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Taking and Giving: Police Power, Public Value, and Private Right

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ESSAYS

TAKING AND GIVING: POLICE POWER, PUBLIC VALUE, AND PRIVATE RIGHT

By

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"So long as government action constitutes a taking and a giving to the same individuals in the same proportions, all is well."1

"Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."2

* 1995 Natural Resources Law Institute Distinguished Visitor, Northwestern School of Law of Lewis & Clark College, 1995; Henry Oswald Head Centennial Professor of Real Property Law, University of Texas School of Law; formerly counsel to the Attorney General, U.S. Department of Justice. This Essay was originally presented as the Natural Resources Law Institute’s 1995 Distinguished Visitor Lecture, September 14, 1995. Many of the themes I advance here remain to be more fully developed.

1 RICHARD A. EPSTEIN, Takings, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 211 (1985). This view also characterizes the work of Professor Donald Hagman. See, e.g., Donald G. Hagman, Wipeouts and Their Mitigation, in Windfalls for Wipeouts: Land Value Capture and Compensation 5, 5-14 (Donald G. Hagman & Dean Misczynski eds., 1978) [hereinafter Windfalls for Wipeouts]; Donald G. Hagman, Windfalls for Wipeouts, in Windfalls for Wipeouts, supra, at 20, 20-27; Donald G. Hagman, Compensable Regulation, in Windfalls for Wipeouts, supra, at 256, 256-307. As economist William Fischel points out, the benefit-offset principle is based precisely on this insight. WILLIAM A. FISCHEL, Regulatory Takings: Law, Economics, and Politics 80-83 (1995). The strictness implied by Professor Richard Epstein’s formulation is not required in practice. Id. at 81-82. Fischel notes the efficiency effects of the benefit-offset approach and traces the uneven history of the application of this principle. Id. at 84-99; see also Charles M. Haar & Barbara Hering, The Determination of Benefits in Land Acquisition, 51 CAL. L. REV. 833 (1963) (discussing use of the benefit-offset principle to help finance highway construction). This insight was also at the core of social reformer Henry George’s single tax proposal. HENRY GEORGE, Progress and Poverty 401-05 (1879). C. Ford Runge, a professor of applied economics, has just completed a comprehensive empirical study of the positive and negative wealth effects of government action. C. Ford Runge et al., Government Actions Affecting Land and Property Values: An Empirical Review of Takings and Givings 65-66 (Jan. 23, 1995) (draft on file with author).

"I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. . . . It is only through the protection of law that I am able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest."3

I. INTRODUCTION

The quotations that begin this Lecture summarize the relationship between property as a social artifact and law. I hope that the following discussion will more fully explicate that relationship and why it is misunderstood.

This lecture is divided into three parts. First, I will outline a critique of efficiency as it has functioned as the metanarrative underlying our basic current understanding of social institutions. A metanarrative is merely a legitimating background story rooted in the claim that it is the “story that can reveal the meaning of all stories.”4 The claim I am making is that the standards of efficiency in common usage have operated in this way in questions of social policy.5 For government institutions, this is summed up in the popular claim of politicians that they will “run government like a business.” The forgotten correlative is, of course, that government decisionmaking always involves issues of fairness as well as efficiency.

Second, drawing on this analysis, I will illustrate the political technique of the property rights advocates. This technique involves telling a story about property rights that personalizes and humanizes a drama in which the major characters include a big, impersonal government running out of control, and small, relatively powerless owners of private property. I also hope to reveal how this is a story in which the powerful are cast in the unlikely role of victim. Here the story is how the successful, those who win in the market, are ruined by that gang of losers, the government. I will illustrate how this narrative construction defines certain arguments as out-of-bounds by limiting considerations of fairness to the effects of government decisionmaking on the current possessors of property.

Third, I will review the law on these issues to reveal the sources of the discontent and to examine the extent to which the evolution of the doctrine supports the claims of the property rights advocates. Here I will show that the issues are not trivial and are not just about wealth, but rather go to the heart of who we think we are as a people. That is precisely why this discussion matters.

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3 Bentham, supra note 2, at 112, quoted in Blumm, supra note 2, at 182 n.84.
II. A CRITIQUE OF EFFICIENCY

The definition of efficiency that dominates policy debate, at least at the nonspecialist level, is too narrow. The definition is too narrow to the extent that a focus on Pareto-optimality\(^6\) or Kaldor-Hicks efficiency\(^7\) excludes other important values. These other values (like species protection or historical preservation, for example) are marginalized or excluded altogether because they cannot be assessed according to the metric that efficiency criteria require.\(^8\) This argument suggests that a debate over how well social institutions function has a narrative structure organized around two norms: the current distribution of wealth and revealed market-based preferences. To criticize these two norms I make two points, one obvious and the other more problematic.

First, the misnamed property rights revolution is predicated on an effort to freeze in place the existing distribution of wealth. One way to achieve this goal is to define the existing distribution of rights and liabilities as part of the total wealth held by individuals. Thus, any regulation that rearranges the distribution of rights and liabilities can be understood as a redistribution of wealth. This treats common-law arrangements as entitlements, rather than merely the result of social contests mediated through legal institutions. In the context of the debate over regulatory takings, the ultimate effect of this conception is to frame the police power by common-law nuisance doctrine. Yet this leads the so-called property rights

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\(^6\) A Pareto-optimal position is the state in which no possible change in position would make one party better off without making another party worse off. An action, such as a rule change or a voluntary transaction, might be described as Pareto-superior when it leaves one party better off and no one worse off. By definition, all transactions voluntarily undertaken are Pareto-superior. A Pareto-optimal state is merely the result of Pareto-superior transactions. See generally Dean J. Mischeyski, Efficiency and Equity, in WINDFALLS FOR WIPESOUTS, supra note 1, at 142, 143-46.

\(^7\) This efficiency criterion is similar to Pareto-superiority in that it posits that the result of a transaction would leave the winners able to compensate the losers without sacrificing all of their gains. Obviously, one important difference is that Kaldor-Hicks efficiency rules are not predicated on voluntary transactions and do not require actual compensation to the losers. See generally Epstein, supra note 1, at 200-01.

\(^8\) The problem of assessing values that do not have readily accessible market prices has spawned much literature in economics. This literature is especially rich in the context of environmental resources. See, e.g., Brian R. Binger et al., The Use of Contingent Valuation Methodology in Natural Resource Damage Assessments: Legal Fact and Economic Fiction, 89 NW. U. L. REV. 1029 (1995); Jeffrey C. Dobbins, Note, The Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Damages, 43 DUKE L.J. 879 (1994).

Fischel, in his review of takings jurisprudence and economic critiques of the legal doctrine, described this limitation: "[T]he issue involves fairness as well as efficiency. Economists are uncomfortable with fairness issues and the concept of demoralization costs, because they seem so mushy. . . . We have no obvious metric for them." Fischel, supra note 1, at 216-17. As this Lecture demonstrates, the application of a single metric to all decisions and decision-making processes ignores the complex issues of governance by attempting to force them into a single class of actions. As Fischel notes, "a self-governing people has to decide about takings and related wealth-distribution issues through the institutions that it creates." Id. at 217.
advocates to base their claims "on a radical premise that has never been a part of our law or tradition: that a private property owner has the absolute right to the greatest possible profit from that property, regardless of the consequences of the proposed use on other individuals or the public generally." This point is more or less obvious.

Second, and less obvious, is the effort to hold public and private institutions to the same standard of narrow efficiency, defined provisionally here as profit maximization. This effort ignores the fundamental differences between governance and production. Property rights advocates want to stop government from acting in ways that promote the general welfare, where welfare cannot be measured as an increase in the dollar value of social relations.10

These two observations lead inexorably to the normative question: What kind of society do we want? Understanding constitutional limitations on the power of the government to regulate private commercial behavior, especially where those regulations frustrate an economic opportunity related to real property, is central to mapping the relationship between the individual, state, and society. The distinction between the state and civil society is old11 and has come under both recent criticism and renewed support as a descriptive and analytic matter.12 Recent analyses of the forces that led to the collapse of communism in Eastern and Central Europe13 clarify the problems associated with confusing the institutions of the state with those of civil society. Yet much of the recent commentary on property rights is notable principally because it mistakenly

11 See, e.g., Blumm, supra note 2, at 196 (citing other additional sources). There is also a large school of liberal theorists who rely on this distinction. See, e.g., Sheldon S. Wolin, Politics and Vision: Continuity and Innovation in Western Political Thought (1980) (maintaining the importance of nonstate social organization); Michael Walzer, Spheres of Justice 321 (1983) (arguing that "what a larger conception of justice requires is not that citizens rule and are ruled in turn, but that they rule in one sphere and are ruled in another"); Jean-Jacques Rousseau, The Social Contract (Curt J. Ducasse et al. eds., 1947) (discussing the necessity of surrendering aspects of self to construct a larger governing whole, but rejecting the identity of state and society). There is also a pre-Leninist Marxist tradition that relies on this distinction. See Karl Marx, Selected Writings in Sociology & Social Philosophy 218-21, 233-36 (T.B. Bottomore & Maximilien Rubel eds., 1956).
12 See, e.g., Francis Fukuyama, Trust: The Social Virtues and the Creation of Prosperity (1995) (describing intermediate institutions and their importance in mediating the relationship between the individual and the state); see also Jean Bethke Elshtain, Democracy on Trial 62 (1995) ("To survive, a richly complex private sphere requires freedom from an all-encompassing public imperative.").
evaluates public and private institutions using identical criteria. What is worse, much of that same commentary misunderstands the relationship between public and private institutions and thus comes to conclusions about how the state ought to act that are entirely mistaken.

A constitutional order designed to ensure nothing more than an atomized citizenry can scarcely be said to provide the basis for a representative government. Yet, that is what some of the so-called property rights advocates are seeking to create. The rhetoric of these advocates indicates a willful ignorance of the social function of property: to bind us together as a society and culture, as well as to provide the basis for the maximal individual exclusion of others. To see property's exclusionary role as its principal function is to misunderstand that property rights have always created webs of responsibility between owners and nonowners. At its most basic, this function is described in the Latin phrase *sic utere tuo, ut alienum non laedas* (one should so use his property as not to injure the rights of others). This maxim describes an immediate, substantial, and basic limit on property rights. The absolutism at the heart of the popular expression of the modern property rights movement was never part of the jural relations described by the law of property. The evolution from a pre-capitalist conception of property rights is the story of the increased commodification of realty and the extension of similar claims to various forms of personality and intangibles, but it is not the story of an enlarging conception of absolute dominium. This story might be understood as an adaptation of the law to changed economic relations and an accommodation to slowly evolving expectations of property owners. But those expectations were always bounded by the expectations of others. The history of property rights in this country reflects this community regarding function but has been largely forgotten or ignored in the current debate.

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14 The limitations on the right to exclude found both in the public accommodations laws and in the common-law limitations are examples of just this impulse. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. (forthcoming 1996).

15 *Id.; see also* Morton J. Horwitz, *The Transformation of American Law* 102 (1977) (describing the evolving notions of reciprocal rights and duties between landowners); S.F.C. Milsom, *Historical Foundations of the Common Law* 88-89 (1969) (describing the network of relations that lay at the core of the concept of property as it emerged from the feudal era and distinguishing the concept of "dominium" from our sense of commodity ownership).

16 Horwitz, *supra* note 15, at 32-33; *see also* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 152 (1971) [hereinafter Sax, *Private Property*] (describing the ways in which property use and value are tied to the uses that others make of their property).

17 Horwitz, *supra* note 15, at 47-62 (describing the transformation of doctrine reflecting the exigencies of the era); *see also* Sax, *Private Property*, *supra* note 16, at 155-161 (describing the concept of public rights); Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964) [hereinafter Sax, *Police Power*] (analyzing the traditional approaches to distinguish takings from police power regulations and proposing a more fruitful approach).

Whatever value efficiency criteria have for assessing private institutions, they do not have the same value for public institutions, but instead perform an ideological function aimed at restructuring the idea of governance. Similarly, the claim of the absolute nature of property rights is primarily a claim about the legitimacy of government to act in other than the most narrow and limited way. A decade ago, Professor Richard Epstein provided the philosophical carapace for the political fight which then had the Sagebrush Rebellion as its *nom de guerre*. Epstein was principally concerned with articulating the constitutional basis for controlling the problem of all majoritarian democratic systems: political domination by the majority and legislative self-dealing. He asked the questions: Has state power been captured and used for ends other than expanding total social wealth? and Is the state using the power to regulate or the power to condemn to add to its own resource base (is it appropriating the surplus of any regulatory scheme)? According to Epstein, yes to either of these questions means the state has exceeded the legitimate boundaries of its authority.

Many critical reviews of Epstein's book misunderstood its foundational importance. Professor Epstein correctly identified the struggle and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 YALE L.J. 694, 697 n.9 (1985).

19 See Epstein, supra note 1, at 19.


The Sagebrush Rebellion was spreading like wildfire across the West. From Nevada through Utah, Wyoming, and Montana, people were growing frustrated with the federal government's opposition to resource development in their region.... One national newspaper noted "a diffuse and ill-focused feeling of uneasiness, powerlessness, and anger, that cuts through political and socioeconomic boundaries" among residents of the region.

The first people to actively organize against the government were those dependent on federal lands for their livelihoods. Landowners being closed out of the productive use of their lands included farmers, ranchers, miners, loggers, and "inholders"—those with property bordering or surrounded by federal land.... Trade associations representing each of these interest groups (such as the National Cattlemen's Association) fought specific regulations, but there was no real "network" connecting the organizations. The establishment of broader organizations like the Center for the Defense of Free Enterprise, National Inholders Association (now the American Land Rights Association), and People for the West! in the mid 1970s created a common network, and a name—the "Wise Use" movement.


21 Epstein, supra note 1, at 112, 126-28.

22 Id.

over property rights as the grounds upon which issues of our social architecture would be fought, much in the way that the Due Process and Equal Protection Clauses provided the grounds for similar struggles a generation earlier. Epstein hinges his theory of takings on the constitutional prerequisites for a theory of limited representative government. At its core, the constitutional theory that legitimizes the government itself also protects property rights by limiting the reach of the doctrine of sovereign immunity. He would, in essence, make every governmental action subject to common-law tort analysis and expand governmental liability to include those actions that have traditionally been considered legitimate regulatory exercises of the police power. Epstein’s theory does not just modify the doctrine of sovereign immunity, his theory eliminates it. The Takings Clause, according to Epstein’s view, merely enacts common-law nuisance and trespass standards into the Constitution. Because, in his theory of representative government, the state has only those rights that the people have, it is allowed to exercise the police power only to prevent harm or to arrange affairs to achieve a Pareto-superior result where the problems associated with large scale voluntary transactions make such a result unlikely. While I disagree with Epstein’s conclusions, I believe that in many ways his focus is correct. I too want to concentrate on conceptions of power, value, and right and to reject the crabbed vision of social life that Epstein, the Sagebrush rebellion, and its progeny see as the future for this country.

This grass-roots movement has its academic analog. The ascendancy of the rhetoric of law and economics has led to importation of public choice and game theory into legal analysis. While that literature has contributed many important insights into the evolution of law and democratic processes, it produces an odd kind of tunnel vision when it becomes prescriptive. Part of the problem is that it adopts a particular metric, that of revealed preferences through market exchange or its methodological equivalent, that masks a range of problems when applied to nonmarket circumstances. Social complexity and a democratic commitment to pro-

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24 See Marzulla, supra note 20, at 3 (“The property rights movement is to the 1990s what the civil rights movement was to the 1960s.”).
25 Epstein, supra note 1, at 35-56.
26 Id. at 44.
27 U.S. Const. amend. V (“nor shall private property be taken for public use, without just compensation”).
28 Id.
29 Id.
32 See Mark Sagoff, The Economy of the Earth 49 (1988) (arguing that the economic conception of environmental values is too narrow to provide an accurate assessment of all the normative questions posed by issues of environmental quality); Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 986 n.101 (1982) (discussing the difficulty of distinguishing market “inalienability rules” from “property rules” and the implication of the
tect the varieties of ways people value social goods require that political and social institutions designed to sustain diverse values be free to structure their normative visions in ways consistent with their own ends. Requiring that every institutional judgment conform to a specific standard produces distortions in policy to the extent that it requires the institutions of governance to mimic the institutions of the market. The institutions of the state presumably exist to effect the allocation of social goods for which there is no clear market, nor even a reasonable market substitute, and for which there is continuing contestation over the conceptions of “the good” that justifies the institution itself.

Value is a critical conception in this contest. What it is, how it is created, and how it is measured are of central importance. While the rhetoric of market value (sometimes phrased as use value or exchange value, although these terms have diverse and at times opposed pedigrees) has dominated the debate, that conception of what something is worth should not divert our attention from other struggles over things we think important. As Professor Jack Balkin has pointed out, one of the central aspects of our humanity is our propensity and capacity to value, to assess, and to weigh. Freedom, community, and neighborliness are also values; that is, we think that the particular aspects of social life summarized by those words are important and we would not sacrifice them without getting something equally important in return. Yet even here, the language of exchange should not obscure the truth that there is no objective calculus for those things, no metric or system of bargain that relieves us of the obligation to make normative judgments. As I discuss the evolution of the property rights debate, part of my argument hinges on the conception of value that has dominated the debate. This is important because the effort to impose a single evaluative criteria on the consequences of public and private action leads us to focus on the wrong questions.

The political technique used to accomplish this redefinition of value separate from values has been to tell a story about property rights. This story personalizes and humanizes the dispute over government regulations of private property by casting the story in terms of a generalized government attack on private property. The state is seen not as the insurer of private property, but its destroyer. In essence, it is a man bites dog story. The powerful are cast in the role of the victim. They have captured the current fascination with victimology and structured their story around it. Thus, the rhetorical tropes have played on the notion of the individual against the state by using the symbol of the government as something alien from us. Instead of asking the more obvious question: how might we restructure the system of governance to be more responsive to the desires of the people, the rhetorical reflex is to define the actions that are taken in nature of contract, because both contract and property may be perceived as based on personhood).

our name as illegitimate. By raising the claim of illegitimacy, the debate is transformed and the property owner taking up the mantle of victim is more honorable, because he does so not in his own name, but in the name of the people. Seen this way, this is not the story of mere venality; instead, it is the story of patriotic struggle. Much of the debate that surrounds property rights today is heated, highly ideological, or hyper-technical. Each side wants to give simple answers to fiercely knotted questions. Yet mere desire does not create effective politics, even less does it provide a sufficient foundation for sound legal argument.

Despite the various technical iterations, the basic arguments of the so-called property rights advocates run this way:

1) Property ownership is tied to political power. The right to own real property is, in fact, the basic right. It undergirds all civil rights and civil liberties.

2) The Takings Clause of the Fifth Amendment to the U.S. Constitution directly limits the power of the state to expropriate private property unless those owners are compensated at the unregulated exchange value of the property.

3) Because of this limitation, the state is using regulation to achieve without compensation what the Constitution would prohibit if the government acted directly.

4) This move is a deliberate attempt to expand the power of the state at the expense of property owners and to the detriment of all citizens.

5) The regulatory zeal of the state “makes enemies of the majority of Americans” and is part of the mistaken belief that the government can do things better than people can.

6) Any government action that limits development potential of real property, where that action is not aimed at preventing an immediate public harm, is a compensable taking. Compensation is required regardless of the value left in the parcel after the regulation is enacted or the reciprocal benefit conferred by the limitation.

7) The environmental motivation behind much of the regulation of private property is antihuman.

These arguments combine into a story about government that suggests the government is separated from the people and does not represent the public interest in any coherent way—especially because it makes claims in the interest of the public that we could not make against our neighbors. All of the state actions that feel oppressive are attributable to the capture by the central government of most of the political power in our society and the parallel capture of the central government by collectivist special interests.

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36 See Marzulla, supra note 20, at 26 (“The environmental ethic denies the natural human impulse to own things and protect one’s right to ownership as well as shuts out and makes enemies of the majority of Americans.”).

37 This rather incredible claim is made in Nancie Marzulla’s article, supra note 20, at 24-25.
Confronting the arguments in play in the current debate leads to the following questions: What is the basis for the so-called property rights revolution? How have its proponents been able to weave a socially and legally compelling story? How is that story tied up with the general antipathy to government, yet consistent with restrictive systems of private social control? Professor Carol Rose suggests that attention to just these issues is central to understanding the ways in which various heuristic devices are transformed into normative positions. The political argument then proceeds from the normative, forgetting that the “principle at stake” is as much a narrative principle as a traditional doctrinal value. We can see a political argument that claims to be grounded in principle for the story that it is, yet this does not mean the restatement of the story cannot produce a way of understanding the normative debate that precludes some arguments from the debate. It is not enough to say of a particular formulation that it is merely one way of telling the story, especially when a particular narrative has popular political resonance. The political power of a particular story delegitimizes other explanations and viewpoints, and structures the form of political and legal contestation.

The Sagebrush Rebellion, for example, began with the cry that federal land should “revert” to the states and their citizens. The idea of reversion has both a vernacular and technical valence. The two meanings are deeply at odds. The popular meaning of reversion is “give us back what rightfully belongs to us.” The technical meaning appears similar, yet is critically different. For property to revert, the claimant must be vested with an interest that arose prior to the claims of the current claimants. If a technical reversionary interest existed, then release of the current possessory interest would cause the land to “go back” to the original owner (or her heirs). Thus, with that simple exclamation, the “Sagebrush Rebels” asserted a revolutionary idea: that the federal government had no constitutional claim to the land it was administering and thus the current occupiers were the legitimate heirs to the fee interest. Of course, this claim conveniently forgets the story of how and when the current occupiers came to be the current occupiers—a story that may be told by the history of Native Americans and Mexican land grants. Also, by asserting a form of constitu-

41 See, e.g., RUSSELL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492 (1987) (chronicling the decline in the physical population of the American Indian, discussing in particular the geographic removal of Indian people from their territories). John Swanton describes the same phenomena in a straightforward ethnographic
ational argument by reference to the "equal footing" doctrine, the western states are making a claim of entitlement status equivalent to the states of the eastern seaboard. The adoption of reversion as the foundation of their normative claim asserts a dignitary harm of the following type: "We in the West ought to be treated with the same constitutional respect as the original colonial states and we cannot achieve that because of the heavy hand of federal ownership of 'our' land base." Thus, it is not only small land owners who are the victims, but the entire West. The warning is that unless the federal government is controlled, the rest of the country will suffer the same fate.\textsuperscript{42}

Controlling the stream of experience requires that we create ways of understanding it. Recognizing the didactic strategy of the narrative of the property rights revolt is important to understanding its persuasive effect. In this context, the narrative structure of the well-told story includes a history of government and the sources of its legitimacy.\textsuperscript{43} How we categorize the data of social life into events or phenomena, analytic categories, or narrative structures helps to determine the meaning of those data and give them, among other things, a political and legal valence. By casting the story of property rights as a revolt against "big" government, the early proponents were able to turn a simple resource allocation decision that was made in the nineteenth century into the foundation for current oppression of the underrepresented small property owner. Importantly, they were also able to pit the West against the East. The sectional injustice is located in the fact that the foundational states of the Union were able to enter the Union without any federal ownership claim to their territory.\textsuperscript{44} Using elements of persuasive, exemplary, and authoritarian didacticism,\textsuperscript{45} the most vocal advocates of the Sagebrush Rebellion were able to turn a states'
rights and sectional argument into an argument for individual liberty. This didactic strategy has occurred before in our national history.  

Yet, none of us alone completely write the stories that give coherence to our lives and our understanding of events. As Michael Walzer, a professor of social science, puts it, "[t]he individual does not create the institutions that he or she joins; nor can he or she wholly shape the obligations he or she assumes. The individual lives in a world he or she did not make."  

The symbols we adopt and the rhetorical figures we employ are used because of their currency in the larger culture. Their conversion to legally significant symbols, and thus into arguments and doctrines, is part of the contest over our national history and the conception of social life that is central to the property rights debate as it has evolved. Thus, it is significant that the property rights rebellion is playing the role that the civil rights movement played in the sixties: the role of defining who we are and who we want to be as society and culture. The irony is that by playing the role of oppressed outsiders, property rights advocates vindicate vast agglomerations of private power whose authority over the individual is not regulated according to commonly agreed-upon standards. In fact, in order to prevail, the property rights rebels must overturn the essence of the civil rights victories.

Both an analytic and moral claim are made when a movement attempts to assume the mantle of the civil rights movement. The analytic claim rests on the proposition that property rights are at the heart of both theories of representative governance and individual liberties. The moral claim of the property rights movement, unlike the arguments of civil rights activists for both formal and substantive equality that were rooted in the language of the Civil War Amendments and centuries-old history of racial subordination, is murkier and harder to state. The basic moral claim is that the voluntary distribution of social goods reflects the optimum expression of individual choice. So long as no goods were obtained through force or fraud, there is no justification, save prevention of harm, for interfering with those private preferences. As an abstract matter, the moral claim is relatively strong. As an empirical claim it is somewhat weaker. This is especially true if time is not discounted and historical claims of fraud and force are preserved.

The baseline proposition that the law exists to protect and defend the existing distribution of wealth requires that the distribution of legal enti-

46 For example, this didactic strategy appeared in the pre-Civil War debate, the constitutional convention debates over the appropriate structure and distribution of power between the states and the central government (federalism versus anti-federalism), the Dixiecrat arguments in the 1940s, and now in the debates over the Republicans' Contract with America.

47 Walzer, Liberalism, supra note 33, at 324.

48 See, e.g., Charles Reich, The New Property, 73 YALE L.J. 733 (1964); Symposium, The New Property and the Individual—25 Years Later, 24 U.S.F. L. Rev. 221 (1990). These articles capture the extent to which property functions as a defense to government excesses but also limits the extent to which the government may extend and deny largesse. The essence of the civil rights victories lies in the recognition that there are limits to both private and public power based on the core normative claims of democracy.
tlements also be included as part of the “protected wealth.” The existing wealth distribution pattern can be interrogated from a number of perspectives. It is a commonplace that the distribution of rights and liabilities is part of the distribution of wealth.\(^4\) Thus, rather than accepting the premise that any deviation from the existing distribution pattern ought to be suspect, the analysis ought to begin with a critique of the existing pattern of distribution. Only upon a finding that the distribution conforms with our background principles of justice (even those proposed by Professor Epstein) should the question of whether a deviation from the existing pattern is permissible be considered.\(^5\) Certainly, the principles against self-dealing legislatures (however constituted) ought to require that analysis. Otherwise, patterns that are predicated on the existing distribution merely replicate the sin of nonrepresentative special interest capture of the state.

With these arguments in mind, when aspects of government action create wealth (especially wealth created as a byproduct of some police power function of government), the “giving” part of the “taking and giving” argument is only one aspect of the justice claim that underlies the argument for a broader understanding of the wealth effects of government action. While the justice claim is essential to understanding the complex nature of both obligations and effects of governance and may, in itself, be sufficient to answer the arguments for limiting the police power and the regulatory reach of government by analogizing them to the actions of private actors, there is a more compelling reason to reject that analysis. Unless there is a clear demarcation of institutional functions, the government and the powers of government merely become the mirrors of the distribution of private economic power with no principled basis for dissenting from that model absent some theory of institutional capture. The elevation of the extant distribution of entitlements and liabilities to a matter of principle is critical to the moral claim outline above. The answer to the risk of capture objection is to assert that the principles of private property are embedded in the Constitution, and to claim that their very embeddedness would preclude any dictatorial abuse of power by clearly spelling out the limitations of governmental action—except that, in fact, the mirror is required by our constitutional commitment to a representative government. Yet if this is true, then the condemnation of every majoritarian decision that rearranges pre-existing property rights is required. Such decisions are viewed as naked power grabs, without considering whether the arbitral function the government serves is appropriate or whether the government is merely adding to its own resource base. The anti-majoritarian theory, in effect, lacks a sufficient theory of the state.

### III. The Current State of Takings Jurisprudence

The assault on the proper functions of government that has been undertaken by the so-called property rights movement has not occurred in a


vacuum. The legal and philosophical claims must be understood against the background of takings jurisprudence and the dominant models that have guided that type of adjudication. This Part will examine the law of takings and determine the status of contemporary takings jurisprudence and, in the process, assess the impact of the property rights movement. The property rights movement has already had a major impact on public policy discourse, but what is its impact on the law?

The basic understanding of the Takings Clause is simple. The state may not dispossess a property owner of his property unless it does so to achieve a public purpose and pays the property owner the market value of the property that the state has taken. The test that the courts apply to adjudge the constitutionality of a particular action is to inquire whether the action is justified by the police power and whether adequate compensation has been paid. That is the easy part. The hard part is where the state acts to limit the range of activities a property owner may undertake with her property, but does not actually take possession of the property. The problem is especially acute when the regulation can be shown to have diminished the exchange value of the property in some marked way.

There is no doubt that the state may regulate the uses of private property. The may be done either through the imposition of a court order resolving a private dispute or through a general legislative message designed to minimize private disputes or achieve a democratically determined public goal. The regulation is limited by the police power and, except in the case of nuisance, if the regulation eliminates all economic uses of the property, the state must typically pay compensation. But what if the regulation does not totally devalue the subject property, but merely diminishes the exchange value of the property by totally eliminating the value of one aspect of ownership? Is compensation required? The answer has typically been no, but those situations are at the heart of the property rights movement. Environmental regulations have been viewed as the principal culprit in charges of government overreaching. What is wrong with the conventional view?

Property rights advocates answer that the conventional view misunderstands both the true constitutional limitations on the exercise of the police power as well as the proper constitutional conception of the effects of state action on property rights. Their view runs roughly as follows: The Constitution requires that property be understood as a bundle of rights, each one a part of the value of the whole, but valuable in itself. When the value of any one of the rights in the bundle is eliminated the state must compensate the property owner for the loss of the value of the right regardless of the remaining value of the whole parcel. By adopting some version of the diminution of value analysis, modern takings analysis has corrupted this understanding and has led to a loss of constitutional dignity

for property rights. Moreover, the state may only regulate private property if it is eliminating what would be a nuisance under common law or where the regulation produces a Pareto-optimal result based upon the extant distribution of wealth. Who is right?

One point conceded by all is that when a regulation produces "an average reciprocity of benefit," no compensation is required. Even Epstein agrees with this. He would merely require a more searching and individuated inquiry and would have the reciprocal advantage analysis limited by a dollar-for-dollar balance. This is a form of the takings and givings argument. The idea of balancing value is well established in our law.

The easiest place to find this analog is in the theory of set-off in commercial and bankruptcy law. Remember that the Court in *Agins v. City of Tiburon* used a "reciprocity of advantage" argument that was in the nature of a set-off to justify the restrictions on the property owners. That argument only comes into play, however, when there are well-established rights that are in question. That is the meaning of the distinct investment-backed expectation test of *Penn Central Transportation Co. v. New York City*. Commercial law does not count inchoate possibilities, nor does the common law value contingent interests.

In 1964, Professor Joseph Sax published an article in the *Yale Law Journal* that attempted to construct a framework for making a principled distinction among the varieties of actions that government undertakes that have a negative impact on private land value. In determining which actions produce a compensable event, Sax argued that it was important to first consider the nature of the governmental action. In his analysis, the principal division between types of governmental action can be found when the government is acting in a way that merely aggrandizes its own, position in relation to private actors compared to when it is arbitrating disputes between private actors. The police power is constrained by the arbitral role that the state plays. The government may act through the

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53 See sources cited supra note 1. While there are powerful economic data to justify such an inquiry, it would in practice "introduce yet another layer of governmental interference and uncertainty to cloud the valuations given in the market. This further incursion of public or judicial judgment on market processes is, ironically, precisely what advocates of wider compensation for takings seem most to abhor." Runge et al., supra note 1, at 66.
54 See Coletta, supra note 52, at 360-64; sources cited supra note 1.
57 Id. at 262 ("The zoning ordinances benefit . . . [the property owners] as well as the public . . . . [The property owners] therefore will share with other owners the benefits and burdens of the city's exercise of its police power.").
59 See *THOMPSON ON REAL PROPERTY* § 85.15 (David A. Thomas ed., 1994).
60 Sax, *Police Power, supra* note 17, at 36.
61 Id. at 62.
62 Id. at 62-64.
63 Id. at 64.
adjudication of individual disputes or may legislate generally, achieving the same results that would occur by the mere accumulation of the resolution of individual disputes. That this is a normative process is understood. The Takings Clause is a limitation on the police power to the extent that it prevents majority self-dealing in the guise of dispute resolution through regulation or legislation. The 1964 article, despite Sax's subsequent reservations concerning the analysis, is fundamentally important because of the contribution it makes toward a fuller understanding of the proper demarcation of institutional functions that is critical for appreciating the distinct roles that the state plays. The article's sophisticated understanding of state roles prevents the confusion of the state's function with that of other market participants or the institutions of civil society. By clearly outlining that distinction and working through the implications for the exercise of the police power, the ground can be cleared for an assessment of when it makes sense to compensate diminished expectations even if it is not constitutionally required. Unlike the modern advocates for limiting governmental activity through the Takings Clause, the careful analysis of decision-types asks a more sensible question about whether it is a good policy to use the uncompensated police power regulation to achieve a particular policy end.

Professor Frank Michelman, in his justly celebrated article, followed a similar insight and outlined a utilitarian approach to calculating when compensation would, as a matter of policy, be required. According to Michelman, compensation is required when demoralization costs exceed efficiency gains and settlement costs. Efficiency gains are "the excess of benefits produced by a measure over the losses inflicted by it." Demoralization costs are

the total of (1) the dollar value necessary to offset disutilities which accrue to the losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment . . . . "Settlement costs" are measured by the dollar value of the time, effort, and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs.

This standard, when combined with the arbitral approach proposed by Sax in his 1964 article, limits the power of government in important ways. However, the limits do not arbitrarily prevent legislatures from en-

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64 Id. at 64-67.
65 Sax, Private Property, supra note 16, at 150.
67 Id. at 1215.
68 Id. at 1214.
69 Id. (footnote omitted).
70 See Sax, Police Power, supra note 17, at 63; Sax, Private Property, supra note 16, at 151-55.
acting laws for the public interest. Even the majority in *Lucas v. South Carolina Coastal Council*\(^7\) admitted that restricting the police power to enforcing claims that arise either within the context of common-law nuisance or common-pool problems is to use substantive due process in a way that brutally circumscribes the legislative power and the democratic capacity of the state to say what the public interest is.\(^7\) The early cases that suggest that no regulation can constitute a taking\(^3\) seem right to this extent: the police power is not limited to securing the public from some nuisance-like harm. The Takings Clause was designed to prevent the government from localizing all of the burdens of a particular public policy. But this is a very different concern from whether the common-law boundaries of nuisance law describe the constitutional boundaries of the police power. This particular limitation on the exercise of the police power is summed up by both Professors Michelman and Sax. Where, under some theory of capture, the state is operating like a private scavenging company on behalf of the politically powerful as against the politically weak, it seems relatively easy to use the limitation of the police power to invalidate a particular action.\(^4\) Merely because there is some ancillary private benefit, however, is not proof of constitutional corruption and may only occasion more searching judicial inquiry. It may only be evidence of the wealth-creating aspects of regulation.

The idea of partial takings, outside of the context of actual physical occupation, is quite perplexing. Because the argument for compensation is predicated upon the fact that property interests are capable of being segmented, what principle determines which loss will require compensation? This argument, taken to the extreme, potentially turns every regulatory action into a compensable event. Legislation undertaken to foreclose private disputes is not immune from the inquiry, which now would go beyond questions of majoritarian rent-seeking. If each segmentable property interest is subject to takings review, what are the appropriate limits to the consideration of novel interests? Surely, the law would not in this instance be limited to old common-law interests. As Professor S.F.C. Milsom demonstrated, the history of the common law has largely been the history of the abuse of its fundamental principles generated by the novelty of the practicing lawyer.\(^5\) What are the appropriate limitations to the legal imagination? If the lawyer's mind can conceive of a new way to cut a particular parcel, is each new idea a protectable interest? Of course, the answer is

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\(^7\) 505 U.S. 1003 (1992).

\(^7\) Id. at 1022-26 (stating that a legislative determination of a noxious-use justification is no longer determinative in regulatory takings analysis).


\(^4\) FISCHER, supra note 1, at 19-21.

\(^5\) See MILSOM, supra note 15, at 6-7.
no, especially when the purported interest is only of speculative value. If this is true, doesn't this just return us to the common-law interests baseline, now fortified by existing regulatory decisions such that the existing government binds successors on the basis of judgments made now? No one accepts that principle of sovereign limitation except to the extent that the Due Process Clause requires some regularity in the processes of governance consistent with the other constitutionally protected interests of individuals.

The idea is murky largely because it is unworkable. The principal problem is measuring the reduction in value. Are baseline common-law rules the only possible basis for making the takings determination? If so, then what of all regulation? Do we need to account for the value attributable to public action? If my property value increases because of public regulation (even assuming the limitations of the average reciprocity of advantage arguments), then shouldn't any economic loss caused by new government regulation be discounted by the corresponding value added by the existing regulations? If the change allows my neighbor to do something that diminishes the value of my property, is that just the workings of the market, or is it the result of government action? The question might be rejected as spurious because the parties can always bargain and reach a Pareto-optimal solution. However, that does not resolve the question of whether the government is responsible for my loss. After all, the change in a liability rule may directly cause me to have to "bribe" my neighbors to preserve the residential quality of my neighborhood. Who should pay for that change in my position? Florida Rock Industries, Inc. v. United States, a recent decision by the Federal Circuit, presents an interesting approach to these issues.

The reasoning in Florida Rock is deceptive because it suggests that Lucas decided the question of whether compensation was required. The limited holding in Lucas is inapposite to the dispute in Florida Rock. Remember that in Lucas the landowner purchased land without restrictions with the expectation that he would be able to use his property to the same extent as his neighbors. Subsequent regulation dashed those expectations and virtually reduced the economic value of his parcel to zero. In Florida Rock the landowners purchased the property just before the enactment of the Clean Water Act. Before they began mining operations, however, the Army Corps of Engineers adopted regulations under section 404 of the Clean Water Act that restricted dredging and filling operations in wetlands. By the time mining operations began the landowners should have been cognizant of the restrictions on the property and should also have known that the economic use of the property for mining purposes would require a permit. To say that the permitting process reduced the

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7 Id. at 1009, 1020.
8 See Florida Rock, 18 F.3d at 1562 (briefly reciting the chronology of events leading up to the lawsuit).
value of the property is to treat the market value as though it were independent of the restrictions on all similarly situated properties. This is not a plausible construction of value, and it also elevates investment-backed expectations, the limitation created in *Penn Central*, to an investment predicated upon a contingency. In *Florida Rock*, the contingency was a permit. The argument in *Penn Central* was much more akin to the more common vested rights limitation on uncompensated changes in governmental permission for a private action. To so limit the permissible range of governmental permitting processes in this way is an argument for social paralysis and makes the public interest hostage to those who own property, rather than to the citizens who make up the polity. It is only slight hyperbole to suggest that this analysis is the mere reimposition of the property requirement to the question of representation. The reasoning in *Florida Rock* would turn all of regulation into fodder for an aggressive and malignant form of the condemnation blight argument that is limited and already well understood.

The reasoning in *Loveladies Harbor, Inc. v. United States* is similarly flawed. In that case, the plaintiffs owned land in New Jersey that they planned to develop and sell for residential use. However, some of the land the plaintiffs aimed to develop was wetland. When the U.S. Army Corps of Engineers denied the plaintiffs a permit to develop the wetland tracts, the plaintiffs sued for compensation for the reduction in value they alleged was traceable to the permit denial. The plaintiffs claimed that the government's action constituted a taking and had effectively reduced the value of their property to zero. The trial court had found that the proposed development site was worth $2,658,000 before the Corps denied the permit and only $12,500 afterwards. This is a brutal reduction in value, but the size of the "diminution" does not resolve the question of whether compensation is required or whether the regulation is permissible.

The court held that with regard to the interest allegedly taken, the Supreme Court, in *Lucas* and its progeny, announced the test for the existence of a regulatory taking. According to the court's version of the existing jurisprudence of regulatory takings, compensation is required if three requirements are met. First, there must be proof that all economic use of the subject property was eliminated and the loss was the result of a regulatory action. The inquiry goes to the extent of the landowner's

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82 See, e.g., Berman v. Parker, 348 U.S. 26, 34-36 (1954) (recognizing condemnation as a valid exercise of the police power to attack the problem of urban blight on an area-wide as opposed to structure-by-structure basis).
83 28 F.3d 1171 (Fed. Cir. 1994).
84 Id. at 1174.
85 Id.
86 Id.
87 Id. at 1174-75, 1178.
88 Id. at 1178-79.
89 Id. at 1179.
90 Id.
property affected by the permit denial. In the court's view, the easiest case is when the entire tract of property is affected by the regulatory action. The inquiry becomes increasingly more problematic depending upon the extent of the remaining unrestricted property. This construction of the appropriate judicial inquiry indicates that this court has fully accepted the partial taking hypothesis and asserts that the latter inquiry is whether there is a partial taking.

Second, the court looks to see if the property owner had a distinct investment-backed expectation. Third, the court must ascertain whether this investment-backed expectation was vested in the property owner as a matter of state property law and was not within the power of the state to regulate as a matter of common-law nuisance doctrine. If the court determines the answers to that set of inquiries are "yes," then compensation is required. Just compensation is then determined by the formula created in Florida Rock. In Florida Rock, the court determined that the landowner was owed the difference between the parcel's unrestricted fair market value before the permit was denied and the property's fair market value after the permit was denied. As I suggested earlier, this determination of value presumes that the property was purchased without any thought of the necessity of public approval before a particular use was made of it. Taking the court's analysis at face value would suggest that the mere existence of the regulation worked a taking. Hodel v. Virginia Surface Mining & Reclamation Ass'n, of course, resolved that issue, and economic theory suggests that the expectation value must be based on the potential realities of the market, not some imagined unregulated market for the commodity in question. Moreover, in its resolution of the "denominator" problem, the Florida Rock court merely looked at the economic impact of the permit denial on the regulated portion of the parcel rather than the impact on the parcel taken as a whole.

Despite Lucas's suggestive language, the Court has never limited the reach of the police power to the contours described by common-law nuisance. The Court has increasingly required a closer connection between

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91 Id. at 1180.
92 Id.
93 Id. This, of course, is not a completely accurate characterization, because it is impossible to find any property that is completely unrestricted; what the court means is the portion of this property not covered by this particular regulation. The court is making a jurisdictional argument. So understood, the court's reasoning is better suited to the issue of whether there was appropriate use of the police power in the first instance. The answer to that question would render the analysis of the "partial taking" claim irrelevant.
94 Id. at 1179. This issue was not disputed during the trial. Id.
95 Id.
96 Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1567 (Fed. Cir. 1994) (quoting Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 905 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987)).
98 Id. at 293-97 (holding that a mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking).
99 Florida Rock, 18 F.3d at 1571-73, 1578-79.
the proposed regulation and the desired goal to be achieved, but that is a far cry from the limitation suggested either in Florida Rock or Loveladies Harbor. The restriction on state action in those cases creates by negative implication a theory of vested rights that gives rise to the existence of their version of the "distinct investment-backed expectation" doctrine. This analysis also creates a constitutional limitation on the exercise of the police power that is not found in the jurisprudence of the Supreme Court. It is not even a very convincing extrapolation. Lucas is not the only source of insight into the Supreme Court's thinking on the limitations of the police power. The Court has often suggested that the limitation is not defined abstractly in advance, but that a detailed factual inquiry is at the heart of the matter. One example is Nollan v. California Coastal Commission.100 The essential nexus test developed in Nollan is essentially one test of the legitimacy of the police power. There the Court noted that "a use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose."101 By imposing the requirement of a close relationship between the means and the ends, the Court was reaffirming its commitment to the conditions of decision making that would prevent the kinds of democratic excesses the Takings Clause was designed to guard against.

To demonstrate the constitutional effect of the necessity of a close connection, the Supreme Court in Dolan v. City of Tigard102 stressed that the obligation to demonstrate an instrumental need for the restriction would effectively eliminate the temptation to overreach.103 The constitutionally required nexus between the impact of a proposed development and the restriction on that development is captured in the following quotation from Dolan:

We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm . . . . But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we

101 Id. at 834 (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127 (1978)).
102 114 S. Ct. 2309 (1994).
103 The Dolan Court made this point in the following way:
  In some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. We think this standard is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose.
  Other state courts require a very exacting correspondence, described as the "specific[ally] and uniquely attributable" test. . . . Under this standard, if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes "a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations."
  Id. at 2318-19 (citation omitted) (quoting Pioneer Trust & Savings Bank v. Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961)).
hold to be the requirement of the Fifth Amendment. No precise mathematical
calculation is required, but the city must make some sort of individualized de-
termination that the required dedication is related both in nature and extent to
the impact of the proposed development.104

This requirement of “individualized determination” means that re-
strictions on use will be more carefully scrutinized and the power to say
no in the permitting process cannot be used to extort concessions from
landowners unrelated to the actual or cumulative impacts of their actions.
That is not a radical proposal, but merely follows the reasoning of Justice
William Brennan in San Diego Gas & Electric Co. v. City of San Diego,105
that city planners, as well as police officers, ought to be able to apply the
Constitution.106

Justice John Paul Stevens’s dissent in Dolan correctly focuses on the
impact of the exaction on the property as a whole.107 Moreover, he looks
to the state court cases and finds that they balanced the benefit received
by the land owner as well as the burden endured.108 The reduced risk of
flooding based upon improvements to the floodplain is a form of like-kind
exchange that ought to be considered when analyzing the compensable
consequences of a particular government action. In contradiction to Ep-
stein’s nuisance rationale (and, in fact, a retreat from its harsher implica-
tions), the Lucas Court noted that “[w]here the State seeks to sustain
regulation that deprives land of all economically beneficial use, we think it
may resist compensation only if the logically antecedent inquiry into the
nature of the owner’s estate shows that the proscribed use interests were
not part of his title to begin with.”109

Justice Antonin Scalia, writing for the majority in Lucas, concluded
that for a state to avoid paying compensation for a regulation that elimi-
nates all economic value of a piece of real property, the regulation must be
justified by reference to background common-law principles of property
and nuisance law.110 This, of course, has always been the law and is
merely a way of saying that the state did not deprive the aggrieved prop-
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erty owner of any cognizable property right. But this does not answer the question of compensation in cases in which the regulation works a diminution in value, unless Justice Scalia means the test to apply to each segmentable property interest—a point that Justice Scalia concedes.\textsuperscript{111} There can be no doubt, however, that the state may, through a change in the general law, make what was once permissible now impermissible so long as there is a sufficient finding that the change was necessary to prevent a public harm. I recognize, as did Justice Anthony Kennedy in his concurrence, that the harm/benefit distinction is notoriously unstable, but this instability is not a sufficient reason to believe that a legislature is limited to the common-law definition of nuisance when attempting to regulate for the "general welfare."\textsuperscript{112}

I want to conclude this cursory discussion of the law with a brief discussion of the idea that seems so troubling to those who want to find a "principled" basis for takings decisions and who seem disgusted by the notion that the Court is acting in an \textit{ad hoc} manner when deciding these cases. The notion can be traced back to Justice Oliver Wendell Holmes's decision in \textit{Pennsylvania Coal v. Mahon}\.\textsuperscript{113} The approach has been criticized as allowing any eventuality to obtain. In fact, Holmes was attempting to articulate the basis for the creation of objective standards.\textsuperscript{114} This process is best captured by reference to the epistemology of the Pragmatists, under whose sway Holmes clearly was. That view can best be summed up as follows: "[I]nquiry is a never-ending process whose purpose is to resolve doubts generated when experience does not mesh with preconceived theory."\textsuperscript{115} Holmes clearly concurred in this formulation when he said, in \textit{Rideout v. Knox},\textsuperscript{116} "the limit up to which a man may impair his neighbor's enjoyment of his estate by the mode of using his own is fixed by external standards only."\textsuperscript{117} Holmes underlined this in \textit{Hudson Water Co. v. McCarter}\.\textsuperscript{118}

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which becomes strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is

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\textsuperscript{111} \textit{Id.} at 1016 n.7 ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."); \textit{see also} Sax, \textit{Private Property}, \textit{supra} note 16, at 151-55; Frank I. Michelman, \textit{Takings, 1987}, 88 COLUM. L. REV. 1600, 1614-15 (1988) (describing how the same regulation can be described either as a "partial" or "total" taking).
\textsuperscript{112} \textit{Lucas}, 505 U.S. at 1034-35 (Kennedy, J., concurring).
\textsuperscript{113} 260 U.S. 393 (1922); \textit{accord} \textit{Lucas}, 505 U.S. at 1035-36 (Kennedy, J., concurring).
\textsuperscript{114} The following discussion is based on similar analysis in Gerald Torres, \textit{Wetlands and Agriculture: Environmental Regulation and the Limits of Private Property}, 24 KAN. L. REV. 539, 559 (1986).
\textsuperscript{115} GRANT GILMORE, \textit{THE AGES OF AMERICAN LAW} 50 (1977).
\textsuperscript{116} 148 Mass. 368 (1889).
\textsuperscript{117} \textit{Id.} at 372.
\textsuperscript{118} 209 U.S. 349 (1908).
\end{footnotesize}
called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. . . .

It is sometimes difficult to fix boundary stones between the private right of property and the police power . . . . But it is recognized that the State as quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned.\footnote{119}

Unfortunately, the cases have not focused on the police power \textit{simply}, but rather on the “goes too far” language in \textit{Pennsylvania Coal}.\footnote{120} The search for what is “too far” has produced the diminution in value inquiry and now the partial takings arguments. Instead, the analysis, even by Holmes’s admission, should have focused on that “neighborhood of principles of policy which are other than those on which the particular right is founded, and which becomes strong enough to hold their own when a certain point is reached.”\footnote{121} What Holmes was describing is the way in which policy is created both logically and prudentially. He was articulating a system for recognizing when a particular position is of doubtful authority. By referring to a system of rights (and within it a system for their evolution), he was rejecting a sterile search for first principles, because he was conscious of the fact that so-called first principles are never unmediated. The way in which they are mediated (the way in which we recognize their legitimate evolution) is by constantly comparing the principle in question with the “neighboring” principles that are not in question in this case, but which describe the boundaries of the issue under consideration. Too great a deviation from the norms described by the family of principles suggests the potential illegitimacy of the deviation. Importantly, it does not foreclose that “deviation” for all time, necessarily, but cabins it when the deviation would render a system of principled restraint unstable. This approach to the problems of the extent of governmental regulatory power reveals the constellation of rights, powers, liabilities, and immunities as a dynamic system, not as the mere ordinal ranking of predetermined claims. That such a dynamic approach to analysis and adjudication leaves much undecided is not a demerit and, in fact, is an important value. To focus upon only that which is still in general social dispute is to lose sight of all that is not in dispute. Worse, such a focus ignores the general stability of the system that has protected “property rights,” even if it has emerged only fitfully, and even if it has been tempered by the “neighborhood of principles,” not in dispute, on which we rely.

\footnote{119} \textit{Id.} at 355.\footnote{120} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).\footnote{121} Hudson Water Co., 209 U.S. at 355.
I want to conclude this Lecture with some suggestions about what the struggle over these issues means for our history and our conception of social life. In many ways, the conflict over our history is what makes this moment—a moment in which the narrative construction of our social life is deeply contested—a deeply significant one. The history of sectionalism in our country has always reflected deeply rooted divisions over how our nation ought to be organized. The revival over the past twenty years of concern with "our federalism" reflects the tension that is at the heart of our system of governance. These tensions also reflect the ways our culture has been transformed in the past generation under the pressures of an economy that has begun to move past its extractive and heavy manufacturing phase. The translation of those tensions into political issues—and the translation of political issues into legal issues and issues of "rights"—also reflects traditional American ways of confronting difficult social problems. But, as I hope I have illustrated, more is at stake than the constitutionality of the various environmental statutes that have been enacted over the past generation—although those statutes are critically important and supported by a majority of Americans. Limitations on majoritarian policymaking, beyond the existing constitutional limitations on government, are also part of the so-called property rights agenda and should not be obscured by the narrative devices employed by self-described property rights advocates.

The emotional pull and persuasive force of the story told by these property rights advocates stems not only from their ability to tell a good story, but also from the real connections the story makes to a way of life and the pressures that are making that life increasingly less tenable. Because I am a Westerner by birth and disposition, although I have lived for much of the past two decades in the Midwest, I feel a great deal of sympathy for those who make a living off the land. I have watched family farm and ranch operations struggle over the recent past, beset by the vagaries of the natural resource economy. I can appreciate the tug of those felt injustices. When one speaks to farmers, ranchers, and others in rural America, one begins to appreciate the "way of life" arguments that are pooh-poohed as mere sentimentalism by economists and some policymakers. These "way of life" arguments make sense in the context of a rural economy that is being transformed more quickly than the social system can accommodate. These facts do not make the doctrinal arguments of the


123 The "rust belt" crisis of the 1970s and the "farm crisis" of the 1980s were also emblematic of this phenomenon.
property rights advocates correct, but they do make the arguments and their rhetorical force more understandable.

Essayist William Kittredge makes a similar point:

[All over the West, as in all of America, the old folkway of property as an absolute right is dying. Our mythology doesn't work anymore.

We find ourselves weathering a rough winter of discontent, snared in the uncertainties of a transitional time and urgently yearning to inhabit a story that might bring sensible order to our lives—even as we know such a story can only evolve through an almost literally infinite series of recognitions of what, individually, we hold sacred. The liberties our people came seeking are more and more constrained, and here in the West, as everywhere, we hate it.

Simple as that. And we have to live with it. There is no more running away to territory. This is it, for most of us. We have no choice but to live in community. If we're lucky we may discover a story that teaches us to abhor our old romance with conquest and possession.124

He is right, people hate it. They reject the close of the mytho-historical phase of American history that has been called “the opening of the West.” The story has never been completely told and is largely myth, but old romances and generational connections to the land don’t change easily. But the history of federal control over national resources is not unconstitutional and the Fifth Amendment is a poor tool to overrule our national history. No historical course is ever inevitable, which is why the debate over property rights and the government’s role in regulating the social consequences of private behavior matter so much. As religious historian Jaroslav Pelikan has said:

Ultimately, however, tradition will be vindicated for us, for each of us as an individual and for us as communities, by how it manages to accord with our own deepest intuitions and highest aspirations... Those intuitions and aspirations tell us that there must be a way of holding together what the vicissitudes of our experience have driven apart—our realism about a fallen world and our hope for what the world may still become, our private integrity and our public duty, our hunger for community and our yearning for personal fulfillment, what Pascal called “the grandeur and the misery” of our common humanity.125

125 Jaroslav Pelikan, The Vindication of Tradition 60 (1984). I was drawn to the work of Kittredge and Pelikan by Indian law scholar Frank Pommersheim. See Frank Pommersheim, Braid of Feathers (1995) (offering a “reservation perspective” of Indian law and remarking on the significant role, due to tribal ownership of many natural resources, that Indian tribes play in both the political and economic life of the West).