

The Constitutional Protection of Property Rights: America and Europe

by Roger Pilon, Ph.D., J.D.

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by Roger Pilon, Ph.D., J.D.**

I. INTRODUCTION

When the French Revolution shifted its focus from liberty to bread it sowed the seeds for a division between human rights and property rights that socialists would later exploit, denigrating property rights in ways that haunt us to this day. Classical liberals had earlier understood that human rights and property rights are one and the same: property rights are simply the rights of people to their property, toward which all humans strive. That vision inspired America's Founders and the Framers of the United States Constitution. They saw the protection of property—broadly understood as “lives, liberties, and estates”¹—as the principal business of government.²

Toward the end of the nineteenth century, however, with the rise of Progressivism in America and the growth of government that followed, the division between human rights and property rights began slowly to seep into American law.³ In 1938, in a famous footnote, the United States Supreme Court finally constitutionalized it.⁴ As a result, we have a body of property law today—at least as it relates to the relationship between private property and public law—that is little more than ad hoc, leaving owners seriously disadvantaged when up against the claims of the state.⁵ In its 2004-2005 term, for

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¹ The phrase is from John Locke, *The Second Treatise of Government*, in *Two Treatises of Government* para. 123 (Peter Laslett ed., revised ed. 1965); see also *id.* para. 87.

² James Madison, the principal author of the U.S. Constitution, wrote, “Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.” James Madison, *Property*, *The National Gazette*, Mar. 27, 1792, in 14 *The Papers of James Madison* (R. Rutland ed., 1983) (original emphasis).

³ See Richard A. Epstein, *How Progressives Rewrote the Constitution* (2006).

⁴ *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

⁵ “[T]his Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons,” [and instead has engaged in] “these essentially ad hoc, factual inquiries.” *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (quoting *Goldblatt v. Hempstead*, 369 US 590, 594 (1962)).

example, the Supreme Court decided three property rights cases that pitted individual owners against the government, and in all three the owners lost, despite having legitimate claims from a consideration of first principles.⁶ Indeed, it is not a little ironic that America is thought by most of the world to be the very embodiment of free-market capitalism, grounded in property and contract, yet in some respects the European Court of Human Rights seems today to be better protecting property rights than the Supreme Court of the United States.

Although my knowledge of the state of property rights protection in Europe, whether by the European Court of Human Rights or the European Court of Justice, is quite limited, it is my impression that better protection is in fact evolving, despite positive law that is problematic at best. Indeed, as the European Convention on Human Rights was being drafted in the early 1950s, the question whether property rights should be included at all among our “human rights” was much debated, with socialists generally opposing such inclusion, and British delegates especially concerned that so doing might frustrate various nationalization schemes. In the end, however, Article 1 of Protocol No. 1, the property clause, was signed on March 20, 1952, by 14 Member States of the Council of Europe. As of July 31, 2007, Protocol No. 1 was in force in 43 of the 46 Member States of the European Convention.⁷

In this essay I will simply touch upon the European scene, and do so only at the end. My main concern will be to examine the state of property rights protection in America, with which I am more familiar. Toward that end, I will focus on the question of how American law in this area has gone astray. I will begin with an outline, drawn from the American Declaration of Independence, of the theory of legitimacy that underpins our law, at least in principle. I will then show how property rights arise and operate within that natural rights context, drawing from the English common law in the process. With that “pure theory” in view, as a touchstone of legitimacy, I will turn next to the positive law of the Constitution to show, first, how it is largely consistent with the pure theory of the Declaration; then, second, how “constitutional law” departed from that theory

⁶ For a critical discussion of those cases, see James W. Ely Jr., “*Poor Relation*” *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004-2005 *Cato Sup. Ct. Rev.* 39.

⁷ For a discussion of this history, see Yves Haeck, *The Genesis of the Property Clause under Article 1 of the First Protocol to the European Convention on Human Rights*, in *Property Rights and Human Rights* 163 (H. Vandenberghe ed., 2006).

following the Progressive Era. Finally, with that positive law as background, I will examine how the Supreme Court has treated property rights over the twentieth century, increasingly deferring to “public policy” to give us a body of law that is far removed from America’s organic principles. That detailed analysis will then allow for a few reflections on the European treatment of property rights.

II. THE AMERICAN THEORY OF LEGITIMACY

Although positive law in America today is little connected to natural law, that was not so in the beginning, and for good reason.⁸ Those who wrote our founding documents understood that positive law alone, even when the product of democratic will, is only contingently legitimate: its legitimacy, that is, is a function not of its democratic pedigree but of its conformity to deeper principles of right and wrong, grounded in reason, their origins in antiquity. Given that many today have lost touch with those understandings, it may be useful to begin with a brief review of why it was that classical liberals thought it necessary to ground positive law in natural law.

A. Natural Rights and the Limits of Political Consent

Recall that in challenging the legitimacy of monarchical rule, liberals began with a simple question: By what right does one man have power over another? The difficulty in answering that question led them to a simple premise that had emerged slowly from early modernity—the right of every individual to rule himself. But the transition from individual self-rule, in a theoretical state of nature, to collective self-government, once government is established, encounters well-known problems.

To begin, only unanimity, which is all but impossible to achieve on public matters, preserves true self-rule; anything short of unanimity leaves some fraction of the whole ruling the rest. For that reason, social contract theorists distinguished two levels of consent: in the original position, the argument runs, we agree unanimously to be bound thereafter by some fraction of the whole—most often the majority. But that solves the problem, when it does, only for those in the original position or those immigrants who come later and expressly agree to be bound by such arrangements, not for the generations that follow either group. Given that difficulty, democratic theorists fall back finally on

⁸ See generally Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* (1955).

“tacit” consent: those who stay, they argue, tacitly agree to be bound by the will of the majority.⁹

But that “love-it-or-leave-it” argument is circular: it has majorities putting minorities to a choice between two of their entitlements—their right to stay where they were born, and their right to rule themselves, the very premise of the argument. In the end, therefore, will theories of legitimacy, grounded in consent, leave us exactly where we were with rule by the king, except that now the majority stands where the king once stood. And political majorities, believing themselves imbued with an air of legitimacy the king rarely assumed, can be even more tyrannical than the king.

B. Individual Liberty, Limited Government

America’s Founders had a fair grasp of those points. As George Washington is said to have put it, “government is not reason, it is not eloquence, it is force.”¹⁰ Recognizing government’s inherent nature as a forced association, they sought to limit it as much as possible so that individuals, families, and associations would be free to pursue happiness as they saw fit, but mainly—and here is the crucial point—in their *private* capacities, where it could be done freely, rather than through government, where coercion was inherent. Government was created mainly to secure those private rights, not to pursue public ends.

That vision of individual liberty, secured by limited government, was captured in 1776 in a few simple phrases in America’s founding document, the Declaration of Independence. We Americans are fortunate to have such a document, for not only does it mark our beginning as a nation; more important, it serves as a touchstone of moral, political, and legal legitimacy. Addressed to “a candid World,” the Declaration draws on a long tradition of higher law that holds that there are “self-evident truths” of right and wrong, rooted not in will but in reason, from which to derive the positive law and against which to judge that law at any point in time. Stated elegantly by the document’s principal author, Thomas Jefferson, those truths are:

that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the

⁹ An early version of the argument can be found in Plato’s *Crito*.

¹⁰ Attributed to George Washington. Frank J. Wiltach, *A Dictionary of Similies* 526 (2d ed. 1924).

Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.¹¹

Notice that by outlining first the moral order, then the political and legal order that follows, the Founders placed us squarely in the tradition of state-of-nature theory, reflecting the influence especially of John Locke's *Second Treatise of Government*. For if the aim is to show how government and its powers might be legitimate, we assume their existence only on pain of circularity. Thus, we begin in a world without government; and using pure reason alone we determine what our rights and obligations are vis-à-vis each other. Only then can we determine how government might arise through the exercise of those pre-existing rights.¹² Stated otherwise, government does not give people their rights; rather, the people give government its powers, drawing from the powers they have to give. To know what powers we have to give, however, we need to know what rights we first have. Thus are political and legal legitimacy derived from moral legitimacy.

Toward determining our rights, then, we begin with the Declaration's premise of equality. Here again, to reduce circularity we assume as little as possible, invoke a rule of parsimony, and establish the simplest premise: that all men are created equal, as defined by rights to life, liberty, and the pursuit of happiness. Thus, anyone wishing to challenge that premise has the burden of showing why his more complex premise of unequal rights should prevail. Assuming no such challenge succeeds, we now have a starting point—the equal liberty of all.

Individuals are thus born free: either to live in splendid isolation, if they wish, enjoying their natural rights, with others obligated essentially to leave them alone; or, more likely, to associate with others. At bottom, there are two morally relevant ways to associate: voluntarily, or by force or fraud—through promise or contract, on one hand, or tort, crime, or contractual breach, on the other hand. And in both cases, by our actions we change the pre-existing world of natural rights and obligations: we alienate certain of our general rights and obligations, good against the world, and bring into being new special

¹¹ U.S. Declaration of Independence para. 2 (U.S. 1776). I have discussed the points that follow more fully in Roger Pilon, *The Purpose and Limits of Government*, in *Limiting Leviathan* ch. 2 (Donald P. Raftery and Richard E. Wagner eds., 1999); reprinted as Cato's Letter No. 13, Cato Institute.

¹² For an elegant argument along those lines, see Robert Nozick, *Anarchy, State, and Utopia* Part I (1974).

rights and obligations, good only against the parties to the transaction.¹³ Finally, torts, crimes, and contractual breaches bring enforcement rights into being—the second-order rights that arise when our first-order rights are threatened or violated, enabling us to secure those rights. Such rights, as powers, constitute what Locke called the “Executive Power” that each of us enjoys in the state of nature: the power to protect against and to punish and seek restitution for wrongs.¹⁴ When we leave the state of nature, that is the main power we yield up to government to exercise on our behalf—the “police power,” the power to protect our first-order rights.¹⁵

C. Political and Legal Legitimacy

With that bare sketch of our rights and obligations in the state of nature, about which more in a moment, we are now in a position to inquire about political and legal legitimacy—and to see further the problems that surround the inquiry. As Locke showed, there are certain “inconveniences” in the state of nature, pertaining mainly to securing our rights; and those impel us toward creating government to serve that end.¹⁶ Thus, just as individuals have a right to associate voluntarily for other reasons, so also, to address those inconveniences, may they associate as a *political* group—so defined because that association purports to sweep *everyone* in a given geographical area into its maw, and it claims a monopoly on the powers of enforcement within that area. Note how the Declaration treats that move from the moral to the political and, eventually, legal order: “that to secure these Rights [the rights we have just outlined], Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.” Thus, the government’s purported legitimacy is a function, first, of our exercising our rights to create it; second, of its serving all and only the ends we charge it to serve; and, third, of its doing so through means we have authorized. Government is thus twice limited: by its ends, and by its means. And in both cases we can give government only those powers we first have to give it.

But as seen above, that theory of political and legal legitimacy must immediately be qualified, for “the people,” collectively, create and empower government (usually

¹³ See H.L.A. Hart, *Are There Any Natural Rights?*, 64 *Phil. Rev.* 175 (1955).

¹⁴ Locke, *supra* note 1, para. 13.

¹⁵ I have discussed the theory of rights more fully in Roger Pilon, *A Theory of Rights: Toward Limited Government* (1979) (unpublished Ph.D. dissertation, Univ. of Chicago).

¹⁶ Locke, *supra* note 1, para. 13.

through a constitution) and change it (through constitutional amendment) only rarely—and even then not all the people consent. Most of the time the individuals who compose that constantly changing body called “the people” take no part in the process of consent that serves ultimately to legitimate positive law. To be sure, the people may vote to fill offices provided for in a constitution, but rarely do they vote to affirm or deny the powers those officers exercise, or vote for or against the offices themselves. As a practical matter, that is, short of frequent constitutional conventions, themselves impractical, there are inherent and intractable limits on consent as a foundation for political and legal legitimacy.¹⁷ The argument from consent—for democracy, that is—may be the best we have—it is better, certainly, than the argument from divine right, or from might-makes-right. But it still leaves government with an air of illegitimacy about it. For that reason, one wants to limit government’s scope and powers, as noted above; and one hopes that the powers that have been given to a government by at least some of the people, however rarely that happens, conform closely to the powers natural law would authorize.

III. PROPERTY IN THE STATE OF NATURE

A. Human Rights as Property Rights

We now move to a fuller account of the rights and obligations we have, by nature, in the state of nature. As should be clear already, the human rights thus far mentioned are in reality *property* rights. On one hand they are claims to things that *belong* to the claimant—his life, liberty, or property. On the other hand they entail further claims upon the actions or omissions of others—obligations correlative to those rights. They are claims to be *entitled* to those things and those actions—to hold “title” to them.¹⁸ It may sound odd to speak of holding title to the actions of another, yet what do contracts ordinarily entail if not a “title” to some future performance? And our rights to life and liberty entail, as correlative obligations, simply the omissions of others: we are entitled to others not interfering with our lives or liberties. Even modern welfare “rights,” so called, are claims to be entitled to the goods or services claimed, except that here the titles to the

¹⁷ See Randy E. Barnett, *Restoring the Lost Constitution* ch. 1 (2004).

¹⁸ See Roger Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 Ga. L. Rev. 1171 (1979).

things claimed belong to others, which is why we are not really entitled to such things and why welfare “rights” are spurious—are not really rights at all.¹⁹

The basic point, however, is that it is impossible, in the end, even to talk about rights, real or spurious, without using the language of possession or property.²⁰ That is why Locke wrote “Lives, Liberties, and Estates, which I call by the general Name, *Property*.”²¹ He understood that all rights, at bottom, are reducible to property.²² And that insight helps us, in turn, to distinguish legitimate from spurious right claims, as just noted: to have a right is to hold title, free and clear, to the object claimed—one’s life, one’s liberty, one’s property in the ordinary signification. One may need, or want, or have an “interest” in other things, but that is not the same as having a *right* to such things, to hold a *title* in those things.

B. Original Acquisition

What, then, do we hold title to, by right, in the state of nature. Pure reason will get us only so far in answering that question, but at least it should give us a strategy for going about the matter, as suggested above in the case of equality. Reducing a complex issue of moral epistemology to its essence,²³ it may not be possible to justify our having rights with axiomatic precision, but by getting the presumptions and burdens of proof right it should be possible to construct an argument that is good enough, and certainly better than any alternative. Thus, following Locke again,²⁴ it seems plain that each of us holds title to his life and liberty (or actions)—by a certain “natural necessity,” as it were. Surely, other things being equal, no one else has a *better* title to the life and liberty that “belong” to each of us than we ourselves do. The presumption, that is, must be that each of us alone owns himself—each of us has “a property” in himself, as Locke put it—and anyone who

¹⁹ See Maurice Cranston, *Human Rights, Real and Supposed*, in *Political Theory and the Rights of Man* ch. 4 (D.D. Raphael ed., 1967).

²⁰ Pilon, *supra* note 18.

²¹ Locke, *supra* note 1, para. 123 (original emphasis).

²² Madison put it well: “In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.” Among a man’s “property” he included his land, merchandise, money, opinions and the free communication of them, religious opinions and the profession and practice dictated by them, safety and liberty of his person, and free use of his faculties and free choice of the objects on which to employ them. Madison, *supra* note 2.

²³ See Alan Gewirth, *Reason and Morality* (1978). Cf. Pilon, *supra* note 15, on issues of casuistry.

²⁴ Locke, *supra* note 1, para. 25-51.

would argue otherwise has the burden of showing how it is that he has a right over what is, after all, “our” life and liberty.

The virtue of that strategy becomes evident as we move further afield and ask the more difficult question of how we acquire title in tangible and intangible things: land and land uses, chattels, intellectual property, privacy, reputation, and the like. Drawing by implication on the English common law that had evolved since the twelfth century, itself rooted in “right reason,”²⁵ Locke laid out the basic theory of the matter, especially as it took root in America, devoid as we were of any feudal legacy. In a nutshell, by mixing the labor we own with unowned things—by picking the apple from the tree, catching the fish from the sea, working the land—we acquire title in those things. Thus, consistent with the common law principle that title arises, *prima facie*, from possession,²⁶ Locke outlines his labor theory of original acquisition.

We need to pause here, however, because in the Lockean account, things are not unowned in the beginning. Rather, Locke posits as his premise that God gave the Earth “to Mankind in common.”²⁷ Thus, he needs to show how *private* property can arise, but without the consent of all, which of course would be impossible to obtain. Toward that end he offers both deontological and consequentialist arguments of varying merit. Clearly, however, he might better have started with a more parsimonious premise: not with the world held in common—by generations past, present, and future—but with it unowned.²⁸ Not only would that have rendered moot even the seeming need for the consent of all; more important, it would have been more consistent with the entire enterprise. After all, it is *ownership*—individual *or* common—that must be justified, not its absence; for ownership is an *affirmative* claim, absent which we must presume things to be unowned. Indeed, it is doubtless more important still to justify the more complex idea of holding things *in common* than the simpler idea of individual ownership.

Had Locke proceeded in that fashion, he would have had a cleaner argument. And he would not have had to resort to a pair of devices of dubious merit: the famous Lockean

²⁵ “[T]he notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law.” Corwin, *supra* note 8, at 26.

²⁶ See Richard A. Epstein, *Possession As the Root of Title*, 13 Ga. L. Rev. 1221 (1979).

²⁷ Locke, *supra* note 1, para. 25.

²⁸ For a fuller discussion, see Roger Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 Georgia L. Rev. 1245, 1277-84 (1979).

proviso, which prohibits one from taking something out of the common if there is not “enough and as good left in common for others;” and the argument from spoilage, which prohibits taking more than can be used without waste. Starting with things held in common, however, Locke is driven to such devices, in a world of scarcity, because others may complain when we take “too much” or “waste” what we take. Yet the proviso undercuts *all* private ownership, for there will always be a “last” person whose claim leaves less for others; and if that is so, the next-to-last person then becomes the last person, and so on back down the line.²⁹ And the argument from spoilage is problematic as well since it undercuts the traditional common law right to use our property as we wish, including destroying it.

To return to the main line of argument, however, if we begin not with things held in common but with the more parsimonious and justifiable premise of unowned things, no one can be heard to complain that his rights are violated when someone acquires something by a rule of first possession, for no one had a prior right to begin with in the thing thus acquired. This is truly a case of first come, first served. And if ownership based on a rule of first possession is challenged by late comers, the owner can always respond by saying that he at least *did* something to establish his claim, which is more than the challenger can say. That may not be an apodictic argument, but it is better than anything that those who have done nothing can offer.

C. Positive Law

That summary of the natural law argument for private property—which captures fairly well how titles in land arose as America’s “manifest destiny” unfolded³⁰—gives rise to any number of related matters, only a few of which can be addressed here. Before touching on them, however, we should note that the initial act of acquisition, the “mixing of labor,” can take many forms—from easy cases like picking the unowned apple to more complex cases like “staking out” unowned land to cases arising in contexts like auctions or securities markets where a mere nod of the head can switch titles. Yet in all of that, the

²⁹ See Nozick, *supra* note 12, at 178-82.

³⁰ I do not mean to discount the claims the Indians, or Native Americans, may have had as European settlers moved west in America. For several perspectives on this complex subject, see *Special Issue: American Indians and Property Rights*, 24 PERC Reports (June 2006) (Property and Environment Research Center); Terry L. Anderson and Peter J. Hill, *The Not So Wild, Wild West: Property Rights on the Frontier* (2004).

generic act is essentially one of *claiming*: it is the first step in transforming unowned into owned things, whatever form the claiming takes.

Of course, to “perfect” a claim, more than a mere act of claiming will often be required. That raises additional matters that must be considered in a full account of original acquisition, such as how one identifies what one has claimed, how boundaries and limits on acquisition are established, and how one gives notice of and defends one’s claim. As seen above, Locke tried to address questions like those in a kind of ad hoc way. In truth, they all point to the need ultimately for positive law of some sort as the power of pure reason starts to wane. It is one thing, for example, to stake out Blackacre, quite another to put one’s toe on the shore of today’s Florida and claim the New World for Queen Isabella. Yet there is no bright line between those two claims. State-of-nature theory helps us understand how property rights have their origins in natural rights theory—failing which title is a function merely of the lawgiver’s will—but it is not sufficient if we are to have a full and useful account of those rights. And that is especially so when we turn to intellectual property, privacy, reputation, and the like, where consequentialist considerations bear so directly on the very conceptions of the property.³¹

Finally, it may be objected that this approach to original acquisition would be fine if we were working with a clean slate; but even if, as Locke said, “in the beginning all the World was America,”³² so much has happened since then, so many pristine titles have wrongly changed hands, that this approach, if legitimacy is our concern, is futile today. To be sure, with wars, conquests, fraud, and much else, few titles today are immaculate. But once again, what is the alternative? Much as with the rule of adverse possession, the passage of time tends to settle titles, even as it closes the book on earlier injustice as new generations come along. In an imperfect world, the cost of righting every wrong may be too great. In this context, possession as the root of title takes on a different hue. But on

³¹ In granting Congress the power “To promote the Progress of Science and useful Arts, *by securing for limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,” the U.S. Constitution recognizes the practical considerations that come into play in recognizing many forms of property. U.S. Const. art. I, § 8, cl. 8 (emphasis added). Nevertheless, natural law principles should still underpin those considerations. Thus, even complex forms of property like radio broadcast frequencies arose in America originally by a rule of first possession. See *Turner Broadcasting Sys. Inc. v. FCC*, 819 F. Supp. 32, 65-66 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994); Thomas H. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & Econ. 133, 147-52, 163 (1990).

³² Locke, *supra* note 1, para. 49.

balance it works less injustice than a rule by which all titles are lifted, in the name of justice, and then redistributed through some central planning agency. Witness such a scheme at work today in Zimbabwe.³³ No thoughtful person wants that. Considerations such as those argue for a strong presumption in favor of reasonably settled titles and against redistribution.

D. Rights of Use

But the right of acquisition, even with boundaries, limits, and so forth settled, is only the initial element in the theory of private property. The rights of use and disposal are the other two basic elements. And as with acquisition, here too liberty is the starting point—the presumption—bounded only by the rights of others. Thus, people are free to use and dispose of their property as they wish, provided only that they respect the equal rights of others to do the same. Because others' rights limit that liberty, however, it is crucial to be clear about the initial distribution of rights—the rights we have at the start, so to speak. And for that, it is well to begin with relatively simple examples and contexts, the better to develop the principles and rules systematically. The old common law judges did not have that luxury, of course; they decided cases as they came before them. Nevertheless, using reason and custom, they did the casuistry fairly well, adjudicating disputes that neighbors brought before them, all of which established the precedents that constituted, essentially, a theory of rights. Here, a few illustrations will suffice.³⁴

After acquisition is established, the easiest rights of use to justify are what might be called passive or quiet uses, because all such rights, by definition, can be exercised simultaneously, without conflict, by those who have them. At the other extreme, active uses like trespass to person or property, including tort, crime, and trespass on the case, are forbidden because they intrude on rights of both quiet and active enjoyment, denying those who have such rights the exclusive use of their property; and the right to exclude others, the right to sole dominion over what one owns, is the very mark of private property. Thus, the right of quiet enjoyment is essentially the right to be left alone, just as the exercise of that right leaves others alone.

³³ See Craig J. Richardson, *The Loss of Property Rights and the Collapse of Zimbabwe*, 25 *Cato J.* 541 (Fall 2005).

³⁴ For a fuller discussion, see generally Pilon, *supra* note 28.

When owners use their property more actively, two sorts of complaints may arise. The first involves actions that turn out to be perfectly legitimate, even though others may be “harmed” by them. If *A* builds an addition on his home, thereby blocking neighbor *B*’s lovely view, *B* may be thus harmed—he may even lose some of the market value in his home. But *A* has violated no *right* of *B*, for he has taken nothing that belongs free and clear to *B*. No one “owns” the market value of something, of course, since that is a function simply of what others are willing to pay, and that can change for any number of reasons. As for the view, the loss of which caused the market value to drop, that was never *B*’s to begin with since it ran over *A*’s property. *B* could not have enjoined *A* from building the addition, for that would have taken a right belonging to *A*, the same right to build that *B* himself has. Of course, there *is* a way *B* could have preserved “his” view and made it truly *his*: he could have offered to purchase an easement over *A*’s property, running with the land. That would have been the legitimate way to preserve the view. Alternatively, once out of the state of nature, he could have taken the illegitimate route of petitioning the government to redistribute use rights in his favor, about which more below.

What we have here, of course, is a simple application of the ancient *ad coelum* rule, which says that within the bounds of one’s property one owns from the nadir to the zenith, which permits all uses that take nothing belonging free and clear to others. Notice first the simplicity of the rule and the ease of application. Courts need not make subjective value judgments about which uses are more important than others; they work simply with straight lines, from the nadir to the zenith. Thus, if *A* may build to his property line, so may *B*, even if his doing so blocks *A*’s “ancient lights.”³⁵ Notice also that the rule need not be absolute: obviously, the advent of the airplane gave rise to public law limits on an owner’s control of his airspace; yet the basic right, albeit qualified, remains. Notice finally the importance of being clear about the initial distribution of rights, which a “do-no-harm” rule easily obfuscates. One wants to ask not whether a use is “harmful,” a term fairly inviting subjective value-judgments, but whether it takes what belongs free and clear to another, a more objective standard. Market offers can “harm” competitors, for example, even drive them out of business; but those competitors never

³⁵ See *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. App. 1959).

owned that trade in the first place, which was perfectly free to go elsewhere. We have here *damnum absque injuria*.

E. Nuisance and Endangerment

Unlike that first category of complaints, a second sort that may arise from active uses *may* turn out to be credible. There is no bright line, of course, between passive and active uses; yet clearly, as uses become more active they may conflict with both the passive and active uses of others, giving rise to the need for adjudication. Nuisance and endangerment are the main concerns here. By our actions we create “externalities,” as economists say: we expose others to noise, particulate matter, vibrations, odors, and other forms of nuisance; and to the risk that our actions may go awry and injure others.

We are faced, then, with the possibility of incompatible uses and, if that is so, with a need to draw a line beyond which active uses intrude on the rights of others.³⁶ Here again we will need public law of some sort, there being no principle of reason that tells us where precisely to draw that line—how much noise, particulate matter, risk, and so forth. Reason does tell us, however, that unlike with ordinary torts, where tortfeasors take their victims as they find them, in these cases extra-sensitive plaintiffs get no relief; for if they were to set the standard for permissible conduct concerning nuisance and risk, they could shut down the world. Instead, the “reasonable man” standard prevails.³⁷ Those who want more relief than that standard allows may insulate themselves through various self-help remedies, of course, or purchase greater relief from those creating the nuisance or engaged in the risky behavior. By the same token, those who want to create greater nuisances or risks than permitted by that standard may do the same, *mutatis mutandis*.

This is a fundamental point at which the deontological theory of rights must turn to values, including consequentialist considerations, to flesh out our rights—to complete that part of morality that properly serves, for a free society, as a model for positive law. Similarly, in two other areas—remedies and enforcement—values must be introduced as well if the world of rights is to be completed. The theory of rights can tell us when *A* must make *B* whole again, but it often cannot tell us what will do that, what a life or a limb may be worth, for example. Nor can it tell us precisely what *A* may do when his

³⁶ I discuss these issues more fully in Roger Pilon, *Property Rights, Takings, and a Free Society*, 6 Harv. J.L. & Pub. Pol’y 165, 189-94 (1983).

³⁷ See, e.g., *Rodgers v. Elliott*, 146 Mass. 349, 15 N.E. 768 (1888).

rights are violated, especially if he does not know who violated them. The process that is due both plaintiff/victims and potential suspect/defendants involves many close and disputed questions that can be answered only by positive law reflecting some public consensus about such procedural matters as probable cause, rules of evidence, and standards of proof.

Still, despite the need for positive law to complete the picture that natural law begins, that beginning is crucial; for it sets the fundamental principles—broad principles that serve in turn, ideally, to limit the positive law as it unfolds. And here we should note especially, as just outlined, that our property rights—and rights of use, in particular—are limited only by the property rights of others, not by their “interests,” nor by anything like the “public interest,” a notion we will take up shortly. Nor should the “public interest” be equated or otherwise confused with the positive law that is needed to flesh out the theory of rights. The positive law thus far discussed is simply that law that we might all agree to, if asked, when reason has come to its limit, yet issues remain to be resolved if we are to be clear about our rights.

F. Rights, Values, and the Pursuit of Happiness

Those fundamental principles are nowhere better distilled, perhaps, than in the phrase “the pursuit of happiness.” It is often asked why Jefferson used “Life, Liberty, and the Pursuit of Happiness” to illustrate our unalienable rights rather than the more common “life, liberty, and property.” There are several possible answers. For one, and without getting into the complex question of whether this applies to life and liberty as well, the right to property is of course alienable.³⁸ Another answer is that Jefferson did not want to broach the difficult contemporary issue of slaves as property. Yet again, property is already subsumed under “the pursuit of happiness”—people pursue happiness, in large part, by acquiring and enjoying the property that sustains them.

But an answer that may be closer to the mark goes to a fundamental distinction that is implicit in the phrase. That distinction, between rights and values, was at the core of the classical liberal vision and was pivotal in the evolution of natural rights theory from the older natural law. As the late H.L.A. Hart has argued, rights and values are very

³⁸ For that answer, see Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 Val. U.L. Rev. 367, 369 (1991) (citing Jean Yarbrough, *Jefferson and Property Rights, in Liberty, Property, and the Foundations of the American Constitution* 66 (Ellen Frankel Paul & Howard Dickman eds., 1989)).

different moral notions: they come from “different segments of morality.”³⁹ What makes us happy is a subjective matter, varying from person to person according to his values. Rights, by contrast, are objective claims against others, derived from reason. Thus, the basic principle is that each of us has an objective right to pursue happiness according to his own subjective values, provided he respects the equal right of others to do the same.

Once the distinction between rights and values is grasped, we need not succumb either to moral skepticism, on one hand, or to moral dogmatism, on the other. Skepticism leaves us with no moral compass. Dogmatism leaves us with no liberty. Natural rights theory threads its way between those two poles, yet it does so not by striking a compromise but by finding the principle of the matter. It gives us a moral compass, setting forth objective standards, derived from reason and grounded in property, that limit what we may do to each other. But it also leaves us free to pursue happiness by our own subjective values, however wise or foolish. It is the moral foundation of the free society.

IV. FROM NATURAL TO CONSTITUTIONAL LAW

As that brief review of the theory of rights and the foundations of political and legal legitimacy should make clear, to bring about a free society, given the enforcement uncertainties that arise even among people of good will, we need more than natural law. In a state of nature, “judges” may adjudicate disputes by discovering and declaring “law,” making it “positive” to that extent; but their authority to do so, and the effect of their doing so, is little different than that of a priest or a rabbi having done so in civil society. Some people may agree with those decisions and agree to be bound by that “law.” Others may not. Such are among the “inconveniences” in the state of nature of which Locke spoke.

A. Public Goods and “Public” Pursuits

Prudence suggests, therefore, the need to standardize matters and bring everyone under a common and known rule, thereby enhancing and securing the authority of judges, giving them a greater measure of legitimacy. At their best, constitutions aim at least at that: to bring about a common legal order; to make positive what otherwise is only natural law; and to authorize judges both to make that law positive and to enforce any statutory law that is necessary to complete that process, as discussed above. One hopes

³⁹ Hart, *supra* note 13, at 179 n.1.

that one's constitution does that, and does it accurately—that the framers and subsequent judges and legislators “get it right,” that is.

But constitutions are usually written and ratified with more in mind. Beyond that first and most basic purpose of securing our rights, they often authorize and empower the governments thus created to pursue *other* ends, “public” ends of various kinds, reflecting the will and wishes of the people—or at least the will and wishes of that portion of the current population that votes to ratify them. Therein lies a moral problem, of course, for if government as such has an air of illegitimacy about it by virtue of its being a forced association, as discussed above, then the more ends we pursue through government, the more we resort to force to get what “we” want. Thus, on a continuum from limited government to leviathan, the presumption must be for the former, with the burden on those who would pursue ends through government to show why those ends should not be left to individuals to pursue in their private capacities, where they can be pursued without resort to force. It is one thing to pursue collectively what economists call “public goods,”⁴⁰ like justice and national defense, quite another to pursue collectively the many goods governments today are found pursuing.

In that connection, diplomacy and national defense, like police protection and adjudication services, may be seen as public goods, as facilitating the basic function of government—to secure our rights. Likewise, agencies that regulate commerce or standardize intellectual property may be necessary to flesh out our rights in uncertain contexts, at least when they limit themselves to that end. And certain environmental measures may be thought of as clarifying the uncertain lines of nuisance law, especially in large number contexts, such as automobile pollution. When we move further afield, however, to such goods as health care, education, retirement security, housing, business supports, environmental and cultural amenities, and the like—the stuff of modern government that could be and often is provided more efficiently by the private sector—we are no longer talking about *public* goods, as properly defined, or about government's core function of securing rights. On the contrary, such goods and services are provided in

⁴⁰ “Public goods” like clean air or military defense, unlike private goods, are goods that, once provided, are available to everyone (nonexcludability), whether or not each person has paid for them; and cost no more to provide as more people consume them (nonrivalrous consumption). Not all goods can be categorized neatly as public or private, but most can. The tendency of modern politics has been to try to define ever more goods as public, thus turning ever larger aspects of life over to government administration.

violation of the rights of those whose property, through redistribution, affords their existence, and no democratic rationale can change that.

B. A Constitution for Liberty

Fortunately, the United States Constitution was drafted by men who had a good grasp of such basic issues. Having recently fought a long war to unburden themselves of overweening government, yet knowing that they still lived in a dangerous world, the Framers in 1787 crafted a document that carefully balanced powers and limits, reflecting on one hand the natural law the Declaration had outlined 11 years earlier, and on the other the experience in self-government they had gained since independence, mostly at the state level.

The Constitution's Preamble, reflecting state-of-nature theory, makes it clear from the start that all power comes from the people. Thus, government does not give people their rights—an idea stemming from government declarations of rights; to the contrary, the people give government its powers, by right, rights they already have *before* they establish government. That alone limits the government's power to the power people have to give. And we discover the powers the people have given simply by looking at the document. Structurally, power is divided between the federal and state governments and separated among the three branches of the federal government, each defined functionally. The legislative power is limited to that "herein granted," as the first sentence of Article I states. Section 8 of Article I lists 18 such powers. Article's II and III vest the "executive Power" and the "judicial Power," respectively. And throughout the document we find the various checks and balances: among them, a bicameral legislature, each chamber differently constituted; provision for executive veto, and legislative override; for judicial review, by implication; for periodic elections to fill offices; for amendment of the document, and so forth.

The main restraint on overweening government, however, was meant to be the doctrine of enumerated powers, not the Bill of Rights, which was an afterthought, added two years later. That doctrine says that the federal government has only those powers that have been delegated to it by the people, as enumerated in the Constitution. And most power was *not* delegated but rather was left with the states or the people. As the Tenth Amendment, the last documentary evidence from the founding period, makes clear, "The

powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” In short, the Constitution creates a government of delegated, enumerated, and thus limited powers.

The Bill of Rights, which many today think of first when they think of the U.S. Constitution, was made necessary when several states, as a condition of ratification, insisted on such a bill. But others objected that a bill of rights was both unnecessary and dangerous: unnecessary because the doctrine of enumerated powers would be sufficient to limit power; dangerous because no such bill could enumerate all of our rights, yet the failure to do so would be read, by ordinary principles of legal construction, as implying that those rights not enumerated were not meant to be protected. To address that problem, once it became clear that a bill of rights would be needed to ensure ratification, the Ninth Amendment was written: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” Thus, the Constitution protects both enumerated and unenumerated *rights*; but it grants the federal government only enumerated *powers*.

The Constitution’s vision was thus essentially the same as the Declaration’s. Individuals were free to plan and live their lives as they wished, pursuing happiness by their own lights, provided only that they respect the rights of others to do the same. And government’s main business was to ensure that liberty. Again, most government took place at the state level. In Federalist 45, the principal author of the Constitution, James Madison, put that simply: the powers of the new government, he said, would be “few and defined,” directed largely against foreign threats and at ensuring free trade at home. It fell mainly to the states to conduct the rest of government’s limited affairs.

The Constitution was not perfect, of course. Its cardinal flaw, in fact, was its oblique recognition of slavery, made necessary to ensure ratification by all thirteen states. That slavery was inconsistent with the grand principles the Founders and Framers had articulated could hardly be denied. They hoped simply that it would wither away over time. It did not. It took a civil war to end slavery, and the passage of the Civil War Amendments to end it as a matter of constitutional law. The Thirteenth Amendment did that in 1865. In 1870 the Fifteenth Amendment prohibited states from denying the franchise on the basis of race, color, or previous condition of servitude. And in 1868 the

Fourteenth Amendment, for the first time, gave federal remedies against state violations of rights. Prior to that time, the Bill of Rights had been held to apply only against the federal government, only against the government that was created by the document it amended.⁴¹ Thus, the Civil War Amendments are properly read as “completing” the Constitution by bringing into the document at last the principles and promise of the Declaration.⁴²

C. The Constitution and Property Rights

With that outline of the Constitution as completed by the Civil War Amendments, we can turn at last to the question of how it protects property rights. It is noteworthy that nowhere in the document do we find explicit mention of a right to acquire, use, or dispose of property. Yet given the theory of the Constitution, that should not surprise. We start with a world of rights and no government; we create government and give it certain powers; by implication, where no power is given that might interfere with a right, there is a right. Thus, the failure to mention a right implies nothing about its existence. And in fact the Framers simply assumed the existence of such rights, defined and protected mainly by state law, because the common law, grounded in property, was the background for all they did. The Constitution made no basic change in that law. It simply authorized a stronger federal government than had been afforded by the Articles of Confederation it replaced, and for two main reasons. First, to enable the nation to better address foreign affairs—both war and commerce. And second, to enable the federal government to ensure the free flow of commerce among the states by checking state efforts, arising under the Articles of Confederation, to erect tariffs and other protectionist measures that were frustrating that commerce.

Like the state law that recognized and protected them, therefore, property rights were a fundamental part of the legal background the Framers assumed when they drafted the Constitution.⁴³ That explains the document’s *indirect* protection of property rights,

⁴¹ *Barron v. City of Baltimore*, 32 U.S. 243, 250 (1833).

⁴² See Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights, and Fourteenth Amendment*, 66 Temp. L. Rev. 361 (1993).

⁴³ As Professor Steven J. Eagle writes, “in *Gardner v. Trustees of Village of Newburgh* [2 Johns. Ch. 162 (N.Y. 1816)], probably the leading early decision, Chancellor Kent required compensation on natural principles at a time when there was no eminent domain clause in the New York Constitution. Indeed, many American decisions, mostly up to about the Civil War era, explained eminent domain principles in natural

mainly through the Fifth and Fourteenth Amendments. Both contain Due Process Clauses that prohibit government from depriving a person of life, liberty, or property without due process of law. The Fifth Amendment protects against the federal government; the Fourteenth Amendment protects against the states. The Fifth Amendment also contains the Takings Clause, which is good against the federal government and has been held by the Supreme Court to be “incorporated” by the Fourteenth Amendment against the states.⁴⁴ The Takings Clause reads, “nor shall private property be taken for public use without just compensation.” In addition, most state constitutions contain similar clauses. Thus, actions can be brought in state courts under either state or federal law or in federal courts under federal law.⁴⁵

Read narrowly, the Due Process Clauses guarantee only that if government takes a person’s life, liberty, or property, it must do so through regular procedures, with notice of the reason, an opportunity to challenge the reason, and so forth. Strictly speaking, of course, the clauses say nothing about the reasons that would justify depriving a person of life, liberty, or property. That has led to a heated debate in America jurisprudence between “textualists,” who would allow deprivations for any reason a legislative majority wishes, within the constraints of its authority; and others advocating “substantive due process,” who point to the historical understanding of “due process of law” as limiting the reasons that a judge or a legislature may invoke. The first group tends toward legal positivism and legislative supremacy, the second toward natural rights and judicial supremacy.

The Takings Clause is clearly a substantive guarantee, but it has problems of its own. To begin, like the Due Process Clauses, which are aimed simply at protecting rights, the Takings Clause has a similar aim, but it is couched within an implicit grant of power, the power of government to take private property for public use, provided the owner is paid just compensation—commonly known, of course, as the power of eminent domain. The problem, however, is that no one has such a power in the state of nature. No one has a right to condemn his neighbor’s property, however worthy his purpose, and even if he

law terms.” Regulatory Takings (3d ed. 2005). See also J.A.C. Grant, *The “Higher Law” Background of the Law of Eminent Domain*, 6 Wis. L. Rev. 67 (1931).

⁴⁴ Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897).

⁴⁵ But see *infra* Part V. B. 3. for the difficulties of bringing suits in federal court.

does give him just compensation. Where then does government, which gets its power from the people, get such a power? It is patently circular, of course, to say that eminent domain is an “inherent” power of sovereignty. The most we can say, it seems, is that in the original position we “all” consented to government’s having this power; and its exercise is Pareto Superior, as economists say, meaning that at least one person is made better off by its exercise (the public, as evidenced by its willingness to pay), and no one is made worse off (the person who receives just compensation is presumed to be indifferent to its exercise).

It was not for nothing, then, that eminent domain was known in the seventeenth and eighteenth centuries as “the despotic power.”⁴⁶ In the case of unwilling “sellers,” after all, it amounts to a forced association. Indeed, if there is a presumption against doing things through government because government, at the initial collective level, is a forced association, as we saw above, then *a fortiori* there is a presumption against using eminent domain, at the individual level, because it is a forced association yet again. And that is especially so when the compensation is less than just, as happens when “market value” is the standard, as usually it is in American law.

But two more problems have plagued eminent domain in actual practice. First, in many cases courts have narrowly defined “private property” to exclude the use rights that are inherent in the very idea of property. That has led to the “regulatory takings” problem that will be discussed below. Second, courts have also expanded the meaning of “public use” such that eminent domain is used today to transfer private property from one private party to another as long as there is arguably some “public benefit” to the transfer. That problem will also be discussed below. For the moment, however, it is enough to note that, far from there being a presumption against the use of eminent domain, its use in America today is promiscuous.

D. From Limited Government to Leviathan

To place those problems in context, however, it will be useful first to outline the larger constitutional history within which they have developed, the better to appreciate the several forces that have weakened property rights in America over the twentieth

⁴⁶ *Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304, 311 (1795).

century.⁴⁷ That larger history is one of constitutional demise and government growth. As discussed above, the Constitution, especially after it was completed by the Civil War Amendments, stood for individual liberty secured by limited government. Yet today, government in America is anything but limited. Because property rights especially have fallen victim to that growth in government, an account of how the growth came about will help explain the Supreme Court's more particular treatment of property rights over the period.

In actual practice, of course, the Constitution's principles never have been fully respected, even after the document was completed following the Civil War, and no example since then has been more troubling than racial policy in the South. Official "Jim Crow" segregation would last there for nearly a century, until the Supreme Court and Congress brought it to an end in the 1950s and 1960s. One of the main reasons it took so long to do that was that courts, despite their counter-majoritarian charter, were reluctant to act against the dominant political will, especially in the area of race relations. That reluctance was illustrated early on in the notorious *Slaughterhouse Cases* of 1873 when a bitterly divided Supreme Court effectively eviscerated the Privileges or Immunities Clause of the Fourteenth Amendment, barely five years after the amendment was ratified, upholding in the process a state-created New Orleans monopoly. That left the Court trying thereafter to restrain the states, where most power rested, under the less substantive Due Process Clause. For the next sixty-five years the Court would do that fairly well, especially when states intruded on economic liberty; but the record was uneven, in large part because the Court never did grasp deeply or comprehensively the theory of rights that underpins the Constitution.⁴⁸

In time, however, the courts also found themselves swimming upstream against changing intellectual currents that were flowing toward ever-larger government. Late in the nineteenth century the Progressive Era took root to America. Drawing from German schools of "good government," from British utilitarianism as an attack on natural rights, and from home-grown democratic theory, Progressives looked to the new social sciences

⁴⁷ I have discussed these issues more fully in Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 Notre Dame L. Rev. 507 (1993); Roger Pilon, *On the Folly and Illegitimacy of Industrial Policy*, 5 Stan. L. & Pol'y Rev. 103 (1993).

⁴⁸ See Kimberly C. Shankman and Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 Tex. Rev. L. & Pol. 1 (1998).

to solve, through government programs, the social and economic problems that had accompanied industrialization and urbanization after the Civil War. Whereas previous generations had seen government as a necessary evil, Progressives viewed it as an engine of good. It was to be better living through bigger government, with “social engineers” leading the way.⁴⁹

Standing athwart that political activism, however, was a Constitution authorizing only limited government, and courts willing to enforce it—as courts were, for the most part. Things came to a head during the Great Depression, following the election of Franklin Roosevelt, when the activists shifted their focus from the states to the federal government. During Roosevelt’s first term, as the Supreme Court was finding one New Deal program after another to be unconstitutional, there was great debate within the administration about whether to try to amend the Constitution, as had been done after the Civil War when that generation wanted fundamental change, or to pack the Court with six new members who would see things Roosevelt’s way. Shortly after the landslide election of 1936, Roosevelt chose the latter course. The reaction in the country was immediate: not even Congress would go along with his Court-packing scheme. But the Court got the message. There followed the famous “switch in time that saved nine,” and the Court began rewriting the Constitution without benefit of constitutional amendment.⁵⁰

The Court did so in two main steps. First, in 1937 it eviscerated the very centerpiece of the Constitution, the doctrine of enumerated powers. It read the Commerce Clause, which was meant mainly to enable Congress to ensure free interstate commerce, as authorizing Congress, far more broadly, to regulate anything that “affected” interstate commerce, which of course is everything, at some level.⁵¹ And it read the so-called General Welfare Clause, which is merely a summary phrase in the Taxing Clause, as authorizing Congress to tax and spend for the “general welfare,” which in practice means that Congress can spend on anything it wishes.⁵² The floodgates were thus now opened

⁴⁹ See Epstein, *supra* note 3.

⁵⁰ See William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (1995).

⁵¹ See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2000); Cf. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387 (1987).

⁵² See *Spending Clause Symposium*, 4 Chapman L. Rev. 1 (2001).

for federal regulatory and redistributive schemes, respectively—for the modern welfare state.

Second, because federal power, now all but plenary, and state power could still be checked by individuals claiming that federal and state programs were violating their rights, that impediment to expansive government was addressed in 1938 in the infamous *Carolene Products* case.⁵³ In famous footnote four of the opinion the Court distinguished two kinds of rights, in effect, fundamental and nonfundamental, and two levels of judicial review, strict and rational basis review. If a measure implicated “fundamental” rights like speech, voting, or, later, certain personal rights, courts would apply “strict scrutiny,” meaning the burden would be on the government to show that the measure served a “compelling state interest” and the means it employed were “narrowly tailored” to serve that interest, which meant that in most cases the measure would be unconstitutional. By contrast, if a measure implicated “nonfundamental” rights like property, contract, or the rights exercised in “ordinary commercial relations,” courts would apply the “rational basis test,” meaning they would defer to the political branches and ask simply whether the legislature had some rational or conceivable basis for the measure, which in effect meant it would sail right through. With that, the die was cast: “human rights” would get special attention; property rights would fall to a second-class status.

E. Judicial “Activism” and “Restraint”

That methodology was nowhere to be found in the Constitution, of course. It was invented from whole cloth to enable New Deal programs to pass constitutional muster. Not surprisingly, there followed a massive growth of government in America—federal, state, and local—for the Constitution now served more to facilitate than to limit power. And it was only a matter of time until those measures found their way back to the Court, the Court now being asked not to find powers nowhere granted and ignore rights plainly retained—the judicial “activism” of the New Deal Court, often mistaken, due to the Court’s deference, for judicial “restraint”—but to do the interstitial lawmaking needed to save often inconsistent and incoherent legislation—itself a form of judicial activism.

⁵³ *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). For a devastating critique of the politics behind the *Carolene Products* case, see Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 *Sup. Ct. Rev.* 397 (1987).

In the late 1950s, however, the Warren Court—“liberal” in the modern American sense—began a third form of activism that has continued, more or less, to the present. Much of that activism has amounted to nothing more, nor less, than a properly active court, finding and protecting rights too long ignored. But modern liberals on the Court were also finding “rights” nowhere to be found even among our unenumerated rights,⁵⁴ while ignoring rights plainly enumerated, like property and contract, even as they continued to ignore the doctrine of enumerated powers.

As that patently political jurisprudence grew, it led to a conservative backlash, beginning in the late 1960s, and a call for judicial “restraint.”⁵⁵ But most conservatives directed their fire only against liberal *rights* activism. Making peace with the New Deal Court’s evisceration of the doctrine of enumerated *powers*, they called for judicial deference to the political branches, especially the states, and for protecting only those rights that were enumerated in the Constitution, thus ignoring the Ninth Amendment, the Privileges or Immunities Clause of the Fourteenth Amendment, and the substantive implications of the Due Process Clauses of the Fifth and Fourteenth Amendments.

In practice, however, although both camps tended toward deference to power, liberal jurists tended to protect “personal” rights, variously understood, while leaving property rights and economic liberties to the tender mercies of the political branches. Conservative jurists, by contrast, tended to protect property rights and, to a far lesser extent, economic liberties, while leaving unenumerated rights, including many personal liberties, exposed to majoritarian tyranny.

As those two camps warred, a third, classical liberal or libertarian school of thought (re)emerged in the late 1970s.⁵⁶ Reflected in this essay, it criticizes both liberal “activism” and conservative “restraint”—both stemming from the mistaken jurisprudence of the New Deal. Courts, it argues, should be concerned less with whether they are active or restrained than with whether they are discerning and applying the law, including the

⁵⁴ The most contentious example, of course, is the Court’s 1973 abortion decision, *Roe v. Wade*, 410 U.S. 113 (1973). I have discussed the case briefly in Roger Pilon, *Alito and Abortion*, *Wall Street Journal*, Nov. 28, 2005, at A16.

⁵⁵ The most influential exposition of that view is in Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990).

⁵⁶ See, e.g., Bernard H. Siegan, *Economic Liberties and the Constitution* (1980); Roger Pilon, *On the Foundations of Justice*, 17 *Intercollegiate Rev.* 3 (Fall/Winter 1981).

background law, correctly—recognizing only those powers that have been authorized,⁵⁷ protecting all and only those rights we have, enumerated and unenumerated alike. That, of course, is what judges are supposed to do. To do it, however, requires grasping the basic theory of the matter, the Constitution’s first principles, and that is the understanding that is too rare today, steeped as we are in legal positivism, far removed from our natural rights origins.

V. THE SUPREME COURT’S TREATMENT OF PROPERTY RIGHTS

As that brief history should indicate, to a great extent in America today, politics has trumped law. Ignoring and often disparaging the Constitution of limited government, Progressives promoted instead the virtues of expansive “democratic” government.⁵⁸ And under political pressure, the New Deal Court “constitutionalized” that agenda simply by radically rereading the Constitution. As a result, government today intrudes into virtually every aspect of life. That entails massive redistribution, either through taxation or through regulation—coercing some for the benefit of others. In a word, public policy today is far less concerned with protecting rights than with providing goods—by redistributing *property*, including liberty.

Lest there be any doubt about the modern Supreme Court’s view of regulatory redistribution, here is the Court in 1985 speaking directly to the issue:

In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Takings Clause

⁵⁷ Over several years the Rehnquist Court made tentative efforts toward reinvigorating the doctrine of enumerated powers: *see, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). But with *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), that effort stalled. *See* Douglas W. Kmiec, *Gonzales v. Raich: Wickard v. Filburn Displaced*, 2004-2005 *Cato Sup. Ct. Rev.* 71.

⁵⁸ In fact, as early as 1900 we could find *The Nation*, before it became an instrument of the modern left, lamenting the demise of classical liberalism. In an editorial entitled “The Eclipse of Liberalism,” the magazine’s editors surveyed the European scene, then wrote that in America, too, “recent events show how much ground has been lost. The Declaration of Independence no longer arouses enthusiasm; it is an embarrassing instrument which requires to be explained away. The Constitution is said to be ‘outgrown.’” *The Nation*, Aug. 9, 1900, at 105.

is violated whenever legislation requires one person to use his or her assets for the benefit of another.⁵⁹

To illustrate, systematically, how modern Supreme Court decisions have undermined property rights, limiting “property” here to its ordinary signification, I will first sketch four basic scenarios involving government actions that affect property, distinguishing those actions that do not and those that do violate rights. I will then take the last of those scenarios and distinguish four versions of that, again distinguishing those actions that do not and those that do violate rights. Finally, I will raise a few procedural issues surrounding the Court’s property rights jurisprudence. An outline of this kind, drawing on points made earlier, gives us a theory of the matter that is grounded in first principles, as mentioned just above, something that is often not evident in the cases.⁶⁰ I will then turn to cases evidencing the scenarios that involve violations.

A. Government Actions Affecting Property: In Summary

In scenario one, government acts in a way that causes private property values to drop, but it violates no rights. It closes a local public school, for example, or a military base, and local property values drop accordingly; or it builds a new public highway some distance from the old one, reducing the flow of trade to businesses located on the old highway. In those kinds of cases, owners sometimes believe the government owes them compensation under the Takings Clause because its action has “taken” the value in their property. But as discussed earlier, the government has taken nothing they own free and clear—they do not own the value in their property. Absent some contractual right against the government on which they might rely, there is no property right the government has violated; thus, it owes them no compensation.

In scenario two, government regulates, through its basic police power, to prohibit private or public nuisances or excessive risk to others, and here too property values decline accordingly. But once again, no rights are violated. As discussed above, no compensation is due the owners thus restricted, even if their property values are reduced

⁵⁹ *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1985). Contrast that with the 1936 Court’s view of direct redistribution through taxation: “A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government. The word has never been thought to connote the expropriation of money from one group for the benefit of another.” *United States v. Butler*, 297 U.S. 1, 61 (1936).

⁶⁰ For a detailed treatment along these lines, see Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

by the regulations, because they had no right to engage in those uses to begin with. Thus, the government takes nothing that belongs to them. In fact, it is protecting the property rights of others—their right to the quiet enjoyment of *their* property. We have to be careful here, of course, to ensure that the regulated activity *is* noxious or risky to others, and so is properly subject to regulation under the police power. But if it is, government owes the owners no compensation for their losses.

Scenario three is the classic regulatory taking: when regulations designed to give the public various goods take otherwise legitimate uses an owner has in his property, thereby reducing its value, with no offsetting benefit, the Takings Clause, properly understood and applied, requires just compensation for the loss.⁶¹ Here, government regulates not to prohibit wrongful but rather rightful uses; not to prevent harms to others, as under scenario two, but to provide the public with various goods—lovely views, historic preservation, agricultural reserves, wildlife habitat—goods that are afforded by restricting the owner. Regulations prohibit the owner from using his property as he otherwise might—thus taking those uses—and the value of the property drops. If the government is authorized to provide such goods to the public, it may do so, of course. But if doing so requires restricting an owner from doing what he otherwise could do, the Takings Clause should apply and the government should pay for what it takes. Were it not so, government could simply provide the public with those goods “off budget,” the costs falling entirely on the owner, the public enjoying them cost free. It was precisely to prevent that kind of expropriation that the Takings Clause was included in the Constitution in the first place.⁶²

That, unfortunately, is not how American law works today when owners bring actions against governments for the great variety of regulatory takings that happen every day. In almost all cases, in fact, owners face an uphill battle, struggling against a body of law that is largely ad hoc, as we will see below. Those who defend the government’s not having to pay owners for regulatory takings often claim, among other things, that “the property” has not been taken. But that objection rests on a definition of “property” found

⁶¹ For a detailed treatment of the American law of regulatory takings, see Eagle, *supra* note 43.

⁶² In 1960 the Court stated the principle well: “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

nowhere else in law. Property can be divided into many estates, after all, the underlying fee being only one. Take any of the uses that convey with the title and you have taken something that belongs to the owner. In many cases, however, the regulations are so extensive that the owner is left holding an empty title. Apart from *de minimis* losses, and losses that arise when regulations restrict everyone equally in order to provide roughly equal benefits for everyone, the public should pay for the goods it acquires through restricting the rights of an owner, just like any private party would have to do. It is quite enough that the public can simply take those goods through the “despotic power” of eminent domain. That it should not pay for them besides adds insult to injury, amounting to plain theft. Yet that is happening all across America today, as we will see below.

It is a mistake, then, to think of regulatory takings as “mere” regulation: they are *takings*—through regulation rather than through condemnation of the whole estate. In fact, they are usually litigated, when they are, through an “inverse condemnation” action whereby the regulated owner sues either to have his property condemned outright so that he can be compensated for it, or to retain title and be compensated for the losses caused by the regulatory restrictions. Thus, condemnation and the power of eminent domain, parading as regulation, are plainly at issue in either case. Even though the government does not condemn the property outright, it condemns the uses taken by the regulation.

That brings us to scenario four, condemnation in the full sense, with government taking the whole estate. These are usually called “eminent domain” cases, but that is somewhat misleading insofar as it implies that regulatory takings do not also involve eminent domain, as just noted. In these cases, however, government is ordinarily the moving party as it seeks to take title and oust the owner from his property, offering him compensation in the process. Unlike with regulatory takings, therefore, the obligation of government to compensate the owner is not at issue—although whether the compensation is just often is an issue. Rather, the “public use” restraint comes to the fore.

The Takings Clause authorizes government to take private property, but only for a “public use” and with just compensation. Here again we see the Progressives’ agenda facilitated by courts willing to expand the definition of “public use” so that government may grow. Either directly or by delegating its eminent domain power to private entities, government takes property for projects that are said to “benefit” the public. And the

courts have accommodated that expansion by reading “public use” as “public benefit.” Clearly, those terms are not synonymous: one restricts government, the other facilitates it, since virtually any project benefits the public at some level.

There are four basic contexts or rationales for such full condemnations. In the first context, property is taken from a private person and title is transferred to the government for a clear public use—to build a military base, a public road or school, or some other public facility. Assuming just compensation is paid, those takings are constitutionally sound because the public use restraint is clearly satisfied.

The second context is more complicated but no less justified. It involves taking property from a private person and transferring title not to the government but to another private person or entity for network industries like railroads, or telephone, gas, electric, cable, water, and sewer lines. Without the use of eminent domain, the classic “holdout” problem can easily arise in such contexts, with the owners of the last parcels needed to complete a line demanding extortionate prices. Yet even when privately owned and operated, the public use restraint is satisfied here because the subsequent use is open to the whole public on a nondiscriminatory basis and often at regulated rates. Although collusion must be guarded against in these cases, the virtue of this reading of “public use” is that it avoids many of the problems of public ownership, enabling the public to take advantage of the economic efficiencies that ordinarily accompany private ownership.

By contrast, the third and fourth rationales for using eminent domain are deeply problematic. Over the years in America, many cities, often spurred on by federal money, have engaged in “urban renewal,” bulldozing whole neighborhoods and then rebuilding them, taking title from one private party and giving it to another, all in the name of “blight reduction.” If there is a genuine nuisance, labeled “blight,” the uses that create the blight can easily be enjoined through a state’s general police power: title does not have to be transferred.

But if blight reduction stretches the denotation of “public use,” the closely related fourth rationale for using eminent domain, “economic development,” stretches it even further. Here again title is transferred from private parties to other private parties—often to a quasi-governmental entity, a developer, or a corporation—and “downscale” housing and commercial properties are replaced by “upscale” properties, including industries.

Providing jobs, increasing the tax base, promoting tourism, and other “public benefits” are invariably claimed for such projects, although the actual benefits rarely materialize as promised. Neither here nor with blight reduction are holdouts a real problem, nor are the subsequent uses ordinarily open to the public on a nondiscriminatory basis as is true of the public utility condemnations discussed in the second context. Far from satisfying a public use standard, these economic development condemnations are naked transfers of property, usually from poorer, less politically connected populations to wealthier, better-connected people who are often looking to get the property “on the cheap” rather than at the prices the owners are willing to accept.

Finally, if this deterioration of property rights were not enough, the procedural rights needed to vindicate the substantive rights that remain have deteriorated as well. Prior to the rise of the modern regulatory state and the reduction of property rights to a second-class status, one simply exercised one’s property rights, by and large. If neighbors or the government objected, an action for an injunction and/or damages might be brought; but the presumption was on the side of use, the burden on the complainant to show that the use objected to was in some way wrongful—essentially, because it violated the complainant’s rights. With zoning and many other forms of land-use planning in place in most of America today, however, that presumption is reversed. Rights are exercised only “by permit,” with permits often needed from several levels of government. This is just one more example of how “human rights” and property rights have parted: we would never tolerate making people get official permission before they exercised their right to speak; but before they can make often the most trivial changes to their property they have to get government permission to do so.

That is only the beginning of the problem, however, because obtaining the permits needed before an owner can develop his property or change its use is often just the start of a procedural nightmare that can go on for years. The Supreme Court’s “ripeness” test keeps cases out of federal court until all administrative remedies have been exhausted. But exhausting those remedies often means clearing vague and ever-changing administrative hurdles erected by local regulators opposed to any change. And under the Court’s test, until an agency issues a final denial, it cannot be sued. Once the owner does obtain a final denial, however, if he is not exhausted financially and emotionally by then

he must go to state court to seek compensation for the taking of his property, albeit under a regulatory takings regime that is anything but favorable. But if wrongly denied compensation by the state court, he will find that he is denied federal court review on the merits by the federal Full Faith and Credit Act.⁶³ That is just a summary of procedural problems discussed more fully below.

B. The Court Stumbles Through the Cases

We now turn to a number of cases, both those that do not and those that do protect property rights, the latter to show how the reasoning even there so often misses the mark. We will start with the regulatory takings cases (scenario three above), then look at cases involving the full use of eminent domain (scenario four, focusing on the third and fourth rationales), then consider finally the procedural cases. As noted at the outset, and as will soon be apparent, rather than having developed a sound and systematic jurisprudence based on a natural reading of the Takings Clause, as outlined above, the Court admits that it, “quite simply, has been unable to develop any set formula” and instead has engaged in “essentially ad hoc, factual inquiries.”⁶⁴

1. Regulatory Takings. Given the ad hoc character of this jurisprudence, any taxonomy of the cases must of course be inexact. Nevertheless, the regulatory takings decisions with which we begin, despite their great variety, can be divided roughly into four categories: government acts or authorizations that constitute physical invasion or occupancy; diminution of value without occupancy; unreasonable regulatory exactions; and temporary takings. That is only one possible taxonomy, to be sure, doubtless suggesting more order than the cases admit; but it will serve our purpose, which is to try to discern where and how the Court has gone wrong. Naturally, we will consider only a small sampling of cases.

a. Physical Invasion Cases. The physical invasion cases are perhaps the easiest to get right, and the Court has generally done so, because exclusive dominion—the right to exclude—is the very mark of private property, and physical invasion usually leaves little room for ambiguity. Thus, early on the 1871 Court found an owner’s property taken after

⁶³ 28 U.S.C. § 1738 (2006) (providing that “judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State”).

⁶⁴ Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

it was flooded by a state-authorized dam.⁶⁵ In 1903 the Court found a taking when river dredging flooded a rice plantation,⁶⁶ and in 1917 when a government dam and lock system flooded land.⁶⁷ The military's repeated firing of guns over an owner's property was declared a taking in 1922⁶⁸ as were military overflights that interfered with business operations on the ground in 1946⁶⁹ and regular and continuous daily flights at low altitudes that interfered with the owner's quiet enjoyment of his property in 1962.⁷⁰

The modern case that established a nearly categorical rule that physical invasions constitute takings is *Loretto v. Teleprompter Manhattan CATV Corp.*⁷¹ There a New York State statute required residential landlords to permit cable TV companies to install wiring and small cable boxes on their apartment buildings, upon payment of a nominal fee of one dollar, so that tenants could enjoy the cable TV services. Writing for the majority, Justice Thurgood Marshall said,

we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, the "character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.⁷²

Still, in a complex fact case the Court was unable to discern a physical invasion when the court below said, correctly, that there was one.⁷³ And even in the relatively easier overflight cases, state courts today are split over whether building height restrictions constitute a physical taking, even as the Supreme Court recently declined to hear a case directly on point.⁷⁴ For the most part, however, the Court has decided the physical invasion cases correctly.

⁶⁵ *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871).

⁶⁶ *United States v. Lynah*, 188 U.S. 445 (1903).

⁶⁷ *United States v. Cress*, 243 U.S. 316 (1917).

⁶⁸ *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922).

⁶⁹ *United States v. Causby*, 328 U.S. 256 (1946).

⁷⁰ *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

⁷¹ 458 U.S. 419 (1982).

⁷² *Id.* at 426.

⁷³ *See, e.g., Yee v. City of Escondido* 503 U.S. 519 (1992).

⁷⁴ *Hsu v. Clark County, NV* 544 U.S. 1056 (May 23, 2005).

b. Diminution-of-Value Cases. By contrast, the cases involving diminution of value without occupancy—the stock “regulatory takings” cases—are far more numerous and have proven far more difficult for courts and owners alike. Recall that these do not include cases involving mere diminution of value, cases in which regulations protect the rights of others by prohibiting noxious or risky uses, or cases with offsetting benefits. Rather, the uses or, sometimes, omissions prohibited, so that goods may be provided to others, including the public, are otherwise perfectly legitimate. In principle, owners who suffer more than *de minimis* losses under such regulations should be compensated for their losses, whatever they may be. In practice, they are compensated today in most cases only if their property is rendered all but useless—if their losses, that is, are near total.

Not surprisingly, the problem of regulatory takings came to the fore with the birth of the modern regulatory state. An early example, arising in 1921 when Progressivism was in full flower, involved landlord challenges to wartime rent control measures enacted by Washington, DC, and New York City.⁷⁵ The Court upheld the statutes in 5-4 rulings, one of which, *Block v. Hirsh*, reversed a decision below that had found the Washington measure “void, root and branch.”⁷⁶ Writing in dissent, Justice Joseph McKenna nicely summarized the facts in the Washington case, succinctly criticizing the statute in the process:

The statute in the present case is denominated “the Rent Law” and its purpose is to permit a lessee to continue in possession of leased premises after the expiration of his term, against the demand of his landlord, and in direct opposition to the covenants of the lease, so long as he pays the rent and performs the conditions as fixed by the lease or as modified by a commission created by the statute. This is contrary to every conception of leases that the world has ever entertained, and of the reciprocal rights and obligations of lessor and lessee.⁷⁷

⁷⁵ *Block v. Hirsh*, 256 U.S. 135 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

⁷⁶ *Block*, 256 U.S. at 158.

⁷⁷ *Id.* at 159 (McKenna, J., dissenting).

As grounds for dissent, McKenna cited “the explicit provisions of the Constitution” and “the irresistible deductions from those provisions.”⁷⁸ Writing for the majority, Justice Oliver Wendell Holmes, the quintessential Progressive, cited exigent circumstances.

The confusion in the Holmes opinion begins with his invocation of the police power as the rationale for rent controls: he appears to appreciate neither the rationale for nor the limits on that power. Instead, all is policy. Thus, “the general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law.”⁷⁹ Note the ambiguity of “law:” public policy, reflected in a statute that itself reflected the will of a legislative majority, trumps the law established by the contract between the parties. In the same vein, and equally vague: “a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation.”⁸⁰ And finally:

All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law.⁸¹

The idea that there is a point at which the police power “ceases” and the eminent domain power begins is utterly confused. Recall that Locke spoke of the Executive Power that each of us enjoys in the state of nature, which we yield up to government as the police power: its function is not to *create* rights but to secure the rights we *already* have, which limits its scope to the rights there are to be secured. Yet here the tenant’s “right” to renew the lease at a controlled rent is *created* by statute *pursuant* to the police power, Holmes tells us. We need not rely on natural law alone to find the error in that view, for the parties themselves had settled the matter: the lease they had agreed to left the risk of subsequent rent increases with the tenant. What the statute did was undo that agreement: to benefit the tenant, it extinguished the right of the landlord to charge market rents upon

⁷⁸ *Id.* (McKenna, J., dissenting).

⁷⁹ *Id.* at 155.

⁸⁰ *Id.* at 156.

⁸¹ *Id.*

renewal, thus taking from him the difference between the market rent he could otherwise have charged and the rent permitted by the statute. In effect, the landlord alone is made to serve the “public interest” that purports to justify this statute. Unfortunately, all of that escaped Holmes. His opinion exhibits no understanding of the theory of the matter; not remotely does it go to first principles. It is essentially a policy ruling.

A year later, however, Holmes faced a statute that did go “too far,” so he went the other way, finding it unconstitutional. In a case that has come to stand for the beginning of regulatory takings jurisprudence in America, *Pennsylvania Coal Co. v. Mahon*,⁸² the Court ruled against Pennsylvania’s Kohler Act because it worked a taking of private property. The facts, in a nutshell, are these. Beginning in the late nineteenth century, landowners in Pennsylvania entered into contracts with coal companies to mine the coal beneath their property. They retained ownership of the surface estates; the companies bought the subsurface estates, where the coal was; and the risk of subsidence and cave-ins, a not uncommon occurrence as mining proceeded, was borne by the surface owners, for which they were paid at the time of the contract. As subsidence began occurring over time, however, the surface owners sought legislative relief in the form of the Kohler Act, which the state legislature was only too happy to provide, the votes of surface owners being far more numerous than those of coal company owners.

Clearly, the statute here is on all fours with the rent control statutes just discussed: the parties had settled their relationships by contract, including the distribution of risk; the challenged statute upset that agreement. The rent control statutes took the landlords’ rent differential. The Kohler Act took the coal companies’ right to mine coal in their subsurface support estates. Yet here, unlike in the cases a year earlier, Holmes found a taking.

Once again the police power played prominently in his opinion—“[t]he question is whether the police power can be stretched so far”⁸³—but again one finds no theory of the matter. And here too Holmes treats the police power and the eminent domain power as if they were opposite ends of some continuum:

⁸² 260 U.S. 393 (1922). For a trenchant discussion of the case, see Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1.

⁸³ *Id.* at 413.

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.⁸⁴

Or, as Holmes put it famously, “[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking.”⁸⁵

Here again we see Holmes trying to define a taking by examining “the extent of the diminution” of “values incident to property.” Yet that has nothing to do with the definition: restrict rights and you have a taking, even if the loss is minimal; restrict wrongful uses and you have no taking, even if the losses are great. Holmes understands the function of the Takings Clause, of course: “We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”⁸⁶ But when he adds immediately that “this is a question of degree—and therefore cannot be disposed of by general propositions,”⁸⁷ we are left with no principle of the matter, no way to distinguish this case from the earlier rent control cases. Why may government take property in one case but not in the other?

And so we see the beginnings of regulatory takings jurisprudence in America mired in confusion. Holmes showed little grasp of the foundation, function, or scope of the basic power of government, the police power, which is intimately connected, as we saw earlier, to the theory of natural rights that underpins the Constitution. Indeed, detached from that theory, the police power is simply a function of political will, restrained only by such positive law as may restrain it. And if restraint should come from

⁸⁴ *Id.*

⁸⁵ *Id.* at 415 (emphasis added).

⁸⁶ *Id.* at 416.

⁸⁷ *Id.*

something like the Takings Clause, that is hardly a restraint if the “property” protected by the clause is itself a function merely of positive law and hence of political will.

The confusion in *Holmes*, an inveterate legal positivist, is no doubt best explained by his reluctance to come to grips with the nation’s first principles. And it is evidenced here in easy cases, cases in which the parties themselves had spelled out their respective property rights by contract. Is it any wonder, therefore, that a Court under the sway of ideas like those that informed his thinking should have gone astray when more difficult cases came its way, cases in which government was alleged to be taking property defined not by contract but by natural or common law? In fact, it was just such a case that would next come before the Court, and it proved a further, massive undoing of property rights by opening the door to government land-use planning.

That case, *Village of Euclid v. Ambler Realty Co.*,⁸⁸ decided in 1926, upheld a local zoning scheme, reversing the decision below 6-3. In 1922 the village council of Euclid, Ohio, a suburb adjoining the city of Cleveland, adopted a comprehensive zoning plan for regulating the location and character of housing of all sorts, businesses, trades, industries, municipal services, charities, churches, signage, the size of lots, the heights of buildings, and on and on. The detail was exquisite—stables for fewer than five horses, for more than five, dance halls, dry cleaners, institutions for the insane, crematories—it was the very model of Progressive planning. The plaintiff owned sixty-eight acres of land, part vacant, held for years with the idea of selling it “for industrial uses, for which it [was] especially adapted, being immediately in the path of progressive industrial development.”⁸⁹ Zoned residential, as the plan required, its value dropped by seventy-five percent.

Here again the scope of the police power was at issue, but unlike in the cases just discussed, the regulation did not seek to rearrange rights the parties had already declared and arranged themselves through contract; rather, it was directed against rights that owners held under common law, to be discovered by judges, as discussed earlier. In fact, Justice George Sutherland, writing for the majority, seemed to recognize as much when he mentioned the plaintiff’s pleadings: “It is specifically averred that the ordinance

⁸⁸ 272 U.S. 365 (1926).

⁸⁹ *Id.* at 384.

attempts to restrict and control the *lawful uses* of [plaintiff's] land, so as to confiscate and destroy a great part of its value"⁹⁰—uses lawful because running with the land, presumably, rather than because authorized by statute, which was just the issue at stake.

Rather than try to discern and declare those “lawful uses,” however, Sutherland focused instead on the character and scope of the police power. “The ordinance now under review, and all similar laws and regulations,” he said, “must find their justification in some aspect of the police power, asserted for the public welfare.”⁹¹ Notice the door that is opened wide by that understanding of the police power: it serves “the public welfare.” To be sure, Sutherland begins his analysis, rightly, by saying that the power must be determined in context, pointing to the law of nuisance as a “helpful aid.” Thus, he notes colorfully, “a pig in the parlor instead of the barnyard” is a nuisance.⁹² But he never homes in on the specifics of the complaint that gave rise to the suit.

Instead, he latches on to the fact that “the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate.”⁹³ Reflecting the utilitarianism of the times, he dismisses any concern for individual cases: “we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class.”⁹⁴ The question, rather, is whether, “as a whole, the statute is invalid.”⁹⁵

There, precisely, we find policy trumping principle, politics trumping law. What can it mean, after all, to assess the scheme “as a whole” except to engage in some sort of utilitarian calculus—to ask, for example, whether it provides the greatest good for the greatest number, a policy question? The effect of the plan, Sutherland says, is to divert this “natural” industrial development elsewhere, in accordance, he adds, with the will of the majority. That would be unobjectionable had it come about voluntarily, of course: we see all manner of private communities today with far-reaching covenants running with

⁹⁰ *Id.* at 384 (emphasis added).

⁹¹ *Id.* at 387.

⁹² *Id.* at 388.

⁹³ *Id.*

⁹⁴ *Id.* at 389.

⁹⁵ *Id.* at 396.

the land. But here, recalling the earlier discussion of political legitimacy, we have a *political* majority imposing its will on the minority, with no limiting principle—which makes it all the more curious for Sutherland to be adding that he does not mean “to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.”⁹⁶ How would we ever know whether “the general public interest” outweighed the interest of the community? Are they not the same?

But we get a more precise understanding of the problem before us from this contention:

If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow to the injury of the residential public if left alone, to another course where such injury will be obviated.⁹⁷

That inference does indeed follow, but the problem is in the premise. It is *not* a proper exercise of the police power to “relegate” industrial establishments to nonresidential locations, at least in the affirmative sense of that term, as implied here. Absent express authorization through some *other* power to do that sort of thing, government’s principal business under the *police* power is simply to secure our rights, which it does in this context merely by injunction, by enjoining the “active” (here, industrial) use complained of, as discussed earlier.⁹⁸ It then falls to the owner thus enjoined to (a) cease or change his operation so that it no longer constitutes a nuisance, (b) offer to and then buy enough surrounding property from neighbors to be able to continue operating, but without offense since the operation is now sufficiently insulated, or (c) move. No planning board, much less court, should be making those kinds of economic decisions on behalf of the owner.

⁹⁶ *Id.* at 390.

⁹⁷ *Id.* at 389-90.

⁹⁸ *See, e.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (law barring operation of brick mill in residential area); *Miller v. Schoene*, 276 U.S. 272 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (law effectively preventing continued operation of quarry in residential area).

Once a court authorizes government to “relegate” industries to different locations, however, it is but a short step to authorizing it to divert the industrial flow itself from its “natural” course. But in either case, government is now in the planning business. As a corollary, and more important, the presumptions and burdens of proof have switched: property is no longer used *by right* but only *by permit*. That places vast powers and discretion in the hands of government bureaucrats, often only indirectly answerable to the people being regulated—power and discretion that are invitations to corruption, as history amply demonstrates. And it has government planners doing what only markets can do efficiently and rightly—and courts saying, as this Court did, that “the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community.”⁹⁹ For reasons of economy, that kind of segregation usually happens in any event, and happens far more efficiently when done by the market.¹⁰⁰ But who is the Court to make that value judgment? What is the Court to say to the person who wants to remain living next to the factory, having accepted, and been paid for, an easement running with his property? He cannot do that, because the planning board says otherwise?

The person left out in all of this, of course, is our plaintiff here. And so we return to him. The property the zoning scheme took from him was the ancient use of holding for speculation. The Court finds the value of that right “speculative.” To a certain extent it is, because it is difficult to know *ex ante* what offers will be made for the land once the natural “industrial flow” gets there. But uncertainty in determining precisely what that lost use is worth is no reason for taking it from the owner and giving him nothing in return. Rather, it is one more reason for letting nature take its course, for letting the economic forces play out, which enables the land to be put to its highest valued use. No zoning board can determine what that use is. Only markets can.

Sutherland saw neither the ethics nor the economics of the matter. He found “no difficulty in sustaining [industrial] restrictions.”¹⁰¹ “The serious question,” he said,

⁹⁹ *Euclid*, 272 U.S. at 391.

¹⁰⁰ Houston, Texas, the fourth largest city in America with a population of over two million, has managed quite well without zoning, proposals for which have been voted down by the citizens several times over the years. See Bernard H. Siegan, *Land Use Without Zoning* (1972); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681 (1973).

¹⁰¹ *Euclid*, 272 U.S. at 390

“arises over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments.”¹⁰² To him, one imagines, those uses seemed less “intrusive” and hence more acceptable. “Nuisance,” for this Court, was a function not of uses that intruded on *rights*, as discussed earlier, but of *aesthetics*. As with Holmes—who voted, not surprisingly, with the *Euclid* majority—it was all a matter of degree, with aesthetics determining the issue here.

Thus, while *Mahon* secured the principle that regulations can take property if they go “too far,” its flawed analysis of the issue—in particular, its open-ended reading of the police power—led directly to *Euclid* and to the Court’s authorization of massive land use planning by state and local governments. Eleven years later the Court would unleash federal power by eviscerating the Constitution’s doctrine of enumerated powers, as discussed earlier, and a year after that, in *Carolene Products*, the Court would reduce property rights to a second-class status. Not surprisingly, regulation burgeoned over the ensuing years: some of it was long overdue, if sometimes over done, as with the protection of air and water; but much of it was at the expense of individual owners, as with the provision, “free” to the public, of such environmental amenities as viewsheds, wildlife habitat, and the like. The result has been an uneven,¹⁰³ yet steadily growing assault on property rights. In fact, sixty-five years after *Mahon* was decided, the Court faced a statute identical in all relevant respects to the one faced in *Mahon*, yet it went the other way, finding against the coal companies.¹⁰⁴ That is but one of countless examples of owners having no recourse because they retained title and still had some uses available to them.

Finally, in 1992, now seventy years past *Mahon*, a case came before the Court that was so simple on its facts and so egregious that it could not be ignored: *Lucas v. South Carolina Coastal Council*.¹⁰⁵ In 1986 David Lucas, a local real estate developer,

¹⁰² *Id.*

¹⁰³ *Compare, e.g.,* Claridge v. New Hampshire Wetlands Board, 125 N.H. 745, 752, 485 A.2d 287, 292 (1984) (owner may, without compensation, be barred from filling wetlands because landfilling would deprive adjacent coastal habitats and marine fisheries of ecological support), *with, e.g.,* Bartlett v. Zoning Comm’n of Old Lyme, 161 Conn. 24, 30, 282 A.2d 907, 910 (1971) (owner barred from filling tidal marshland must be compensated, despite municipality’s “laudable” goal of “preserv[ing] marshlands from encroachment or destruction”).

¹⁰⁴ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987). *See* Epstein, *supra* note 81, for a critical contrast of the two cases.

¹⁰⁵ 505 U.S. 1003 (1992).

paid nearly one million dollars for two oceanfront parcels near Charleston, South Carolina, with the idea of building a home for himself on one and a home to sell on the other. Nothing was extraordinary about his plans: the land was zoned residential; homes stood adjacent to and between his two lots. Before he began building, however, the state passed a Beachfront Management Act. Aimed at promoting tourism, preserving various flora and fauna, and other such public goods, its effect was to deny Lucas all but the most trivial uses of his property: he could picnic on it, pitch a tent, but that was about it. In essence, to provide the public with the goods listed in the Act, Lucas was wiped out. He retained title, and the obligation to pay property taxes, but the title was all but worthless.

Shocking as those facts were, Lucas lost 3-2 in the South Carolina Supreme Court. Fortunately, the U.S. Supreme Court agreed to hear his case.¹⁰⁶ In the end, the Court remanded the case so that it could be decided below under the law its opinion articulated; in effect, however, the Court decided that Lucas was entitled to compensation under the Takings Clause because the regulation had wiped out his investment. Justice Antonin Scalia wrote for himself and four other justices. Justice Anthony Kennedy concurred in the judgment. Here again, however, we were left with an opinion that was less than clear, in part because Scalia was drawing on what he openly granted was the Court's "70-odd years" of ad hoc regulatory takings jurisprudence.¹⁰⁷

At bottom, the case is known for its categorical rule that "the Fifth Amendment is violated when land use regulation . . . denies an owner economically viable use of his land."¹⁰⁸ But the Court had never set forth a justification for that rule, Scalia noted. Thus, he began that task, first, by entertaining the idea that such a wipe-out is tantamount to a physical invasion; and, second, by observing that when the loss is total, the usual rationales for allowing uncompensated takings do not seem to apply. That takes him in no time to the heart of the matter, for him, the police power. The court below had found against Lucas—who was asking merely to be compensated for his total loss—on the ground that he had failed to challenge the police power rationale for the regulation;

¹⁰⁶ The Supreme Court grants only 75 or 80 of the more than 9,000 cert. petitions (petitions for writ of certiorari) it now receives each year.

¹⁰⁷ *Id.* at 1015. There is little justification for the Court's continuing efforts to square new decisions with old error-filled ones. Given that stare decisis is far less important in constitutional law than in, say, commercial law, the Court would be better advised to start with a clean slate in deciding these regulatory takings cases.

¹⁰⁸ *Id.* at 1016.

instead, he had simply accepted the state’s argument that prohibiting him from building was designed to protect valuable public resources. “In the [lower] court’s view,” Scalia said, “these concessions brought petitioner’s challenge within a long line of this Court’s cases sustaining against Due Process and Takings Clause challenges the State’s use of its ‘police powers’ to enjoin a property owner from activities akin to public nuisances.”¹⁰⁹ In other words, the Court below likened the building of a house, similar to others in the neighborhood, to creating a nuisance that the state could stop through its police power.

But the lower court concluded too quickly that the noxious use principle decided this case, Scalia added. True, the Supreme Court’s early cases had held that noxious uses could be prohibited without compensation—“a reality we nowadays acknowledge explicitly with respect to the full scope of the State’s police power.”¹¹⁰ But while the Court had not elaborated on the standards for determining what constituted a “legitimate state interest,” it had made it clear, Scalia continued, “that a broad range of governmental purposes and regulations satisfy these requirements.”¹¹¹ Indeed, nuisance analysis was “simply the progenitor of [the Court’s] more contemporary statements that land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’”¹¹²

Notice the move there from nuisance analysis, which focuses on the actions of the plaintiff that are enjoined under the police power, to “legitimate state interests,” which may reach well beyond the prevention of noxious activities to include the state’s pursuit of all manner of public goods—yet under the “police power,” no less. Plainly, that power has expanded. It has been transformed into the “policy power,” as it were; and the implications for exercising it free from the Fifth Amendment’s compensation requirement are palpable. If government acting under the police power to prohibit nuisances need not compensate individuals thus restricted—and it need not—why not the same when it acts under the police power in pursuit of a wide range of “legitimate state interests”?

Surprisingly, Scalia rationalizes that expansion—and the attendant contraction of the compensation requirement. “The transition from our early focus on control of

¹⁰⁹ *Id.* at 1022.

¹¹⁰ *Id.* at 1023.

¹¹¹ *Id.*

¹¹² *Id.* at 1023-24 (quoting *Nollan v. California Coastal Com.*, 483 U.S. 825, 834 (1987)).

‘noxious’ uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between ‘harm-preventing’ and ‘benefit-conferring’ regulation is often in the eye of the beholder.”¹¹³ It is all a matter of perspective and, indeed, values, Scalia says. “A given restraint will be seen as mitigating ‘harm’ to the adjacent parcels or securing a ‘benefit’ for them, depending upon the observer’s evaluation of the relative importance of the use that the restraint favors.”¹¹⁴ Scalia then draws the following conclusion:

When it is understood that “prevention of harmful use” was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation that “prevents harmful use” and that which “confers benefits” is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory “takings”—which require compensation—from regulatory deprivations that do not require compensation. A fortiori, the legislature’s recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court’s approach would essentially nullify *Mahon*’s affirmation of limits to the noncompensable exercise of the police power.¹¹⁵

Thus, Scalia comes full circle at the end, turning the allegedly impossible-to-discern distinction between preventing harms and conferring benefits *against the state*. If the individual cannot use the distinction to block the state’s pursuit of legitimate state interests under the expanded police power, neither can the state use it to depart from the Court’s categorical rule regarding total takings.

Notwithstanding that come-around at the end, Scalia has seriously overstated the difficulty of drawing the distinction at issue here. To be sure, it is easy to become confused if you have no baseline. That is why the distinction between passive and active

¹¹³ *Id.* at 1024.

¹¹⁴ *Id.* at 1025.

¹¹⁵ *Id.* at 1026.

uses was drawn earlier, with a focus on uses that intrude, in context, on the rights of others. Thus, to take a famous example, the doctor's injunction against the next-door confectioner's noise can be said to harm the confectioner and benefit the doctor rather than simply prevent harm to the doctor; but the doctor sought that injunction only because he was *first* harmed by the confectioner's noise, *while giving no harm in turn to the confectioner*. Without a baseline of rights, however, one is reduced to a morally neutral theory of "reciprocal causation,"¹¹⁶ with nothing other than a value criterion for deciding between incompatible uses.

It is hard to know exactly why Scalia went down that harm/benefit road, because in the end he does offer a baseline, albeit one grounded in positive law rather than the background theory of that law—and limited, apparently, to wipe-out cases like *Lucas*. "Where the State seeks to sustain regulation that deprives land of all economically beneficial use," he says, "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."¹¹⁷ Again, "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."¹¹⁸ And he concludes finally that "[i]t seems unlikely that common-law principles would have prevented the erection of *any* habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land. The question, however, is one of state law to be dealt with on remand."¹¹⁹

¹¹⁶ Scalia is plainly drawing here from Ronald Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960):

The traditional approach has tended to obscure the nature of the choice that has to be made. 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.

In a world free of political constraints, with low or no transactions costs, rights will be distributed efficiently, of course, but it is important to know about the initial distribution before any voluntary redistribution through market offers takes place. See Pilon, *supra* note 35, at 191-94.

¹¹⁷ *Lucas*, 505 U.S. at 1027.

¹¹⁸ *Id.* at 1029.

¹¹⁹ *Id.* at 1031 (emphasis added).

At least four closely connected problems leap from that analysis. First, the Court’s ruling is limited to cases, as here, in which regulations deprive the owner of *all* beneficial use. Yet few regulatory takings fall into that category.¹²⁰ Recall that the plaintiff in *Euclid* alleged “only” a seventy-five percent reduction in the value of his land, not a complete loss. Thus, it is the rare victim of a regulatory taking who will be able to avail himself of the Court’s categorical rule. Scalia addressed that problem, unsatisfactorily, in a footnote responding to Justice John Paul Stevens in dissent:

Justice Stevens criticizes the “deprivation of all economically beneficial use” rule as “wholly arbitrary,” in that “[the] landowner whose property is diminished in value 95% recovers nothing,” while the landowner who suffers a complete elimination of value “recovers the land’s full value. . . . It is true that in at least some cases, the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these “all-or-nothing” situations.¹²¹

That is cold comfort, of course, for owners who have been *mostly* wiped out, but who have some uses remaining, almost all of whom, unlike David Lucas, will never have their cases heard by the Supreme Court. Yet those cases are everywhere today, none more common than the “downzoning” cases that result from anti-growth measures.

That leads to the second problem. Because we now have a categorical rule, we have what has come to be called the “takings fraction” or “relevant parcel” problem. If a regulation prohibits the owner of fifty acres of land from developing all but one acre, while leaving the rest fallow—say, to preserve “open space” or a “viewshed” for the public—is the denominator of the fraction the forty-nine acres from which all economically beneficial use has been taken, or the whole parcel, on which some use

¹²⁰ In fact, even here, Justice David Souter, who did not join the majority, wrote a separate “statement” questioning both the extent of Lucas’s loss and, more deeply, the very idea of a categorically compensable taking. *Id.* at 1076.

¹²¹ *Id.* at 1019-20 n. 8. The second example in Scalia’s penultimate sentence would presumably fall into our scenario one above and hence not constitute a taking.

remains? Because of the categorical rule, owners argue that all use has been taken from the regulated portion; government officials, uncharacteristically concerned about taxpayer well being, argue that use remains for the parcel taken as a whole. Although the issue predates *Lucas*,¹²² that decision brought it to the fore in stark relief. And courts have gone both ways.¹²³

Third, Scalia has given us no real answer to the takings problem—to the problem of the boundless and thus ever expanding police power—because he misapplies the background theory of property rights that should confine that power. If we think of the right to property as comprising a “bundle of sticks,” as the common metaphor has it, the Court’s categorical rule tells us we have a taking when every stick, except the one for title, is taken by the police power. But on one hand, and once again, that should not be so in the rare case in which the taking is to stop a wrongful use and no other use of the land is possible—no other “stick” remains save that of title. On the other hand, when the taking stops an otherwise rightful use (in context), that “stick”—that property—is taken. In other words, a taking occurs not simply when the *next to last* stick is taken; it occurs from the moment the *first* stick is taken. (After all, we would hardly say that a thief had taken someone’s money *only* if he took all of it.) Thus, the scope of the police power is a function of the background theory of rights. Apart from that theory, it is boundless, save for the Court’s arbitrary wipe-out rule, which has nothing to do with that theory.

That leads directly to the final problem: it is hard to know what to make of the promising turn Scalia takes toward the end of his opinion when he speaks of a baseline of “background” “common law principles” that inhere in the owner’s title, because he undermines the importance of the turn by applying it only to wipe-out cases (“[i]t seems unlikely that common law principles would have prevented the erection of *any* habitable or productive improvements on petitioner’s land”¹²⁴), and his expansive reading of the

¹²² See, e.g., Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 Harv. L. Rev. 1165 (1967).

¹²³ Thus, in *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994), the U.S. Court of Appeals for the Federal Circuit allowed for a categorical taking where there was a ninety-five percent loss of economic value, while in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the U.S. Supreme Court found that regulations that allowed the owner to build only one home on his 18 acres, thereby reducing the value of the land from an asserted \$3,150,000 to \$200,000, did not constitute a taking because it did not leave the property “economically idle.”

¹²⁴ *Lucas*, 505 U.S. at 1031 (emphasis added) (citation omitted).

police power only buttresses that limitation (short of a wipe out, presumably, the police power can take “economically beneficial uses” without having to compensate the owner). One would have hoped for more. Instead, Scalia says, “[i]t seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.”¹²⁵ True, but we still do not know which exercises *are* legitimate? The categorical rule tells us only that the state may take right up to the last stick, and only then do the background principles seen to kick in.

Yet, if the background common law tells us what rights are in the bundle, there is no reason why those principles should not kick in from the start—no reason why the state should be able to take *any* rights free from the obligation to pay for them. That does not mean, however, that those rights cannot be “lost” from time to time, without compensation, as *circumstances* change. A case that illustrates something like that is *Spurr Industries v. Del Webb*.¹²⁶ As Del Webb, a developer, was building homes closer and closer to Spurr Industries’s cattle feedlot, the feedlot’s operations, legal at one time, became a nuisance at a later time, and were rightly enjoined; for if rights (of quiet enjoyment) run with the (homeowners’) land, then the feedlot owner’s “coming-to-the-nuisance” defense in response to the developer’s suit to enjoin the nuisance will not avail. He has to change his operations, buy out his neighbors, or move.¹²⁷ But none of that analysis would be possible without a theory of how the background principles play out over time. And that theory must begin from the beginning, not simply kick in at the end. Once again, from a consideration of first principles, the police power is a function of the theory of rights, not the other way around.

Despite those problems in the *Lucas* opinion, the growing property rights movement in America¹²⁸ was buoyed after the decision came down, first, because an

¹²⁵ *Id.* at 1027.

¹²⁶ *Spurr Indus. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (Ariz. 1972) See also *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (Los Angeles brickyard, pre-dating residential development, ordered shut down despite reduction in value of the land from \$800,000 to \$60,000).

¹²⁷ Actually, this was not a “clean” case because (a) the defendant never did have a right to spill his noxious activities over on to the plaintiff’s unimproved lots; and (b) the case ended with an injunction purchased by the developer on behalf of the homeowners who eventually bought homes from him, perhaps in recognition of his having sat on his rights while the feedlot owner was despoiling his lots.

¹²⁸ See Stephen J. Eagle, *The Birth of the Property Rights Movement*, Cato Institute Policy Analysis No. 558, Dec. 15, 2005.

owner had won for a change, and, second, because only five years earlier owners had won in two other cases before the Supreme Court.¹²⁹ The hope was short-lived, however, because in time the Court reverted to its all but inscrutable three-factor “balancing” test for diminution-of-value cases that it had announced in 1978 in *Penn Central Transportation Co. v. City of New York*.¹³⁰ Today, the *Penn Central* test, despite its incoherence, dominates the analysis of diminution-of-value cases.

Very briefly, the case arose when the Penn Central Corporation sought to build a 55-story office building above its famous Beaux-Arts Grand Central Terminal in New York City, which the city’s Landmarks Preservation Commission had designated a landmark. After the commission rejected Penn Central’s application to build, despite the plan’s meeting all other building and zoning requirements, the company brought suit in the state trial court and won. With that, the case became a cause célèbre, eventually ending up in the U.S. Supreme Court, which upheld the commission, 6-3. Writing for the majority, Justice William Brennan lamented the Court’s inability to find any “set formula” for such cases, then wrote most famously, or infamously, as follows:

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.¹³¹

If there is any connection between that language and the language of the Constitution’s Takings Clause, it has yet to be discovered. No one knows with any confidence, least of all the Court, how to apply the elements of *Penn Central*’s three-factor test: “economic

¹²⁹ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

¹³⁰ 438 U.S. 104 (1978). The first major reversion was in *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002).

¹³¹ *Penn Central*, 438 U.S. at 124 (citations omitted).

impact,” “investment-backed expectations,” and “the character of the government action.” The test does serve, however, to keep owners seeking compensation under the Takings Clause at bay. It is the main reason today why diminution-of-value claimants rarely find relief.

Yet the issue, at its core, is strikingly simple. If the people, through their government, want some good that can be afforded by restricting the property rights of one or a few among them, they have the power, unlike private individuals, to take those rights, but only if they pay for them.¹³² If they fail to pay, the demand for such “free” goods, obtained not by taxation but “off-budget,” will increase exponentially—hence the explosion today of regulatory takings. Worse than that, however, their actions will be no different in principle than those of a common thief. That is what we have come to.

c. Regulatory Exaction Cases. Beyond the direct expropriations of uses by government lie the indirect expropriations, which the modern permit regimes have facilitated. To obtain a permit to do what one would otherwise have a perfect right to do, owners are sometimes coerced by planning or regulatory agencies to give up other rights as a condition for receiving the permit. Two modern Supreme Court cases, one decided in 1987, the other in 1994, addressed this form of regulatory taking, and both were decided for the owner. But the story, unfortunately, does not end there.

In *Nollan v. California Coastal Commission*,¹³³ the Nollans had sought permission from the Coastal Commission to tear down their old bungalow on their oceanfront lot, situated between two public beaches, and build a new house much like others along the coast. But the commission conditioned the permit on the Nollans granting a public easement along their beach that would connect the two public beaches on either side. The issue for the Court was whether there was a connection between the relevant statutory purpose of the permit regime—to protect public access to the ocean—and the condition imposed on the Nollans. Justice Scalia, writing for a 5-4 Court, held that there was no “essential nexus” between the two.¹³⁴

The commission’s “power to forbid construction of the house in order to protect the public’s view of the beach,” Scalia wrote, “must surely include the power to condition

¹³² See note 62, *supra*.

¹³³ 483 U.S. 825.

¹³⁴ *Id.* at 837.

construction upon some concession by the owner, even a concession of property rights, *that serves the same end.*”¹³⁵ But the absence of such a connection was the problem here:

the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of “legitimate state interests” in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but “an out-and-out plan of extortion.”¹³⁶

In the years following *Nollan*, lower courts gave an uneven application of the “essential nexus” test, so in 1994, in *Dolan v. City of Tigard*,¹³⁷ the Court refined the test to one of “rough proportionality.” Here again a conditioned permit was at issue. The Dolans had sought a permit from the Tigard City Planning Commission to expand their hardware store and pave their adjacent parking lot. As a condition for granting the permit, however, the commission required the Dolans to dedicate approximately ten percent of their 1.67 acre lot for a public greenway along an adjacent creek, to minimize flooding that was said to be exacerbated by the proposed expansion, and for a pedestrian/bicycle pathway intended to relieve downtown traffic congestion.

Writing for a 5-4 majority, Chief Justice William Rehnquist first determined that here, unlike in *Nollan*, there was a nexus between the interests of the state in controlling floods and traffic and the conditions imposed by the commission. The next question, however, was whether the findings of the commission relative to that connection were sufficient to justify imposing the conditions on the Dolans. After looking at various state standards for answering that question, Rehnquist determined that the appropriate test was one of “rough proportionality.”¹³⁸ “No precise mathematical calculation is required,” he said, “but the city must make some sort of individualized determination that the required

¹³⁵ *Id.* at 836 (emphasis added).

¹³⁶ *Id.* at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)).

¹³⁷ 512 U.S. 374, 391 (1994).

¹³⁸ *Id.*

dedication is related both in nature and extent to the impact of the proposed development.”¹³⁹ Here, however, the city had failed to provide such an individualized determination. Moreover, it had not shown why a private greenway, rather than a public dedication, would not serve just as well for flood control. Finally, the city had not shown, apart from a conclusory statement, how a pedestrian/bicycle pathway would ease any additional traffic occasioned by the Dolans’s expansion.

Three things stand out in *Dolan*. First, Rehnquist’s “rough proportionality” test, opaque as it may be, is an effort to elevate the standard of review in exaction cases, especially as Rehnquist went out of his way in the opinion to distinguish that standard from the minimal “rational basis” review that emerged in 1938 from *Carolene Products*, as discussed earlier. Second, requiring “individualized determinations” shifts the burden to the government to justify its exactions, which is also consistent with a heightened standard of review. Finally, the doctrine of “unconstitutional conditions” came into play in *Dolan*. That doctrine holds that government may not condition the receipt of a discretionary benefit on the recipient’s giving up a constitutional right, like the right to receive just compensation when property is taken for a public use, where the right has little relation to the benefit. Yet that is just what the city was attempting here—to obtain the land, without compensation, in exchange for the permit. When Rehnquist cited two free speech cases in support of that point¹⁴⁰—two “fundamental rights” cases—Justice John Paul Stevens objected in dissent,¹⁴¹ implying that property rights and “human rights” were to be treated differently. Taken together, those points underscore Rehnquist’s aside: “We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.”¹⁴²

Unfortunately, the Court’s moves in *Nollan* and *Dolan* to better protect property rights in exaction cases seem to have stalled in the years since. One reason is that, on remand, *Dolan* settled: the city agreed to pay the Dolan family \$1.5 million as

¹³⁹ *Id.*

¹⁴⁰ *Perry v. Sindermann*, 408 U.S. 593 (1972) (state college instructor allegedly stripped of de facto tenure because of his views); *Pickering v. Board of Education of Township High School District*, 391 U.S. 563 (1968) (teacher allegedly dismissed because of letter to newspaper critical of district’s financial practices). See Eagle, *Regulatory Takings*, *supra* note 43 at 871-72.

¹⁴¹ *Dolan*, 512 U.S. at 407 (Stevens, J., dissenting).

¹⁴² *Id.* at 392.

compensation for imposing its restrictions. As Professor Steven J. Eagle notes: “This settlement truncated the legal proceedings, thus leaving us with *Dolan* . . . as it was decided in 1994. Since then, the Court has said that *Dolan* was ‘inapposite’ in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,¹⁴³ a case in which it also displayed great reticence to revisit fundamental takings precepts.”¹⁴⁴ And a number of more recent cases have held that *Del Monte Dunes* “limits the *Dolan* ‘rough proportionality’ test to cases involving excessive exactions of real property interests.”¹⁴⁵ The Supreme Court has yet to revisit the “rough proportionality” standard to help lower courts better understand the concept in practice.

d. Temporary Takings. From physical invasion, to diminution-of-value, to exaction cases, the Court has shown a decreasing ability to apply the Takings Clause in anything like a consistent or even coherent manner. Given the twentieth century’s switch in presumptions from owners to government, that should not surprise. Nor should it surprise that owners have found even less relief when they have been subject to temporary takings. After all, in a world of planning, in which owners can exercise their rights only after they have received a government permit allowing them to do so, the distinction between a normal planning delay and a temporary taking will be difficult to draw. One court described it as the difference between a “prospectively temporary” moratorium and a “retrospectively temporary” moratorium.¹⁴⁶ The planning delay, in other words, is intended to be temporary, whereas the temporary taking is not obviously intended to be temporary but turns out to be such only when it is invalidated, repealed, or amended. Unfortunately, in the real world of planning the distinction is often blurred.

The Court tackled the issue of temporary takings in 1987 in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.¹⁴⁷ In 1979 the county passed an interim ordinance that prohibited the church from rebuilding on land a flood had devastated the year before. Shortly thereafter the church filed an inverse condemnation action claiming the ordinance denied it all use of its property, leading to complex litigation below in which the church ultimately failed. Finally, years later, the

¹⁴³ 526 U.S. 687 (1999).

¹⁴⁴ Eagle, *Regulatory Takings*, *supra* note 43, at 879.

¹⁴⁵ *Id.* at 905.

¹⁴⁶ *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 262 (Minn. Ct. App. 1992).

¹⁴⁷ 482 U.S. 304.

case reached the U.S. Supreme Court, which agreed to consider whether compensation is required for takings that operate only for a period of time.

Writing for a 6-3 majority, Chief Justice Rehnquist did not reach the merits of the case but focused instead on the question at hand concerning compensation for temporary takings. Looking at a number of World War II cases in which the government needed property temporarily, he noted that they “reflect the fact that ‘temporary’ takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.”¹⁴⁸ But simply invalidating the ordinance, as the court below had done, will not satisfy the Takings Clause, he continued. “Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.”¹⁴⁹ Whichever option it chooses, however, “where the government’s activities have *already* worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”¹⁵⁰

Unfortunately, that victory, after a decade of litigation, was short-lived: on remand the California appellate court found that there was no taking since the interim ordinance constituted a “reasonable moratorium for a reasonable period of time” while the city conducted a study to determine what uses, if any, were compatible with public safety.¹⁵¹ Thus, we are back with the problem of distinguishing normal planning delays from temporary takings, which is exacerbated by the Court’s difficulty in distinguishing partial takings, which temporary takings seem to be, from full takings—the “denominator” problem. Yet planning delays, even if they turn out not to be temporary takings, can work great hardship on those whose lives are put on hold to accommodate them. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*¹⁵² is a case in point.

¹⁴⁸ *Id.* at 318.

¹⁴⁹ *Id.* at 321.

¹⁵⁰ *Id.* at 321 (emphasis added).

¹⁵¹ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1356 Cal. Rptr. 893, 894 (1989).

¹⁵² 535 U.S. 302 (2002).

Beginning in the 1970s, the Tahoe Regional Planning Agency, created by the states of California and Nevada to plan land use around Lake Tahoe, began instituting a series of temporary moratoria on new construction to give it time to develop a comprehensive land-use plan. Aimed in large part at protecting the quality of the lake, the effect of the rolling moratoria was to deny development of their property to those who had not yet begun building. Starting in the early 1980s some 700 such owners sought relief. By the time the Supreme Court decided their case in 2002, 55 of the plaintiffs had died and many others had dropped out from sheer exhaustion, financial and emotional, their land still undeveloped.

Notwithstanding deprivations of use running for more than two decades, Justice Stevens, writing for a 6-3 Court, focused on only two moratoria running for 32 consecutive months during the 1980s. The plaintiffs argued, not surprisingly, that whenever government deprives them of all economically viable use of their property (*Lucas*), even temporarily (*First English*), it has taken that property. But Stevens dismissed that “categorical approach” in favor of the ever-malleable *Penn Central* balancing test. Pointing to “the ‘denominator’ question,” he said that separating out the 32-month segment and then asking whether it had been taken in its entirety would ignore *Penn Central's* admonition to focus on “the parcel as a whole.”¹⁵³ Instead, “we are persuaded that the better approach to claims that a regulation has effected a temporary taking ‘requires careful examination and weighing of all the relevant circumstances.’”¹⁵⁴ And chief among those circumstances, it seems from the rest of Stevens’s opinion, is the impact a compensation requirement would have on “prevailing practices:” it would impose “serious financial constraints on the planning process,”¹⁵⁵ he said. In fact, “the consensus in the planning community appears to be that moratoria, or ‘interim development controls’ as they are often called, are an essential tool of successful development.”¹⁵⁶

Tahoe was a complex case that required balancing the environmental interests of the community with the rights of landowners in the Tahoe basin. Unfortunately, the Court

¹⁵³ *Id.* at 331 (quoting *Penn Central*, 438 U.S. at 130-31).

¹⁵⁴ *Id.* at 335 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001)).

¹⁵⁵ *Id.* at 337.

¹⁵⁶ *Id.* at 338.

took it as an opportunity to cement the return of *Penn Central*'s incoherent balancing test, after a period during which it looked like the Court might be moving in a more principled direction. The result was to leave in place the allegedly deleterious uses of residents who had already developed their lots, while imposing the entire cost of protecting the environment on those who had not yet built their homes, rendering their investments nearly worthless. That distribution of benefits and burdens escaped the Court's majority, whose approach was essentially that of the planner.¹⁵⁷

2. Eminent Domain. We turn now from government actions that take part of a person's property to actions that take the whole property, including title, through eminent domain, focusing on the third and fourth rationales outlined above: to reduce blight; to promote economic development. Two problems arise here, recall. First, the compensation owners normally receive is "market value"—sometimes not even that—whereas their losses are usually far greater. Ideally, "just compensation" should mean, given that the transaction is not voluntary on their side, an amount that leaves them indifferent as to whether they receive the compensation or keep their property—in a word, what a private party would have to pay to induce them to surrender their property. Short of that, they should receive compensation that reflects the full extent of their losses, including relocation expenses, business losses, sentimental value, and so forth.

Second, property is taken by government today not simply for "public use," the authorization found in the Takings Clause, but for "public benefit," a much broader standard that opens the door for expansive use of eminent domain.¹⁵⁸ Indeed, given that there is virtually no public undertaking that cannot be said in some way to benefit the public, it is no standard at all. Courts have focused mainly on that issue, and so will we.

a. Blight Reduction Cases. It was a 1954 case, *Berman v. Parker*,¹⁵⁹ that opened the door to an expansive reading of "public use." Before the Court was a classic "urban renewal" project, funded like so many others by massive infusions of federal money. Not only did such projects often destroy whole neighborhoods but, as Professor Ilya Somin has written, "[s]o many poor African Americans were dispossessed by urban renewal

¹⁵⁷ For a critical analysis of the case from that perspective, see Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2001-2002 *Cato Sup. Ct. Rev.* 5.

¹⁵⁸ See, e.g., Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 *Geo. Wash. L. Rev.* 934 (2003).

¹⁵⁹ 348 U.S. 26 (1954).

condemnations in the 1950s and 1960s that “[i]n cities across the country urban renewal came to be known as “Negro removal.””¹⁶⁰ Under consideration here was a comprehensive scheme Congress had enacted for clearing an area of the District of Columbia said to be “blighted.” The plan authorized the acquisition of parcels by eminent domain for later sale to private parties. Yet the department store owned by the plaintiff could not be described as “blighted,” which is one reason he fought to keep it.

Writing for a unanimous Court, Justice William O. Douglas would have nothing of that complaint. In fact, his opinion so perfectly captures the mind-set of the New Deal Court—except for the new chief justice, Earl Warren, every member had been appointed by either Franklin Roosevelt or Harry Truman—that it bears quoting at length:

We deal . . . with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. Miserable and disreputable housing conditions may do more than spread disease and

¹⁶⁰ Ilya Somin, *Robin Hood in Reverse: The Case against Taking Private Property for Economic Development*, Cato Policy Analysis No. 535, Feb. 21, 2005 (citing Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *Yale L. & Pol’y Rev.* 1 (2003)).

crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

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. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.¹⁶¹

With the Court's deference to the political branches so complete—amounting virtually to judicial abdication—it is no wonder that “public use” ceased to be a serious restraint on eminent domain. In fact, 30 years after *Berman* was decided the Court would

¹⁶¹ 348 U.S. at 32-33 (citations omitted).

find “public use” satisfied by a Hawaii land reform plan that authorized the state to condemn land and transfer title to private tenants who had built or bought homes on the land under long-term ground leases.¹⁶² Much like Douglas above, Justice Sandra Day O’Connor, writing again for a unanimous Court (Justice Marshall took no part in the decision), said that “[t]he ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”¹⁶³ If that is so, then plainly the cover of “blight reduction” was no longer needed.

b. Economic Development Cases. Given that boundless understanding of the police power, the move from blight reduction to economic development as a rationale for using eminent domain is no stretch at all. In fact, the two rationales are intimately connected, since condemnation of whole neighborhoods for reasons of “economic development” usually means replacing “downscale” (sometimes “blighted”) properties with “upscale” properties—not through voluntary market transactions but through the force of law.

The quintessential such case, perhaps, came in 1981 from the influential Michigan Supreme Court, *Poletown Neighborhood Council v. City of Detroit*.¹⁶⁴ To make way for a General Motors assembly plant—to build Cadillacs, no less—the city condemned a neighborhood of 4,200 residents, home to generations of Polish immigrants: 1,400 homes, 16 churches, 144 local businesses, several schools, everything, destroying “roots, relationships, solidarity, sense of place, and shared memory,”¹⁶⁵ as Professor Mary Ann Glendon put it. Yet the Michigan Supreme Court upheld the plan. Although the court cautioned, “[t]he power of eminent domain is restricted to furthering public uses *and purposes* and is not to be exercised without substantial proof that the public is primarily to be *benefited*,”¹⁶⁶ such “proof” is invariably speculative. Here, in fact, as nearly always is the case when such grand public-private partnerships supplant market forces, the jobs,

¹⁶² Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

¹⁶³ *Id.* at 240.

¹⁶⁴ 410 Mich. 616, 304 N.W.2d 455 (Mich. 1981).

¹⁶⁵ Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse 30 (1991).

¹⁶⁶ *Poletown*, 304 N.W.2d at 459 (emphasis added to indicate the court’s understanding of “public use”).

increased tax revenue, and other economic benefits touted by the city establishment promoting the project never did materialize as promised.¹⁶⁷

Given the seminal importance of *Poletown* as a model for other state courts, it was no small matter that in 2004 the Michigan Supreme Court revisited the issue of economic development condemnations, unanimously repudiating its *Poletown* decision in *County of Wayne v. Hathcock*.¹⁶⁸ *Poletown*, the court said, was “a radical departure from fundamental constitutional principles and this Court’s eminent domain jurisprudence.”¹⁶⁹ But if that reversal were not enough to give hope to the beleaguered property rights movement, just a month after *Hathcock* came down the U.S. Supreme Court decided to hear a closely watched economic development case from Connecticut, *Kelo v. City of New London*.¹⁷⁰ Since the Court had not taken a public use case in years, speculation ran high, especially in light of *Hathcock*, that it was ready to revisit and rethink the issue. Alas, the opinion that emerged the following year showed no new thinking at all.¹⁷¹

Kelo was a classic redevelopment case involving a comprehensive government plan aimed at revitalizing a distressed part of a New England town that had seen better days. In conjunction with the Pfizer pharmaceutical company’s building a new research facility in New London, the city authorized a private development company to redevelop an adjacent ninety-acre site by purchasing or acquiring by eminent domain the properties that were located there. The new hotel, stores, and residences planned for the site were to be leased back to private parties on completion of the project. And the usual rationales—employment, increased tax revenue, and the like—were offered in support of the scheme, which was financed originally by a state contribution of seventy-three million dollars.¹⁷²

Susette Kelo and a few of her neighbors, with the support of the Institute for Justice, a non-profit libertarian litigation organization, decided to resist the city’s effort to

¹⁶⁷ Interestingly, it seems that General Motors did not initiate or even want the project, as is commonly supposed. Rather, the mayor of Detroit and the federal government, during the oil crisis and recession of 1979, were the principal proponents, and federal money was the lubricant. See William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 Michigan State Law Review 929 (Winter 2004).

¹⁶⁸ 471 Mich. 445, 684 N.W.2d 765 (Mich. 2004).

¹⁶⁹ *Id.* at 787.

¹⁷⁰ 268 Conn. 1, 843 A. 2d 500 (2004).

¹⁷¹ *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). For a critical review of the case, see Ely, *supra* note 6, at 53-65.

¹⁷² Kate Moran, *The Day*, Jan. 18, 2004, at A1.

evict them from their homes. But Justice Stevens, writing for a 5-4 Court, found nothing wrong with transferring property from one private party to another as long as some “public purpose” justified it. Drawing from an idiosyncratic reading of early cases, he wrote that “when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as ‘public purpose.’”¹⁷³ And in echo of Justice Douglas in *Berman*, he concluded that “[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”¹⁷⁴ In dissent, Justice O’Connor, whose *Midkiff* opinion Stevens employed, attempted to distinguish the two cases; but her main concern was that “[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.”¹⁷⁵

The public reaction to the *Kelo* decision was immediate, intense, and widespread, surprising even those who were close to the case—all the more surprising because, in truth, the Court had done little more than continue its long line of cases weakening property rights. But the idea that government could take a person’s home or business and transfer it to another who might, in the government’s eye, make better use of it, gathered the public mind in a way that previous cases seem not to have done. Federal and state legislators ran to the microphones, hearings were called, and bills to address the problem were introduced. It seemed not to occur to most that those very same legislators, who had enacted the economic development schemes in the first place, were the problem.¹⁷⁶ Nevertheless, to date some twenty-nine state legislatures have passed bills or constitutional amendments of various types, all aimed at limiting economic development

¹⁷³ *Kelo*, 125 S.Ct. at 2662.

¹⁷⁴ *Id.* at 2664.

¹⁷⁵ *Id.* at 2671 (O’Connor, J., dissenting).

¹⁷⁶ My own testimony in the U.S. House of Representatives, making that point, among others, can be found at <http://www.cato.org/testimony/ct-rp090705.html>. *Strengthening the Ownership of Private Property Act of 2005: Hearing on H.R. 3405 Before the H. Comm. On Agriculture*, 109th Cong. (2005) (statement of Dr. Roger Pilon).

takings.¹⁷⁷ And on the litigation front, on July 26, 2006, the Ohio Supreme Court, echoing the Michigan Supreme Court two years earlier, handed down a ringing unanimous rebuke to a local municipality, holding that “economic or financial benefit alone is insufficient to satisfy the public-use requirement” of the Ohio Constitution; and adding that “the courts owe no deference to a legislative finding that [a] proposed taking will provide financial benefit to a community.”¹⁷⁸

In the limited realm of full eminent domain condemnations, therefore, there is a glimmer of hope for owners, at least at the state level. But notice that state legislatures and courts are coming at the issue from the back, as it were. These are not head-on challenges to the expansive reading of the police power, with a substantial burden placed on the government to justify its actions. In fact, the blight rationale for eminent domain remains alive in most of the bills and court decisions. What we see, rather, is the economic development rationale carved out, with heightened scrutiny required in those cases. That is a start—a move in the right direction—but there is much more to do before we can say that property rights have the status of human rights.

3. Procedural Justice. Dispiriting as the Court’s substantive treatment of property rights may be, there is perhaps no clearer indication of the second-class status of those rights than can be found in the procedural law on the matter. As outlined earlier, the root of the problem is the modern presumption against use, occasioned by the rise of the regulatory state and the need to obtain a permit, or several permits, before use, changes in use, or development can begin.¹⁷⁹ If the agency issuing permits is disinclined to see change, as it often is, the grueling process of trying to obtain one can take years, exhausting most owners long before it is finished. But only after a “final denial” has been issued can the owner go to state court to seek compensation for a taking. And only after compensation has been denied may the owner appeal to a federal court.¹⁸⁰ Once he

¹⁷⁷ For details, see the Institute for Justice website at <http://www.castlecoalition.org/legislation/index.html>.

¹⁷⁸ *City of Norwood v. Horney*, No. 2005-0227, 2006 Ohio LEXIS 2170, at *69 (Ohio July 26, 2006).

¹⁷⁹ Thus, at issue here are “as applied” challenges. Facial challenges to statutes will be entertained by federal courts, where they will almost always fail due to the Court’s presumption of constitutionality.

¹⁸⁰ See Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Regulation of Constitutionally Protected Property Rights*, 29 Calif. Western L. Rev. 1 (1992).

satisfies that two-prong test, however, he will then find that the federal Full Faith and Credit Act,¹⁸¹ encompassing *res judicata*, precludes his case being heard in federal court.

The two-prong test emerged in 1985 from *Williamson County Regional Planning Commission v. Hamilton Bank*,¹⁸² another complex factual and procedural case. In brief, in 1973 the bank's predecessor in interest, a Tennessee land developer, obtained the planning commission's approval for residential development under then existing zoning regulations. But in 1977 the county rewrote its zoning law, reducing the allowable density in the process, which the commission applied against the developer in 1979. Thereafter the commission disapproved development of the remainder of the tract, whereupon the developer brought suit in federal district court, alleging a taking without compensation. When the Supreme Court took the case, it declined to address the merits the complex litigation below had addressed. Instead, the Court held that the bank's claim was not "ripe." Although the developer's plan had been rejected (under the new regulations), he had not sought variances and so had not obtained a "final decision."¹⁸³ Moreover, the Court held the bank's claim premature because the developer had not sought compensation under an inverse condemnation action in state court.¹⁸⁴

The principle underlying ripeness rules is sound enough: appellate courts should avoid premature adjudication. But in practice the rules work great injustice in regulatory takings cases—due, again, to the way the presumption on behalf of the government plays out in fact. Recalcitrant planning and zoning agencies are notorious, for example, for stalling and for avoiding issuing a "final decision." Under that prong of the *Williamson County* test the owner must apply for a specific use; if rejected, he has to apply again for another specific use, responding to agency comments in the process. Or he may ask for a variance—an exception from a rule following a denial based on the rule—all of which can go on forever. Planners are skilled at delay. In one Supreme Court opinion Justice

¹⁸¹ *Supra*, note 63.

¹⁸² 473 U.S. 172 (1985).

¹⁸³ *Id.* at 190-94.

¹⁸⁴ *Id.* at 194-95.

Brennan cited a California city attorney advising fellow attorneys: “[i]f all else fails, merely amend the regulation and start over again.”¹⁸⁵

The cases exhibiting such delays are legion. Recall *Tahoe-Sierra* above,¹⁸⁶ which went on for over two decades. In *Del Monte Dunes*,¹⁸⁷ also mentioned above, the Court brought an end to a struggle that had gone on for eighteen years, during which the company had tried repeatedly to obtain permission to build homes. Although the zoning law allowed more than 1,000 homes to be built on the company’s property, in 1981 the company applied to build only 344 homes. What followed was a long history of rejected proposals, each with fewer and fewer homes; forced exactions; and finally an agreement for 190 homes. But that agreement was later rejected because the land was then said to be habitat for an endangered butterfly. Fortunately, this is a case the Court got right, in 1999, albeit with multiple complex opinions.¹⁸⁸

But again, even if an owner does make it through all the *Williamson County* hurdles, when he finally gets to federal court he will find, even if the state supreme court has wrongly denied him compensation, that the federal court’s doors are closed by the federal Full Faith and Credit Act. Only a year ago the U.S. Supreme Court visited that issue in *San Remo Hotel v. City and County of San Francisco*,¹⁸⁹ here again an exceedingly complex case that has run on for years. Around 1990 the plaintiffs, owners of a partly residential hotel in San Francisco, petitioned the city for a permit to operate as a tourist hotel. The city granted the permit, but only on several conditions, including payment to the city of a \$567,000 “conversion fee.” Lengthy administrative and judicial proceedings followed in both state and federal courts, the plaintiffs alleging a regulatory taking without compensation. Having finally satisfied the *Williamson County* two-prong ripeness test after losing the compensation claim in state court, the plaintiffs made it at last to the U.S. Supreme Court, where the Court agreed to decide the narrow question of

¹⁸⁵ *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655 n.22 (quoting Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, in 38B NIMLO [National Institute of Municipal Law Officers] Municipal Law Review 192-93 (1975)).

¹⁸⁶ *Supra*, note 152.

¹⁸⁷ *Supra*, note 143.

¹⁸⁸ For a brief account of the case, see Eagle, *supra* note 128, at 19. For many examples of property rights horror stories, see Timothy Sandefur, *Cornerstone of Liberty: Property Rights in the 21st Century* (2006).

¹⁸⁹ 125 S. Ct. 2491 (2005).

whether it should grant an exception to the Full Faith and Credit Act and allow federal court review of Takings Clause claims.

Justice Stevens, writing for a unanimous Court on the holding, declined to grant an exception without a congressional change in the law. More interesting, however, was the concurrence of Chief Justice Rehnquist for himself and three other justices. Although he agreed with the Court's holding, he urged the Court to revisit the second prong of *Williamson County*, an opinion he had joined in 1985, because "further reflection and experience" had led him "to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic."¹⁹⁰ And he added that the Court had not explained why it should "hand authority over federal takings claims to state courts . . . while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment, or the Equal Protection Clause."¹⁹¹ We have here, in short, just one more example of the Court's second-class treatment of property rights under the Fifth Amendment's Takings Clause.¹⁹²

VI. Brief Reflections on Europe

Thus, armed with both natural and positive law aimed at protecting property rights, the U.S. Supreme Court has managed nonetheless to make a mess of things. One should imagine, therefore, that courts armed with less should do even less well. And yet, that is not entirely so when one looks at modern Europe—or so it seems from the limited acquaintance I have with the European courts. My impression is that the protection of property rights by those courts is still very uneven, yet it is evolving in the direction of better protection. That it is uneven should hardly surprise, given the positive law with which the courts are working.

In particular, Article I of Protocol No. 1 reads:

¹⁹⁰ *Id.* at 2509-10 (Rehnquist, C.J., concurring).

¹⁹¹ *Id.* at 2509 (Rehnquist, C.J., concurring) (citations omitted).

¹⁹² For a fuller treatment of *San Remo*, see Ely, *supra* note 6, at 66-69. For a discussion of yet another of the government's procedural ploys—the so-called Tucker Act Shuffle whereby plaintiffs are bounced between the U.S. Court of Federal Claims, if they are seeking compensation for a *federal* taking, and a U.S. district court, if they are seeking an injunction against a federal taking—see Roger J. Marzulla and Nancie G. Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens That in Fairness and Equity Ought to Be Borne by Society as a Whole*, 40 *Catholic Univ. L. Rev.* 566 (1991).

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

That language has come to be described as consisting of three “rules.” The first rule, protecting “the peaceful enjoyment of property,” has been variously described as a general rule, a declaratory clause, or an omnibus rule. The second rule protects against the “deprivation” of property except under certain conditions. And those conditions are expanded further by the third rule, which recognizes the right of states to regulate the “use” of property “in accordance with the general interest.”

Commentators have noted that although the courts have tried to decide cases under one of the three rules—and, in particular, under rules two and three, in the main, failing which they turn to the general rule—the three rules are not distinct or unconnected.¹⁹³ That should not surprise: drawing by analogy from the single American “rule”—“nor shall private property be taken for public use without just compensation”—the three European rules track the American rule fairly closely. Yet the differences are instructive. To begin, America’s Takings Clause opens by expressly recognizing private property, much like Europe’s rule one. Although it does not restrict the right by express reference to “peaceful enjoyment,” as rule one does, that restriction is implicit in the American right by virtue of America’s background of common law.

The second rule reflects the central point of the Takings Clause, that no one shall be “deprived” of his property—i.e., have his property “taken”—except under certain conditions. The differences in the language, however, are not insignificant. The American Takings Clause, at least in principle, imposes two restrictions on government takings: property may be taken only for a “public use;” and if that test is met, the owner must be

¹⁹³ See, e.g., H. Vandenberghe, *La Privation de Propriété*, in *Property and Human Rights*, *supra* note 7, at 31.

paid just compensation. By contrast, Europe's rule two would seem to afford far less protection. Owners may be deprived of their possessions "in the public interest"—a far broader concept than "public use." And no mention is made of "just compensation." Instead, deprivations are "subject to the conditions provided for by law and by the general principles of international law." In theory, of course, that law and those principles could provide for just compensation, and they generally do; but there is no guarantee of that in the basic law of the Convention as there is in the basic law of the United States, the U.S. Constitution. In fact, it seems that during the drafting of the Convention the reason for referencing international law was to protect domestic investors from foreign nationalizations, not to protect citizens from their own governments' deprivations. It was left to the democratic process to do that—not always the surest way to protect minority rights, which property rights often are.

But if rule two is problematic for those reasons, rule three is more troublesome still. Whereas rule two pertains to "deprivations"—or the taking, presumably, of an entire holding, as discussed above—rule three pertains to the taking of "uses," as discussed above under the category of "regulatory takings." But here, unlike with the American rule, the right to use one's property is expressly constrained by "the general interest." To be sure, American law too has come to reflect that restraint in an ad hoc way; but it has done so contrary to the implicit limits the Takings Clause imposes on government. As discussed above, owners hold rights not simply to their "property" but to all the uses their property affords them that are consistent with the rights of others. That final qualification *could* be understood as equivalent to "the general interest." But for that, the latter would have to be a function of the former. Rights would first have to be defined, that is, in private law, according to principles of reason and the entailed political principles, not by mere positive law or will, even democratic will. Thus, "the general interest" would be the upshot or outcome of that rational process, not something independently aimed at by the political process. By contrast, when "the general interest" is defined as a function merely of public law, as in a positivist regime, rights of use cease to be independent variables. "Public policy" replaces principle. "Public good" replaces private right.

Unfortunately, the regimes of Europe today are generally the products of positive, not natural, law—nowhere more evident than in their vast social welfare schemes, which

take from some and give to others. It would be surprising, therefore, if a court found that a restriction on use was not in the general interest. Thus, in the case of *Pine Valley Developments Ltd and Others v. Ireland*¹⁹⁴ the European Court of Human Rights upheld a regional land use plan under rule three, even as it found that “although the value of the land was substantially reduced, it was not rendered worthless”—shades of the *Lucas* case in America, except that there Lucas was compensated. Yet in the seminal case of *Sporrong and Lönnroth v. Sweden*,¹⁹⁵ involving a proposed governmental expropriation running for several years, thus compromising the owner’s use or sale of his land, the Court found for the owner, not under the third but under the first rule. It sought to determine “whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”¹⁹⁶ Four years later, in a similar case, the Court added, “[t]he requisite balance will not be found if the person concerned has had to bear ‘an individual and excessive burden.’”¹⁹⁷

Other cases too have led to what may seem surprising results, given the Protocol’s language tending toward public interests and public policy. Thus, while challenges to rent controls have not been viewed favorably, in the recent case of *Matheus v. France*¹⁹⁸ the Court found for an owner complaining that authorities had refused to provide police assistance to aid in the court-ordered eviction of his tenant. Deciding again under the first rule, the Court said that the right of ownership “can require positive protection measures, particularly where there is a direct link between those measures an applicant could legitimately expect from the authorities and the effective enjoyment of his goods.”¹⁹⁹ But in another recent case involving the failure of authorities to carry out a final court order to tear down an illegal wall, the Court found against the owner of the wall, holding that the complaining owners had a “possession” in their view and their property values, which

¹⁹⁴ 29 Nov. 1991, Series A No. 222, § 56.

¹⁹⁵ 23 Sept. 1982, Series A.

¹⁹⁶ *Id.* §69.

¹⁹⁷ *James and Others v. United Kingdom*, 21 Feb. 1986, Series A No.98, § 50.

¹⁹⁸ No. 62740/00, 31 March 2005.

¹⁹⁹ *Id.* at §§ 68-69.

had dropped as a result of the wall.²⁰⁰ As we saw above, short of contractual arrangements to the contrary, those are doubtful “possessions.”

From this limited sample and analysis, let me venture only a few tentative observations. First, viewing the First Protocol as constituted by three discrete rules lends a certain artificiality to the analysis of cases. As discussed above, from a consideration of first principles one wants to know whether property is at issue; if so, whether the government action takes it; if so, whether the action is justified under a fairly strict reading of the government’s power to protect the rights of others; and, if not, whether the taking is for a public use and just compensation has been paid to the owner. The language of the First Protocol, especially understood as three discreet rules, does not lend itself well to that kind of analysis. Rather, second, it appears to be loose enough to allow the Court substantial latitude—sometimes getting it right, sometimes not. Third, because the language is so freighted with policy and evaluative terms, it lends itself also to judicial lawmaking—to what in America is called judicial “activism.” That may not be a bad thing when judges get it right; but the rule of law entails getting it right for the right reasons and from sound authority. Fourth, from an institutional perspective, it may be that the Court is getting it right, when it does, because of the European Community’s unique institutional arrangements. Unlike the U.S. Supreme Court, which is the third branch of the federal government, the European Court of Human Rights is not a branch “of” any of the governments of Europe. That affords it a certain independence not enjoyed to the same extent by national courts—and a potential for abuse as well as good.

Finally, and doubtless of greatest importance, one cannot ignore changes in the climate of ideas. The forces of socialism that worked in the 1950s to try to frustrate the treatment of property rights as human rights are everywhere on the run today. To be sure, they are still pressing their agenda in countless ways, small and large. But no serious person today thinks that anything but democratic capitalism yields both justice and prosperity, and the foundation of that system is property, starting with the property in oneself. No Court can be immune to that shift in the climate of ideas, including the European Court of Human Rights.

²⁰⁰ Fotopoulou v. Greece, No. 66725/01, § 33, 18 Nov. 2004.

VII. Conclusion

Because language has its limits, a constitution that aims at striking a principled balance between powers granted and liberties retained can go only so far in achieving that end. It is crucial, therefore, that when judges interpret and apply constitutional language to cases and controversies brought before them, they do so with an eye to the larger theory behind the language and the principles the theory entails, as reflected in the document.

As this lengthy review of the U.S. Supreme Court's treatment of property rights has shown, we Americans have grown ever less conversant with the principles our Constitution was meant to secure, to say nothing of the theory that stands behind those principles. The police power, in particular, has been severed from its roots in the theory of natural rights to become simply a reflection of the will of those wielding political power at any given time. The cumulative effect is a growing body of public law that in far too many cases trumps the private law of property and contract, reducing it to a subsidiary role in the American legal system.

And in this brief look at the European scene, we have found similar themes, but the situation seems more fluid because both the constitutional and legal contexts are more fluid as well. It is hard to know, therefore, just where the "constitutional" protection of property rights is headed in Europe. But in both Europe and America, one can take hope from changes over the past few decades in the climate of ideas, toward greater respect for individual liberty and limited constitutional government. Sustaining those changes, however, requires constant vigilance, as Thomas Jefferson reminded us, failing which the implications for individual liberty, responsibility, and dignity are clear.