellate court noted? Wasn't that determination of harm authoritative enough?

Mansolo v. State of New Jersey is useful as an entry point into the complex and confusing legal side of private property in America today, full of dangerous half-truths. If popular sentiment on private property displays uncertainty about key elements of the institution of private rights, the problems, in truth, are just as considerable in many legal settings. Even courts have trouble understanding how private property functions and how the rights of landowners today are affected by new generations of statutes and regulations.

To make sense of these disputes, and particularly to decipher the challenging New Jersey Supreme Court ruling, we need to regain the complexity of private property in the real world. And the way to do that is to identify the assumptions that we often embrace about private property, putting them on the table and giving them a good, critical look. In reality, many of the ideas we hold about private property are flawed or distorted. The ideas aren't wrong, exactly; if they were we would know it. More apt is that they're about half right. Yet half-truths, in law as in life, can be as bad as or worse than falsehoods in the confusion they sow and the passions they arouse.

One of the partial truths that pervades American thought today is that landowners inherently possess the right to exclude all outsiders. Each land parcel, we assume, has a designated owner, and the owner gets to decide who can enter. American law in recent generations has largely incorporated this legal idea. Landowners today have vast powers to exclude. But owners in America didn't always possess this right so fully. Other countries with private property embrace the right only in part, and there's nothing inherently essential about this landowner right in contrast with the related right to halt interfer-ences with one's own land activities. Beyond that, cases frequently arise—again, the Kansas dispute—where the right to exclude is implicated on both sides: the Havenfield's alleged right to keep county agents away; Byron Sower's alleged right to keep rodents from invading. The right to exclude is an important one in American culture and law.

We can turn to seven other widely held assumptions about private ownership. They, too, incorporate various mixtures of truth and misunderstanding. By examining them, one by one, we can gain a better sense of what property does and how it really works. This is liberating knowledge, good for both democratic governance and individual rights. It opens up new possibilities in the search for middle ground.

Partial Truth #1: Private property exists to protect individual liberty, and the more we protect property, the more we protect liberty.
America sees itself as a nation of liberty, perhaps the preeminent one in the world. That liberty is reflected in and protected by America's strong commitment to private property, especially private rights in land. In the common view, property is basically an individual right that exists to protect and enhance the economic and other liberties of the landowner. When property is protected, we presume, individual liberty rises and America honors its ideal as the land of the free.

To test the soundness of this idea, let's consider what really happens when a person becomes first owner of a tract of land and puts up no-trespassing signs around the perimeter. Before then, any person could wander onto the land and use it; the landscape was a commons for all to enjoy, collecting wood and berries, bringing their livestock, and looking for game. Now, with the no-trespassing signs up, these people can no longer make use of this particular land. Only the owner can do so, and those who have gained permission to enter. So what's the overall effect, then? The landowner, to be sure, has gained greater freedom over this exclusive piece of land. The owner's liberty has gone up. At the same time, everyone else's liberty has gone down. Before the signs, they could use the land and gain sustenance from it. Now they can't. Their freedom to use the countryside has decreased. To the extent he or she has the right to exclude, in short, the landowner has gained liberty at the expense of other people.

This simple tale illustrates how property works. Private property functions by enhancing the liberty of owners at the expense of everyone else. Or to put it more crisply, property is a coercive institution that constrains individual liberties, even as it expands the options of the owner. Imagine this scene: A police officer arrests a trespasser and puts him in jail. A greater interference with liberty is hard to imagine. Needless to say, this kind of coercion is morally problematic and requires a good moral justification to support it. We can't be arresting people and throwing them into jail without good reason. And it isn't enough to point to property rights as justification because the property rights themselves are what need justifying.

The case of the arrested trespasser displays the social complexity of private property. As owners, we can cut our trees and grow crops on our land to the exclusion of other people. We can build a house or office building while other people cannot. Let's go further and assume we own vast tracts of land that other people need in order to live, perhaps to grow food, or perhaps for shelter. Circumstances could compel landless people in the region to deal with us or go hungry. This puts landowners in a position of power. And it is power, not just over the land itself, but over other people.

We confront here one of the critical lessons about property, loudly trumpeted over the generations. Private property operates to give one person (the owner) power over other people, as C.S. Lewis put it, "man's power over Nature means the power of some men over other men with Nature as the in-

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
The more scarce and vital a natural resource, the greater the power wielded over people by those who control it.

Historian Donald Worster has traced this reality of power in the illuminating case of arid regions where water is the key resource. In Worster's account, irrigation-based societies have been particularly prone to take hierarchical forms, with inordinate power rising to the top and control over water making it all possible. The more scarce and vital a natural resource, the greater the power wielded over people by those who control it. Medieval feudalism was based on this principle, as was Russian serfdom. This power over people is particularly strong when people are forbidden to leave the land, as serfs long were. We uncover, then, a half-truth in our conventional wisdom: Private property does enhance an owner's liberty by creating a sphere of private control; that half is true. But it does so at the expense of the liberties of others.

Partial Truth #2: Property in land first arose when individuals seized pieces of land and proclaimed them their own; governments were then instituted to protect and defend these rights.

No property theorist is more honored in Anglo-American thought than John Locke, a 17th century English philosopher who wrote a diverse array of subjects. Locke, whose works are rightly viewed as a pillar of Western liberal thought, exalted individual rights and claimed that individuals could assert those rights to limit intrusive actions by the state. Property, in Locke's view, was one of those rights, perhaps the key one. Locke spun an elaborate tale about how private property rights arose in a state of nature, before the king of England and other oppressive leaders came along. Private property predated the state, Locke claimed. States emerged only later, and they arose to protect property rights along with other rights.

Locke did not invent this state-of-nature story; it had been around for generations. Nor did he invent what is called the labor theory of ownership, the idea that private property in a particular thing arises when a person mixes labor with the thing, thereby creating value. But Locke made the state-of-nature story famous. It has since exerted great influence and underlies many popular ideas about landowning, even though we rarely hear Locke's full tale recounted. In the case of land, property arose when a person came along, staked out a piece of territory and proclaimed to the world "this is mine." Government's proper role was and is to protect private property created by such labor, subject only to modest regulation.

Locke's story was politically convenient in the late 17th century and it's been useful ever since, to friends and foes of private property alike. To be sure, a lot of good has come from the liberal theories that Locke helped put forth. But as a historian or anthropologist Locke was miserable, and his tale displayed only a weak grasp of how property operates. Property is inherently a social institution. It has to do with the relations among people—both between owners and nonowners and between adjacent owners.

Property does not arise simply when person A stakes out territory and proclaims his or her ownership to the world. That's the "king of the hill" game, in which we retain control of a hilltop only until someone pushes us away. It's the military conquest story of "might makes right." Property involves something much different, more social and peaceful.

Property arises not when Alice takes control of a piece of land but later, when Bob, Carol, and Dave show up and agree to respect Alice's rights. Or more precisely, it arises when Bob, Carol, and Dave come along and get together with Alice to decide exactly what rights Alice shall have and how far Alice's property rights will limit the liberties of Bob, Carol, Dave, and all others. Communal action is required, as natural law theorists before Locke, including Hugo Grotius and Samuel Pufendorf, well knew. For a full property scheme to emerge we also need another piece, an enforcement mechanism so that people respect one another's rights. Owner Alice needs to have somewhere to turn, or someone to call upon, to enforce her new rights. Without an enforcement mechanism, formal or informal, we haven't moved much beyond king of the hill.

Partial Truth #3: Property rights exist in the abstract, much like free speech; the question today is whether and how far government should protect them.

A centerpiece of today's property rights movement is the unspoken assumption that property rights exist in the abstract—as some sort of individual right—and that laws and regulations mostly cut into them. Law, that is, is a tool that governments use to constrain, limit, or even undercut private rights. The basic belief here is that the less law the better, a claim economic libertarians present overtly. Best of all, presumably, would be a world where no lawmaking took place. Then, we'd have police and courts to protect private rights but otherwise would leave owners alone to exercise their rights as they see fit. The state would remain neutral toward land use activities and merely keep the peace, nothing more.

Here again we encounter a cultural half-truth, possibly the most troublesome.

New laws can indeed curtail private property rights, of that there is no doubt. Imagine a law that suddenly allowed the public to enter a private ranch and to camp and hunt as the wanderers saw fit, without the owner's consent. The landowner's rights would have diminished, with law the agent of change. But this anecdote tells only part of a complex story. To fill in this story we need to build on the two points already made: that property operates to curtail the liberties of other
people, and that property arises only by
social convention with enforcement
mechanisms available to back it up.
Property comes into existence, as we
noted, only when people assemble and
agree upon the rules of landowning.
Once they’ve done that, they then in-
corporate their conclusions into some
sort of law, backed by enforcement
measures.

To imagine this necessary process—
necessary in the sense that it had to
happen in various cultures in various
times—is to invoke a foundational con-
clusion: Private property is a product of
law. And it exists, necessarily, only to
the extent specified and authorized by
law. Take away the law and we are back
to king of the hill. Take away the law,
take away the enforcement mecha-
nisms, and property rights come to an
end. John Locke, in other words, got it
mostly wrong, as philosopher Jeremy
Bentham pointed out forcefully a few
generations later. Property did not
come first and government later. What
came first was an agreement on the
meaning of ownership among some
lawmaking group of people. Once that
happened, private property was born.

Property law can define the rights of
owners in widely varied ways. For in-
stance, landowners may or may not
have the right to use the water flowing
on or by their lands (in the Eastern
United States they do; in the West they
largely do not). They may or may not
have the right to extract minerals from
the ground (in this country they largely
do; in other countries with private
property they often do not). They
might not even have a right to develop
land, a notion that is especially hard for
Americans to imagine. Without looking
further, then, we can’t know whether
tomato growers can use arsenic, despite
killing bees, nor whether landowners
can let prairie dogs proliferate despite
the troubles they cause for neighbors.
Indeed, so great are variations among
private property regimes in different
times and places that it means almost
nothing to say that a person owns a
tract of land unless we go further and
explain what landownership means at
that time and place.

These variations in property regimes
are worth noting because they chal-
lenge further the myth that private
property arose in a state of nature or is
otherwise an individual right that exists
apart from law. If private property arose
in a state of nature, then what law ap-
plied there? Who came up with the de-
tailed rules to govern disputes that in-
evitably arise when actions by adjacent
landowners clash? Who set the rules of
drainage, mining operations, water use,
and blockages of light and air? Who de-
cided whether a landowner could or
could not build homes in a floodplain?
The answer, of course, is no one.

Property, in sum, is necessarily a so-
cial convention. It is created by people
in a given place to meet their needs. It
is a fantasy to claim that it arose in a
misty time before government or to
claim that it exists in some timeless,
Platonic form—in a body of natural law,
for instance, embedded in the order of
the universe. Government and laws cre-
ate private property even as they pose a
threat to it. This paradox is the harsh,
confusing reality lying at the heart of
today’s controversies.

We can see plainly how law creates
property by looking at some of its
newer forms, such as intellectual prop-
erty rights in computer software. These
rights simply would not exist without
laws to create and protect them.
Software creators know this, as do drug
developers and bioengineers. Without
protective laws they gain no property
rights in their ideas, technologies, and
computer designs. Land is really no
different.

Partial Truth #4: Private property is fore-
most an individual right, perhaps the most
important of all in American society—the
"keystone" of all other rights.
Private property, we often hear, is a key
civil right—an individual right of some
sort, maybe even the most important of
our rights. But what does this claim
mean? We have free speech rights in
America simply by living in the coun-
try. We have rights to religion, to jury
trials, and to due process that attach the
moment of birth or immigration. We do
not, though, get property issued to us
merely by being born or entering the
country. So in what sense is property an
individual right?
The idea of a right to property has been
around for centuries. Along the
way, the meaning attached to the idea
has evolved. At the time the United
States was formed, for instance, a key
strand of property-related thought had
to do with the ability of a person to gain
easy access to it, especially enough land
to support a subsistence farm. This is
what Thomas Jefferson largely had in
mind as a “right to property.”
Widespread landownership helped pro-
 mote democracy, Jefferson thought.
Landowners were more stable, reliable
citizens, better able to resist the pleas
of demagogues and to work for the
common good. This preference for
widespread ownership and independ-
ence led Jefferson to propose a variety
of legal reforms to make land readily
available, turning the right to property
into a practical reality. He fought to
eliminate the last vestiges of feudal
tenural property relations, in which
landowners held their rights subordi-
nate to some lord, and to institute
across the board the kind of free owner-
ship that we know, what the law terms
allodial ownership. He opposed primo-
geniture—the inheritance of all family
land by the first-born son—to help
break up property holdings. He also op-
posed the legal institution of entail,
under which lands were securely kept
within a family line with the current
generation unable to sell it. 5

Most revealing, in terms of
Jefferson’s views on property, were his
ideas about making land freely avail-
able to all adults, including a proposed
constitutional provision for Virginia giv-

5. Jefferson’s views on property
are considered in Gregory S.
Adams, Commodity and
Property: Countering Visions of
Law and Economics 19 (1976),
467 at seq.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
Jefferson encouraged governments to use every means possible to break up large landholdings and to make land readily available to ordinary citizens.

ing "every person of free age" 50 acres of land if he neither owned nor had owned that much. (Virginia didn't accept the idea but Georgia largely did.) Jefferson encouraged governments to use every means possible to break up large landholdings and to make land readily available to ordinary citizens. While in France he specifically complained that the large landholdings of some people were leaving it hard for others to gain land. "Whenever there is in any country," he contended, "uncultivated land and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right." The holding of uncultivated land by the wealthy, that is, violated the natural right of property of the landless! In Jefferson's view, according to historian Joyce Appleby, government "did not exist to protect property but rather to promote access to property or more broadly speaking, opportunity." Homestead laws enacted during the second half of the 19th century displayed this attitude toward land, as did other public policies. The underlying right to property was a right of easy access—a right to gain property without having to buy it at prevailing prices.

This particular "right to property" line of thought is largely gone, along with the subsistence-farming mode of life that it envisioned. Its disappearance, though, creates a problem. What does it mean to have a right to property if the only way to gain private land is to buy it? If property is not about easy access, then in what sense is it an individual right?

The apparent answer, judging from today's rhetoric, is that the right to property in land is a right to remain secure in one's property—a right of noninterference of some sort, once one has acquired property. This is probably what advocates of a right to property have in mind. And it is an individual right, they claim, that is securely protected, or should be, by the Constitution.

On the surface this claim makes sense, but it begins to unravel once we probe it. First, there's the point already mentioned, that property is based on law and on public power. Our right to property is in reality a demand to have control over the use of police, courts, and other public resources. Second, there is the coercive element of property, the fact that ownership by one person denies other people the chance to use the same resource. Individual liberty, of course, is another of our key rights, so we have strong individual rights on both sides of our conflict. How do we decide which right is to take precedence, property or liberty? Property theorists have wrestled with the issue for centuries. Going further, we need to bring in the neighbors who have property rights of their own. When the land uses of adjacent owners clash, whose rights take precedence? Somehow the law has to favor one owner over the other. The cultural claim to property as individual right can't resolve such disputes. The "right to property" is simply too vague to deal with real-life questions.

John Locke formulated his theory about property by phrasing it as an individual right based on "natural law," but his reasoning is easily knocked down. Locke hypothesized a world in which land was so plentiful that it had no value. Anyone who wanted land could just take it; there was no need to buy, Locke presumed. This is not the world we know, of course, nor was it really the world of Locke's day. A theory based on counterfactual assumptions shouldn't carry much weight. Locke's extended argument about property did contain a more sound, limited claim: that people have a natural entitlement to the value they add to land by their personal labor—to the physical improvements they make to it. This claim does possess certain merit. But bare land itself, apart from improvements, is not covered by Locke's justifying theory. No person's labor created land, and it is inherently scarce.

The reality, as philosophers have long concluded, is that private property in land really has only one solid moral justification. Private ownership is sound because it is useful to us collectively as a people. Our world, in brief, is better with private property than without it. Private property helps generate wealth and prosperity. It gives owners a stake in their communities, encouraging them to support and defend the communities. It adds ballast to the civil state and protects families. This is an argument based on overall social welfare or utility; it is a moral argument that justifies a thing based on its good consequences (what philosophers term a consequentialist justification). What's critical to emphasize here, with this argument for property, is that it's based on the ways property helps us collectively, not individually. Society as a whole benefits when we implement a scheme of private property in which individuals possess reasonably secure entitlements. That's the main justification for private property, and really only the justification for property rights in land. It is the answer that we give to the landless when they ask what's in it for them. The landless benefit not merely because they might someday become owners. They benefit indirectly because the society in which they live is more prosperous, stable, and progressive than it would otherwise be. To the extent these claims are factually true, they give property a sound moral base.

The conclusion reached here, that property is justified only when it contributes to the common good, helps clarify the flaw in the frequently heard claim that property is an individual right. It is an individual right, but only derivatively. Individuals possess moral property rights to the extent and only to the extent that society benefits by recognizing those rights. Private property, therefore, is an individual right only secondarily. To be sure, social welfare is often promoted by creating and
If draining a wetland appears harmful to the community, then why should society authorize it?

respecting individual rights; that’s why we have individual rights. But individual rights always require justification in terms of the ways that they benefit society. If draining a wetland appears harmful to the community, then why should society authorize it? If development in the Hackensack River floodplain is ecologically damaging, where is the social benefit in giving up property rights to engage in it? Maybe there are answers, but we need to hear them and they aren’t obvious.

Partial Truth #5: Full ownership is absolute ownership, and property rights become more complete as they approach this absolute.

Judging again by public rhetoric, yet another widespread idea is that property can take an “absolute” form of some sort. In popular thought, that is, an owner could possess a bundle of private rights that includes all possible elements of ownership. Hardly anyone asserts that real-world owners ought to have such absolute rights. Rights need pruning here and there, almost everyone agrees. But the vocabulary and imagery that are used to talk about property presume that there is such a thing as absolute ownership. And this ideal often serves as a benchmark to help evaluate how far a government regulation has curtailed private rights. Indeed, it is almost the universal benchmark. When people challenge a regulation, claiming that it disrupts property rights, they typically start with the idea that a landowner possesses full rights and then calculate how deeply a particular regulation has cut into these absolute rights. When a regulation cuts too deeply then the landowner deserves to get paid, just as Ronald Mansoldo claimed. The only debate is about the “too deeply” part—about how far a regulation can diminish absolute ownership before it triggers an obligation to compensate for the loss.

The problem with this reasoning is that it begins with a serious mistake of fact. There simply is no such thing as absolute ownership, not even in the abstract. Indeed, the concept makes no sense. Or to put it another way, there are several forms of ownership that are each absolute in one critical respect but far from absolute in other respects.

This reality was starkly apparent in a recent legal dispute involving grass burning, resolved by the courts of Idaho with a bit of legislative help. Several landowners in northern Idaho wanted to burn grass as part of a grass-seed-producing operation. Neighboring landowners complained about the smoke and soot generated when the grass-seed producers burned their fields after harvest. The neighbors asserted, rightly, that the smoke interfered with the use and enjoyment of their private property, causing substantial harm. They relied upon their private property rights to challenge the burning. The landowners doing the burning, predictably, pointed to their own property rights. If the law forced them to halt their burning, the growers urged, it would be undercutting their private rights. Liberty, too, lay on both sides of the dispute: the liberty to use land as one sees fit and the liberty to halt interferences.

So how might we resolve such land use disputes? We don’t need to provide an answer to spot the weakness of absolute ownership as a mythical ideal. Does absolute ownership mean you get to use your land however you like? Or does it mean, instead, that you can halt all interferences with what you can do on your land? The first option provides absolute protection for the right to use, the other something close to absolute protection for the right to halt interferences by neighbors. But the two rights are in direct conflict. A landowner cannot enjoy them both. We might be inclined to say that the key entitlement of landowning is the right to use land as you see fit. But why should this be the preference? It makes no sense to own land if you can’t halt interferences with what you are doing. That right has to be part of the mix, which means the law necessarily has to impose limits on intensive land uses.

To lawmakers at the time the United States was formed, the key attribute of landownership was not the right to use land, though that was important. It was instead the right to remain free of interferences, or as they termed it, the right of quiet enjoyment. To them, the grass-burning dispute would have been an easy one to resolve. The burning disturbed the quiet enjoyment of neighboring lands. It was therefore improper. The wisdom that then prevailed was summed up in a much repeated legal maxim, the do-no-harm rule. Landowners were told they could use what they owned so long as they didn’t harm anyone else. When they did cause harm, they had exceeded the limits of their rights. Since the late 18th century, we’ve been less sure about this answer. We are inclined, or have been until lately, to tolerate intensive land uses even when they harm more sensitive neighbors.

As a policy matter it makes little sense to favor either of these two opposing forms of absolute ownership. It makes little sense to recognize either an absolute right to use land or an absolute right to halt all interferences, no matter how slight. Undoubtedly we ought to end up in the middle somewhere, allowing certain intensive land uses despite resulting harms while halting other intensive uses so as to protect quiet enjoyment. The line needs drawing somewhere. And human lawmakers need to do it. No mythical image can provide answers.

Partial Truth #6: Property rights are essentially timeless in nature, even as regulations come and go.

The mistaken image of absolute, or full, property ownership is matched with another widely held ideal, nearly as flawed. That is the idea that property rights are somehow timeless in the
The twists and turns that property law has taken provide a fascinating field of study. Sense that ownership retains a settled meaning, even as regulations come and go. We all know what it means to own land; that's the basic idea. And this timeless ideal of ownership helps us judge the effects of new statutes and regulations. Whenever a new law comes along, we measure its impact by setting it side by side with the timeless ideal.

This reasoning presumes that there are essentially two types of law dealing with private land. One type includes the foundational laws that set the basic terms of ownership. These are the laws that remain stable. The other type are the laws, usually termed "regulations" (even if they take the form of statutes), that tinker with the basic content of ownership, most often cutting into it. When regulations cut too deeply into property's basic content they become illegitimate.

This image of property as a legal institution is quite mistaken, even though widely embraced. It reflects a misunderstanding about the forms of law and how legal change occurs over time. Regulations are very much a form of law, along with statutes, the common law, and constitutional provisions. All law changes over time, the law of property included. Given that property is a product of law, with legal rights specified by law, then changes in the law necessarily bring changes in the meaning of ownership.

The twists and turns that property law has taken provide a fascinating field of study. Perhaps the dominant change in 19th-century property was the shift in many areas of the law to allow railroads, mines, mills, and industries to operate, even though they imposed harms on neighboring landowners and surrounding communities. The effect was to increase the ability of landowners to use their lands intensively while decreasing the legal rights of landowners to complain when their neighbors caused them harm. Although a counterreaction set in early in the 20th century, private property retains much of the shape and ideological content given to it during the era of industrial expansion.

One corner of the law that underwent this transformation was the law of riparian water rights as applied in the eastern half of the United States. The legal situation as the 19th century dawned was summed up by the New Jersey Supreme Court in a 1795 ruling, Merritt v. Parkes (1 N.J.L. 460, 1 Goxe 460 (N.J. 1795)). A purchaser of land, the court explained in its ruling, possessed the legal right to use water flow over and alongside his land, but he could use the water flow only "in its natural state" and had no right "to stop or divert it to the prejudice of another." A waterway should flow in its natural channel without being disrupted by diversions or pollution. The goal of this legal rule was to allow each riparian landowner to enjoy the river in its natural condition, even though this meant riparians generally had only severely circumscribed rights to use water. So "perfectly reasonable" was this rule and so "firmly established" was it "as a doctrine of the land," the New Jersey court stated, that the legal rule "should never be abandoned or departed from."

Despite the court's wish, though, other tribunals soon began changing water law, giving landowners greater rights to divert and consume water, even pollute it severely and block water flows and fish migrations, all in the name of promoting new industrial activities. Courts rewrote water law to allow landowners to undertake "reasonable" uses of waterways even when their uses disrupted the natural flow. Downstream property owners simply had to tolerate the harms.

What the rich history of property law shows, above all, is that property is an ever-changing set of norms and understandings. And appropriately so. If property is legitimate only when it promotes the common good, and if ideas about the common good shift, then the rules of ownership ought to shift along with them. We need to be careful, of course, about the ways we go about changing the rules of ownership. But change is a political reality and a moral necessity.

Partial Truth #7: Regulations reduce land values and thus interfere with property rights.

The final half-truth that needs airing is the assumption that regulations inevitably curtail private rights, reducing land values, and that because they do, owners are better off with fewer regulations. The flaws in this claim are probably better known than those of our other half-truths and require less discussion.

Consider the case of a lot in the typical single-family residential subdivision created anytime within the past few decades. In all likelihood, zoning rules prohibit nearly any significant use of the land except as a residence. Various statewide laws are likely to ban an array of intensive land uses such as mining. Restrictive covenants probably also limit uses of the land, perhaps in far more detail than any laws. The covenants could create a home owners association, which can insist that owners get permission before changing land uses. In combination, these limits could curtail severely how landowners can act. And in doing so, they could add market value to the land.

The value comes, of course, mostly because the restrictions that one owner faces are also faced by other people. Land values are highly interdependent, particularly in congested areas. By limiting land uses, area-wide restrictions can raise the values of nearly all land parcels. This reality is hardly unknown, and in fact largely drives the politics of land use regulations. The people who most want regulations are typically resident landowners themselves. They view regulations as tools to protect what they own.

A complicating factor is that we're too often prone, when facing real-world conflict, to assess land use regulations on a regulation-by-regulation basis, rather than by considering as a package all laws that apply in a given locale. Critics of regulations often point a finger at one particular regulation that they dislike, alleging that it curtails land values. When they do that, they can ignore numerous other regulations, also in effect, that could elevate values of the same land parcels. In truth, the drop in value attributed to one regulation might simply offset increases in value that arise from other regulations. This, though, is hardly the worst distortion. The worst comes when a landowner claims that a regulation reduces his land value by limiting his ability to start
Much of our legal mess has arisen because of the odd way we allocate power within our federal system of governance.

some new, more intensive land use, but in calculating the economic effect of the regulation the landowner assumes that other landowners in the area will remain subject to the same regulation! That is, the owner wants neighbors to comply with the regulation limiting development so as to enhance the market value of his own greater right to develop. This approach, of course, unfairly takes advantage of regulation-induced land values, but owners sometimes get away with it.

CONCLUSION
These seven half-truths have accounted for much of the confused debate taking place about private property today. When we correct them we clear away a good deal of intellectual and cultural clutter. To finish the work, though, we need to dig further into the legal side of property, to figure out how we got into the current intellectual mess. Why have things become so clouded legally? Why do courts that decide key private property cases spend little or no time talking about private property and how they, and we, might best define landowner rights? Why do they so rarely talk about the processes of legal change? Something is going on.

Much of our legal mess has arisen because of the odd way we allocate power within our federal system of governance. Particularly since the New Deal era of the 1930s we’ve looked to the federal government to address big problems. The land use/property rights area is no exception. It’s been a mistake, however—a big one. And right in the center, confusing matters, has been the United States Supreme Court. We can hardly lay full blame on the Court; state courts also deserve some of it, as do legal academics. But the Supreme Court deserves a firm chiding. Its rulings have encouraged Americans and other courts to think about property rights in terms of whether a land use rule amounts to an unconstitutional “taking” of property. But that’s not the chief question that needs asking. It approaches the property rights issue from the wrong direction, since the Constitution itself plays virtually no role in prescribing landowner rights.