HARVARD JOURNAL
of
LAW AND PUBLIC POLICY

PROPERTY RIGHTS, TAKINGS, AND A FREE SOCIETY

By
Roger Pilon

Reprinted from Vol. 6, Summer
HARVARD JOURNAL OF LAW AND PUBLIC POLICY
1983

PROPERTY RIGHTS, TAKINGS, AND A FREE SOCIETY*

ROGER PILON**

I. INTRODUCTION

In the collection in which this article recently appeared, several prominent economists and lawyers argued, correctly I believe, that the current housing crisis in America, and in California in particular, can be traced in many of its dimensions to a host of government regulations that have been building for many years now—from restrictive zoning to timber policy, environmental policy, monetary policy, and much else.[1] Against this background of burgeoning regulation, the supply of new housing has decreased while the cost of all housing has rapidly increased; as a result, one of the basic American dreams—"a decent home and a suitable living environment for every American family"[2]—is fast becoming a dream. To be sure, many of those already owning houses have enjoyed windfall appreciations. But just as often the mobility they traditionally enjoyed has been frustrated. And those who do not own their own homes and lack independent means have been all but eliminated from the buying market, relegated to rental housing, itself fast disappearing in the face of ubiquitous rent controls (real and threatened), antidiscrimination measures, and legislation limiting the construction of new rental housing. But in countless other ways as well the owners of property generally—whether residential, commercial, industrial, or undeveloped—have come increasingly to be regulated in the uses they can make of their property, all the while that others, especially "the public," have been

---

* This article is reprinted, with minor revisions, from RESOLVING THE HOUSING CRISIS: PUBLIC INTEREST, 369-401 (M. Bruce Johnson ed. 1982). The editors wish to thank the Pacific Institute for Public Policy Research for their permission to reprint.

** Special Assistant to the General Counsel, U.S. Office of Personnel Management, Washington, D.C. A.B., Columbia University, 1971; M.A. 1972, Ph.D. 1979, University of Chicago. The author is grateful to Davis E. Keeler and M. Bruce Johnson for their several helpful suggestions in the course of preparing this article.

1 *See* Johnson, *supra*, title footnote. For a very recent account, which focuses on Oregon's statewide system of land-use planning, see Ross, *Losing Ground in Oregon*, REASON, April 1983, at 40.

2 *Third Annual Report on National Housing Goals*, H.R. DOC. NO. 92-136, 92d Cong., 1st Sess. 1 (1971) (citing the Housing and Urban Development Act of 1968, in which Congress reaffirmed the national housing goal first declared in 1948).

given rights over that property that would have been unthinkable at the time of America's founding.[3] What we have here at bottom, then, is not simply a housing crisis or even a crisis in property generally, but a fundamental shift in the underlying structure of property rights—rights that the accumulated regulations have rearranged and redistributed over the years. Not unexpectedly, as this redistribution has taken place, the economic consequences have set in—sometimes making the rich richer and the poor poorer, sometimes the other way around, but nearly always making us all poorer in time.

In order to get to the bottom of this crisis, then, it is not enough simply to point to the regulations that have brought it about—with the implication that they be rolled back. For that would presume that the right and wrong in the matter were clear, when in fact those many regulations, except in certain cases of disingenuous legislation, have come about precisely in the name of justice. Those who have called for rent controls, for example, or for building codes, or for legislation prohibiting discrimination, or for the regulation of lot sizes, or for the preservation of open spaces or coastal views have done so in the name of various private and public *rights.* To go to the root of the crisis, therefore, we have to raise not simply the economic and legal issues but those moral issues that in the end have led us to where we are. More precisely, we shall have to ascertain whether the various rights that the regulations have brought into being can be justified as a matter of basic moral theory. Or is it rather that the legal arrangements that preceded this growth of regulations reflected the rights that alone can be justified in a free society? In recognizing or creating these new rights, that is, did government simply give legal force to the underlying moral order? Or did it instead extinguish that order, putting new and spurious rights in the place of legitimate rights?

These are large questions, of course, going well beyond matters of economic efficiency on the one hand or legal legitimacy on the other, for they inquire about the basic moral order—about what moral rights and obligations we have with respect to each other and with respect to the state. In the background, then, is the fundamental idea that ethics comes first, that the legal order ought not to stand apart from the moral order but ought instead to recognize and reflect, if not the whole of ethics, at least that part

---

3 *See generally* B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

described by our moral rights and obligations. This idea stood at the heart of the world the Founding Fathers set forth in the eighteenth century.[4] It is an idea that continues to compel today.

With this basic view in mind—that law and legal institutions are morally legitimate only to the extent that they reflect our moral rights and obligations—I shall try to sort out some of the issues at the center of this property crisis. First, I will sketch and then examine the two principal theories about the connection between property rights and a free society that have vied for legal attention over the past century—the traditional theory, which argues that private property and individual freedom are inextricably connected, and the modern theory, which argues that a decrease in private and an increase in public property is the mark of a free society.[5] In the course of this analysis I will argue that the modern view is fundamentally mistaken, that it ends in practice, as the theory requires, by using people whereas the traditional view is fundamentally correct, serving to sort out in a principled way the many issues that constitute the current property crisis. Second, I will apply the traditional theory to the taking issue, to the questions "When do regulations of property amount to a taking of that property such that under the taking clause of the Fifth Amendment we are required to compensate the individuals thus regulated?" and "When do regulations amount simply to an exercise of the police power, requiring no compensation to those regulated?"[6] This issue has vexed lawyers and economists for over ninety years now.[7] Nevertheless, when adequately explicated, the

4 *See especially* the American Declaration of Independence. *See also* C. BECKER, THE DECLARATION OF INDEPENDENCE (1922); E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955); B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967). I have discussed the distinction between the theory of rights and the theory of good (or value) and some reasons the former is especially suited to serve as the model for law in Pilon, *On Moral and Legal Justification*, 11 S.W. U. L. REV. 1327, 1341-44 (1979). *See also* Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 186 (1955).

5 My temporal reference here is meant to denote, very roughly, the period since the rise of modern collectivist theories of property, represented most thoroughly and most forcefully by the Marxist doctrine. Of course, this doctrine has not usually been at the center of the American debate in any explicit way—not the American legal debate, at least. Nevertheless, Marxism has systematically articulated many of the tendencies and, more important, many of the underlying justifications for the modern view, however limited the implementations of that view may still be in the American context.

6 *See generally* PLANNING WITHOUT PRICES (B. Siegan ed. 1977).

7 *See* Sax, *Takings, Private Property and Public Rights*, 81 YALE L. J. 149 (1971):

> Few legal problems have proved as resistant to analytical efforts as that posed by the Constitution's requirement that private property not be taken for public use without payment of just compensation. Despite the intensive efforts of commentators and judges, our ability to distinguish satisfactorily between "takings" in

classical theory of rights can shed important light on this question, sorting out the principles in the matter and thus further elucidating the place and scope of property rights in a free society.

It may be well to note, however, that in all of this I will be stepping back from the more concrete problems that are ordinarily the concern of the lawyer or the economist. In fact, I will be stepping into some fairly abstract and even arid regions, into the province of the philosopher, the better to get a picture of the larger issues before us. These issues are indeed large; in truth, the title of this article is the title of a substantial treatise. Accordingly, this will not be a detailed or exhaustive statement of just what our property rights are; rather, it will be a general statement only. Nor will this be a detailed statement of the complex theory that stands behind those rights; for that I will simply refer the reader to more complete discussions and hope that the treatment here, if sometimes elliptical, will not be inscrutable.

II. Two Theories of Property: Private and Public

It is a commonplace in the study of ideas that theories about the world will tend, more or less, to reflect the way the world, in fact, is: when more, they will yield insights that give order to the world; when less, they will break down in error, confusion, and disorder. This applies not only to explanatory theories of science, helping us to understand what Thomas Kuhn has called the structure of scientific revolutions,[8] but to normative theories of ethics, politics, and law as well. Thus, in the eighteenth century the two ideas of private property and a free society were thought to be so intimately connected as to be all but equivalent. Property rights, it was believed, both enable and describe our freedom, just as the free society is the society defined by the property rights that define in turn the relationships between the individuals who constitute the society.[9] Drawn not only from the thought of the Enlightenment but from the long and revered tradition of English common law,

---

> the constitutional sense, for which compensation is compelled, and exercises of the police power, for which compensation is not compelled, has advanced only slightly since the Supreme Court began to struggle with the problem some eighty years ago.

Id. (citing Justice Harlan's opinion in Mugler v. Kansas, 123 U.S. 623 (1887), which is generally taken as the beginning of the modern compensation law). *See also The Supreme Court, 1979 Term*, 94 Harv. L. Rev. 1, 205 (1980): "Judicial interpretation of the 'takings' clause of the fifth amendment is notoriously confused."

8 T. Kuhn, The Structure of Scientific Revolutions (2d ed. 1970).

9 *See, e.g.*, G. Dietze, In Defense of Property 19-34: (1963); Fellman, *Property in Colonial Political Theory*, 16 Temple U. L. Q. 388, 400 (1942).

these insights epitomized a theory of ethics and law that the Founding Fathers institutionalized and set in motion some two centuries ago, a theory that has provided a remarkable degree of order and stability, affording the conditions for the pursuit of happiness with which we are all familiar.[10] By virtue of this order and stability, then, an *a posteriori* justification has been conferred upon the theory of the Founding Fathers, a theory that otherwise was justified *a priori*. Taken together, in short, these justifications argue that the Founders got it right.[11]

In the intervening years, however, much has happened in the realm of ideas—the realm that has ever been the ultimate force in the shaping of history.[12] As the democratic influence has grown, as legislature, statute, and popular will have come increasingly to succeed court, precedent, and reason, the earlier insights have gradually been lost. Rights of private property in particular have fallen out of favor; yet calls for a freer society have grown more intense. Thus, a new theory has emerged, one posing an antinomy between private property and a free society and pitting property rights against so-called "people rights"—for example, the rights of landlords to select their tenants on whatever grounds they choose against the rights of tenants to "open housing," or the rights of landowners to build on their property against the rights of the public to enjoy views running over that property.[13] And let us be clear that this new theory is not simply a refinement of the old; it is not a theory, that is, that evolved by some natural course from

10 To say that the American legal order is grounded in a respect for property rights is not to say that those rights were consistently respected in practice. Indeed, almost from the outset the so-called "inherent power" concept of sovereignty began to whittle away the foundations. Nevertheless, until the spread of restrictive zoning following the decision in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), and the rise of environmental law more recently, these inroads on the traditional rights of property were relatively modest. On the earlier periods, see generally M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972).

11 In the discussion that follows, I concentrate upon the *a priori* justification of property rights, leaving it to economists and others to demonstrate that a society that recognizes such rights "works" (that is, is more efficient than one that does not recognize property rights).

12 *See* R. WEAVER, IDEAS HAVE CONSEQUENCES (1948).

13 This distinction between property rights and so-called "people rights" is spurious, of course. All rights are "people rights," in the sense that they are rights *of* people; and they are also property rights, in the sense that they are rights *to* property. Proponents of "people rights," after all, are advocating that (certain) people be given rights to have, or at least to use, property—property that otherwise belongs to others. When A is given the right to use B's property (in specified ways), he can be said to own that use. Certainly B can no longer be said to own it, for he can no longer exclude A or prevent A from exercising the right of use that A now has.

the thought of the Enlightenment, however gradually it may have insinuated itself into our law. Rather, it is a radical departure, for its concern at bottom is not with individual freedom but with so-called "collective freedom." Accordingly, it views private property not as a condition of freedom but as an outright impediment to freedom. Whether in its thoroughgoing form, in which *all* private property is at issue, or in its more modest proportions relating primarily to *uses* of property, it remains in principle the same: a theory that argues that private property is something not to be secured but to be abolished—or better, to be collectivized, thus ensuring freedom for all, the freedom of all to use that property. What is private is to be made public; uses that otherwise are individually determined are to be collectively determined—and hence to be politicized.[14]

In the broadest terms, these are the two theories about the connection between property rights and a free society that have sought the attention of the law for the better part of a century—the theory of private property and individual freedom, the theory of public property and collective freedom. What I want to do now is to look at these two theories a bit more closely and argue, again, that the traditional theory of classical liberalism, if not always well articulated, is fundamentally correct whereas the new theory, which draws an opposition between private property and a free society, is fundamentally mistaken. This new theory, that is, does not reflect the basic moral order. Thus, it should come as no surprise that when our law and legal institutions attempt to reflect this theory, the result is error, confusion, and disorder.

A. The Theory of Private Property

Again, the traditional theory holds that rights of private property, far from being antithetical to a free society, are at its very core;

14 The literature here is vast. For two recent philosophical statements of differing intensity, see N. BOWIE, TOWARDS A NEW THEORY OF DISTRIBUTIVE JUSTICE (1971); and K. Nielsen, *On Justifying Revolution*, 37 PHIL. & PHENOMENOLOGICAL RESEARCH 516 (1977); the latter calls for violent revolution to overthrow capitalism. For applications in the land use area, see THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH, A TASK FORCE REPORT SPONSORED BY THE ROCKEFELLER BROTHERS FUND (W. Reilly ed. 1973); and F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973).

In the property rights context, ordinarily understood, the redistribution of rights for which the modern theory calls is not so much from private person to private person as from private person to the public, or at least to specified classes of the public, as with renters in the case of rent controls, community residents in the case of zoning restrictions, or tourists and other interested parties in the case of coastal views. These do, then, become "public rights."

they both enable us to be free and define our freedom and hence the free society itself. That property enables us to be free was a point well understood by no less than Karl Marx and his followers; they argued that unlike the wealthy man, the man with little or no property could hardly be said to be free.[15] That, after all, is why most of us try to acquire property: so that we will have the freedom it affords. In thus stating the matter, however, Marxists glossed over a fundamental distinction, namely, that the poor man is *at liberty* to do what he wants even though he may be *unable* to do it. Nevertheless, they pointed to a basic ambiguity in the notion of "freedom," which they went on to richly exploit. That ambiguity, which upon reflection is hardly surprising, is that an individual can be said to be at once free and unfree: free from the interference of others, or *politically* free, as we would say, yet unfree in the sense just mentioned, unable to do what he wants to do. In emphasizing the latter, the "positive" sense of freedom, as it has come to be called, Marxists have tended to equate "freedom" with "power" and hence to ignore the political or "negative" sense of "freedom" that classical liberals had always sought to secure.[16] Nevertheless, our ordinary language does admit of this "positive" usage; thus the liberal cannot really argue that the Marxist is misusing the language. Nor should he rest his case on so slim a reed, especially when there are stronger ones nearby and when this distinction, taken by itself, seems to argue for redistributing property when doing so would enlarge freedom for all.[17]

As a theoretical matter, however, the more crucial function of property is to *define* our freedom—and, by implication, the free society itself. For when held as a matter of moral *right,* our property serves to delineate our moral relationships with each other and with the state.[18] It does this in the quite literal sense in which one person's rights and another's obligations begin at the same line. But it does so much more broadly as well, a point that is best appreciated when we notice that *all* rights, at bottom, are matters of property. John Locke, who more than anyone else, perhaps, can be said to have authored the American Revolution, put the matter

15 Like most points in Marx, this one is not made unambiguously. *See, e.g.,* Marx, *Economic and Philosophical Manuscripts,* in KARL MARX: SELECTED WRITINGS 79 (D. McLellan ed. 1977).

16 *See* Berlin, *Two Concepts of Liberty,* in I. BERLIN, FOUR ESSAYS ON LIBERTY 118 (1969). But see also MacCallum, *Negative and Positive Freedom,* 76 PHIL. REV. 312 (1967).

17 These points are more fully developed in chapter one of R. Pilon, A Theory of Rights: Toward Limited Government (1979) (Ph.D. dissertation, University of Chicago).

18 *Id.,* chs. 1, 2.

plainly: "Lives, Liberties, and Estates, which I call by the general Name, *Property.*"[19] To Locke, as well as to many others of the Enlightenment, everything in the world, including people and their actions, could be viewed as property and hence as objects of rights claims.

Now there are subtle and far-reaching implications in this property approach to ethics, which not even the classical liberals fully appreciated. For the moment, however, I will focus upon the matter of consistency, which later will bear importantly upon the taking issue. In a theory of ethics or law, consistency is imperative —especially when the theory purports to be grounded ultimately in reason, as English common law did for centuries.[20] For if a theory is inconsistent—if it yields conflicting rights, for example, and hence is contradictory—then to that extent it cannot be grounded in reason and so is not well justified. When we reduce rights to property, however, thereby tying the theory to the real world, we objectify it and hence improve immeasurably our chances of being consistent.[21] We do this because *there are no contradictions in the world*: There is only what is. Contradictions exist, when they do, only in our minds—as manifest in our theories, say, or in our values. And, indeed, it was precisely the genius of the common law jurists and the men of the Enlightenment that they saw, if only inchoately, that rights at bottom are *not* matters of subjective value or interest but matters of objective *property.* In drawing the connection between rights and property, they gave us a theory of ethics and law that was, for the most part, both objective and consistent.[22]

But was that theory correct? It is one thing to develop a theory of rights that is both objectively grounded and consistent, quite another to show that that theory is *justified.* On this score, regrettably, the men of the Enlightenment, and the Founding Fathers in particular, were at their weakest—not surprisingly, for the epistemological tools at their command were altogether prim-

---

19 J. LOCKE, THE SECOND TREATISE OF GOVERNMENT, § 123 (revised ed. P. Laslett ed. 1965) (emphasis in original); *see also id.* § 87.

20 *See* CORWIN, *supra* note 4, at 26: "Indeed, the notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law."

21 In thus objectifying and grounding rights in property, we still have to specify the "property" of the world—how it arises as private property, what in particular it encompasses, how it devolves, and much else. *See infra* notes 32-34 and the accompanying text.

22 These points are more fully developed in Pilon, *supra* note 17, ch. 2, and Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To,* 13 GA. L. REV. 1171 (1979).

itive.[23] Thus, their arguments from versions of natural law, although they persuaded many, did not stand the test of time. Today, for example, we can no longer get away with saying that our rights are justified because God-given—whereas other rights, presumably, are unjustified because not God-given—for there are well-known objections to that line of argument.[24] But neither can we view our rights as justified because assigned by the sovereign, as is often done, at least by implication, in the modern legal and economic literature; for legal positivism is no more an ultimate justification than theological positivism.[25] This is not to say, of course, that the rights of theology or of legal positivism are not in fact *justifiable*; it is to say only that these lines of argument will not do the job of justifying them.[26] What is called for instead is an account whereby our rights are derived not as a matter of will—divine or political—but as a matter of reason, an account such as Locke[27] only adumbrated and Kant[28] developed a bit more fully. That work is proceeding today in philosophical circles, and not without results.[29]

In general, the idea is to show that certain rights must be accepted as justified such that to deny that individuals have them is to contradict oneself. This strategy was always implicit in various formulations of the Golden Rule, but it was never developed with anything like the requisite detail.[30] Some of the work going on today, however, is aimed at setting forth that detail and, in particular, at showing that rights are grounded in the normative

---

23 It was not until David Hume, for example, who died in the year America was born, that we came to appreciate the "is-ought" problem, the point that normative conclusions cannot be derived from factual premises. *See* D. HUME, TREATISE OF HUMAN NATURE 469-70 (reprint ed. 1888). *Cf.* Locke, *supra* note 19, § 6; Gewirth, *The Is-Ought Problem Resolved*, 47 AM. PHIL. ASSOC. PROCEEDINGS AND ADDRESSES 34 (1974).

24 The king, after all, invoked the divine right thesis in support of conclusions quite opposite to those of his opponents. The argument from theological considerations was not the only form of the natural law argument, of course. But those other versions have likewise fared ill against the criticisms of modern epistemology. *See* Pilon, *supra* note 4, at 1333-34; Veatch, *Natural Law: Dead or Alive?*, 1(4) LITERATURE OF LIBERTY 7 (1978).

25 This line of argument usually seeks its support in a background theory of political legitimacy. But here, too, there are well-known objections. *See, e.g.*, R. P. WOLFF, IN DEFENSE OF ANARCHISM (1970); Riker, *Implications From the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432 (1980).

26 For fuller discussions of these issues, see Pilon, *supra* note 4; L. BECKER, ON JUSTIFYING MORAL JUDGMENTS (1973); A. GEWIRTH, REASON AND MORALITY 1-47 (1978).

27 *See* LOCKE, *supra* note 19, §§ 5, 6.

28 *See, e.g.*, I. KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS (H. Paton trans. 1964).

29 *See, e.g.*, GEWIRTH, *supra* note 26; A. DONAGAN, *THE THEORY OF MORALITY* (1977); R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

30 *See* M. SINGER, GENERALIZATION IN ETHICS (1961).

claims inherent in the basic subject matter of ethics—human action.[31] This normative theory of action is then connected with or explicated over an entitlement theory of distributive justice that characterizes the world in terms of holdings or property and goes on to explain how those holdings arise or come to be attached to particular people or institutions, either legitimately or illegitimately.[32] To be legitimately held or owned, property must have been acquired without violating the rights of others. In the case of their own persons and labor, for example, individuals acquire title by a certain "natural necessity," as it were, along the lines of the theory of action just mentioned. With respect to the more ordinary kinds of holdings, something might have been acquired from the state of nature, in which it was unheld; more likely, it might have been acquired from someone else who held it legitimately, either in exchange for something else or as a gift; or it might have been acquired from someone else or his agent in rectification for some past wrong by that other.[33] Thus, in general, do holdings and rights to the exclusive possession and use of those holdings arise legitimately. By contrast, things are held illegitimately when they are taken by force or fraud from those who hold them legitimately —that is, when they are taken without the voluntary consent of those who rightly hold them. When what is ours has been taken without our consent, our basic right to be free from interference in our persons and property has been violated. At bottom, then, rights violations are *takings,* which means that to be clear about them we must be clear, first, about what is held and then taken and, second, about the causal process by which those holdings are taken. These are very large subjects, but both bear crucially upon the current taking issue, as we will shortly see.[34]

---

31 *See especially* GEWIRTH, *supra* note 26.

32 The entitlement theory of property stems from NOZICK, *supra* note 29, at 149-82.

33 For an account of justice in rectification in the area of torts, see the following, all by Richard A. Epstein: *Pleadings and Presumptions,* 40 U. CHI. L. REV. 556 (1973); *A Theory of Strict Liability,* 2 J. LEGAL STUD. 151 (1973); *Defenses and Subsequent Pleas in a System of Strict Liability,* 3 J. LEGAL STUD. 165 (1974); *Intentional Harms,* 4 J. LEGAL STUD. 391 (1975). In the area of criminal law, see Pilon, *Criminal Remedies: Restitution, Punishment, or Both?,* 88 ETHICS 348 (1978).

It is often easier to state the outlines of this theory than to apply it in particular historical contexts, where the legitimacy of the titles that are transferred from time to time may be uncertain or dubious. Whereas the theory presumes that we start with a clean moral slate, history provides us with such a slate only more or less.

34 For discussions of property held, and the causal processes by which property is taken, see Pilon, *supra* note 17, ch. 3; and Pilon, *supra* note 22. For a substantial application of this background theory, see Pilon, *Corporations and Rights: On Treating Corporate People Justly,* 13 GA. L. REV. 1245, 1269-1365 (1979). I have tried in these works to integrate a

With this, the sketch of the traditional theory is completed. As can be seen, it is a theory of justice as *process,* not a theory of justice as result or end-state.[35] Whatever property distribution has justly arisen is justly held, even though the distribution may be unequal or may reflect the many fortuitous factors that entered into its development. On the traditional view, then, the free society is a society of equal *rights*: stated most broadly, the right to be left alone in one's person and property, the right to pursue one's ends provided the equal rights of others are respected in the process, all of which is more precisely defined by reference to the property foundations of those rights and the basic proscription against taking that property. And the free society is also a society of equal *freedom,* at least insofar as that term connotes the freedom from interference that is described by our equal rights. But the free society is *not* a society of equal freedom insofar as that term connotes the liberty or power that comes from property ownership. For in the free society there will be powerful and weak, rich and poor, haves and have-nots, reflecting everything from industry and ingenuity to our luck in the lottery of life.

B. The Theory of Public Property

The final point—that the free society is not a society of equal freedom, defined as power—is precisely the rub that gives rise to the new theory of property and a free society. On this view, recall, private property is seen not as the foundation of our individual rights but as an impediment to our freedom—more precisely, though not always stated this way, as an impediment to our "collective freedom." For the property rights of some stand in the way of others' doing what they wish with that property—whether renting it at will, or at a controlled price, or determining the numbers or kinds of structures that can be built upon it, or enjoying the view it affords, or whatever. Exponents of this position, in fact, find it quite comfortable working in the collective idiom, as when they ask, for example, what "we" should do about planning the future of "our" region, thereby disparaging, by implication at least, the property rights that might stand in the way of such central planning. In order to increase freedom or power for all, this theory

number of partial accounts of the theory of rights, especially those by Gewirth, Nozick, and Epstein, making corrections where necessary and constructing new arguments where spaces remained in the overall theory.

35 *See* NOZICK, *supra* note 29, at 153-60.

calls for taking freedom or power from some. Thus, the aim of the theory is to redistribute freedom, defined as power, by redistributing property. In its modest form, the theory calls for transferring only certain uses of property—from those who own the property to those who do not. In its more far-reaching forms or applications, the theory calls for transferring property itself. And in its egalitarian form, the theory advocates measures to bring about equal freedom, understood as equal power and hence as equal property which might then be individually or, more likely, publicly held. It is important to recognize, however, that in principle there is no end to this process of redistribution, for not only does the world not stand still, especially in the face of fortuitous events, but power is every bit as much a function of the property we possess in ourselves and our talents as it is a function of the property we possess in the world.[36] Accordingly, to bring about a state of equal power, we have to take not only others' property, narrowly understood, but their persons and talents as well. We have to *use* others, in short, and all in the name of justice.

Now it should be noticed that as a distributional matter the new theory is perfectly consistent: The new rights it "discovers" supplant the traditional rights it extinguishes. Thus, it cannot be charged with yielding conflicting rights and hence with ending in contradiction—not at this level of analysis, at least. Where it goes wrong instead is both at the practical level and at the level of basic moral theory. I have just mentioned one of the practical difficulties, namely, that the redistribution the theory requires is an endless task, requiring an endless series of redistributors whose mission, in principle, will be to reach into every facet of our lives that would make for unequal power and hence for unequal freedom. Information costs alone suggest the practical impossibility of ever constructing such a Leviathan,[37] which is not to say that much damage will not be done in the attempt. Yet when redistribution proceeds not from person to person but from person to public, as is common in the case of land use restrictions, here too the practical problems are immense—not simply the problems of ensuring and encouraging economic efficiency, defined as a measure of so-called "social wealth," but the problems of use or rights of

---

36 For an eighteenth-century statement of this point, see D. HUME, ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 194 (H. Aiken ed. 1948).

37 *See* Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945); 1 F.A. HAYEK, LAW, LEGISLATION, AND LIBERTY 11-15 (1973).

use. Individually held property is used at the will of the owner, by right of the owner. The analogy to collectively held property breaks down, however, as soon as we realize that our collective rights over the property are informed by a collective will that simply does not exist.[38] Whether the Public Broadcasting System should air opera or baseball and whether Yosemite National Park should admit recreational vehicles or backpackers only are not idle questions. And when we turn to the democratic device to try to settle how "we" should use "our" property, we face the notorious fact that that device rarely yields a majority preference, an embarrassment of no small proportions for proponents of the new theory.[39] Morevover, even if a majority preference were produced, the democratic device suffers from the further embarrassment of being unable to recognize the rights of the minority over what is, after all, "their" property.

This leads us to a few of the more obvious moral difficulties of the new theory, which promises liberty or power for all but ends, as it must, by giving power to some, which it can do only by taking power from others. This point holds with respect to decision making over collectivized property, as just noted; and it holds *a fortiori* with respect to the initial collectivization and redistribution of property. For in those initial steps, the individual whose property is taken is simply *used.* This is patent in the far-reaching versions of the new theory, which argue for the literal use of individuals and their efforts: sending students to the cane fields, for example, or doctors or lawyers to do *pro bono* work. But the same objection applies to the more modest versions, which call for using only the individual's property, ordinarily understood. For that property represents past efforts, which are used by that expropriation every bit as much as present efforts are used by the conscription of labor. In the name of "collective freedom," then, we end up with anything but a free society. And in all of this, let us be clear, the justificatory argument is positively primitive. At best we are told that "need" or "want" entails "is entitled to," concerning which one need simply note that the logical gap is yawning—certainly in contrast with the gap in the traditional theory between "freely acquires" and "is entitled to." In short, the new theory has located

---

38 *See, e.g.,* J. HOSPERS, LIBERTARIANISM 81-94 (1971); Anderson, *Cost-Benefit Analysis for Government Decisions-Discussions,* 57 AM. ECON. REV. PROCEEDINGS 101, 105-07 (1967).

39 *See especially* Riker, *supra* note 25. *See also* WOLFF, *supra* note 25, at 58-67.

no real support at all in moral theory; on the contrary, it has been shown to be utterly immoral.[40]

III. The Taking Issue

Notwithstanding its many difficulties, both practical and moral, the modern theory of public property, especially as it involves public rights over nominally private property, has found its way into vast areas of our law. Not surprisingly, the practical and moral difficulties that plague the theory in the abstract do not disappear when the theory is put into practice in the world. In this part of my discussion, then, I will try to show how the traditional theory of ethics and law sorts out a few of the problems that are the concern of the new law, giving principled solutions to the conflicts raised by that law, all of which will lead ultimately to the taking issue.

A. Procedure and Substance

The place to begin is with a few of the complex but critical procedural matters and, in particular, with a brief look at how procedure and substance go together on the traditional view. As a substantive matter, recall, the classical theory of rights argues that generally related individuals have a right to pursue their ends, individually or collectively, provided only that in doing so they respect the equal rights of others—that is, that they not take what belongs to others, whether lives, liberties, or property. This means that as between strangers, we can use our property however we wish and the burden falls upon others to show that particular uses violate their rights by taking what is theirs. As a procedural matter, that is, there is no general obligation to obtain the permission of others before we act or even an obligation to seek that permission—*e.g.*, to demonstrate the "feasibility" of our acts. For were there such obligations, this would amount to there being a preemptive right of those to whom the demonstration had to be made to *prevent* us from acting, a logically prior right to interfere with the performance of those acts by refusing permission, with or without cause, when in fact it is acts of *interference* that must be justified, not action per se. And acts of interference are justified only *with* cause—*e.g.*, to prevent other acts of interference. (Acts of "in-

40 *See, e.g.*, Nozick, *supra* note 29, at 167-74.

terference" are also justified when the interference does not amount to a taking of wholly owned property, as in the view and competition examples I will develop shortly.)

This result, however, presupposes a world of perfect information, which of course is not the world in which we live. It is not always clear, for example, whether given acts interfere in such a way as to constitute a rights violation or, if they do, whether they do so with cause and hence do not amount to a rights violation. Accordingly, within certain limits we allow individuals to interfere with others as a *procedural* matter: We recognize procedural rights, that is, rights that allow particular individuals—along with the rest of us—to determine whether other individuals are, in fact, interfering with them as a *substantive* matter and, if so, whether those others have a substantive cause for thus interfering. In other words, ordinarily, general substantive rights are simply *exercised*; when they are *asserted*—if they are—it is usually *defensively* ("What right have you . . .?"), by way of calling for the warrant for an actual or anticipated and, presumably, unjustified interference of another.[41] Only thus does the *dispute* between the parties get off the ground, a dispute that the procedural rules help to sort out. It is important to notice, however, that even though the acts complained of may indeed turn out to be unjustified acts of interference, the *initial* burden of proof rests with the party who asserts the procedural right to interfere with those acts, not with the party whose acts may be interfering as a matter of substance.[42] And that burden, on the classical theory, is one of showing that the acts complained of do, in fact, interfere as a matter of substance by taking something wholly owned by the complainant. Once that burden is discharged, however, once the complainant (or plaintiff) makes out a *prima facie* case by showing that the acts of the other do in fact interfere in the requisite way, he thereby demonstrates his substantive cause of action—he justifies *his* in-

---

41 *See* Hart, *supra* note 4, at 187-88.

42 "Burden of proof" is used here in a less than strict juridical sense. In the ordinary juridical context, the plaintiff is asking the court to intercede on his behalf; thus the burden of proof is discharged *to* the court. In the text, however, I do not mean to move to the juridical context just yet; rather, I simply want to indicate at what point or how the initial *justificatory* burden arises, even if we were in, say, a state-of-nature context, where presumably that burden would be owing to the party whose interference, actual or anticipated, is being called into account. Here again, not only at the substantive but at the procedural level as well, our law ought ideally to reflect the moral order. We are very far, however, from having a well-worked-out theory of state-of-nature procedural justice.

terference—and the burden shifts to the other party to show why *his* interference may be justified.[43]

In general, then, this is the way in which procedure and substance go together on the traditional view. Now I raise these issues because they are not always clearly articulated as they apply to the matters before us. In particular, procedural criticisms are sometimes advanced when substantive criticisms are really in order. In the case of restrictive zoning, for example, it is not so much that the burden of proof has shifted in this century from legislatures or municipalities to the individuals restricted, as some have suggested.[44] For with *any* legislation thought to be illegitimate, the initial burden to make out a *prima facie* case will rest with the individual upon whom the legislation falls. As a procedural matter, it does not fall to the legislature to justify its enactments before enacting them, any more than individuals have to justify their actions before performing them; rather, those enactments are justified, if at all, in the adversarial context, which arises only when someone challenges them.[45] Where the problem *has* arisen in this century, however, is at the *substantive* level. The burden of those who have sought to overturn restrictive zoning, for example, has been made onerous and often impossible to discharge not because courts presume exercises of the police power to be reasonable but because "reasonable," as a *substantive* matter, has been so broadly and variously interpreted.[46]

---

43 For a discussion of several of these issues, see Epstein, *Pleadings and Presumptions, supra* note 33.

44 *See, e.g.*, Johnson, *Planning Without Prices: A Discussion of Land Use Regulation without Compensation*, in PLANNING WITHOUT PRICES 63, 70 (B. Siegan ed. 1977):

> In effect, the "reasonableness" of the legislature's actions falls under the due process clause; and, under recent interpretation of that clause, anything the legislature does is reasonable unless someone can show the contrary. The burden of proof has shifted from the legislature to the individual.

See also Siegan, *Editor's Introduction: The Anomaly of Regulation under the Taking Clause*, *id.* at 17:

> The courts will presume that the ordinance adopted by the locality is a reasonable exercise of police power, and the burden is on the challenger to prove otherwise. "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." (quoting Speiser v. Randall, 357 U.S. 513, 525 (1958)).

See also Siegan, *id.* at 56 n.84.

45 This discussion assumes the straightforward case in which an individual plaintiff brings suit to invalidate a legislative enactment. In the more complex case, in which the municipality brings suit to enforce a legislative enactment against an individual defendant, the municipality is the plaintiff and must make out the *prima facie* case, which it does simply by showing failure to comply with the statute. To show that the statute is invalid, the defendant must then offer an affirmative defense, showing that the statute amounts to an unjustified interference, as indicated earlier.

46 *See, e.g.*, notes 51-53, *infra*.

Perhaps these points could be sharpened as follows. It might be thought that courts should presume nothing when cases are brought before them. In truth, however, there is always a background presumption, namely, that the defendant—the legislature in this case—is "innocent," that it acted legitimately, that it acted within the law. (Assume for the present that the background law is clear.) It is the plaintiff's burden, then, to overcome that presumption, to show that in fact the legislature did not act within the law, just as he would have to do against any private defendant.[47] But this is a *substantive* matter, accomplished, if it is, in light of the facts and the law in the case. The plaintiff makes out his *prima facie* case, that is, not simply against some formal presumption of reasonableness or innocence but in light of the facts and against the background law that informs that presumption. If it happens, however, that the court has imbued its presumption with certain substantive colorations of its own making—as the opinions often bring out[48]—then the plaintiff's argument must appeal not simply to the facts and the law of the case but to the court's substantive constructions as well. In that event, the plaintiff may indeed have an onerous burden to overcome—depending upon the exact presumptions the court has made. That burden, however, will be a function of *substantive,* not procedural, considerations. In introducing substantive presumptions of its own, the court will have introduced new law, which it is now the burden of the plaintiff to overcome, if he can.

Ultimately, then, it is to the substantive issues that we will have to look if we are to clarify the many uncertainties that have surrounded our property law in this century.[49] Now in the preceding remarks on the procedural issues, I have simply assumed that the background substantive law on these matters was clear. In fact, it seldom is. This is especially true in the case of the police power doctrine, which of course is nowhere to be found in our Constitution.[50] And indeed it is through this doctrine in particular, especially in the case of zoning or other forms of land use regulation,

---

47 *See* note 45, *supra.*

48 *See* notes 51-53, *infra.*

49 Once again, it is not in this century alone that these uncertainties have arisen. *See* note 10, *supra.*

50 Indeed, the police power doctrine owes its construction to a series of nineteenth-century cases that introduced it in the course of working out a theory about the attributes of sovereignty, especially as this involved the power of eminent domain. *See, e.g.,* E. FREUND, THE POLICE POWER (1904); Corwin, *The Doctrine of Due Process of Law before the Civil War,* 24 HARV. L. REV. 366 (1911).

that the new law has most often been introduced. In presuming legislative enactments to be reasonable exercises of the police power, that is, rather than defer, by way of explicating this presumption, to the background law alone—and in particular to the classical theory of rights as this stands behind the Fifth, Ninth, and Fourteenth Amendments, which of course *are* in the Constitution—the courts have increasingly understood "reasonable" in a broad policy sense, which has enabled them to rewrite our law as a function of the pursuit of policy. Sometimes they have done this rather more by default, by way simply of a broad definition of the police power, which has enabled the legislature to do the more particular rewriting of the law.[51] On other occasions, however, the courts have themselves developed the particulars of policy by asking not the principled question—"What are the *rights* in this case?"—but the evaluative question—"What is a 'reasonable' balancing of interests, or a 'reasonable' trade-off of costs and benefits?"—which they have decided by reference to their own utility schedules.[52] In the first instance, the courts seem to have con-

---

51 *See, e.g.*, Mid-Way Cabinet Fixture Mfg. v. County of San Joaquin, 257 Cal. App.2d 181, 186, 65 Cal. Rptr. 37 (Sup. Ct. 1967):

> Theoretically, not superimposed upon but coexisting alongside the power of eminent domain is the police power, unwritten except in case law. It has been variously defined—never to the concordant satisfaction of all courts or legal scholars—and frequently it has been inconsistently applied by different courts;... sometimes, to our belief, by the same court, the police power is described more readily than it can be defined. It has been said to be no more "than the powers of government inherent in every sovereignty ... the power to govern men and things within the limits of its dominion.

For an opinion that fairly invites the rewriting of law by the legislature, there is the dictum of Justice Douglas in Berman v. Parker, 348 U.S. 26, 33, 35, 36 (1954):

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive.... 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....
>
> Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.

52 *See, e.g.*, Lionshead Lake v. Township of Wayne, 10 N.J. 165, 173, 89 A.2d 693, 697 (1952):

> Has a municipality the right to impose minimum floor area requirements in the exercise of its zoning power? Much of the proof adduced by the defendant Township was devoted to showing that the mental and emotional health of its inhabitants depended upon the proper size of their homes. We may take notice without formal proof that there are minimums in housing below which one may not go without risk of impairing the health of those who dwell therein.... But quite apart from these considerations of public health which cannot be overlooked, minimum floor-area standards are justified on the ground that they promote the general welfare of the community....

For egregious cases of the pursuit of policy through the courts, see the so-called "exclu-

strued police-power questions as, in essence, questions of policy and hence as not for them to decide, thinking perhaps that the legislative enactment already reflects a utilitarian calculus arrived at through political consensus.[53] In the second instance, they have construed police-power questions identically but have had no reservations about deciding the policy issues themselves. On the one hand, the courts have abdicated their function of deciding cases on the law; on the other, they have done what they have no business doing. Thus does policy triumph over justice, whether pursued by the legislature or by the courts; for in either case the policy considerations through which the modern theory of property has worked its way into our law have led to the extinction of many of our traditional rights.

B. The Declaration of Independence and State-of-Nature Theory

In order to clarify the substantive issues before us, then, we are going to have to clarify the nature and scope of the police power, at least at a general level. More precisely, we will have to discover how the police power arises and functions within the context of the classical theory of rights. Within that context, clearly, police-power questions are *not* questions of policy, at least not fundamentally. In the end, that is, the issues these questions raise are not issues to be decided simply by asking what "we" should do in pursuit of certain "social goals"—as though society were a single actor seeking to maximize its welfare according to some cost-benefit analysis. Rather, the police power, if it is to be legitimate, must itself flow from and be justified by the theory of rights; and it must be exercised within the constraints set by that theory. For if governments are indeed instituted among men to secure their rights, then even that policy of securing rights, and the power that attends it, must conform to the constraints set by those rights.

But an inquiry into the police power is, of course, an inquiry into the foundations of sovereignty—hence, into the fundamental roots of political authority. In the American context, this brings us face to face with state-of-nature theory and, in particular, with the

---

sionary zoning" cases: for example, Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

53 *See, e.g.*, Miller v. Board of Pub. Works, 195 Cal. 477, 491, 234 P. 381, 385-86 (1925).

objections from anarchism.[54] So profound are those objections that no one to date has succeeded in meeting them at a basic level.[55] In the absence of primordial unanimous consent, that is, which of course has ever been a fiction, or short of a satisfactory invisible-hand theory of political legitimacy,[56] we are left with mere consequentialist arguments[57] and, indeed, with the conclusion that was held by many in the eighteenth century, namely, that far from being a fundamentally legitimate institution, the state *cannot* be justified in any ultimate sense, that it is a forced association, an expedient only, constituted because of the profound *practical* problems of individual self-rule in a state of nature—and constituted in violation of the rights of those who would choose not to enter into the association.[58] Running through the state at its very core, then, is a fundamental air of illegitimacy, creating a strong presumption against doing things through government. Because of its inherently coercive nature, the state is ill suited to be an institution through which to pursue good—contrary to the view so prominent in the twentieth century. Rather, it is an imperfect institution constructed to prevent evil, to which powers are to be given with the greatest of caution and mindful always that those powers are exercised with less than unanimous consent and, indeed, contrary to the wishes of many. For however elegant our social-contract theories of hypothetical consent may be, in the end

---

54 See *supra* note 4 and the accompanying text. It should be mentioned that state-of-nature theory does not presuppose that anything like a state of nature ever existed in historical fact—although early America, setting aside the problem of the Indians, closely resembled this theoretical starting point. Rather, the state of nature is a theoretical posit, intended simply to help us get a clearer picture of the moral world generally and of the political world in particular.

55 *See especially* WOLFF, *supra* note 25.

56 This was Nozick's strategy in his heroic attempt to overcome the anarchist's objections. *See* NOZICK, *supra* note 29, part I. I have criticized that argument in Pilon, *supra* note 17, ch. 4.

57 Consequentialist arguments, such as utilitarianism, appeal ultimately to subjective values rather than to principles of reason; thus they have located no real epistemological support.

58 Notice that a common objection to this line of argument will not work, namely, that the individual who would choose not to enter into the political association is always at liberty to leave. (This is the "love it or leave it" objection, which leads to the argument for political obligation from "tacit consent"—"You stayed; therefore you consented to be ruled"—which can be found at least as early as Plato's *Crito*.) For the issues of political authority cannot be argued by analogy to the authority of a private association, which one may or may not join. Rather, the issue is whether one may rightly be put to the choice: "Join our association and live by its rules (for example, yield up your rights of self-enforcement) or leave where you are, for where you are is to come under our rule." By what right does the group put the individual to a choice between two of his entitlements—his right not to associate and his right to stay where he is?

they are second-best arguments, attempting to make palatable, or even attractive, what at bottom cannot be justified.[59]

Nevertheless, we do live with the state, and we do construct second-best theories aimed at justifying various of its powers. We construct theories referring to the good consequences that ensue from the state's having those powers, for example, which in truth are third-best theories and hence are hardly adequate at all, owing to the well-known problem of the incommensurability of interpersonal comparisons of utility.[60] And again, we construct justificatory theories referring to hypothetical consent, to the rights that we *would* choose to yield up to the state to be exercised by it—if we were "rational" or "prudent" individuals. A fundamental point in the more thoughtful versions of the argument from hypothetical consent, then, is simply this, that we cannot yield up to the state rights that we do not first *have* to yield up. Thus, in order for a particular power of the state even to be a *candidate* for legitimacy, it is necessary that that power have been held first as a right by individuals in the state of nature such that they had the right to yield up at all, quite apart from whether they ever did. In this fundamental and limiting way, then, does moral theory serve as the background for political and legal theory.[61]

C. Eminent Domain

Nowhere are these several points more sharply illustrated, perhaps, than in the case of eminent domain, the "despotic power" as it was often called in the eighteenth and nineteenth centuries. For in exercising this power against an unwilling individual, the state simply *takes* private property for public use. The association is forced and blatant, and no amount of compensation to the victim will alter that fact when he is unwilling to part with his justly held property. As a matter of fundamental moral theory, then, there is no justifying this power. It cannot be justified in particular applications for the reasons just cited. And it cannot be justified in general for the reasons mentioned earlier: First, no primordial unanimous consent to be ruled under this power can be located

---

59 The most elegant attempt of this kind to come forth recently is from John Rawls, A THEORY OF JUSTICE (1971).

60 *See also* note 57, *supra*.

61 *See* NOZICK, *supra* note 29, at 6: "Moral philosophy sets the background for, and boundaries of, political philosophy. What persons may and may not do to one another limits what they may do through the apparatus of a state, or do to establish such an apparatus."

—much less a consent that binds heirs; and second, because there is no *private* right of eminent domain, there could hardly be a *public* right either, for, again, individuals cannot give to the state rights they do not first have to give.[62] What justification the power of eminent domain enjoys, then, must be taken from considerations of necessity, which are compelling only in exceptional cases and never from considerations of right. In those cases, moral theory requires, as a matter of simple justice, that whatever inroads the state must make on private rights must be accompanied by just compensation, compensation that in truth should reflect not only the physical but the moral facts of the matter as well. Given these moral facts about the power of eminent domain, then, there exists a strong presumption *against* its use and, once the burden has shifted to the state, a heavy burden of proof before it is used.

D. The Police Power

When we turn to the police power, however, the issues are slightly different. Here too, of course, there is no unanimous consent to which to point to justify the exercise of this power by the state. Nevertheless, police power *can* be justified as a *private* right; in the state of nature, that is, individuals *do* have rights of self-enforcement; hence, in theory, at least, these rights might have been yielded up to the state to be exercised *by* the state on behalf of its members. (Thus do governments derive their just powers from the consent of the governed.) Now again, no such unanimous consent can be located as a matter of historical fact; at best, if we are in a republican democracy, we can point to imperfect consent given through surrogates. Nevertheless, in the case of the police power, unlike that of eminent domain, there *is* a legitimate power to yield up, quite apart from whether it was ever in fact yielded. Accordingly, save for the problem that we did not all ask the *state* to exercise the police power for us, that power is otherwise legitimate.

This much, of course, addresses the theoretical *foundations* of

---

62 Notice that primordial unanimous consent *would* entitle the state to take private property for public purposes (with or without compensation), at least if we set aside the problem of heirs. That power of the state would be legitimate, but it would *not* be the power of eminent domain, for the prior consent would make the whole arrangement contractual.

the police power. But it also provides an insight into its legitimate *scope* and hence into the taking issue itself. For if the police power has its origins in the enforcement rights of the individual, then that power, if it is to be exercised legitimately, can be no more broad than those original rights. Setting aside the consent problem, that is, the state can do no more *by right* than any individual could rightly do in a state of nature. For again, where would the state get such rights if not from the individuals who constitute it? Indeed, precisely here, in its legitimate foundations, are the legitimate boundaries of the police power.

E. Takings, Legitimacy, and Compensation

In general, then, and arguing by analogy from the case of eminent domain, the basic taking question—"When is the state required to compensate those it regulates?"[63]—can be answered as follows. First, when the activity prohibited is a rights violating activity, no compensation is required, for the activity is illegitimate to begin with. Second, when the activity is legitimate, the state has no right to prohibit it. But, third, when the state does prohibit such an activity anyway, in order to achieve some "public good," then it is required to compensate those from whom the rightful activity was taken, every bit as much as in eminent domain. And in all of this, the same presumptions and burdens of proof should obtain as apply in eminent domain.

Thus, in the end, the question whether prohibitory regulations are "takings" is really quite irrelevant; for *all* prohibitions are takings—of activities otherwise possible and hence otherwise "held" by those who hold the material conditions that make them possible.[64] The landowner who is prohibited from building on his land, for example, has had that use taken from him. But likewise, the gun owner has certain uses taken from him by the criminal code that prohibits those criminal uses. In the first case, compensation is owing, for the state has no right to take justly held property, including justly held or legitimate activities. In the second case,

---

63 *See* note 64, *infra.*

64 I am arguing, therefore, that the usual "taking question" ("When does a regulation go so far as to amount to a taking and hence require compensation?") is fundamentally misstated. For if *all* prohibitions are takings, then the real question is how to distinguish legitimate from illegitimate takings—which is *not* a matter of degree, of the "extent" of the regulation, but a matter of kind. And *this*, in turn, will answer the question about when compensation is owing.

however, no compensation is owing, for the criminal use of the gun is illegitimate to begin with and hence can rightly be prohibited or taken by an exercise of the police power.

When we apply these findings to various of the regulations that constitute our current property law, we discover that many of those restrictions are illegitimate as a matter of right and hence should be abolished.[65] Failing that, those restricted should at least be compensated for the uses prohibited to them and hence taken from them. For if some "public good" is indeed achieved by those restrictions—if a scenic view, for example, is a public good—then let the public pay for that good rather than take it from some individual member of the public.[66] Similarly, except when issues of endangerment arise,[67] regulations of lot sizes, set-back requirements, or restrictions on types of construction are all illegitimate. For the prohibited uses, were they permitted, would take nothing that belongs to others and hence would violate no rights. We have no rights to preserve particular neigborhood styles, for example, not unless we create those rights through private covenants. Likewise with rent controls or antidiscrimination measures: private individuals have a perfect right to offer their properties for sale or rent to whomever they choose at whatever prices they wish. For neither discrimination, on whatever grounds, nor offers, of whatever kind, can be shown to take what belongs free and clear to others; opportunities that depend upon the holdings of others, though perhaps measurable as a matter of *costs,* are not themselves freely held and hence are not objects of *rights.*[68] Again, not even regulations that preserve private views can be justified if those regulations prohibit activities otherwise legitimate. For a view does not "belong" to someone unless he owns all the conditions of the view; views that run over the proper-

65 I speak here of "restrictions," although many regulations set requirements or affirmative duties. In that case, of course, the burden may be even more onerous, for the individual is then required to contribute to the "public good" not simply with his omissions but with his substance as well, when the omission to do so might otherwise be perfectly legitimate. I have discussed the issue of negative and positive duties at some length in Pilon, *supra* note 17, ch. 1.

66 This is, of course, the welfare state idea in reverse. Rather than being transferred from the many to the few, wealth is flowing from the few to the many. The public, in short, is *using* those individuals from whom it takes to enrich itself, as brought out in the earlier discussion.

67 The normative issues of endangerment, like those of nuisance, are extremely complex. For the broad outlines of the endangerment issue, *see* Pilon, *Corporations and Rights, supra* note 34, at 1333-35.

68 On discrimination, see *id.* at 1327-31. On opportunities, see *id.; see also id.* at 1277-84.

ty of others, even lovely ones, are not "owned" but are merely "enjoyed" at the pleasure of those others, who have a perfect right to block them by exercising any of their own freely held uses. In general, whether it is a view, a certain neighborhood style, or whatever, these and other such goods have to be wholly owned in order to be secured as a matter of right. Asking the government to step in to fully secure these goods is nothing less than acquiring them by taking what rightly belongs to others. If the individual has no right to do this on his own, then he has no right to do it through the government.

F. Sources of Confusion

If the broad lines of the taking issue are this straightforward, why has so much confusion surrounded it? There are at least two reasons, I believe. First, the language of the Fifth Amendment, around which the discussion revolves, is less than complete, like so much else in the Constitution. In particular, it seems to require either a narrow interpretation, in which property taken is limited to physical property proper, or the broad interpretation of Locke and others, in which property includes not only physical property but liberties or uses of property as well. On the narrow interpretation, property could be rendered all but useless by regulation and yet no compensation would be owing, the absurd result advocated by some today.[69] But on the broad interpretation, at least if we limit ourselves to the Fifth Amendment, the state would have to compensate murderers, muggers, and others for any restrictions it imposed upon "their" activities, which is equally absurd. Yet those are the polar positions we get when we focus exclusively upon the text of the taking clause. This dilemma will be resolved, let me suggest, neither by "balancing" values or costs in particular cases, whatever that may ultimately mean,[70] nor by any other form of economic analysis, but only by going behind the Constitution to the moral theory that informs it.

A second reason for the confusion surrounding these general matters, I believe, is that the criteria for required compensation are often uncertain in *specific* cases, and that in turn vitiates our *general* view of the matter. Nowhere is this more clear, I submit,

---

69 *See, e.g.*, Reilly, *supra* note 14; BOSSELMAN, CALLIES & BANTA, *supra* note 14.

70 Once again we are up against the incommensurability of interpersonal comparisons of utility.

than in the economic treatments of the subject, especially as they relate to so-called externalities. Methodologically reluctant to turn to normative criteria, and rarely distinguishing deontological from evaluative criteria, or rights from values, the economist turns instead to considerations of efficiency, as in the well-known Coasean account,[71] which is translated as *social* wealth maximization on the Posnerian view.[72] Now as a matter of pure economics, of course, the class of externalities need not be limited to the standard nuisances.[73] Why not restrict First Amendment activities, for example, if they offend and hence are costly to others? And, indeed, if all is reduced to costs and benefits alone—and hence, let us be clear, to subjective value—the answer appears to be: Indeed, why *not* restrict First Amendment activities when they offend?

The traditional theory of rights explains "why not," I submit, and does the further job as well of fleshing out the issues in even the troublesome nuisance cases. More fully, the generative, causal, consistency, and property theories that constitute the theory of rights all serve to sort the issues out in a morally principled way, which a theory of value—including a theory of economic value—has as yet been unable to do. None of these constitutive theories can be developed here, of course, but I do want to give a glimpse, at least, of the kind of thing I have in mind. The basic idea is this: The generative theory of action yields rights claims and shows in the process that ethics is fundamentally causal, concerned with which actions do what to whom and, in particular, with which actions take what from whom, all of which is fleshed out as a descriptive account of property rights and all of which, if it is to conform to canons of reason, must yield a consistent set of rights. Thus, in general, do each of the constitutive theories go together. Again, it is takings of wholly owned property that constitute rights violations. Thus, the theory must yield an account both of wholly owned property and of wholly owned property rights, which it does at a generic level, from which more specifically described rights are derived deductively.

These generic rights are rights to be left alone, or passive rights of quiet enjoyment; rights of action, or active rights, provided again that others are left alone; and rights of association or con-

71 Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

72 *See especially* Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). I have criticized these views in Pilon, *supra* note 4, at 1355-38.

73 *See, e.g.*, Moore, *An Economic Analysis of the Concept of Freedom*, 77 J. POL. ECON. 532, 536 (1969); and Johnson, *supra* note 44, 74-83.

tract. These overarching rights and their specifications exhaustively describe the worlds of general and special relationships; thus, they inform the traditional law of torts as well as the laws of contracts and associations, under the first of which our First Amendment liberties, for example, can be shown to be rights and hence to be immune from being forcibly taken. And the theory can handle what are often thought to be problematic cases as well, such as view or competition cases; in this last connection, for example, even though entering into competition with someone may impose costs on him, it is not a taking of his trade because his trade is not really *his* but is enjoyed by him simply because third parties contribute with *their* trade, which they have a perfect right to give to others. Thus, there is a perfect right to enter into competition—costs or harms to others notwithstanding.

In the overwhelming number of cases, then, the theory of rights yields answers to the question—"Why not treat *all* activities as candidates for prohibitory regulation and hence for taking?" —which is the question that arises when we focus upon costs and benefits or externalities alone. We cannot because many of those activities are performed by *right*—that is, they take nothing that is wholly owned by others. Thus, by right they cannot be forcibly taken, even with compensation.

G. The Emergence of Public Law

But while the theory of rights handles the overwhelming number of cases, it comes to its principled end in the difficult areas of nuisance, endangerment, remedies, and enforcement generally. Nevertheless, even in these domains the theory yields *broad* principles, which I will sketch now in the nuisance area in order to try to get a little clearer about the two questions: "When is a nuisance a right violation?" and, hence, "When can it be prohibited without compensation?" And let us have in mind such typical nuisances as noise, smoke, odors, vibrations, and so on. Now, in general, recall, the plaintiff has a burden to show that the defendant's activity takes a use of the plaintiff that does not itself take in turn. This means, then, that passive uses enjoy a privileged place in the theory of rights, both for causal reasons and for reasons of consistency. The causal reasons are straightforward enough: Passive or quiet uses, the most quiet of which is mere ownership, crowd out neither other passive uses nor active uses.[74] Because

74 My use of "passive" and "active" here is not meant to be precise. By definition, a

passive uses do not crowd out, adjacent property owners can exercise their passive rights at the same time and in the same respect, as a result of which the canons of consistency are satisfied.

Now it may be objected that passive uses do indeed crowd out active uses by preventing them through successful pleas for injunctive relief. We come then to Coase's reciprocal causation thesis. "The traditional approach," he argues,

> has tended to obscure the nature of the choice that has to be made. In the typical nuisance case, the question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.[75]

In other words, if B is to enjoy his passive "activity," let us say in order not to beg the question, A cannot enjoy his *active* activity, which is thus prevented or crowded out by B's passive activity.

I would suggest, along with several other noneconomists who have looked at this passage,[76] that Coase has simply got it wrong here, that his reduction of matters to harms and costs has understandably obfuscated the issues, and that a more fine-grained approach should help to clarify them. Now prior to any determination of rights in this case, A's active activity does *in fact* crowd out B's passive activity; it is not B who is harming A, that is, for as a matter of empirical fact, A can go right on enjoying his active activity whereas B, if A does, can no longer enjoy the passive activity that A's active activity has crowded out. To this point, then, the causation—the *taking*—has gone in only one direction. Now in *reaction* to this taking, B gets an injunction, and *then* the causation goes in the other direction. But this is simply to cancel or reverse the initial taking. Thus, it is *not* the passive activity but the *injunction* that does the taking of the active activity. The injunc-

---

passive use does not crowd out the uses that others make of their property—that is, as a matter of *fact*, others can use their property however they wish and the passive use will not interfere. Active uses, however, except when conducted in sufficient isolation or insulation, may crowd out passive uses or even other active uses, depending upon any number of factual conditions, including the sensitivity of the individuals involved. But in general, "passive" and "active" are meant to denote the two halves of a continuum, not two distinct classes.

75 Coase, *supra* note 71, at 2.

76 *See, e.g.*, Epstein, *A Theory of Strict Liability*, *supra* note 33, at 164-66.

tion *does* constitute a taking, then. But as the theory of rights shows, the injunction is legitimate because it takes or prevents an activity that *itself* takes an activity that does not *in turn* take anything. With this, we have the causal analysis that both conforms to the facts and, when joined with the generative argument, yields a consistent set of rights.

Those rights, however, are passive rights, which brings us at last to the practical question, namely: "Can we live with these results?" The purely principled world, that is, is one in which the exercise of passive rights can be only as active as will not crowd out others in their enjoyment of their passive rights. To be sure, the theory of rights permits the exercise of active rights, but only if that exercise does not interfere with others. This result can be achieved either by conducting the activity in sufficient isolation or insulation from others[77] or by purchasing the consent of those otherwise interfered with, which the theory of course allows. But absent those conditions, the principled world is likely to be a very quiet place—and a very peaceful place too.

Nevertheless, for whatever reasons, these results have been found difficult to live with.[78] Thus, as a practical matter, the common law made certain inroads on the principled picture in the domain of nuisance. Most generally, it devised an "ordinary man" standard of nuisance, which precluded the supersensitive plaintiff from getting relief and hence from shutting his neighborhood down.[79] Similarly, it devised locality rules, which sought to make nuisance lines context specific.[80] As a general matter, then, it moved in the direction of *public* lines that defined when an activity was sufficiently active to take the peace and quiet of others such that its abatement would not have to be purchased but could be

---

77 For a judicial statement of this point, relating not to private but to public uses (the principles are the same in either case), see Thornberg v. Port of Portland, 235 Or. 178, 194, 376 P.2d 100, 107 (1962):

> In effect, the inquiry should have been whether the government had undertaken a course of conduct on its own land which, in simple fairness to its neighbors, required it to obtain more land so that the substantial burdens of the activity would fall upon public land, rather than upon that of involuntary contributors who happen to lie in the path of progress.

See also Kretzmer, *Judicial Conservatism v. Economic Liberalism: Anatomy of a Nuisance Case* 13 ISRAEL L. REV. 298 (1978).

78 For one explanation for why the law made inroads on the principled position, see HORWITZ, *supra* note 10, at 74-78.

79 *See* GREGORY, H. KALVEN, JR., and R. EPSTEIN, CASES AND MATERIALS ON TORTS 528-32 (1977).

80 *Id.* at 532-36.

obtained by right. These were uneasy solutions, however, because they *did* constitute inroads upon rights of quiet enjoyment. Nevertheless, they remained second-best *principled* solutions in that they did not have to appeal to the relative values or costs in particular cases, much less to aggregate concepts like "social value" or "social wealth," but instead, at their best, could be understood simply as definitions of lines describing the points beyond which no man need bear the taking costs of another man's activities, whatever the broader costs to that other of his forbearance.[81]

But these common-law results were always haphazard and never constituted reliable predictors for future activity except in cases of gross invasion by nuisances. With the emergence of a public environmental law, however, many of these uncertainties and unpredictabilities are being addressed, sometimes slowly and uncertainly, sometimes with a very heavy hand. Nevertheless, there *is* a legitimate place for at least some environmental law; in addition to addressing large-number problems, as in automobile pollution, its legitimate function is one of drawing the public lines that give us notice as to the point at which the exercise of one man's property *uses* starts to take another man's property *rights.*[82]

IV. Conclusion

There is a great deal more to be said on the many issues covered in this article than I have been able to say here. In particular, the details of causation and of how this combines with a descriptive account of passive and active uses need to be worked out much more fully. Nevertheless, I believe I have sketched at least the outline of a normative resolution of the taking issue, one that in the end can be justified—and can be lived with as well.

In sum, I have tried to show here that property rights are at the very heart of a free society, serving to define the normative relationships among its members and to enable those individuals to pursue their various ends free from the interference of others. I argued also that many of the regulations of property we currently suffer—such as restrictive zoning, or rent controls, or various pro-

---

81 *See* Pilon, *Corporations and Rights, supra* note 34, at 1335-39.

82 For a fuller discussion of several of these issues, see Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints,* 8 J. Legal Stud. 49 (1979); Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System,* 130 U. Pa. L. Rev. 28-130 (1981).

hibitions in order to secure "public goods"—are illegitimate as a matter not simply of efficiency but of right. Finally, I have tried to indicate how the traditional theory of rights, which is the theory of property rights, serves to shed light on the difficult taking issue, ordering it in a principled way such that the rights that are the foundation of the free society are protected.