Chapter 1

Why Land Use Rights?

The instant I enter on my own land, the bright idea of property, of exclusive right, of independence, exalt my mind. . . . This formerly rude soil has established all our rights; on it is founded our rank, our freedom, our power as citizens.

—J. Hector Crevecoeur

This is a book about private property, in particular, land, about government attempts to control it and the constitutional rights that protect it. But it is about more than land and law; it is about freedom and community, values and culture. There is an inescapable tension in liberalism between the individual and the state that is played out in regulatory conflicts over the use of private land. Embedded in debates over constitutional property rights are conflicting visions of the proper polity.

Landowner rights have been orphans of the courts for most of this century. Half a century ago, the U.S. Supreme Court interred property rights in the constitutional graveyard.[1] Henceforth, there would be two classes of constitutional rights: those meriting vigilant protection (such as freedom of expression, voting rights, and equal protection of the laws), and those, including the rights of landowners, that would virtually be abandoned, no longer serious obstacles to government action. For decades, the constitution was essentially irrelevant to the land use regulatory process.

Why, then, do landowner rights merit the attention of an entire book? Are they not the dinosaurs of legal doctrine, extinct symbols of an era forever gone, when strong property rights roamed the country, occasionally stopping to squash legislative attempts at regulation? Twenty years ago, property rights may have appeared to be irrelevant anachronisms. For decades, a profound silence on constitutional property rights echoed across the nation: Between 1928 and 1974, the U.S. Supreme Court did not even hear a zoning case, and most state courts gradually adopted the "see-no-land-rights, hear-no-land-rights" attitude of the Court. But in the past two decades, state and federal justices increasingly have questioned the wisdom of the simple double standard of constitutional rights that has been the foundation of jurisprudence since the New Deal. As a consequence, zoning and the other tools of land use control are no longer sacrosanct. For example, beginning in 1975, the New Jersey Supreme Court, long a leader in deference to legislative control of land use, issued a series of widely hailed decisions condemning the exclusionary effects on the poor of local zoning practices, and ordering radical changes.[2] The U.S. Supreme Court has begun to face the deleterious effects that regulations may have on fundamental rights,[3] and has struck down local land use ordinances or administrative decisions that threatened free expression,[4] entangled church and state,[5] or discriminated against the retarded.[6] And before the Court closed shop in June 1987, it issued two decisions—*First English Evangelical Lutheran Church of Glendale v. Los Angeles County*[7] and *Nollan v. California Coastal Commission*[8]—that together formed the most profound and potentially far-reaching statement on the constitutional rights of landowners the Court had made in fifty years.

We are entering a new constitutional era in which the New Deal double standard of rights has become blurred and property rights are once again the focus of attention in the highest courts of the land. In the future, it will be essential that land use regulators, and scholars who seek to study the process, "know the constitution."[9] Just what sort of rights are emerging from the courts, what their implications are likely to be for government regulation and the autonomy of landowners, and how they reflect the clash of political cultures in the American polity are the subjects of this book.

OF ASPIRATIONS AND RIGHTS

When I was young, a state inspector came around to our family dairy farm. He had two requests. The milkhouse door, which

opened inward, as doors often do, would have to be changed so that it swung out. This was because someone had decided that fewer flies would enter a building if the door opened out, and the inspector, vested with the authority of the state, could require that we put that theory into practice. The actual number of flies around our milkhouse (admittedly, farm flies are difficult to count) was not of concern to the inspector, nor was the general level of sanitation in the barn. The door had to open in the prescribed manner, and that was that. The inspector also informed us that the electric cooler, which protected the milk until we whisked the cans down to a rendezvous with a tank truck in town, had to go. In its stead we would have to install a shiny new storage tank so that the milk could be piped directly into the truck at the farm. Again, there was not an issue of the quality of our milk or the care we took. Milk cans were simply passé. Now milk tanks, unlike shoes, do not come in a wide range of sizes. Our small operation did not produce enough milk to take up much room in the typical tank, which also would be prohibitively expensive and larger than the entire milkhouse. My father considered the demands of the state and the bleak outlook for small farmers, and decided it was time to embark on a new career. So the cows were sold, and our small contribution ceased to flow into the great stream of commerce. And to this day the milkhouse door still swings inward.

Many years later, I was a reporter for newspapers in New England. Since I worked part-time, I was paid by the inch, and the surest way to generate a plentiful supply of inches about local controversies was to go to the meetings of the planning and zoning commissions. Readers who have not had the opportunity to witness these grand clashes do not know what they are missing. Of course, the professional life of the local land use regulator does not always match the excitement and glamour of, say, Donald Trump. Officials can drone on in an obscure bureaucratic tongue that will sedate the most energetic observer. But that is part of the fascination of the process: Fundamental issues about how people shall live become encoded in terms of art such as "mitigating circumstances" and "projected maximum load capacity." And just beneath the thin veneer of obfuscation lie the simmering disputes about the freedom, equality, and community of local citizens. When man meets bureaucrat in a local regulatory proceeding, the result is often lively, with owners demanding their rights, neighbors seeking to restrain them, and officials purveying their visions of social sanity. As a laboratory for finding everyday people grappling with the great questions of social life in circumstances with direct impact on

the participants, a hearing at the local land use commission is hard to beat.

Let me give you an example. Marlborough, Connecticut, is a suburb on the fringes of the Hartford area. As the population has become dominated by middle-class commuters, land use regulation has become increasingly strict and complex and holds a prominent place on the political agenda. While I was covering the town, the home of a local family burned to the ground. They were not well off and had no other place to keep the family together while they rebuilt their home. They sought to put a mobile home on their land until the new home was ready. But lo, Marlborough had an ordinance forbidding mobile homes. The owners appealed, but town officials would not budge. To the working-class owners of burned rubble, the land use process seemed absurdly unjust, keeping them out of their hometown. To the middle-class officials who devoted their evenings to enforcing the regulations, zoning was a benevolent way to preserve the aesthetics and community order they cherished.

Land use regulation is here to stay. By joining together under the banner of government, individuals can extend their control beyond their private world. Land use regulation cannot help but confront the basic social issues of freedom and community. It can be a potent weapon for stopping nuisances before they start (in economists' terms, controlling the externalities). Or it can be a covert way to rig the socioeconomic makeup of a community, excluding those deemed undesirable. And it can leave an homeowner vulnerable to the whims of local residents. Regulation is sometimes benign, sometimes oppressive, absurd at times, and at least occasionally sensible.

Individual property rights are a key element in keeping regulation reasonable. Rights, when enforced, keep procedural hurdles and substantive outcomes from becoming too abusive. And the language of rights permeates controversies over the uses of land. The fire victim in Marlborough spoke of his "right" to a home. My father thought he had a right to let the milkhouse door swing freely and to use whatever milk storage system was safe and economical. The property owners I observed running the regulatory gauntlet in California, where I labored mightily in graduate school, often spoke of rights as if they were moral trumps that would vindicate their positions. A sense of rights seemed to be an underlying phenomenon that drove regulatory proceedings. I became curious to know just what those rights are, as interpreted by the courts, and how the courts reconcile conflicting visions of the proper relations between land use, personal freedom, and community.

LOOKING FOR LANDOWNER RIGHTS

When landowners speak of their "rights," they do not necessarily restrict their claims to constitutions. Statutes and local ordinances that authorize land uses or provide procedural safeguards may benefit property owners. But rights imply a moral foundation and a permanence that do not characterize the pragmatic legislative compromises of shifting political forces. Compared with constitutional provisions, statutory laws are more likely to be perceived as products of inordinate political power rather than as fundamental statements of the moral ideals of the society. The detail and cumbersome language of laws and ordinances may aid implementation, but they also put the substance of laws beyond the grasp of most citizens and reinforce suspicions that complexity hides loopholes for the powerful. And in the land use field most statutory innovations have expanded state control over private property. The liberties of landowners may then be reduced to what can be read between the lines; that which is not yet forbidden may still be allowed. But then the landowner may be accused of subverting the intent of the law, and action to "close the loophole" may result. Statutes and ordinances also are more easily amended than constitutions[10] and thus provide less secure protections. A constitutional clause, in contrast, has a simplicity that makes interpretation uncertain but serves as a readily perceived rhetorical statement of values. Constitutional rights carry a moral and symbolic power not shared by statutory protections. Rights are emphatic statements in simple language of what is good and important to a free society.

Lest anyone think this work is a celebration of symbol over substance, I would point out that constitutional rights, when enforced, have played a critical role in land use litigation. "The most important part of this field [land use law] has been concerned with constitutional law," Norman Williams has pointed out. "Nevertheless, there has been a striking lack of clearly articulated constitutional doctrine."[11] The impact of constitutional law has largely been through the state courts in disparate decisions of many courts across the land, often in obscure language. Even a comparison of the wording of constitutions provides little guidance to the actual status of rights, as different courts may give widely varying interpretations to nearly identical language.[12] Constitutional clauses do not create effective rights unless the courts are willing to enforce them. To understand what rights landowners have, I will evaluate the

reasoning and context of court decisions upholding constitutional protections against government encroachment.

The study of doctrine has fallen out of favor in the social sciences, and that is regrettable. On the book reviewer form for the *American Political Science Review,* for example, there is no category for "law," only for actors and processes such as courts, judges, and judicial process. There is little recognition that the language and logic of legal doctrine is an important factor in the outcome of decisions and more fundamentally in the character and tone of society. This distrust of doctrinal studies stems from an understandable suspicion of backseat judging under the guise of scholarly analysis. But to ignore doctrine is to ignore some of the fundamental rules that affect individual behavior and policy outcomes. The precedental value of the law means that court decisions are not simply solutions to narrow disputes but constraints on the policy process and can be studied as such. And in order to give social legitimacy to decisions rather than simply choose between the conflicting arguments of the litigants in a particular case, the justices must develop some rationale, some vision of the acceptable political and social relations in a polity of democracy and individualism.

In the next chapter I present a framework for analyzing those competing visions, or cultures. I then briefly summarize constitutional land use law prior to the 1980s. Three chapters on different jurisdictions follow. First I look at Pennsylvania where we find a court strong on rhetoric celebrating property rights but as likely to favor municipalities as landowners in its decisions, with outcomes often depending on small factual differences. Exclusionary zoning doctrine, the centerpiece of constitutional land use law in Pennsylvania, vividly shows the cultural conflicts that beset the court, particularly as it struggles to incorporate the more activist approach of its neighbor, the New Jersey Supreme Court, while maintaining a view uniquely its own. Next I turn to California where the Supreme Court has remained steadfast in its deference to government regulation of property, and finally to the U.S. Supreme Court, which has come out of its shell with several significant rulings on behalf of property rights, broadly construed. The Court's rulings may point the way to the future because of their national impact and their resonance with current conflicts of political culture. In the penultimate chapter I discuss the significance of continuing pressures for expansion of the regulatory state. I conclude with a summary of developments in property rights, and recommend doctrinal changes—such as greater procedural protections for landowners, a higher level

of substantive scrutiny, and emphasis on the extent of deprivation in a takings clause case rather than on the government's interest—that would strengthen landowner rights while still accomodating the perspectives of conflicting political cultures.

SEARCHING THE THICKETS OF CONSTITUTIONAL LAW

In my quest for the elusive rights of landowners, I have followed two basic strategies: Developments in state supreme courts, which have loomed large in the land use field for decades and are even more important today, have been given major emphasis, and for the jurisdictions given most emphasis, all constitutional decisions from the 1980s on the rights of property owners in the land use regulatory context have been included to provide a fuller and more balanced perspective on the status of rights.

Legal scholarship has tended to focus excessively on the U.S. Supreme Court. This is quite understandable as it is easier than following the doctrinal twists and turns of fifty relatively obscure state tribunals. In land use regulation, however, the court was virtually silent for half a century, leaving the state courts to fashion their own doctrines. The Supreme Court cannot be ignored, of course, since understanding its abstention from the land use field is key to understanding the wide discretion that regulatory bodies have enjoyed and why that autonomy may now be narrowing. And the Court may be returning as a major player in the field of constitutional property rights.

State high courts have had the final say in the bulk of landowner cases, and many are increasingly willing to find rights in state constitutions, sometimes with explicit encouragement from federal justices,[13] that the Supreme Court has been reluctant to read into the U.S. Constitution. The state courts are beginning to receive some overdue attention,[14] but the comprehensive, comparative study of state constitutional doctrine has been a neglected field. While selected cases, such as the *Mount Laurel* decisions attacking exclusionary zoning in New Jersey,[15] that warm the cockles or draw the ire of commentators receive inordinate attention,[16] the great mass of constitutional litigation receives scant notice. "What is most lacking," according to James Kirby, "is close study of cases in which laws are upheld, as well as invalidated."[17] The unusual cases must be placed in a context of cases in which regulations are upheld or struck down for predictable reasons to get a balanced view of the nature and extent of constitutional rights.

A few authors have made serious attempts to canvas the state of land use law.[18] Although they make extensive reference to recent decisions in many different states, their coverage is selective, and thus they do not provide a comprehensive picture of the state of rights even in the jurisdictions they cite. They make impressive attempts to summarize the law but do not provide methodical, comparative analysis. These treatises also do not seek the underlying social visions that help us understand the development of the law and predict its future, and do not consider the implications of the decisions for competing ways of life.

A notable example of an attempt to bridge the gap between social science and legal doctrine is the study of land use cases in California conducted by Joseph DiMento, Donald Hagman, and their associates in the late 1970s.[19] Their work was both broader and more narrow than my project. They studied all state decisions related to land use, including constitutional and other decision bases such as statutes, ordinances, and regulations. Less than 15 percent of their cases were decided at least partly on state constitutional grounds,[20] and thus their findings, while supporting the general perception that the California court is hostile to development, are of limited help in assessing the extent of constitutional rights. Their study also stopped before the 1980s and did not employ a comparative approach. And their attention was focused primarily on the outcomes of cases rather than on the visions of society sketched out by the opinions. Nonetheless, it is encouraging to see such careful work creeping into the law reviews.

Searching through the thicket of state constitutional law can be daunting. Although I have strived to be constitent in the selection of cases, it is occasionally a judgment call whether a case turns on a property rights issue. As Norman Williams has noted, "A literal minded reading of the case law will show that, in perhaps nine out of ten cases involving constitutional questions, there is no indication as to which constitutional doctrine was involved."[21] Indeed, in some opinions, there may be no mention of a constitution at all, even though constitutional analysis is employed. I have concentrated on the decisions of supreme courts. The decisions of lower state and federal courts are important in particular disputes, and may presage the adoption of innovative doctrines by a high court but are not final[22] and may be conflicting, and thus do not give a good picture of the fundamental rights established in a jurisdiction.

Rather than cover every state in detail, which would tax the stamina of the most devoted reader, or every state superficially,

which would not convey the depth and nuances of debates and developments in the property rights area, I have concentrated on two—Pennsylvania (with comparisons to New Jersey) and California—that represent quite different trends in state constitutional law. Instead of relying on my own impressions, I asked eight specialists in land use law[23] to suggest states that were the most protective of landowner rights and states that were the least protective. California was a near unanimous choice as the state least likely to protect landowner rights. Californian municipalities are well known as leaders in the development of public controls over private land and are accustomed to meeting little resistance from the state courts.[24]

It may be indicative of the generally low state of property rights that finding a vigilantly protective jurisdiction is no easy task. Pennsylvania and Illinois were most frequently cited by those I consulted.[25] Illinois does have a reputation as a protective state. The state is "strongly developer minded," accordingly to Williams,[26] while Ellickson and Tarlock portray Illinois as an activist court "at the other pole" from California.[27] But when I reviewed Illinois cases in the 1980s, I found the court supported the rights of the landowner in only one-third of the constitutional cases. Either the court has shifted direction, or the extent of its protectionism has been exaggerated, which is easy to do, given the contrast with courts deferent to regulation. Of the courts I reviewed, the Pennsylvania Supreme Court was most likely to rule in favor of constitutional property rights, with about half of its decisions favoring the landowner.[28] The Pennsylvania court is an especially attractive subject because it has been a leader in the development of "exclusionary zoning" doctrine, which has been widely heralded as an innovative approach to land use. Pennsylvania and its neighbor New Jersey dominated the citations on exclusionary zoning.[29] Including Pennsylvania in the study provided an opportunity to assess whether decisions requiring local zoning plans to accommodate low-income residents represent victories for landowner rights or merely a new doctrine of state control.[30] The answer, it turns out, depends in part on which bank of the Delaware one is standing on.

THE LEFTWARD LEAN OF LAND USE COMMENTARY

During the stormy days of the hearings on the nomination of Judge Robert Bork to the Supreme Court, Lawrence Tribe of Harvard Law School warned, in all seriousness, that Bork was out of the

"mainstream" of legal scholarship. What he declined to mention was that the legal mainstream has veered well to the left of the American public. In legal scholarship on constitutional law, there is a distinct sense of dejà vu when reading one commentary after another. "Almost all the scholarly treatments of the modern Supreme Court," Martin Shapiro has noted, "have been produced either by active proponents of and participants in the New Deal or by its intellectual and political allies and successors."[31] The land use literature is often more informative of the preferences of the author than the state of the law. The gospel on land use law goes something like this: *Lochner*[32] and its ilk were bad; the double standard created in the *Carolene Products* footnote[33] is good; and the *Mount Laurel* court made a laudatory attempt to correct regulation by making it more egalitarian.[34] Law is ultimately about values, and critical reviews and normative arguments play an important part of thinking about law. What is distributing is how uniform the voices have been and how little candor there has been in acknowledging the pervasiveness of ideology. And what "should be" is not the same as what "is." It often is difficult to distinguish the two in the land use literature. I hope to remedy this by presenting a study that is comprehensive and balanced in the cases selected for study and will critically examine the value premises underlying land use regulation, adding a discordant voice to the harmony of New Deal commentary.

"The reader should know through what spectacles his advisor is viewing the problem," urged William Douglas.[35] Too often, he said, arguments were put forward by "special pleaders who fail to disclose that they are not scholars but rather people with axes to grind."[36] Now, Douglas was never one to walk around with a dull ax, but he was straightforward about his opinions. Too often, opinions in the land use literature are portrayed as the inescapable conclusions of objective experts. Norman Williams, Dan Mandelker, Richard Babcock, and their coauthors wrote a diatribe against the unremarkable position that the constitution requires compensation when governmental restrictions are so severe as to effectively "take" private property, as if their cumulative reputations (which are substantial) should suffice to silence the opposition.[37] In a reply, Berger and Kanner noted that the writers of the "Manifesto," as it was titled, "tend to toil in government vineyards"[38] representing the parties that are seeking to avoid paying for takings (the Manifesto authors had neglected to mention this point). "In *The Manifesto* they are polemicists, not scholars."[39]

To cite another example, Robert Anderson, an accomplished land use scholar, praised "Professor Williams' careful and dispassionate examination" of New Jersey zoning law,[40] although Williams's article reads like a call to arms on behalf of egalitarian regulation. There is a "value judgment rapidly coalescing among thoughtful people," Williams and Norman claimed, that regulatory barriers to equality must be eradicated.[41] The implication was that if you are thoughtful, you agree with the authors; if you disagree, you are thoughtless. Yet the issue of exclusionary zoning is not simple, and reasonable people can disagree on the values to be served and the means to achieve them. Diversity of philosophy and vigorous debate between closely balanced ideological forces have not been hallmarks of the land use literature. "For many decades," Ellen Frankel Paul has noted, "liberals just did not have to confront many free-market advocates during their normal, scholarly routines. They could go about unperturbed, all nodding in acquiescence to the same set of canards inherited from the New Deal."[42]

Some of what I will say may set heads bobbing, but they may not be nodding in agreement. I think abdication by the courts has exposed property owners and users to flagrant abuses of their fundamental rights, rights that are crucial to individual freedom in a democracy. And I am wary of rationales for attacking exclusionary zoning that with their emphasis on putting the coercive power of the state behind preferred visions of where and how people should live, legitimate further governmental intrusions into individual autonomy. In its zeal to justify an expanding regulatory state, the land use establishment—the Mandelkers and Williamses and articulate justices on deferent courts—has undermined the freedom critical to the American polity and has supported the dilution of the Constitution beyond the bounds of credible interpretation. Given the pro-regulation uniformity of much land use commentary, I hope my criticisms will serve to broaden the debate.

Judging from developments in the courts, it is hard not to be encouraged that property rights are on the rebound, although some may consider this cause for worry rather than rejoicing. In the coming years, landowners will likely continue to gain constitutional protections that they have lacked for decades in many jurisdictions. But this recovery of rights has not begun because lawyers and laymen have been dazzled by the forceful arguments of, say, Richard Epstein, a frequent critic of the regulatory state, and reluctantly concluded that indeed the twentieth century is unconstitutional. Rather, it is because regulation has become so pervasive that even

judges, scholars, and average citizens predisposed to support government have begun to fear that things have gotten out of hand, that the control of land is restricting freedom of expression, perpetuating inequality, eroding personal privacy, and creating obstacles to economic opportunity. For private property rights do not only protect the liberty of wealthy developers or large corporations. One need not be hostile to regulation to be disturbed by some of the abuses that have been perpetuated by governments ostensibly acting for the public good. My hope is that a detailed review of constitutional rights in the land use arena will encourage appreciation of the essential role of private property in liberal democracy and awareness of the often absurd regulatory gauntlets that property owners and users may face, and that common ground may be found between differing perspectives to strengthen protection of landowner rights.

A BRIEF INTRODUCTION TO CONSTITUTIONAL AND LAND USE LAW

Constitutional law largely is a matter of logic (or illogic), so I hope readers unfamiliar with the arcane mysteries and dubious science of the law will not be deterred by the emphasis on doctrine. Before moving on, I will review some of the basic legal concepts and terminology I will be using throughout the book.[43] Hardened veterans of land use litigation may wish to skip ahead to the next chapter. For others, the following discussion of constitutional law[44] and land use regulation may be helpful.

Constitutional rights protect the individual from government; they do not protect individuals from interference with their legal rights and interests by other private individuals, such as their neighbors. Those disputes are resolved by the common law,[45] supplemented by state statutes. If you insist on enjoying the sun in my backyard without my permission, for example, I could take you to court for trespass. If the city government has provided a basis for your intrusion, as by declaring all private backyards open to the public, then I might also claim the city has infringed my constitutional rights. Constitutional law deals with the classic conflict in liberalism between the power of the state and the freedom of the individual.

The greatest jurisprudential legacy of the New Deal has been the creation of two classes of constitutional rights. Preferred rights, such as freedom of speech, protection against racial discrimination, and now privacy, have been elevated to the status of "fundamental"

rights, which generally cannot be infringed unless the state can show its actions are essential to serve a compelling governmental interest. Other constitutional rights have been given an inferior status and can be infringed at will unless the government's action lacks any rational relationship to a legitimate objective. The major clauses in the U.S. Constitution under which property rights have received protection, the takings clause and the due process clause, by and large have been relegated to the second category, although states vary in the degree of seriousness they attach to landowner rights.

The due process clause[46] protects individuals from arbitrary or capricious governmental action and has both a procedural and a substantive element. Literally, the government must follow the "process" that is "due," or its actions may be invalidated by the courts. Procedural protections are intended to ensure that individuals are treated fairly. Requirements in administrative processes, which are most pertinent to the land use field, usually include the right to notice of governmental action, an opportunity for a formal hearing, and a decision based on the record. Actions classified as legislative, which in theory are general statements of policy rather than resolutions of particular disputes, need not meet these requirements.[47] But a regulation or law[48] may be struck down if it is too vague (the "void for vagueness" doctrine), essentially because it fails to give clear notice of impermissible conduct or leaves too much discretion with the enforcing agency.

These procedural protections do not guarantee that the property owner will retain any autonomy in the use of land; they require only that restrictions be imposed properly. But one procedural protection, the *vested right*, may create substantive guarantees of rights to use land. A property owner's right to use land in a specific way may "vest" if the owner has acted in reliance on prior approval by the government. If a building permit is issued and construction subsequently begun, for example, a municipality cannot revoke the permit simply because it changes its mind. Generally, however, property owners are subject to the fluctuations of public policy. A manufacturing company that purchases a tract of land zoned industrial may find the property rezoned to forbid its intended use or may be able to gain permit approval only by agreeing to onerous conditions.

The due process clauses of the Fifth and Fourteenth amendments and their state constitutional kin also have substantive components. A statute approved in the proper fashion or a regulation

adopted after notice and hearings may nonetheless be unconstitutional if it lacks a sufficient relationship to an appropriate governmental objective, even if it does not violate any explicit constitutional right. This is a controversial area of constitutional law as it requires that a court evaluate the proper ends and means of government, a task arguably better suited for an elected legislature exercising its "police power," its authority to act on behalf of the public health, safety, and welfare. Since the New Deal, the Supreme Court has required only the most minimal rationality of governmental action except when preferred constitutional rights are at stake. In those cases, judicial evaluation of governmental ends and means is unavoidable, as even the most protected of rights may be overcome if the state's justification is compelling. Justice Holmes's classic example is that shouting "fire" in a crowded theater is not protected by the First Amendment.

Closely related to due process concerns are matters of equal protection. Under the equal protection clause[49] of the Fourteenth Amendment, courts may evaluate the rationality of governmental actions, distinguishing between different groups of persons. Even if a municipality has the power to forbid industrial uses, a court might look closely at a regulation that singles out one or two uses. Equal protection challenges typically are not more successful than due process attacks on land use regulations unless a "suspect class" such as a racial minority is affected. In those cases, judicial scrutiny is much stricter.

The takings clause of the Fifth Amendment states, "Nor shall private property shall be taken for public use, without just compensation."[50] The clause implicitly authorizes the taking of private property, which can be done through *eminent domain* procedures. When a government initiates eminent domain, constitutional questions may arise whether the proposed use of the property constitutes a "public" use and whether "just compensation" is being provided. If the government takes private property without beginning eminent domain proceedings, the owner may file an "inverse condemnation" suit seeking compensation or an injunction to prevent the taking, or both. The hottest area of constitutional law involves "regulatory takings;" a landowner claims his property has been effectively taken through restrictive regulations limiting use of the property even though the government has not asserted title to the property.

For most of this century, the Supreme Court has given little support to property rights under the takings or due process clauses

yet has been much more protective of rights it has deemed "fundamental" or "personal," such as freedom of expression or privacy. Government restrictions on private property may be challenged under these doctrines of preferred rights. Most important in the land use context is the First Amendment,[51] which protects freedom of speech and the free exercise of religion and forbids the governmental establishment of religion. Zoning restrictions on billboards and adult bookstores are frequently challenged on First Amendment grounds. As the courts have been especially protective of expressive rights, in some cases these doctrines may provide greater prospects of success than a takings or substantive due process claim.

Both federal and state constitutions protect rights that are not explicitly mentioned. Following the enumeration of individual rights in the first eight amendments to the Constitution, the Ninth Amendment provides an additional, open-ended guarantee: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The enumeration of rights in the Declaration of Rights of the Pennsylvania Constitution, typical of state charters, begins with "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are," implying that the following explicit rights are not meant to be exhaustive.[52] Yet the courts have been reluctant to specify just what those rights might be for fear of intruding on the legislative process. An exception has been the right of privacy, the origin of which has been tied to the Ninth Amendment, the due process clause, and the "penumbra," or peripheral implications, of more specific clauses. In land use, for example, the privacy right has been used to strike down restrictions on who may live in a "single-family" zone.

Prior to the rise of governmental controls, land uses were regulated through suits in common law, especially trespass and nuisance, and private covenants. Covenants, which remain common today, are contracts between buyers and sellers restricting the uses of property. Entire neighborhoods may eliminate uses damaging to adjoining property owners (or "negative externalities," in the language of economics) through private covenants attached to property deeds.[53] A nuisance is the use of one's property in a way that interferes unreasonably with another person's use of her property. If the rock music emanating from your garage shatters my windows, I could file a nuisance suit. Early land use regulation was defended as a more efficient application of nuisance principles. Rather than wait for damage to occur or to require every person facing a nuisance to

sue individually, a regulation might constrain or forbid certain uses of property before they could do damage. In *Miller v. Schoene*,[54] for example, the U.S. Supreme Court upheld an act requiring the destruction of red cedar trees to prevent the spread of cedar rust to apple orchards on adjoining private property.

The most common tool for public regulation of land use is zoning, in which different uses of property are relegated to different areas, or zones, in a municipality. Typically, there are zones for residential, commercial, and industrial uses, with several subcategories for each. Although zoning may forbid certain uses entirely in some districts, it also explicitly permits them as a matter of right in other districts.

In order to have more control over uses that ostensibly are permitted in a given zone, municipalities have created additional, discretionary permit procedures. The oldest and most common are subdivision regulations. More recent are aesthetic or "design review" regulations covering signs or architectural styles and special permits for modification of historical structures. "Conditional use permits," which may go under a variety of labels, are required for many uses. These discretionary procedures effectively eliminate land uses as a matter of right and may require landowners to agree to extensive modifications and conditions in exchange for permission to use the property. Especially in times of fiscal restraint, "development exactions" attached as conditions to permits may require developers of office buildings or subdivisions to provide or pay for substantial public services, such as roads, schools, day care, libraries, or museums. The constitutionality of these "voluntary contributions" is frequently challenged in the courts.

So much for the constitutional and land use lingo. Beneath the arcane language and technicalities, disputes about property rights reveal fundamental clashes between opposing perspectives on the proper society, and it is to those visions, or cultures, that I now turn.