

## Legalize the Constitution

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“Legalize the Constitution,” read the bumper sticker. Provocative, clearly conservative, likely tea party. And intentionally ironic. The Constitution is what authorizes our laws, no law may exist which is unconstitutional, so how is it that we would legalize that which legalizes. The object of the sticker was not for us to unravel its mystery, but to consider the distance from the constitution’s original intent our laws have strayed, in the mind of the bumper sticker’s author.

Planners deal intimately with constitutional concerns. As Justice Brennan said, in an oft repeated phrase, “...after all, if a policeman must know the Constitution, then why not a planner?” Oddly, that fits on a bumper sticker too. But what do we need to know, and why.

The Constitution is pretty long, shaping our entire government. Do we need to know the structure of the judiciary, or the sixth amendment protections from judicial abuse, or anything from Article II Section 1? Probably not. Thankfully we do not need to fathom the meaning of Section 2 of the fourteenth amendment, yet without it, where would we be.

So what should we know? The commerce clause is tangentially important because it provides one of the few opportunities for Congress to exercise a police power, which is otherwise reserved to the states under the tenth amendment. And it is the police power that lets us prepare general plans and zoning ordinances.

Planners also need to know about the first amendment. They need to know that regulating front yard bird baths is different than putting restrictions on a holiday crèche. The latter is an expression of religion, while the former is just avian stalking. And the front yard sign with the racist outburst is heartbreaking evidence of the strength of the freedom to express ourselves.

What else? The police need a grasp of the fourth amendment, that people have the right to be “secure” in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Supreme Court was busy in the sixties and seventies with numerous decisions about the reach of the law; into your home, into your glove compartment. How far, when, under what circumstance a cop may breach the close is central to their work. They must not only know the rules; they must grasp the concept of what it means for citizens to be free and the police to be shackled by the constraints of probable cause.

It is the next, the fifth, amendment that Justice Brennan was likely thinking of, that no person “be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation.” Planners seldom have the luxury of executing or jailing people, so it is the depriving of property that we must be cautious of. In fact, it is property that we deal with most.

When we mandate the distance back from a street where a house must be set, we are shaving off what was once a determination held by the owner, and moving that to the government. And so the promulgation of a front yard setback requires due process of law. But do we have to compensate? No. The police power given to the states and downloaded to municipalities affords great latitude for regulation. The rules must be driven by the protection of our health, our safety or our welfare.

And the third reason, welfare, is indeed broad. In just the second paragraph of Daniel Curtin’s book on land use law in California, he quotes Justice Douglas in *Berman v. Parker*. That the values represented by the public’s welfare “are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.”

It is this latitude that gives our profession the capacity to prepare general plans, to write sign ordinances, form based zoning codes, and even meddle with bird baths. But with these there must be one basic discipline, that every rule we create has a reason. We must be able to articulate why the rule benefits the welfare of the community, or protects its health or safety. But that is no guarantee that our rules will be well received.

Stand across the planning counter from a lot owner who does not know the hundreds of zoning rules applicable to her land. Explain that the vision she holds for her property is not supported in the ordinance. Watch the disappointment (sometimes anger) grow. Know that deeply embedded beliefs about ownership, rights and self-initiative are pushing up against modern regulatory restrictions.

When I was moving (evolving?) from the practice of law into the profession of planning, I had occasion to draft a zoning ordinance in a small New Hampshire town that had never had one, let alone a general plan. After an evening presentation on the proposed rules, a man dressed in overalls, boots and flannel approached me.

“Am I to understand that these rules will tell me what I can and

cannot do on my land?" What a strange question. Of course that's what zoning does. But here was a person who had never been told this, had never had the law intrude on his land use practices. The depth of his inquiry was evidenced by the intensity in his eyes and face. Not so much anger as surprise. He was discovering for the first time a new force in the universe.

What could I tell him? The dirt in his fingers was just a surface manifestation of how close he was to his land, to the soil. He did not distinguish his farm from himself. And he could not fathom why the government needed to drive a wedge between them. Here I could see into the Constitution, the reason why property was put on the same plane as life and liberty in the fifth amendment. For New Englanders, whose first industry was farming, messing with property would be tantamount to interfering with their life. The bond they had with their land would largely protect it, much the way the bonds of family and marriage had relieved the law of the necessity to regulate. Those must have been the days, and I was privileged to meet a person from the past.

Times change, or perhaps our romanticism is dimmed by scrutiny. The bond is often broken, property is commodity, soil becomes real estate, and the loss of respect for the land generates reasons to regulate.

But how do we know when we've gone too far? When do zoning codes push beyond health, safety and welfare and reduce rights so much that we have effectively relieved someone of their property. That their ownership affords them no real use of their land? This question is so difficult that even the Supreme Court admitted they had it wrong for many years. In their their

decision in *Agins v. City of Tiburon* they told planners that a taking of property would occur when there was no evidence "of a legitimate state interest" being advanced by the regulation, or that it had deprived the owner of any "economically viable use of his land."

From 1980 until 2005, when the court overruled *Agins* in *Lingle v. Chevron*, that was the constitutional understanding we were to apply to our zoning codes and other regulations over property. Now the first part of the test, advancing a legitimate state interest, is not (for the most part) in their purview. In fact, whether a rule advances a legitimate state interest is the job of the legislative branch of government, the folks we are working for when we write these regulations, not the judiciary. It's part of why we have three branches of government, not one.

As a teacher of land use law, it has been difficult to convey constitutional subtleties of takings law. Not because of any lacking on the part of students, but because they are hard for me, and even hard for the Supreme Court.

Because of the chance meeting twenty five years ago with a New Hampshire farmer, I take to heart the admonition to "legalize the constitution," even if I don't understand it. I respect the roots of our system of rights. And I admonish students to find the reason in every rule. That is a fair standard for planners.

Because legalizing the constitution is over my head (and likely over the head of its author), what my bumper sticker will read and the best advice I can give my students is, "Operationalize Your Brain."



*A regulatory sentiment in New Hampshire, and no doubt a violation of a sign ordinance. (photo Chris Clark)*