

Land-Use Policy as Volitional Pragmatism

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Land-use conflicts highlight several myths about property rights. The central myth is that property rights are linked to natural rights, that property rights are durable and unchanging, and that any interference with these property rights requires public compensation. However, particular settings and circumstances lead to conflicting rights claims which the courts must sort through to determine where the more compelling rights claim resides. Situations are not protected because they *have* property rights. Rather, those situations found worthy of protection by the courts *acquire* the status of a property right. Property rights are not discovered, but are created by the courts. Applied economists must build models of property rights conflicts predicated upon an epistemology of volitional pragmatism.

Key Words: consequentialist welfarism, property rights, volitional pragmatism

Applied economists interested in land-use matters come to this policy issue with two distinct conceptual frameworks (models) in mind. The first model concerns the idea and practice of property rights in America. The second model concerns how decisions *ought to be made* in a democratic market economy.

Notice that the first model is simply acquired—picked up, learned, memorized—by the economist who decides to undertake work on land-use matters. This may be thought of as the necessary *institutional detail* if an economist is to do something pertinent about an important public policy issue.

In contrast, the second model is at the core of what it means to be an applied economist. If one is an applied economist, one is expected to subscribe to—indeed to become an advocate for—a particular approach to public policy. This approach is consequentialist welfarism (Sen, 1993). We see this belief in the admonishments of a wide variety of economists, though only a few recent examples are mentioned here (Arrow et al., 1996; Palmer, Oates and Portney, 1995).

In practical terms, some economists imagine it is their professional obligation to be “advocates for efficiency.”¹ After all, if economists do not proselytize for efficiency, it is unlikely anyone else will take up that cause. And of course the world is quite full of individuals seeking to make it less efficient. We call them politicians, bureaucrats, and rent-seekers. We may even have heard that environmental groups are part of some conspiracy seeking the preservation of green space and that by these actions they will destroy an otherwise efficient economy, and they will most certainly stifle American agriculture as we have come to know it.

The advocates of this second model usually hold firmly to the belief that economics is an objective and value-free science. Their convictions along this line seem not to deter them from telling us how public policy *ought to be* carried out in the interest of efficiency—as if by this act they were not violating their belief system about the scientific purity of economics. Apparently these economists continue to hold that efficiency is a value-free truth rule and they therefore see nothing wrong with being its advocate.

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¹This is, I suppose, like geographers being advocates for the study of geography, nuclear engineers being advocates for nuclear power, and social workers being advocates for social work. There are important differences, of course, but notice each discipline imagines the world would be a better place if we would but pay greater attention to what it is the practitioners of each craft can do to help in that quest.

This supposition is jeopardized by the indirect theorem of welfare economics arguing that competitive markets will sustain a Pareto optimal state for *any* one of infinitely many starting points of institutions and endowments. Since public policy is precisely devoted to the task of altering institutions and endowments (the capitalized value of future income streams defined and parameterized, by the way, by existing institutions), it defies logic to suppose that advocacy for efficiency can be thought at all useful to this exercise, let alone be considered neutral and value-free. But this message, understood for at least two decades by welfare theorists, and certainly not held a state secret by them, seems to be of little interest to many applied economists.

My task here is to explore the logical underpinnings of the first of these conceptual models. Specifically, I will discuss the dominant presumptions in the idea and practice of property rights. These common presumptions are: (a) property rights are clear, stable, and unchanging; (b) the owner of a piece of American real estate is the final authority about what activities may or may not occur on that land; and (c) if currently permissible activities are attenuated by government regulations, then compensation must be forthcoming.

As for the second model, I will not again try to explain why consequentialist welfarism is flawed and incoherent for guiding public policy. This has been done (Bromley, 1989, 1990). I shall let the existing literature speak for itself on this matter, and will instead offer the broad outlines of an alternative approach to public policy which I think might be helpful to our work on land-use issues. I will not, to be sure, offer tendentious prescriptions about how public policy *ought to be* structured and evaluated. Rather, I will present a theory—an explanation—of the policy process *as I believe it exists*. I hope this theory will give you a new perspective on public policy in a democratic market economy.

Property Rights in America

John Locke plays an important role in the American idea of property rights. Locke's theory starts from a mythical state of nature in which God directs man to take dominion over land by mixing his labor with it (Kreuckeberg, 1999). Having done so, it is then necessary to bestow permanence of control (ownership) over the thing labored on. From this starting point, Locke and his adherents insist the essential purpose of the state is to protect those who have labored as God commanded, and thereby to bestow

on others the beneficial effects arising from this class of hard-working citizens. The state is thereby obligated to protect those who now hold "property." If one acquires land in the Lockean way, then it has been justly acquired, and its continued holding is justified on moral grounds. Equally important, this holding is justified on prudential grounds since the effect of individuals holding land is the production of benefits to the community at large.

But history reveals there must always be a balance between the interests of the individual owner and what serves the community at large:

Property was to be an aid to creative work, not an alternative to it.... The law of the village bound the peasant to use his land, not as he himself might find most profitable, but to grow the corn the village needed.... Property reposed in short, not merely upon convenience, or the appetite for gain, but on a moral principle. It was protected not only for the sake of those who owned, but for the sake of those who worked and of those for whom their work provided. It was protected, because, without security for property, wealth could not be produced or the business of society carried on (Tawney, 1978, p. 139).²

Locke recognized that as the earth filled up, and as less and less of God's Commons was available for free expropriation, a certain inconvenience might arise. As Locke put the matter, his theory of justified acquisition and subsequent justified holding worked only so long as there was "enough and as good" for others.

This Lockean proviso brings us to Immanuel Kant. Kant noted that rights are not tangible empirical realities (*possessio phenomenon*), but rather noumena (*possessio noumenon*). Those things which cannot be apprehended by the senses but are knowable only by reason are known as *noumena* (Williams, 1977).

Kant asked what conditions were necessary in order that an individual might be able to make *internal* something that is, by its very nature, *external*. The key idea here is one of belonging—of *belonging to*. Something external to an individual is made internal by understanding the idea of belonging to. And how is it decided that something external belongs to an individual?

The individual may well declare that some particular object or situation *belongs to* her. Notice this is a claim against all others to whom the object or situation might otherwise belong. Something external has now, by dint of unilateral proclamation, become internal to the speaker. Kant recognized that such

² For a more extensive treatment of property as a "social institution," see Hallowell (1943); Hohfeld (1917); and Macpherson (1962, 1978).

claims represent negations of the interests of others within the same community. And he suggested that while one individual may indeed announce and display physical *possession* of something external, this was not the same as having a socially sanctioned authority to make that declaration binding on others who might wish to make internal the very same thing. That is, unless others to whom the possessor directs his assertion are predisposed to respect those claims, the situation is unstable and therefore cannot be expected to settle the matter once and for all.

Kant observed it is only from the consent of others that one can make internal that which is clearly external. For if that external thing can belong to *anyone* within the community, what mental process will allow it to become internal (to belong) to any *particular* member of the community? Why should others willingly accept binding duties on nothing more compelling than the self-serving assertions of those already in possession of something of potential value to others?

Kant argued that such assertions are nothing but the affirmation of *empirical possession*. And by being based on mere possession (*possessio phenomenon*), they confuse physical control with something much more profound. This more profound circumstance is one that Kant called “intelligible possession” (*possessio noumenon*). We see intelligible possession at work when a community of sentient beings reaches agreement that indeed it is both right (moral) and good (prudential) that someone among them should be able to make internal something which has hitherto been external.³

On this account, what is mine depends not on what I say about it being mine. Rather, what is mine *becomes* mine by virtue of the assertions of all others who, by their declaration, acquiesce in their own disenfranchisement from the benefits associated with that object or circumstance (Samuels, 1989). Others grant me *possessio noumenon*—I cannot take it for myself.

Locke gave us a basis for justified acquisition and holding of land (“property”) as long as there is “enough and as good” for others (Becker, 1977; Christman, 1994). But Locke stopped short of a complete theory of what is to be done when there is

not enough and as good for others. That is, Locke developed a theory of acquisition and holding which works best when it is needed least. It is here that Kant insisted the continued holding of land (“property”) in the face of scarcity requires something very special. For scarcity raises the specter of deprivation and exclusion if Lockean acquisition and holding works against the interests of others in the community who—by virtue of coming late—find that all of God’s Commons has already been justly acquired. How are we to explain (justify) holding of land (“property”) once there is no more of it to be justly acquired?

Contemporary Lockeans have a ready answer to this question: let the latecomers buy it from those who have justly acquired it (or who have previously purchased it). We see that once the initial acquisition has been transferred to another for a price, the logic seems compelling and without end—all future acquisitions must be mediated by due consideration to the extant holder of land (“property”). And what is transferred in this way is—and must be—precisely what earlier acquirers obtained. Just acquisition and holding continues into perpetuity.

This seeming escape from the grips of scarcity leaves one fundamental issue still to be addressed. What if the current holding results in land-use practices that, in the fullness of time, are found to be neither moral nor prudential? Given this possibility, on what grounds can payment then be justified in order to induce the current holder to stop using her land (“property”) in an antisocial manner? In other words, what is to preclude one or more holders of land from engaging in social extortion? We see that land justly acquired may evolve into land unjustly held—its current use is no longer moral or prudential.

Here, Locke joins Kant in admitting that under certain circumstances the presumed beneficial link between acquisition and holding might be severed. Recall that Locke presumed land justly acquired would be used in a manner that redounded to the benefit of the entire community, and that fact was part of the justification for its acquisition and continued holding. But what if this is not the case? Kant answered with the proposition that the community itself must determine whether land justly acquired remains justly held.

How is this to be done? It is accomplished through *reason* emerging from a *bürgerliche gesellschaft*—a civil society. In other words, it is *the community itself that sets the standards by which continued holding of justly acquired land (“property”) remains*

³ We see immediately that the essence of empirical possession is a dog with a bone. There is not, nor can there be, recognition among the community of dogs—all of whom covet the bone—that it “belongs to” the one in whose mouth it now resides. The most one can say is that they acknowledge possession. It takes Kantian reason to transcend empirical possession. Dogs are as incapable of *possessio noumenon* as they are of the idea of “yesterday.”

justified. If this is the case, then the security and timeless stability of the idea of property rights is suddenly undermined. How is it possible that something as foundational as property rights can rest on nothing more solid than the whims of an entire community? Surely, down this road lies chaos.

Or, perhaps, down this road lies what we might call *constructive malleability*. We are, it would seem, in need of a new theory of holding. Such a theory must offer an explanation (justification) for difficult decisions about just and prudential holdings into the future. In more practical terms, this alternative theory must address the issue of what to do when extant holdings are found to warrant just attenuation—and then under what circumstances, if any, compensation for that attenuation must be forthcoming from the state. Must payment using public funds *always* be forthcoming for this attenuation? This is the essential “takings” question. Can the government—acting as an agent for those whose interests are contravened by the actions of a landowner—prevent those actions? And if so, must the owner be compensated from the public treasury for this new inability?

It is here that we will encounter a few economists intent on discerning whether or not regulations are “efficient.” Or they will seek to discover the “optimal” regulation of land-use practices. Or they will write about the efficiency properties of various approaches to the “takings” question.

Welfarism at Work in the Arena of Property Rights

Economists are by now apparently comfortable discussing the relative efficiency of alternative property rights regimes (Alston, Eggertsson, and North, 1996; Knight, 1992; Knight and North, 1997; North, 1990). This work seems to overlook the fact that efficiency judgments of alternative institutional arrangements are inherently circular. For a quick primer on this matter, recall institutions determine what is a cost and what is a benefit. From this it follows that any judgment of efficiency is necessarily based upon the institutional structure indicating what costs must be accounted for—and by whom (Bromley, 1989, 1991).

Moreover, any explanation of institutions and efficiency must be grounded upon the two fundamental theorems of welfare economics. The first theorem tells us that in the absence of external effects, *every competitive market equilibrium is Pareto optimal*. The second theorem (called the “indirect theorem”

above) tells us that starting from any particular institutional setup (the working rules plus income and wealth endowments), *every Pareto optimal state is a competitive equilibrium*.

The first theorem is a ratification of the idea of competitive markets which economists find particularly endearing. The second theorem is more encompassing—it tells us that *any* initial endowment and rule structure can result in a Pareto optimal state as long as competitive markets are the means whereby trades are negotiated. Indeed, as Sen (1993) has remarked, the second welfare theorem might well comprise the essence of the “Revolutionary’s Handbook.” That is, for any particular structure of institutions and property rights, competitive markets will yield a Pareto optimal outcome. And since each of the infinitely many institutional arrangements can produce optimal outcomes, the decision on which particular structure to adopt cannot be decided on economic grounds. It is here that we encounter confusion in the literature between “efficiency” and “productivity” (Saraydar, 1989).

Some of the literature seems to suggest new institutions are (or ought to be) the outcome of bargaining among political and economic agents. According to this line of argument, those institutions emerge which will bestow future benefit streams on the most successful (powerful) bargaining entities (Knight, 1992). One may wish to take notice of the abiding circularity here. Since “power” is often defined as the ability of an agent (or an entity) to exert self-serving influence over economic and political outcomes, it cannot possibly surprise us that those outcomes which emerge are the inevitable result of actions on the part of those with the most “power.”

I suggest a more credible definition of “power,” for the purposes of building a theory of institutional change, is that power is the ability of an individual or a group to *force* another individual or group into a *new legal situation* not of their choosing.

Notice the important distinction here. The competition model of the new institutionalists regards institutional change as the inevitable outcome of a *bargaining process among the potential gainers and losers of some particular institutional change*. Those who gained had more “power” while those who lost had less “power.” In addition to the circularity here, notice that the collective power of the state is absent in this model—appearing only at the end to ratify the outcome resulting from the interaction of differentially “powerful” bargaining entities.

Of course this is not a theory, but an *ex post* “explanation” having all the properties of justificationism. We would not expect, I imagine, to learn that the party with the *least power* turned out to be the gainer, while the party with the *most power* ended up as a loser. Theories seeking to explain everything explain nothing.

In fact, on my definition of power, we see that the collective authority is at the center of new institutional arrangements. Power is the capacity of one party to put another party in an unfavorable and unwanted legal situation. There is only one way to do that—one party is able to enlist the collective authority of the state to force an unwanted institutional arrangement upon an unwilling party. Just as changes in ownership of future benefits streams in a market require the presence of the state to ratify those new ownership arrangements, changes in legal standing among members of a polity require the presence of the state to ratify and agree to enforce those new legal relations. The state is a necessary party to every transaction. I shall have more to say on this below.

The central problem here is reliance on a theory of institutional change that employs the market as the guiding metaphor, and that uses market outcomes as the truth rule by which outcomes of institutional change *ought to be judged*. Unfortunately these are mere stories wishing to become theories. These stories cannot become theories because they share one central flaw. This flaw is that they seek to explain institutions (the rules of the game) by appeal to rational choice models whose *raison d’être* is to understand and explain individual behavior undertaken *within specific rule structures* (institutions) (Field, 1979, 1981). If one seeks to explain *collective action* from the perspective of *methodological individualism*, then failure is the only possible outcome.⁴

Let me be very clear about this. Institutions, because they are the product of *collective action in the legislature and the courts to liberate and restrain individual action*, cannot possibly emerge from market-like competition or bargaining. If we wish to have a fully identified theory of institutional change, we must embed institutions elsewhere in economic relations.

It is to this point I now turn.

Volitional Pragmatism: Avoiding Welfarism

Outcomes of *available* actions are not ascertained but created. We are not speaking ... of the objective recorded outcomes of actions which have been performed. Those actions are not “available.” An action which can still be chosen or rejected *has no objective outcome*. The only kind of outcome which it can have exists in the imagination of the decision-maker (Shackle, 1961, p. 143).

If we are to develop an improved theory of land-use conflicts in America, it will first require that we abandon *deduction* in favor of *abduction*. Abduction is a class of inference that yields explanatory hypotheses for—or explanations of—observed phenomena. In contrast to deduction, abduction is not the result of the application of axioms, assumptions, and applicability postulates to produce a theory. Instead, abductive knowledge starts with particular known empirical circumstances and then invokes specific axioms, assumptions, and applicability postulates to produce explanatory propositions (testable hypotheses) about the observed phenomena. These propositions might then come to constitute a *theory* of the nature and content of the thing under scrutiny. On the current case, this thing is the idea and practice of property rights and land-use issues in America.

Aristotle referred to this way of knowing as “diagnosis” (Ducasse, 1925). And so it is—this is the epistemology of those whose task it is to diagnose empirical phenomena—physicians, automobile mechanics contemplating an engine that will not start, and pathologists who perform autopsies. I follow Charles Sanders Peirce in referring to this as *abduction* (Peirce, 1934). We use abduction when we observe certain empirical regularities (or irregularities) in the world around us and seek to construct plausible explanations.

The contrasts between deduction and abduction can be illustrated as follows. If we are interested in land-use conflicts, the deductivist will be inclined to ask the following question: “Does this particular Supreme Court protect—or fail to protect—property rights?” The deductivist will then invoke hypotheses (assumptions) which will render a tentative answer to that question. Or, the deductivist will ask a somewhat more subtle question: “What is the position of this particular Supreme Court with respect to property rights?” Notice that both of these questions start with a *prior idea of the nature of property rights*, and the investigator then seeks to answer his/her own question by reading carefully, and by parsing, particular legal decisions.

⁴Methodological individualism holds that the individual is the *sufficient* unit of analysis for collective phenomena.

The abductivist would find these questions seriously flawed. The questions are flawed because they *presume* (axiomatically) the prior nature and scope of something (property rights) that is the very idea (concept) requiring *explanation*. It is akin to asking a three-year old if she is “telling the truth.” The abductivist has a more promising epistemology. The abductivist would observe a series of Supreme Court decisions which, on their face, appear to hold quite different implications for the concept (the a priori idea) of *property rights*.

Candidate land-use cases—the empirical phenomena requiring explanation—might easily include a few of the classic cases of recent memory: *Euclid v. Ambler Realty*, *Teleprompter Co. v. Loretto*, *Hadachek v. Sebastian*, *Mugler v. Kansas*, *Penn Central Transportation Co. v. New York City*, *Agins v. City of Tiburon*, *Lucas v. South Carolina Coastal Council*, *Keystone Bituminous Coal Association v. deBenedictis*, *Nollan v. California Coastal Commission*, *Pennsylvania Coal Co. v. Mahon*, *Palazzolo v. State of Rhode Island*, and most recently *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.

To the deductivist, the findings in these cases appear idiosyncratic, and without logical coherence. These cases are the stuff of long and tortured exegetical law review articles in search of *some* unifying explanatory thread. After all, the Supreme Court must have some *guiding principles* by which it resolves property rights disputes (Sax, 1983). Aren't there durable *legal doctrines* that inform decisions in such important cases? The deductivist would be quite unable to advance a plausible theory of property rights in America.

The abductivist, rather than finding these cases perplexing, would use their very “confounding” reality as the starting point for working out a theory of property rights. That is, these cases and their findings are the very *reality* that cries out for a theory—an *explanation*. And there is a plausible explanation for these seeming disparate decisions by the Supreme Court, but it will require the joining of abduction with the idea of volitional pragmatism.

To the economist interested in land-use matters, I submit that the only way to understand the idea of *property rights* in the American experience is to understand this term is the *benediction applied to those settings and circumstances which, when the dust of consideration by various levels of jurisprudence has finally settled, are found worthy of indemnification by the state*. This proposition springs from the logic of volitional pragmatism.

Notice the term *property right* is not something known axiomatically—something whose essence is clear to us by intuition or introspection *before* the specifics of a particular legal struggle are joined. Rather, the idea of property rights is arrived at—created—in the process of resolving mutually exclusive “rights claims” before the court. That is, property rights are not a priori “essences” that exist and await mere *discovery* in a particular legal scuffle. Property rights *are created* in the process of resolving disputes originating in conflicting rights claims brought before the courts. This means the American judicial system does not seek to discover where the a priori property right lies. Rather, courts offer a necessary forum before which, from time to time, conflicting and mutually exclusive rights claims will be brought. When the more compelling rights claim has been determined, the courts will issue a decree to that effect. Thus, *property rights are made, not found*.

This recognition follows necessarily from the meaning of “right.” To have a right means you have been granted the ability to *compel* the coercive power of the state to come to your assistance against the contrary claims of others. Rights allow an individual to enlist the wondrous powers of the state as your very special ally. The granting of a right by the state (and the courts are but the final arbiters of state action) does not imply passive support by the state. Rather, that grant bestows active assistance for those to whom the state has granted the status of a “right.” That is, the state stands ready to be enlisted in the cause of those to whom it has granted rights. We say that rights *expand the capacities* of the individual by indicating what one *can do with the aid of the collective power* (Bromley, 1989; Macpherson, 1973; Commons, 1968).

We must also understand that property is not an object, but is instead a *value*. When one buys a piece of land (in the vernacular, a “piece of property”), one acquires not some physical object, but rather *control over a benefit stream arising from that setting and circumstance which runs into the future*. That is why one spends money (one benefit stream) in order to acquire a different benefit stream (a new benefit stream arising from the fact of “ownership”). Notice the magnitude of this new benefit stream is a function of the legal parameters associated with it. Can one build a tall office tower on it, or a mere bungalow? Is it now covered by water six months out of the year? And if so, will local ordinances allow it to be drained for some “higher” (i.e., a more remunerative) use?

The price paid to acquire the new benefit stream is none other than the expected discounted present value of all future net income appropriable from “owning” the thing. This is why property is the *value*, not the object (Bromley, 1991; Macpherson 1973, 1978). And of course, we put together two concepts—property and right—to arrive at the understanding that this pertains to the grant of authority by the state to a person now called an “owner.” Such authority promises that the state is a willing participant in the imposition of binding duties on all those in the class of individuals called “non-owner.”

I insisted above that the courts *create* property rights out of the disputes coming before them (Bromley, 1993, 1997). This act of creation stands in contrast to the idea that the courts *discover* property rights as they dig into conflicting rights claims. What might this idea of “creation” entail? Here I draw on Louis Menand’s recent book, *The Metaphysical Club* (Menand, 2001). Menand’s subject concerns the origins of pragmatic philosophy in America. Central players in this story include William James, John Dewey, Oliver Wendell Holmes, and Charles Sanders Peirce. And of course Holmes turned out to be one of the most celebrated of American legal theorists. Menand writes, “It was Holmes’s genius as a philosopher to see that the law has no essential aspect” (Menand, 2001, p. 339).

Menand, in writing about Holmes and his seminal work, *The Common Law*, notes this book (compiled from 12 Lowell Lectures presented at the Harvard Law School in 1880) was intended to trace and explain the evolution of legal doctrine. More importantly, the lectures were an attempt to explain the remark made by Holmes in his very first law review article in 1870: “It is the merit of the common law that it decides the case first, and determines the principle afterwards” (Menand, 2001, p. 339). This of course is a paradox. If legal principles don’t decide cases, what does? Holmes’ answer to this paradox provides the basis of all of his later jurisprudence. Menand conveys Holmes’ views as follows:

A case comes to court as a unique fact situation. It immediately enters a kind of vortex of discursive imperatives. There is the imperative to find the just result in this particular case. There is the imperative to find the result that will be consistent with the results reached in analogous cases in the past. There is the imperative to find the result that, generalized across many similar cases, will be most beneficial to society as a whole—the result that will send the most useful behavioral message.

There are also, though less explicitly acknowledged, the desire to secure the outcome most congenial to the judge’s own politics; the desire to use the case to bend legal doctrine so that it will conform better with changes in social standards and conditions; and the desire to punish the wicked and excuse the good, and to redistribute costs from parties who can’t afford them (like accident victims) to parties who can (like manufacturers and insurance companies).

Hovering over this whole unpredictable weather pattern—all of which is already in motion, as it were, before the particular case at hand ever arises—is a single meta-imperative. This is the imperative not to let it appear as though any one of these lesser imperatives has decided the case at the blatant expense of the others. A result that seems just intuitively but is admittedly incompatible with legal precedent is taboo; so is a result that is formally consistent with precedent but appears unjust on its face (Menand, 2001, p. 339).

And Menand continues:

Many years later, when Holmes was on the Supreme Court, Holmes used to invite his fellow justices, in conference, to name any legal principle they liked, and he would use it to decide the case under consideration either way.... When there are no bones, anybody can carve a goose (Menand, 2001, p. 340).

Volitional pragmatism is the core idea of American jurisprudence, and it offers a theory not only of general jurisprudence, but it is particularly apt to land-use conflicts that are charged with figuring out where the most *compelling*—notice I did not say “correct” or “efficient”—property interests lie. The problem here is to blend moral and prudential arguments in search for the *best* thing to do. This *best* thing will comprise the “truth” in that particular setting. In fact, we may say *truth is merely that which it is better, at the moment, to believe* (Rorty, 1979, 1982, 1999). Or, as William James (1907) would put the matter, “truth happens to an idea.” Specifically, “truth” is the compliment we pay to our settled deliberations of a specific matter.

What Is the Economist to Do?

The land-use conflicts of interest to applied economists can be several. Perhaps a community wishes to establish a policy on tear-downs and the spread of McMansions. Perhaps a community wishes to stop the spread of suburbs into green space now occupied by agriculture and/or open space. Perhaps a community wishes to stop the destruction of trees on private property. Perhaps a community wishes to control the kinds of landscaping acceptable for houses and

commercial buildings. Perhaps a jurisdiction (say a state) wishes to regulate the draining of wetlands no longer protected under federal law by the Clean Water Act.

The answer here is clear. The courts will sanction each of these actions if there is a clear connection between the actions and the general well-being of the community as articulated in some legitimate process by that community. Notice here the connection between democratic processes and community articulation of a particular vision for the future. This is not, to be sure, an exercise in benefit-cost analysis as economists carry out that exercise. It is, instead, recognition of the need and the desire for the nation state to adjust to new priorities, new tastes and preferences, and new threats to desired futures.

These desired futures are created out of a process of the human will in action, looking to the future, and deciding how we wish that future to unfold for us. Landowners sitting among this process may well see themselves as being victimized by the shifting whims of public sentiment about the purposes of nature. Aren't wetlands for draining? Aren't forests for cutting down? Aren't rivers for damming? Not any more, they are not, and it is increasingly unlikely that landowners will be able to manufacture plausible claims for compensation ("takings") as this process continues.

Many people imagine that property rights are secure, do not change, and are timeless protections against the state. If these same people are capitalizing their future well-being on this presumption, then they would be well advised to diversify their portfolio. Public policy is collective action in liberation, restraint, and expansion of individual action. That collective action in America occurs in the legislature and the courts. And as collective ideas about what seems better to do with land and related assets continue to evolve, the courts will be less and less likely to order the expenditure of tax receipts sitting in the public purse to compensate private landowners who appear to be slow learners.

John R. Commons would call this *reasonable valuing* (Hiedanpää and Bromley, 2002). Pragmatists would call it *what seems better to believe*. The general public, whose taxes stand exposed to the predations of those who still wish to defy evolving social norms about land-use practices, call it good-old *common sense*. And, as we know, truth is just common sense clarified.

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