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Routing

The Birth of the Property Rights Movement

by Steven J. Eagle

Executive Summary

Over the past century, Americans who own property—homeowners, landlords, businesspeople of all kinds, even nonprofit organizations such as churches and charities—have found themselves increasingly entangled in a web of regulatory restrictions that have limited what they can do with their property. Imposed in the name of an amorphous "public interest," those restrictions have often been unwarranted and severe, resulting in untold personal and financial losses. By century's end they had led to the birth of the property rights movement and to a call for both legislative and judicial redress. The movement is likely only to grow in the 21st century.

America's founding principles are grounded in the idea of private property. It is property, after all, that enables individuals and organizations to exercise their other rights and enjoy the liberty that property affords. With the rise of the regulatory state during the Progressive Era, however, those rights were increasingly compromised, especially after the Supreme Court upheld restrictive zoning in 1926. That decision opened the door to a host of "permitting" regimes—federal, state, and local—the effect of which has been to tell owners that they can use their property only after they have been authorized to do so by government. That placed immense and often arbitrary power in the hands of government, leaving owners to face a long and expensive series of procedural and substantive hurdles before they could enjoy their property rights. Although the Court has checked some of those restrictions in recent years, owners still bear the brunt of the burden of justifying their rights. What is worse, the Court recently upheld the government's taking and transfer of homes from owners to private redevelopers, hoping their projects would create jobs and tax revenues.

To try to address those problems, about half of the states have enacted laws to protect private owners' rights to use their property. While most require government agencies simply to "assess" whether their actions might impinge on property rights, a few provide for compensation to owners and curtail abusive takings, while many more are considering such legislation. At the federal level, Congress has considered three forms of legislation: measures that would require such assessments; measures that would provide statutory compensation for certain federal agency actions; and measures that would remove procedural roadblocks that frustrate efforts by owners to challenge federal, state, and local regulations of property. To date, however, none of those federal efforts has succeeded.

The property rights movement needs to continue to build on its successes. To be effective, however, it must adopt a principled approach. It must reunite America with its common law and constitutional heritage, which affirms that individuals have rights in their property and property in their rights. Finally, it must recognize that the ultimate protection for private property will be found in reducing government to its legitimate functions.

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Introduction

Property Rights and Governmental Power: Two American Tales

The property rights movement has arisen in response to a growing web of confiscatory governmental regulations. Two stories will suffice to illustrate why the movement is needed: the first involves a developer, the second an elderly citizen who wanted to build herself a retirement home. These stories are unusual only because the U.S. Supreme Court was willing to hear them. Most victims of the modern regulatory state are not nearly as fortunate.

David Lucas was one of a group of developers of a residential subdivision on the Isle of Pines off the South Carolina coast. As the project neared completion in 1986, he bought the last two lots for his own account, paying $475,000 for each. He planned to build his own home on one lot and a house for sale on the other. Residential use of the lots was permitted under the regulations in place at the time of his purchase. In fact, homes stood on lots on either side of his two lots and between them. Before Lucas began building, however, the state enacted a new Beachfront Management Act aimed at promoting tourism and preserving certain flora and fauna. The effect of the act was to prohibit Lucas from all but trivial uses of his property, rendering it worthless. In effect, the state sought to promote its ends at David Lucas's expense. If the state had explicitly condemned Lucas's land for a public park, it would have been obligated to pay him just compensation under the Fifth Amendment's Takings Clause: "nor shall private property be taken for public use without just compensation." Because Lucas still retained title to his worthless property, however, the state refused to pay him compensation. He was the victim of what has come to be called a regulatory taking.[1]

Not surprisingly, Lucas brought suit against the state of South Carolina. Although he lost in the state supreme court, he prevailed in the U.S. Supreme Court because his intended use of the property was perfectly legitimate—it injured no one—and because he had been deprived of all value in the property.[2] After ruling in favor of Lucas, the Supreme Court remanded the case to the South Carolina courts, where Lucas was awarded $750,000 for each lot (including appreciation, interest, and legal costs), and title to the lots was transferred to South Carolina. The state's attorney later explained that the state had considered keeping the lots undeveloped but decided instead to sell them to another developer since, "with a house to either side and in between the lots, it is reasonable and prudent to allow houses to be built."[3] In a striking understatement, John Echeverria, then chief counsel for the National Audubon Society, said that the state's decision to sell the property for development "opens the state to charges of hypocrisy when it is willing to have an economic burden fall on an individual but not when the funds have to come out of an agency's budget."[4]

Although David Lucas had his rights vindicated by the Supreme Court, Susette Kelo was not so fortunate. Mrs. Kelo, a registered nurse, had moved to the Fort Trumbull neighborhood of New London, Connecticut, in 1997. She purchased her Victorian-era house in 1997 and made extensive improvements. She loves the water view, her neighbors, and the fact that she can get in a boat and be out in the Long Island Sound in less than 10 minutes. After the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull, government planners hoped that Pfizer would attract new business to the area, thus serving as a catalyst for the revitalization of the distressed city. The state of Connecticut, the city of New London, and its private development arm, the New London Development Corporation, together planned a project for 90 acres of Fort Trumbull in order to "complement the facility that Pfizer was planning to build." The project would include a luxury

hotel, upscale housing, office space, and shopping, together with other upgrades to the area that Pfizer requested. The NLDC, which would own the land and lease it to private redevelopers for 99 years at $1 per year, was given the power of eminent domain—that is, the right to take private property subject to the constitutional requirements that the owners receive "just compensation" and that the taking be for "public use." After Mrs. Kelo and several other owners refused to sell their homes, believing that the NLDC wanted them not for public but for private use, litigation followed. The state superior court permanently enjoined part of the project, but the Supreme Court of Connecticut reversed, ruling that economic revitalization of already developed land was a "public use." In June 2005, in *Kelo v. City of New London,*[5] the U.S. Supreme Court affirmed. It held, 5 to 4, that "public use" equated to "public purpose" and that it would defer to New London's determination that taking private homes with the goal of creating jobs and augmenting tax revenues would serve the public good.

The Rise of the Property Rights Movement

Across the nation, dozens of grassroots advocacy groups have formed in recent years to defend private property rights from assault by officials at all levels of government.[6] In the months following the Supreme Court's *Kelo* decision, many new groups have formed to fight eminent domain abuse.[7] Those groups have arisen because officials have aggressively disregarded property rights and courts have done little to vindicate those rights. Property rights organizations already have achieved some success by persuading the U.S. Congress and the legislatures of almost every state to consider property rights legislation.[8] More than half of the states have enacted some form of protective statute.

Since the protection of property rights is a preeminent function of government, the work of property rights groups is of vital importance. Yet zeal alone, without guiding principles, cannot restore property rights. With an eye to the first principles of the matter, therefore, this study will review the nature of the threat to property rights in America today and explore the need for federal and state legislation to better secure those rights and the liberty they ensure. It is crucial that the property rights movement be grounded in moral and legal principle, for without such a foundation, resulting legislation could be ineffective and even subversive.

Legislation that is essentially reactive, aspiring to remedy the narrow range of abuses that is in the public eye at any given time, for example, is apt to be piecemeal and unduly complicated. Such legislation tends to offer little or no protection beyond the prevention of those abuses. Perhaps more disturbing is the possibility that unprincipled property rights "reforms" might actually undermine property rights. Inevitably, opportunists will invoke the need for property rights "protection" in their quest for special advantage. Their efforts will obscure the meaning of "property rights." And their successes will lead, ironically, to the expansion of government, for the largesse they acquire for themselves must be exacted ultimately from the property and taxes of other citizens.

In the end, however, the need for legislative protection of property rights results largely from default by the judicial branch of government. The courts of justice were established, after all, to constitute "the bulwarks of a limited Constitution against legislative encroachments," as Alexander Hamilton put it.[9] Yet, instead of protecting the rights of the people by ensuring that legislatures and the agencies they authorize remain "within the limits assigned to their authority,"[10] the U.S. Supreme Court has for many decades acquiesced in governmental encroachments on private property rights. While the Court has made efforts over the past decade to correct the problem, and has done so marginally, its property jurisprudence thus far has proven inadequate. This study will thus explore the current effort to find legislative relief from the Court's failure—even though the problem may have been originally due to legislatures.

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Liberty and Private Property in Our American Heritage

The right to own property is essential to individual liberty and is a birthright of every American. That truth did not emerge from the current property rights movement. Nor are its origins as recent as the Constitution or the Declaration of Independence. Rather, as people who cherish liberty have always understood, property is a natural right of free persons. And, when individuals enjoying such rights freely bargain to coordinate the use or sale of their property rights, they assert their human dignity and enhance their mutual welfare.

Property enables people to satisfy life's material needs without becoming dependent on the state. Secure property rights provide individuals with the confidence needed to invest their labor and capital in productive activity today, knowing that success will benefit them and their families tomorrow. Private property is thus the vehicle by which individual freedom and the enrichment of society are joined in a virtuous circle to enhance the welfare of all.

Five years before the battle of Bunker Hill, the patriot and later Supreme Court justice James Wilson declared,

> All men are, by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is founded in the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they would enjoy in an independent and unconnected state of nature.[11]

The right to own property is essential to individual liberty and is a birthright of every American.

Six years after the Constitution was adopted, Supreme Court justice William Paterson commented on the connection between liberty, government by consent, and property rights:

> It is evident, that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and inalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact.[12]

Liberty and Property through the Colonial Period

The development of the United States as a republic dedicated to securing individual liberty and economic opportunity resulted largely from its settlers' English heritage of freedom and easily obtainable property in land.

A Legacy of Freedom. We are reminded by the eminent historian Henry Steele Commager that "neither Jefferson nor the American people invented" the principles of the Declaration of Independence.[13] The entitlement to property and liberty of which the Founders' generation was "so proud" was not really new but was part and parcel of the historic "rights of Englishmen."[14] Those rights had been "elaborated by the generation of . . . Sidney, Milton, and above all John Locke in seventeenth-century England."[15]

Not limited to great landowners, those "rights of Englishmen" were embodied in a common law that exalted the right of the most humble owner of land to exclude the mighty. When John Adams told a jury that "an Englishman's dwelling House is his Castle,"[16] he was merely reiterating a famous declaration by William Pitt:

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot

> enter—all his force dares not cross the threshold of the ruined tenement![17]

As the Glorious Revolution of 1688 had affirmed, even the king was subject to the rule of law. Some people had clung to the notion that a monarch was unaccountable to his subjects and was anointed by God. Yet the writers of the English and Scottish enlightenment had a deeper understanding of the nature of government. They realized that government was a compact among individuals for the preservation of their liberties. The dissemination of those writers' ideas was important to the success of the Glorious Revolution. The best known of those authors to 18th-century Americans was John Locke, whose *Second Treatise of Government* declaimed, "Lives, Liberties, and Estates, which I call by the general Name, *Property*."[18] Just as a free individual's estate is property, so too his life and liberty, or the rightful uses of his property, are property. A century after John Locke wrote, his point would be restated simply by James Madison, the principal author of the American Constitution: "As a man is said to have a right to his property, he may be equally said to have a property in his rights."[19]

The extent of Locke's influence on the Framers was shown by 20th-century historians of the revolutionary period, led by Carl Becker[20] and Louis Hartz.[21] As Becker wrote:

> Locke, more perhaps than anyone else, made it possible for the eighteenth century to believe . . . [that] it was possible for men "to correspond with the general harmony of Nature"; that since man, and the mind of man, were integral parts of the work of God, it was possible for man, by the use of his mind, to bring his thought and conduct . . . into a perfect harmony with the Universal Natural Order. In the eighteenth century . . . these truths were widely accepted as self-evident: that a valid morality would be a "natural morality," a valid religion would be a "natural religion," a valid law of politics would be a "natural law." This was only another way of saying that morality, religion, and politics ought to conform to God's will as revealed in the essential nature of man.[22]

The Framers' View of Property and Liberty. A clear example of the infusion of Locke's ideas into America's founding documents can be seen in the preamble of the Virginia Constitution, drafted by George Mason and unanimously adopted on June 12, 1776. It declared, "All men are created equally free and independent and have certain inherent and natural rights . . . among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[23] Thomas Jefferson also was an avid reader of Locke's work; not surprisingly, therefore, the form and phraseology of parts of the Declaration of Independence follow closely certain sentences of the *Second Treatise*.[24] Although he undoubtedly was aware of Mason's preamble, Jefferson dropped any reference to "property" in the Declaration—writing instead of rights to "life, liberty, and the pursuit of happiness"—in part to blur the contradiction between his own version of natural rights philosophy and the continuation of slavery.[25] People discomforted by natural property rights have argued that the Founders intended government to have a large role in shaping private property,[26] but their views have been largely discredited.[27] More generally, Pauline Maier, a leading American historian of the revolutionary period, recently concluded, "By the late eighteenth century, 'Lockean' ideas of government and revolution were accepted everywhere in America; they seemed, in fact, a statement of principles built into English constitutional tradition."[28]

The Confluence of Free Land and Free People. The availability of clear title to land for those willing to work to better their lot was a powerful lure to early settlers in the American colonies. As legal historian James Ely observes:

> The high value attached to landownership by the colonists is best under-

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stood in terms of the English experience. In England, as in Western Europe generally, land was the principal source of wealth and social status. Yet landownership was tightly concentrated in relatively few hands, and most individuals had no realistic prospect of owning land. Moreover, in theory no person owned land absolutely: All the land was held under a tenurial relationship with the Crown.

Conditions in North America, however, were radically different from those in England, and traditional assumptions about landownership were ill suited to the colonies. Because land was abundant, the trading companies and proprietors attracted settlers by granting land on generous terms. . . . As a further inducement, colonial governments granted land titles in fee simple. . . .[29]

As even critics of the Lockean perspective have been forced to conclude, property rights were the "great focus" of the Framers.

Private Property in a Growing Nation

America's founding generation rejected the British monarchy and formed new structures of government. In doing so, however, the Founders did not modify their view that the common law was aimed at liberty and that the new American organic law should protect liberty as well. The new Constitution, which established the scope of legitimate political power and its exercise, was bound by two significant limitations. The first was respect for contract, both private and public. The second was tradition, largely embodied in a common law that served to identify and enforce personal rights. "[T]ogether these placed life, liberty, and property morally beyond the caprice of kings, lords, or popular majorities."[30]

Chief Justice John Marshall's respect for property rights had its genesis in "the Constitution's underlying Lockean premise that government was limited" and that ownership of property, along with life and liberty, was an unalienable right the law was designed to protect. "For Marshall's generation, property was a dynamic concept. It referred not merely to existing possessions but also to the industrious acquisition of wealth."[31] John Adams, who as president had appointed Marshall, declared, "Property must be secured or liberty cannot exist."[32] As even critics of the Lockean perspective have been forced to conclude, property rights were the "great focus" of the Framers.[33]

It is significant that James Madison had a broad view of "property." While it would include land, tangible personal items, and money, he declared that property "in its larger and juster meaning" also includes "everything to which a man may attach a value and have a right," including religious liberty and personal security.[34] In addition to being the principal drafter of the Constitution itself, Madison drafted the Fifth Amendment, which includes the Takings Clause; under that clause the federal government's power to take private property is limited to instances in which the property is put to "public use" and the owner receives "just compensation."[35]

Constitutional Protections for Property. Three distinct features of the Constitution were intended to protect property rights. The most important was the doctrine of enumerated powers: while the federal government could be energetic, the legitimate objects of its powers would be limited to a few necessarily national functions. The second safeguard was the system of checks and balances: among them, a separation of powers among three branches of government, including two houses of Congress, and a division of sovereign power between the national government and the states. The third safeguard for property was a mixture of substantive and procedural rights that were embodied, explicitly and implicitly, in the text of the Constitution and the Bill of Rights.

A few of those safeguards restricted the power of the states. For instance, the right of all Americans to trade freely in a national marketplace was protected by the Commerce Clause,[36] and the agreements people made were protected from state interference by the Contracts Clause.[37] Most protections, however, were directed against abuse by the national government. In the protection of property rights, the Fifth Amendment's Takings Clause plays a pivotal role, as noted above.

But the Fifth Amendment also contains a Due Process Clause, which states: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."[38]

The concept of due process has a long history. It goes back at least as far as Magna Carta. The phrase "due process of law" comes from a 14th-century statute, enacted during the reign of King Edward III, that declared, "No man of what state or condition he be, shall be put out of his lands or tenements . . . without he be brought to answer by due process of law."[39] The Massachusetts Constitution of 1780 put it thus:

> No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land.[40]

The historical record makes it clear that the subordination of the sovereign to the rule of law is required to protect the liberty and property of a free people.

Since the Constitution was designed, for the most part, to protect only against federal deprivations of rights, it did not protect property rights from state interference.[41] However, the original state constitutions did contain explicit protections for property, consistent with the Lockean view that state leaders shared with their national peers.[42] By the 1820s, guarantees of compensation for takings had become an established part of state constitutional law.[43] Every state constitution contains a takings provision similar to that of the Fifth Amendment.[44]

Notwithstanding such protections at the state level, it became clear immediately after the Civil War, especially with the passage by southern states of the notorious "black codes," that citizens would also need federal protection when states failed to protect rights. Thus, the Civil War amendments were passed and ratified, giving a measure of federal protection against state violations and denials. The Fourteenth Amendment is especially important in this regard. It provides, in relevant part,

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[45]

Unfortunately, only five years after the Fourteenth Amendment was ratified, the Supreme Court dealt the Privileges or Immunities Clause a grievous blow from which it has never recovered. In the *Slaughter House Cases* of 1873,[46] by the narrowest of margins, the Court upheld a Louisiana statute that gave a single slaughterhouse company a monopoly to serve all of New Orleans, thus restricting the employment and contract rights of all parties not part of the monopoly. In an impassioned opinion for the four dissenters, Justice Stephen J. Field quoted from *Corfield v. Coryell*,[47] an 1823 decision by Justice Bushrod Washington known for its exposition of the natural law. In setting forth the authoritative interpretation of the Privileges and Immunities Clause of Article IV of the Constitution, Washington had deemed as "fundamental" those privileges and immunities

> which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States . . . [and] might be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole.[48]

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Field argued that among the fundamental privileges or immunities of a citizen of the United States was "the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons."[49]

Some 14 years after the *Slaughter House Cases* were decided, the Court upheld a prohibitory ordinance in *Mugler v. Kansas* (1887)[50] that led to the closing of a brewery without requiring a demonstration either that the brewery caused special harm or that less drastic means would not have served. Given its *Slaughter House* holding that occupational liberty was not a federal privilege or immunity, it is not surprising that the Court held that Kansas could regulate alcohol as it saw fit.[51]

The Rise and Fall of Substantive Due Process. After the demise of the Privileges or Immunities Clause, the Court invoked the Fourteenth Amendment's Due Process Clause to try to protect individuals against state deprivations of life, liberty, or property. That "substantive" use of the clause did not follow immediately, however. In fact, the clause was used initially, in 1877, to ensure simply that deprivations followed only after "due process," or procedural fairness, had been afforded.[52] In time, however, the Court fashioned a theory of "substantive due process" to accomplish what should have been accomplished under the Privileges or Immunities Clause. Thus, in 1897 the Court noted in dicta that the deprivation of "liberty" without due process of law could include not only physical restraint but also the deprivation of

> the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.[53]

And in that same year, in *Chicago, Burlington & Quincy R.R. v. Chicago*,[54] the Court held that the Fourteenth Amendment's Due Process Clause "incorporated," against the states, the Fifth Amendment's protections of property, which until then had guarded only against federal violations.

The Court's substantive due process theory was never well-grounded or developed, however, as its uneven applications demonstrated. Thus, protections afforded by economic substantive due process gave way periodically, and without clear reason, to government's police power—its power, ironically, to secure rights. In 1915, for instance, in *Hadacheck v. Sebastian*,[55] the Court upheld an ordinance requiring the closing of a brickyard that had operated for many years, saying that it stood in the path of urban development; the ordinance reduced the value of the land by 87 percent, all of which the owners lost. And, in 1926, in *Village of Euclid v. Ambler Realty Co.*,[56] the Court upheld comprehensive zoning, based on little more than fleeting references to fire, congestion, and disease, matters that could have been dealt with individually on a far more limited basis.[57] Needless to say, the implications of that decision for property rights have been far-reaching, for *Euclid* paved the way for the modern land-use regimes—federal, state, regional, and local—that have played such havoc with the rights of owners. To better understand those issues, however, we need first a fuller understanding of the idea of property rights.

A Conceptual Framework of Property Rights

The Nature of "Property"

Property Is a Set of Rights with Respect to Others. Nonlawyers tend to use the word "property" to refer to a thing one owns. Thus, in casual conversation we say "This is mine" or "Get off my property" or "This is an investment property." But "property," in the legal sense, is not so much a thing as a relationship between people with respect to a thing. Thus, a more precise usage is needed to explicate or defend property rights. An individual stranded on an

uninhabited island, for example, enjoys many physical things but has no "property." It is only when other people are present and the threat of losing things to them arises that property and property rights arise. Thus, property is an understanding among people regarding who has rights with respect to the many things of the world.

It is helpful to remember that, in the days of the Framers, "property" often referred to those attributes that were "proper," or appropriate, to one's situation or station in life. Thus, a "proper" attribute of a free person is liberty; that is what John Locke meant when he said that one has property in one's rights. "Property," then, consists of rights that must be respected by others, not just land or buildings or shares of corporate stock. As the Supreme Court has noted:

> The term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." . . . The constitutional provision is addressed to every sort of interest the citizen may possess.[58]

According to Locke, in the beginning the world was mankind's common heritage, but every person owned individually his own body and his own labor. As people applied their labor and skill to the natural bounty, as they "invested" themselves in things, they made those things and the ensuing products their own.[59] Through natural recognition of the claims that thus arose, "property" came into being.[60] As we know it in American society and law, then, "property" was not established and distributed through some grand statute or scheme but rather came about as that basic pattern unfolded. The role law played was primarily to recognize and clarify the rights people created in things, not to create the rights in the first instance. And that process continues to this day, especially in the area of intellectual property.

Consistent with this conception, the Supreme Court has observed that property interests are not created by the Constitution[61] but are to be found in "existing rules or understandings that stem from an independent source such as state law."[62] And the U.S. Court of Appeals for the District of Columbia Circuit has explained the process as follows:

> The essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement. These mutually reinforcing understandings can arise in myriad ways. For instance, state law may create entitlements through express or implied agreements. . . . [P]roperty interests also may be created or reinforced through uniform custom and practice.[63]

"Property" consists of rights that must be respected by others.

Property Rights Include Possession, Use, and Disposition. If property rights constitute relations among people that arise through mutual recognition of claims, it remains to be seen just what those claims and relationships are. Here, fortunately, the law has always been quite clear. In essence, the principal rights are the right to exclusive possession, the right to use and enjoy, and the right to dispose of one's interest through devise, sale, or gift.

Exclusive possession has always been recognized as a fundamental property right. Blackstone referred to property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[64] The Supreme Court has declared that "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[65]

Beyond mere possession, however, is the

right to use one's property, provided one doesn't violate the similar rights of others in the process. The right of use is what gives property its value, of course, even if the use amounts to mere possession for investment purposes. Yet, as we shall see, it is the right of use that was most under attack in America during the 20th century.

Finally, the right of an owner to dispose of some or all of his ownership interests has been championed by the common law courts since at least the 13th century.[66] It follows that if an owner has the right to exclusive possession, he has the right to invite others to share in or to assume his interest—provided, again, that the rights of others are not violated in the process. Thus, in 1987, in *Hodel v. Irving*, the Supreme Court struck down a law that severely limited Indian inheritance rights because it "amount[ed] to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs. In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times."[67]

Property Is Protected by the Institutions of a Just Government

The Declaration of Independence states that governments are instituted among men to secure their rights. And since all rights can be reduced to property, as both Locke and Madison understood, property rights are thus fundamental. Not surprisingly, Madison applied the Lockean insight contained in the Declaration when he wrote: "Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own."[68]

Since all rights can be reduced to property, as both Locke and Madison understood, property rights are thus fundamental.

In recent years, courts and commentators have focused on the Takings Clause of the Fifth Amendment, which requires that government pay "just compensation" when it takes private property for public use. I will consider the Takings Clause more fully below, when I consider the lack of a judicial framework of property rights. For the moment, however, it should be noted that the heavy reliance the Supreme Court places on the Takings Clause results from the Court's failure to take seriously the protections for property that now will be discussed.

The Police Power and Eminent Domain. The police power is the fundamental power of government to secure our rights, the power to protect members of the community against harm from each other, as defined by our rights against each other, or against harm from outsiders. In an exposition familiar to the Founders, John Locke declared that in the state of nature every person has the "Executive Power" to secure his own rights, but that individuals give up that power, for the most part, in order to obtain the superior protection that civil society can afford. By entering into the social compact with others, a man surrenders his power of self-preservation, in most cases, and agrees "to be regulated by Laws made by the Society, so far forth as the preservation of himself, and the rest of that Society shall require. . . . "[69]

The police power is legitimate, for if we have the right to defend ourselves we have the right to band together for our collective defense. Thus, the state may raise an army to protect against foreign invaders; establish a system of police, courts, and jails to deter and punish those who initiate violence; and institute public health measures as needed to prevent contagion. Each of those legitimate uses of the police power flows from the principle that government derives its powers from the governed. Every individual has the intrinsic right to resist invaders, criminals, and contagious disease. Thus, anyone may delegate those rights under the social compact. Likewise, government has a legitimate, if narrow, role in regulating land use. We say that a landowner commits a nuisance against a neighbor when he interferes with the neighbor's right to use his own lands—a right derived from the same source and having the same dignity as the offender's equal right. The victim may bring a lawsuit for "private nuisance," by which he could seek compensation for past harm and an order forbidding

future harmful conduct.

Where the nuisance results in widespread harm, however, government may seek to vindicate the rights of all of the injured through one action for "public nuisance" or through legislation that properly defines and prohibits nuisance. Government is thereby asserting, not that it has an independent right, but merely that it may protect the aggregate rights of the numerous victims who otherwise might be stymied by the difficulty and expense of bringing individual lawsuits. When thus viewed, not only is the police power not antithetical to property rights, it is a principal tool for their defense.

But many government acts that are rationalized as exercises of the police power are in fact unjustified by it. The police power is not a license, for example, for government to take property from some for the benefit of others, or for the purpose of adjusting or harmonizing or maximizing its own view of the "well-being" of society. Nor can government invoke the police power to interfere with property rights where the exercise of those rights has not harmed others. Indeed, to invoke the police power to protect "the community" from conduct that does not violate the rights of any of its individual members is to invest government with "rights" not derived from its members.[70] Individuals would then be subject to a government more powerful than the people had a right to make it. The evil implicit in governmental overreaching through the police power was recognized in Justice Holmes's declaration in *Pennsylvania Coal Co. v. Mahon* (1922) that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[71]

Government does have one power, however, that is not derived from the individual rights of its citizens: the power of eminent domain, the power to take private property for public use upon payment of just compensation. Known in the 17th and 18th centuries as "the despotic power," eminent domain is an instrumental power: in pursuit of other ends, government takes property when necessary to achieve those ends, then compensates the owner. Thus, government may mandate that landowners not develop the land adjoining an airport runway, or that they transfer title to lands needed for a fort or a post office. The legitimacy of those governmental actions is not based on the police power, however, since there was no wrongful conduct by the landowners. Rather, it is based on the enumerated powers of government to facilitate commerce, national defense, or the mails. Similarly, governmental deprivations of rights of possession or use in order to create scenic vistas or wildlife habitats are predicated, not on the theory that the owner's building plans would constitute a nuisance, but rather on an affirmative desire by government officials to create public goods that would benefit society as a whole. Even if government styles its actions as "regulatory," such regulations are enacted under the power of eminent domain—they "take" otherwise legitimate uses—not under the police power. Thus, those landowners are entitled to just compensation.

The purpose of the police power is to secure rights by prohibiting harms. The purpose of the eminent domain power is to provide public goods by taking private property, but only after paying the owner just compensation. In Ernst Freund's classic words of a century ago, "[I]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful."[72]

The "Public Use" Requirement. Yet if government compensates an owner after taking his property, the action may go beyond government's legitimate powers. That is because the Fifth Amendment (with state law generally corresponding) requires not only that the lawful exercise of eminent domain be predicated upon just compensation but also that the property be taken for "public use." The principle at issue seems self-evident. As the Supreme Court stated in 1798, in *Calder v. Bull*, "a law that takes property from *A.* and gives it to *B.*" would be "contrary to the great first principles of the social compact" and "cannot be considered a rightful exercise of legislative authority."[73] Yet the Supreme

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The Supreme Court today totally misunderstands and ignores the public use requirement.

Court today totally misunderstands and ignores the public use requirement, describing it as "coterminous" with the police power.[74] That is wrong on its face since a legitimate exercise of the police power protects the rights of citizens and requires no compensation.[75] The purpose of the public use requirement is to constrain government's eminent domain power beyond the constraint afforded by the just compensation requirement. There are two principal reasons why such constraint is needed. First, the exercise of eminent domain is an exercise of force that inevitably injures affected citizens. Second, unfettered powers of eminent domain dangerously aggrandize the state and those who seek to control it.

At any given time, most individuals do not have their property up for sale at the market price. Some derive sentimental value from their property; others find it particularly suited to and perhaps customized for their personal or business needs; and all find relocation a substantial burden. Thus, the difference between the market price, which is all that government is required to pay as "just compensation," and what the owner would require for a true consensual sale is lost to the owner when property is condemned through eminent domain. As Richard Posner, chief judge of the U.S. Court of Appeals for the Seventh Circuit, put it: "Compensation in the constitutional sense is . . . not full compensation. . . ."[76] Given the loss to individual property owners that eminent domain inevitably entails, it follows that its use should be limited to situations in which the public will benefit through direct use of the rights that have been taken.

When eminent domain is restrained by the requirement of direct public use, intrusions on individual liberty are minimized. The condemnation of land for public highways is the classic example. Even when the use is by government employees only, as is that of forts and highway maintenance equipment garages, condemnation is constrained by the need for such outposts and structures to serve valid public purposes. By contrast, when eminent domain is limited only by the requirement that there be some "public benefit" resulting from its exercise, the result is no constraint at all. Yet today eminent domain is often used that loosely, to condemn A's title, with compensation, and transfer title to B, on the theory that the public will "benefit" from the transfer. Urban renewal and the building of professional sports stadiums are just two examples. Just about every private activity using land, or labor, or some other scarce resource could be said to "benefit" the public in some attenuated way. By such reasoning government officials might freely impose their own industrial policy. But whether such transfers are instigated by individuals or businesses or by the government, the result for liberty is the same.

Justice O'Connor belatedly acknowledged this truth in her dissent in *Kelo,* where she admitted that her earlier description of the public use requirement as "coterminous" with the police power was "unnecessary" and "errant language." Under the majority holding, she added, "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.[77]

In sum, respect for individual property rights requires that government adhere to two basic principles: that the police power be limited to securing rights and that the eminent domain power, which requires just compensation, be limited to taking property only for legitimate public uses.

Why Property Rights Are Endangered in America Today

We cannot deal effectively with the threat to property rights unless we understand its nature and causes. The threat cannot be attributed simply to judicial misfeasance, although the courts, at best, have been uncertain defenders of private property. Nor is the threat primarily a function of overly broad legislation or arbitrary administrative conduct, although both are widely present. Rather, the threat to private property results

from the combined effects of (1) an inflated view of the legitimate objects of government and the corresponding growth of the regulatory state, (2) pervasive confusion about the rights that individuals have retained and the powers they have delegated to government, and (3) a failure to distinguish the discrete constitutional standard against which a specific act of government must be measured.

The Growth of the Regulatory State

Early in the 20th century a broad-based reform movement known as progressivism argued that expert management of human endeavors could alleviate all manner of economic and social ills. As progressivism took hold, massive administrative regulation of commerce, labor, housing, land use, and much else followed in its wake.

In 1916, shortly before taking his seat on the Supreme Court, Progressive stalwart Louis Brandeis delivered a speech to the Chicago Bar Association. He declared: "At first our ideal was expressed as 'A government of laws and not of men.' Then it became 'A government of the people, by the people and for the people.' Now it is 'Democracy and social justice.'"[78]

That was the ethos that marked the 20th century, right from the start. We have gone from the rule of law, by which government is carefully curtailed to protect our liberties, to the nanny state, in which government subordinates property and other rights in pursuit of "social justice" through majoritarian rule. As one scholar recently put it:

> Modern land use controls in the United States began with the development and legal vindication of zoning in the early 1900s. Zoning was just one product of the impulse of the Progressives for order and predictability. The early enthusiasts for zoning . . . were fighting a holy war against the libertarian sins of nineteenth-century development. . . . Control over land use would be removed from the amoral hand of the market and entrusted to expert elites removed from politics and business. . . .
>
> . . . In part, advocates have sought to downplay the social and political significance of planning by arguing that planning controls land and other natural resources, not people. But the value of resources lies in their social utility, so man and land cannot be so neatly separated.[79]

If outside "experts" and government agencies were quick to assume that social and economic problems involving subtle complexities and myriad tradeoffs were susceptible to solution by regulation, so were state legislatures. Today, the laws of every state permit comprehensive regulation of land use, most delegating regulation to municipalities. While there is much to be said for government at the local level, in land-use matters this generally has resulted in the dominant local group's achieving extortionate gains at the expense of the rest. Thus, in urban areas, rent control has favored sitting tenants over landlords. In the suburbs, zoning has favored homeowners over owners of yet-undeveloped land. Where localities have been subjected to an overlay of statewide controls, other problems have emerged. In Vermont, town officials seeking a Wal-Mart store for the benefit of local citizens were rebuffed by state regulators. Washington State has required localities to draw arbitrary lines separating lands the owners may develop from lands they may not.

In New Jersey, an intricate formula mandating the apportionment of low-income housing resulted in some towns having to provide for more low-income migrants than the towns had existing residents. At the national level, Congress has enacted land-use laws as hazy aspirations, the details of which the executive branch has filled in with often ludicrous regulations. Thus, laws protecting the "navigable waters of the United States" have led to regulations forbidding century-old farming practices on fields damp two weeks per year. And endangered species laws aimed at protecting large mammals have led to regulations protecting habitat for kangaroo rats at the expense of homes that burned because the

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habitat could not be disturbed and to a major dam that goes unused in order to protect a small fish called the snail darter.

The Proliferation of Regulatory Takings

The efforts of government since the Progressive Era to remake society by wrestling control over land from the "amoral hand of the market" and entrusting it to "expert elites" have led to comprehensive zoning, restrictions on development, and the subordination of property rights to often vague environmental concerns. There is no way to square those results with the respect for property rights that the Framers enshrined in the Constitution. Government has misused the eminent domain power to take property from some for the benefit of others. On a far vaster scale, it has misused the police power that was intended to protect individual rights, using it instead to violate rights. Claiming to be acting under that power, government regularly subordinates rights in the name of public goods and public benefits.[80]

A notable example of the misuse of the power of eminent domain was the decision of the city of Detroit during the 1970s to condemn and level a thriving ethnic neighborhood so that the site could be transferred to General Motors for a new Cadillac assembly plant.[81] While there may be "public benefits" from such condemnations, those benefits are incidental. They do nothing to alter the essential character of the condemnations as transfers from one private party to another. Recently, however, in *County of Wayne v. Hathcock* (2004),[82] the Michigan Supreme Court repudiated its *Poletown* holding as a "radical and unabashed departure from the entirety" of its takings jurisprudence, one that departed from "the 'common understanding' of 'public use'" when the state's constitution was ratified.

Far more common is government's enactment of regulations that prohibit owners from using their property in otherwise legitimate ways but do not compensate them for the losses they suffer. Rather than condemn undeveloped land for a public park, taking title, and paying the owner compensation, government prohibits development as "harmful to the land's natural characteristics" and pays the owner nothing for his losses.[83] Rather than spruce up downtown streets as an attractive public venue, government declares the regional shopping center the new "public square" and commandeers its common areas for political speech by uninvited strangers.[84] Rather than purchase highly fractionated shares of ownership in parcels of tribal land from their owners and combine them to facilitate development, government terminates the owners' right to pass their interests on to their heirs.[85] In each of those examples, government argued that it did not take "the property" and did not owe just compensation. But again, "property" is not a mere thing; rather, it is rights in a thing that may be asserted against others. In the examples given, the owner of undeveloped land was deprived of the right to use it, the shopping center owner was deprived of the right to exclude the political speaker, and the owner of the fractional share was deprived of the right to dispose of his interest.

Each of those examples constitutes a regulatory taking. That idea is clear in Justice Holmes's "too far" language in *Pennsylvania Coal*.[86] The phrase was suggested even more directly in 1981 in Justice Brennan's dissent in *San Diego Gas & Electric Company v. City of San Diego*.

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space

through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property. Appellees implicitly posit the distinction that the government intends to take property through condemnation or physical invasion whereas it does not through police power regulations. . . . But "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." . . . It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a de facto exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.[87]

The Lack of a Judicial Framework of Property Rights

Although government officials and legislators have a proclivity to intrude on property rights, abuses may be nipped in the bud by a vigilant judiciary. But that requires courts to form and act upon a sound understanding of constitutional limits on the scope of government. Without a principled jurisprudence of property rights, the courts cannot check the expanding regulatory state. Unfortunately, the current American law of property, as crafted by the U.S. Supreme Court over the course of the 20th century, lacks the coherent, well-grounded conceptual framework of property rights that is the necessary prerequisite for a coherent property jurisprudence.

The following discussion illustrates some of the Court's categorical departures from principle. These result in judicial opinions that pay lip service to property rights while protecting them only in extreme cases in which the government has physically trespassed[88] or, as in *Lucas*, has deprived the owner of all value.

Ad Hoc Balancing. The lack of a coherent judicial framework for property rights is conceded—indeed, celebrated—in a case that today is the controlling precedent for most government regulations of land use.

In *Penn Central Transportation Co. v. City of New York* (1978), the Supreme Court reviewed New York City's decision to deny Penn Central a permit to construct an office building above Grand Central Terminal, a smaller version of which had been contemplated in the building's original plans.[89] The denial was based solely on the city's landmark ordinance, and was solely for the purpose of preserving the terminal's beaux-arts aesthetics for public enjoyment. Justice Brennan, reviewing the Court's takings cases and abjuring any "set formula" for applying the Fifth Amendment's Takings Clause, declared:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. [1] The economic impact of the regulation on the claimant and, particularly, [2] the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is [3] 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.[90]

Under the *Penn Central* ad hoc "balancing test," which remains the "polestar" of the Court's takings jurisprudence,[91] a court would presumably consider and weigh the three factors enumerated in the preceding paragraph. Not one of those factors goes to the principles of the matter, however. Whether a regulation takes something belonging to the owner has nothing to do with "investment-backed expectations,"

Under the *Penn Central* ad hoc "balancing test," a court would presumably consider and weigh three factors. Not one of those factors goes to the principles of the matter, however.

for example, but simply with whether the now-prohibited uses are otherwise legitimate. As Professor Richard Epstein, a leading authority on the law of property, has noted, no judge or scholar offers "any telling explanation of why this tantalizing notion of expectations is preferable to the words 'private property.'. . ."[92] Similarly, the "economic impact of the regulation on the claimant" tells us about the owner's finances, not about the owner's rights. And the "character" of the interference test does not tell us whether the owner had overstepped his rights, for example, by having committed a nuisance, or whether the owner is made whole by benefiting from the imposition of the regulation on others.

In a striking understatement, the dean of the Yale Law School recently observed that "the act of balancing remains obscure." Balancing tests are "likely to be particularly attractive to those who by virtue of their inexperience feel unable to articulate the bases of their judgments, or who simply lack confidence in them and are therefore afraid to expose their own deliberations too nakedly."[93] The Court's *Penn Central* formulation demonstrates his point.

In fact, the *Penn Central* ad hoc balancing test has been synonymous with rubber-stamp deferential review that hardly ever finds government to have overstepped its authority. The Court has essentially stretched the police power to encompass the provision of benefits as well as the prevention of harms and in the process has denigrated the notion that individuals have fundamental rights.

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Failure to Recognize the Limited Powers of Government. As noted earlier, the Framers intended the new federal government to be limited to its enumerated powers. Its primary purpose was to ensure a federal common market and a stronger international presence. As the Tenth Amendment clearly states, "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." Likewise, the states were limited by the inherent rights of the people, notably the understanding that individuals retained their common law property rights, by which, in John Locke's famous formulation, was meant their "Lives, Liberties, and Estates." The Constitution of the United States provides both explicit and implicit protection for property rights. The constitution of every state protects private property as well. Yet for many decades the judicial, legislative, and executive branches of government have not accorded private property the deference those documents and their framers intended.

The Erosion of Fundamental Rights. The government established by the Framers was a social compact designed to better protect individual rights. Yet, having been entrusted with the power to protect fundamental liberties, that government, and the Supreme Court in particular, has sounded a weak and vacillating trumpet. This is evidenced in cases expounding on the most essential property rights.

The first is the right to exclude. In 1979, in *Kaiser Aetna v. United States*, then-justice Rehnquist wrote that the owners of a private marina in a privately owned and dredged lagoon could exclude nonpaying boats because the right to exclude was "fundamental."[94] Yet only a year later, in *PruneYard Shopping Center v. Robins* (1980), he reversed course in affirming the California Supreme Court, which had found that a privately owned shopping center had no right to exclude political speakers and petitioners from its premises. Rehnquist concluded that the owners had "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"[95]

The right to exclude was at issue again in 1987, in *Nollan v. California Coastal Commission*,[96] when the Court struck down a practice by which the commission allowed owners to build on their lands only if they "consented" to permitting the public to walk along a private beach behind their homes. Justice Scalia declared, "We have repeatedly held that, as to property reserved by its owner for private use,

'the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[97]

Yet in 1995 the Court refused to review a case in which the New Jersey Supreme Court had declared not only that regional shopping centers were now public forums for free expression but that all lands within the state might, in theory, be subject to the exercise of free speech, thus calling into serious question the rights of owners to exclude.[98]

The second essential property right is that of use. The Supreme Court has noted that "property" includes "use."[99] In 1994, in *Dolan v. City of Tigard*, it proclaimed that the Takings Clause is not a "poor relation" but rather is "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment."[100] But the Court's seminal holding in *Village of Euclid v. Ambler Realty Co.* (1926) had the effect of placing the burden on landowners to demonstrate that a zoning ordinance violated their rights. The Court has yet to give restrictions on the use of property the same "strict scrutiny" accorded other Bill of Rights protections, such as freedom of religion[101] and expression.[102] Under that standard, agencies would have to demonstrate that their regulations were narrowly tailored to serve a compelling state interest. Even interests that the Court has not regarded as "fundamental" may still receive the benefit of an "intermediate" level of judicial scrutiny. Thus, agencies defending regulatory classifications based on sex[103] or illegitimacy[104] must show a close fit between the rule and its objective. When it comes to regulations of property, however, courts essentially look the other way. Most regulations of property will be judged under the very deferential *Penn Central* ad hoc balancing test, which means that the rights of use the regulations take are effectively second-class rights or "poor relations." In a recent decision of breathtaking import, the U.S. Court of Appeals for the Federal Circuit held that landowners' use rights are limited not only by existing laws but also by the "regulatory climate" at the time of purchase that should have led them to anticipate the enactment of future laws.[105]

The third essential property right is the right to dispose. The Court has vacillated on that right too. In *Andrus v. Allard* (1979), the Court upheld a prohibition on the sale of eagle feathers that had been imposed by bird protection laws, even though the plaintiff's feathers were obtained before the law went into effect. While Justice Brennan agreed that the prohibition was "significant," he continued:

> But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.[106]

Brennan gave no basis for concluding that property rights are important in the aggregate but not individually. In 1987, however, Justice O'Connor struck down a regulation limiting the right of inheritance:

> [T]he regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs. In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times.[107]

Her opinion barely mentioned *Allard* and made no attempt to reconcile its opposite result.

In fact, the *Penn Central* ad hoc balancing test has been synonymous with rubber-stamp deferential review that hardly ever finds government to have overstepped its authority. The Court has essentially stretched the police power to encompass the provision of benefits

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as well as the prevention of harms and in the process has denigrated the notion that individuals have fundamental rights.

Failure to Recognize the Limits of the Police Power. If the Supreme Court has erred in consistently undervaluing the importance of fundamental individual rights, it has also erred in the other direction in its overly expansive understanding of the police power. In the landmark 1926 *Euclid* case, the Court upheld comprehensive zoning as a police power on little more than a casual analogy between apartment houses in neighborhoods of single-family homes and pigs in parlors instead of in barnyards.[108] Even if the facts in *Euclid* had suggested a public health or safety problem that could not be addressed through the common law of nuisance, a carefully drawn opinion could still have left the burden on government to justify how its regulations were narrowly tailored to the specific ill. Instead, *Euclid* almost completely obliterated the common law notion that owners may use their lands as they wish unless there is demonstrable injury to others.

Delay as a Tool of Government. While Justice Brennan was no friend of property rights, as his *Penn Central* opinion indicates, he was no advocate of the government runaround either. Thus, in 1986 he observed that even in the rare instance where a court invalidated a regulation under the Takings Clause, the agency, as evidenced by its subsequent actions, would typically not take no for an answer. "Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity." He quoted remarks and publications by planners showing how changes in regulation could be used to pile delay upon delay:

> At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice: "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN."
>
> If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra "goodies" contained in [a recent California Supreme Court case] appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again. . . . See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck.[109]

The lack of clear legal recognition of an owner's property rights means that a government agency has almost unlimited scope for negotiation.

As will be discussed shortly, the Supreme Court has used "ripeness" and associated doctrines to make it difficult for a landowner to sue an agency that deprives him of his property rights until that agency has issued a "final decision." Not surprisingly, agencies are notoriously unwilling to give no for an answer. In a vicious circle, the lack of clear legal recognition of an owner's property rights means that a government agency has almost unlimited scope for negotiation. Thus, it can return an owner's development plan without approval or disapproval. Instead, the agency will suggest further modifications of the plan. Since the modification of one element of a plan affects others, the groundwork for one round of reconsideration after another is established. While owners must bear the taxes, interest, legal fees, and other expenses of negotiating the possible use of a presently unproductive parcel, the officials with whom they deal are serene in their civil service positions, and their legal advice is provided through tax dollars.

Undue delay is almost impossible to establish as a matter of law. An egregious example is the saga of PFZ Properties, which had attempted for 11 years to make the Commonwealth of Puerto Rico process its development plan for a resort hotel. Substantial evidence was introduced in the U.S. district court to show that the commonwealth's failure was deliberate and malicious, and that it had even gone so far as to remove

records from its files to hinder the developer's progress. Nevertheless, the U.S. Court of Appeals for the First Circuit ruled that, even if all of the charges of official misconduct were true, the landowner's constitutional rights were not violated.[110] The Supreme Court agreed to review the case, received the litigants' briefs, and heard oral argument. Subsequently, however, without any explanation, the Court dismissed the action without deciding its merits.[111]

Another example of government delay coupled with bad faith is *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[112] decided by the Supreme Court in 1999. The landowner had been trying for 17 years to obtain permission to build homes. Even though zoning law would have permitted more than 1,000 homes, the owner's 1981 application was for only 344 residences. There followed a long history of rejections of proposals, each of which was for fewer units than the one before. Finally, after exacting numerous forced dedications of land and agreements not to build on outer sections of the parcel, the city agreed to allow 190 units to be built in the center of the parcel. However, it then prohibited even that development, saying that the center of the tract contained a plant that made the site the only natural habitat of an endangered insect known as Smith's Blue Butterfly, even though the butterfly was nowhere to be located at the site. The U.S. Court of Appeals for the Ninth Circuit held for the landowners, quoting with approval their contention that "the City progressively denied use of portions of the Dunes until no part remained available for a use inconsistent with leaving the property in its natural state."[113] The Supreme Court affirmed, with Justice Kennedy's opinion apparently accepting whole the landowner's claim of unfair treatment. As Justice Scalia noted at oral argument, "the landowner was getting jerked around."[114]

Judicial Resistance to Hearing Property Rights Cases. In the landmark case of *Marbury v. Madison* (1803), Chief Justice John Marshall declared, "It is emphatically the province and duty of the judicial department to say what the law is."[115] Yet when it comes to property rights, the Supreme Court has consistently provided ways for federal judges to shirk their duty to declare and apply the law in actual cases. Whether out of fear of becoming "Grand Mufti" of zoning,"[116] or out of disdain for deciding the "garden-variety zoning dispute,"[117] even conservative judges, often sympathetic to owners, seem to have a palpable dislike for property rights cases.

In fact, federal courts have been so unwilling to hear regulatory takings cases that the probability of dismissal of their lawsuits often is the greatest barrier between injured property owners and their receipt of just compensation. One commentator, in a scholarly study of all takings cases litigated in federal courts between 1983 and 1988, noted that judges avoided the merits in over 94 percent of the cases.[118] Another study determined that in 83 percent of the takings claims raised in federal district courts from 1990 to 1998 the court never reached the merits, and when the court did reach the merits it took an average of 9.6 years for the dispute to be resolved.[119]

The confusion in property rights jurisprudence undoubtedly is a factor in that. Were judges to possess a coherent, well-grounded theory of property rights, examining allegations of state overreaching would not be a difficult matter. The Supreme Court's vague balancing test, however, requires that judges juggle large quantities of information regarding local politics, sociology, economics, and administrative custom, all to no apparent purpose. Under such circumstances, the process quite naturally must seem bewildering and distasteful. It is no wonder that, in the words of one appellate court, "The lack of uniformity among the [federal] circuits in dealing with zoning cases . . . is remarkable."[120]

To fully appreciate how procedural impediments work, however, one must grasp one fact above all: Whereas at one time Americans could use their property freely, today, virtually everywhere, any change in use can come about only after government at some level—sometimes several levels—has given the owner

The permitting process today is ubiquitous. It is a hurdle behind which hides one horror story after another.

The web of procedural barriers contrived by federal judges makes it almost impossible for landowners to obtain a hearing in federal court.

permission to make the change. The permitting process today is ubiquitous. It is a hurdle behind which hides one horror story after another. The story of Susette Kelso, discussed earlier, is one case in point. The travail of Bernadine Suitum is another.

In 1972 Mrs. Suitum and her husband, now deceased, decided to build their dream house. Toward that end, they purchased a lot in Nevada near the shore of Lake Tahoe. Unfortunately, Mr. Suitum later became ill, so construction had to be deferred because of financial problems arising from his illness and subsequent death. It was not until 1989, in fact, that Mrs. Suitum was finally ready to build. At that time, she requested permission from the Tahoe Regional Planning Agency, which regulates land use in the area. The agency turned down her application, but in doing so it did not question any aspect of her building plans; rather, it simply applied a general growth-control formula it had devised earlier that same year and announced that her property was ineligible for development. Having denied her right to build, the agency then gave Mrs. Suitum allegedly valuable "transferable development rights," which she could try to sell to a developer in another area. If she could find a developer who wanted such rights, that would allow more dense development of the purchasing developer's parcel than otherwise would be permitted. Unsatisfied with that treatment of her rights, Mrs. Suitum spent the next eight years running through a gauntlet of administrative hearings and appeals, then lawsuits, to try to vindicate her rights, all to no avail. Finally, in 1997, the U.S. Supreme Court upheld Mrs. Suitum—not on the merits but simply on the question of whether she could sue in federal court before she sold the transferable development rights.[121] By then an elderly widow in poor health and wheelchair bound, Bernadine Suitum had finally won the right not to build but simply to continue her decade-long quest through additional years of litigation—even as her lot stood undeveloped, surrounded by homes similar to the one of her dreams. It was not until May 1999 that Mrs. Suitum, aged 84 and legally blind, finally ended her quest and accepted a $600,000 settlement from the state of Nevada in exchange for her parcel. Much of the money will go to attorneys' fees. The planning agency is unrepentant. "It was a legal strategy of picking the best battle to fight," its counsel said of the settlement. "We have other cases that raise the same issues that have better facts before a different judge. And we like our chances there much better."[122]

Additional horror stories about procedural delays abound. To cite but two examples:

- Paul Presault sued the state of Vermont in October 1981 to recover possession of a strip of his yard that had been granted as an easement for railroad use only. Although the railroad was long abandoned, the state insisted that the strip was open for public use as a recreational trail since the state had paved over the former roadbed running through the Presaults' yard. The Preseaults have been to the U.S. Supreme Court twice and have had their case litigated several times in the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Federal Claims, where it now awaits additional briefs and hearings two decades after the original suit was filed.[123]
- Florida Rock Industries was denied a wetlands permit to mine limestone in its land in southern Florida in 1980 and brought a takings action in the predecessor of the Court of Federal Claims in 1982. It won in that court, but both times the federal government appealed to the Federal Circuit, which remanded.[124] After a third trial on the merits, the Court of Federal Claims again found for the landowner with respect to the 98 acres for which it was allowed to apply for a permit.[125] In 2000 the court ruled that Florida Rock's claim for takings damages for the 1,462 acres for which it was not allowed to apply was "ripe" for judicial review.[126] However, the court deferred review of the merits so that the government could appeal the court's ripeness determination to the Federal Circuit.

Procedural Barriers in the Federal Courts. The web of procedural barriers contrived by federal judges makes it almost impossible for landowners to obtain a hearing in federal court on claims that they have been deprived of their property rights in violation of the federal Constitution.

The first major barrier is the "ripeness" test. The basic principle underlying the judicial ripeness rules is sound. The Supreme Court has said that the doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."[127] But the standard ripeness test is not what federal courts apply in regulatory takings cases. Instead, they have developed a labyrinth-like "special ripeness doctrine applicable only to constitutional property rights claims."[128]

In recent congressional testimony, noted land-use expert Professor Daniel Mandelker declared that "federal judges have distorted the Supreme Court's ripeness precedents to achieve an undeserved and unwarranted result: they avoid the vast majority of takings cases on their merits."[129] The lack of practical recourse to the courts puts citizens at a grave disadvantage. With little chance of being called to account in the federal courts, states and localities have an even greater incentive to take private property through the subterfuge of regulation rather than through exercise of the power of eminent domain.

The ripeness rule is not applied to claims that ordinances or regulations are flatly unconstitutional on their face (i.e., under all circumstances). Owners making such claims will get their day in federal court—and almost certainly will lose. Since the Supreme Court gives government the benefit of the doubt when the validity of a land-use regulation is "fairly debatable,"[130] and since the Court "has been unable to develop any set formula" for property rights cases,[131] only the most egregious rule would be deemed unconstitutional under every conceivable circumstance.

As a practical matter, then, landowners must assert that regulations or government actions violate the Takings Clause or fail to provide due process of law when applied to their own particular situations. In legal parlance, the owner brings an "as applied" challenge to the regulation instead of a "facial" challenge. It is in such cases that the special ripeness test wreaks its vengeance. In order to establish that his fact-laden claim is "ripe" for federal judicial review, an owner must often spend many years and sometimes hundreds of thousand of dollars working his way through an open-ended and often endless administrative maze. "Practically speaking," one authority has noted, "the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small."[132] Making the situation even worse, the Court recently held that the very act of "ripening" an owner's federal takings claim in state court may result in a state decision that federal courts are forbidden by the Full Faith and Credit Act from reviewing on the merits.[133] All that was too much for justices, who urged the Court to reconsider the "state litigation" prong of *Williamson County.*[134]

The principal case in which the Supreme Court has established its regulatory takings ripeness doctrine is *Williamson County Regional Planning Commission v. Hamilton Bank*. The tip of the *Williamson County* iceberg[135] is its "two-prong" test requiring (1) a "final decision" by the governmental agency on the merits and (2) a denial of "state compensation."

Until an agency issues a final decision, it cannot be sued. Thus, the property owner has to overcome every excuse or delay that the agency poses. One part of the final decision prong requires the owner to apply for a "specific use" and another requires a "meaningful" application. This means that the owner's initial application cannot simply ask for the maximum use permitted by law; and it also means that the owner may have to make several applications, each succeeding application responsive to comments in the agency's earlier denials. Yet another part of the prong requires the owner to seek a "variance," that is, an administrative exception from a rule, following a denial based on noncompliance with the rule. Nevertheless, if the owner can prove that the agency's mind is made

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up and that it would be senseless to continue this process, he can seek relief under a "futility exception." That final resort, however, is itself a difficult hurdle.

To better appreciate what is going on in this process, one can imagine what it would be like if a speaker had to "clear" his remarks before speaking. Imagine negotiating the text with a government agency, which would be free to come up with continual modifications and suggestions. While years might go by before the right to speak was formally and finally denied, the speaker would have no recourse to federal court, for only then would the denial be "ripe."

The other prong of *Williamson County* is the "state compensation" requirement. It is not enough to show that government has "taken" a property right by finally denying a permit. The owner must also show that government has not provided "just compensation" for that taking in order for his federal constitutional rights to be violated. The fact that the agency has denied that there has been a taking and refuses to pay does not count. The owner must seek compensation through additional applications to state agencies and litigation in the state courts. Only after receiving a definitive rejection there is he free to go to federal court. Perversely, even though *Williamson County* held that a regulatory takings claim would be "premature" until the issue of compensation was litigated in state court,[136] some federal appellate courts have accepted government assertions that going through the state judicial process itself bars the property owner from recourse to the federal courts.[137]

In general, it is fair to say that state courts have not been at the forefront of preserving the property rights of citizens.

Although in other contexts it seems fair that the litigation of facts, issues, or entire cases in one court precludes their being relitigated in another, the result here is that the landowner is barred from federal court review of rights protected by the federal Constitution. In 1999 the Supreme Court was asked to review *Rainey Bros. Construction Co. v. Memphis and Shelby County Board of Adjustment*,[138] a case in which a landowner had received permission to construct multifamily housing, which it had begun, only to have the city summarily revoke approval without giving the owner notice or a chance to be heard. The owner sued in state court, as required by *Williamson County*. After losing there, the owner went to federal district court. The federal judge determined that the state court had erroneously applied the law and that the owner's federal constitutional rights under the Due Process and Takings Clauses had been violated. Nevertheless, the judge ruled that the prior erroneous state decision precluded federal court review.[139] The federal court of appeals affirmed in an unpublished opinion. In an unusual move, the petition for Supreme Court review was filed by leading attorneys representing both the property owner and the municipalities. What united them was a quest for resolution of an issue in the administration of justice important to both sides: Is there a right to ultimate review of regulatory takings cases in federal court? The Supreme Court declined to hear the case.

The second major barrier is the "Tucker Act Shuffle," a procedural barrier to judicial redress when it is the federal government that takes property. The Tucker Act[140] is a broad statute requiring those seeking nontort money damages against the United States—including those seeking compensation for regulatory takings by federal agencies—to file their claims in the U.S. Court of Federal Claims. Often, however, an owner may want to keep his property rather than sell it to the government for just compensation. If so, he will want to challenge the taking and try to enjoin the government from taking his property in the first place. To do that, however, he must go to the federal district court, which, unlike the claims court, has the power to issue injunctions forbidding the federal government to commit acts that constitute wrongful takings. This is a trap for the unwary.

In the district court, the federal agency will often respond that it was not intruding on the owner's rights out of inadvertence but was acting in a deliberate way to implement an important and necessary federal policy. Thus, it might tell the district judge that the owner is in the wrong court, that he should be seeking money damages in the Court of Federal

Claims, where the case must begin all over again. But if the owner had initially sought damages in the Court of Federal Claims, the government might have asserted that a suit for modification of its activities affecting the land was the owner's proper recourse. Should the court agree, it would dismiss the suit and force the owner to begin anew in the district court. By the time the owner could do this, however, the statute of limitations on the filing of an action might make it too late to assert his claim. And if the owner were inclined to undertake the wasteful process of suing in both the claims and district courts at the same time, such a dual filing is precluded by law.[141] As commentators have noted, "This 'Tucker Act shuffle' is more than a procedural annoyance which may result in the dismissal of an otherwise meritorious case, for it places a premium upon the drafting of sharp pleadings and the gerrymandering of opinions to avoid the jurisdictional dividing line."[142]

The State Courts. The courts of every state are free to interpret the provisions of their own constitutions so as to provide more protection for the property rights of their citizens than the U.S. Supreme Court has provided under the federal Constitution. For the most part, however, state courts have been quiescent. The courts of Illinois, Pennsylvania, and a few other states have respected private property more than the norm. The courts of California and New Jersey have been disdainful of property rights.[143] In general, it is fair to say that state courts have not been at the forefront of preserving the property rights of citizens.

Property Rights Abuses and Citizen Concern

Abuses Continue

Given the many hurdles that owners today face in protecting their property rights, it is hardly surprising that abuses of those rights continue. Building moratoria prevent citizens from constructing homes or businesses on their property. Park regulations impose draconian curbs on lands not even inside park boundaries, to say nothing of curbs on private holdings within the boundaries. Wetlands regulations prohibit the use of lands that are moist only a few weeks each year. Affluent weekenders launch movements to prevent the construction of Wal-Mart and other "big box" stores where less wealthy locals could shop. And across the country today, "no-growth" advocates are bringing about restrictions on land use that amount, in effect, to the socialization of property rights. In recent years, numerous published accounts of such regulatory takings have contributed to the growth of the property rights movement and have led to calls for legislative reform.[144]

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Canards That Mislead the Public

One reason opponents of property rights have been successful in misleading the public is their effective repetition of falsehoods. It is crucial, therefore, to set the record straight on such canards.

If Property Rights Were Unfettered, Pollution Would Become Endemic. Nothing could be further from the truth. It is not the intent of the property rights movement to obtain additional "rights" for property owners—the goal is enforcement of rights owners already have under the common law and the U.S. Constitution. There is no right to pollute. As Justice Scalia carefully noted in *Lucas v. South Carolina Coastal Council*, landowners are not exempt from actions by "adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances. . . ."[145] Indeed, it is in the name of property rights—the property rights of others—that owners are prohibited from polluting. And it is a mark of the confusion sown by much of the modern environmental movement that such a canard could be believed.

If Property Rights Were Unfettered, All Government Actions Restricting Them Would Trigger Massive Raids on the Public Treasury. Not all regulations of property trigger the obligation to compensate owners. As just noted, properly drawn nuisance restrictions do not take rights. And even when legitimate uses are restricted, not every such restriction requires compensation.[146] If a regulation imposes broad and general burdens on all individuals in the commu-

nity, while providing similar, offsetting benefits, it secures an "average reciprocity of advantage," as Justice Holmes put it.[147] Many regulations are of this type. Their cost is compensated by the benefit that each person derives from the imposition of the regulation on others.

But when regulations do reduce value by prohibiting otherwise legitimate uses, without providing the owner with equal offsetting benefits, government should be required to compensate the owner for the loss he suffers. Does that amount to "a raid on the public treasury"? Hardly. It amounts simply to making the public pay for the good the restriction is designed to bring about. If the public wants that good—greenspace, wildlife habitat, a viewshed—it should have to pay for it. The public should not expect the individual owner to bear all the costs of its appetite for public goods. If there is any "raid on the public treasury," that means simply that the public is demanding many such goods—perhaps more than some members of the public want to pay for. But that is a political question, not a legal question. From a legal perspective, the public, just like any private citizen, should have to pay for what it wants.

Obviously, every change to undeveloped land "upsets the natural environment." Under the court's broad holding, therefore, every use is a misuse.

As a practical matter, moreover, making the public pay for what it wants imposes fiscal discipline on public officials. The Supreme Court has said that "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."[148] The unfairness of imposing inordinate burdens on the few is compounded by the fact that in a democracy the few will be outvoted and the majority inevitably will be tempted to impose burdens upon them in lieu of financing government through taxes.[149] Without the requirement to compensate owners, officials are tempted to confiscate property rights rather than raise taxes to pay for public goods, thus risking the wrath of the voters. With a requirement to compensate in place, however, officials will be encouraged to think twice before they regulate. They will be required to recognize that there are no "free" public goods.

If Property Rights Were Unfettered, Owners Would Misuse Their Lands. That canard contains vast ungrounded assumptions about the meaning of "misuse." And it often entails the simplistic idea that people own things alone, not rights pertaining to things, which others must respect. As discussed earlier, property owners own not only land but the right to possess and exclude others, the right of use, and the right to dispose of what they own. The claim that owners with such rights would "misuse" their property is implicit in the following:

> Where the private autonomy of ownership would clash with the greater public good, that is where the private rights in property come to an end and the social obligation of property begins. Were it not for this public interest boundary on private property rights, the laws created to protect property could become powerful instruments to defeat public welfare. A government empowered to act only in the public interest never could have constitutionally conferred such an extensive measure of property ownership.[150]

The premises of that argument are (1) that property rights are derived from government instead of from moral right, individual labor, and consensual trade;[151] (2) that democratic government can formulate a popular mandate regarding "the good";[152] and (3) that enlightened policymakers and technical innovations can command good results.[153]

An extravagant application of that view can be seen in the Wisconsin Supreme Court's holding in *Just v. Marinette County*. In that case the court upheld an extensive wetland regulation as

> a restriction on the use of a citizen's property, not to secure a benefit for the public, but to prevent a harm

> from the change in the natural character of the citizen's property. An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.[154]

Unfortunately, the court never did specify the "injuries" it mentions. The premise of *Just* was not nuisance as the common law knows it, since the "harm" in Just's conduct is never defined beyond the general assertion that "upsetting the natural environment" damages the general public. The opinion simply is a paean to the importance of wetlands, juxtaposing "despoliation of natural resources" with "an owner's asserted right to use his property as he wishes.[155] Obviously, every change to undeveloped land "upsets the natural environment." Under the court's broad holding, therefore, every use is a misuse. The implication seems to be that individuals can own the land, but all uses must be by permission of the state—to guard against "misuse." The claim that a person "misuses" his own rights is itself a tacit admission that he is not violating the rights of others.

If a Government Action Reduces the Value of Property by More Than X Percent, the Owner Is Entitled to Compensation. That canard is sometimes heard not from opponents but from allies of the property rights movement. In fact, it has been incorporated into property rights legislation, as will be noted below. But just as people are not entitled to be made whole from losses caused by the vicissitudes of life by nonnegligent tort defendants, so too they are not entitled to be made whole from losses caused by reductions in the value of their assets by government defendants who have taken nothing they own free and clear. This applies to oyster propagators who want protection from changes in water salinity levels,[156] to utility companies that want to be protected from losses due to the termination of their monopoly status through deregulation of their industries,[157] and to others whose cases are grounded essentially in value changes brought about by government acts that are not takings.

"Property" does not equate to "value." While the loss of property usually results in the loss of value, the loss of value is not necessarily a result of the loss of property. As Justice Robert Jackson noted, "[N]ot all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them. . . ."[158] The ownership of a motel on the old main road might have been very valuable before the new road was built. We could say loosely, but mistakenly, that the government "deprived" the owner of value by building a nearby interstate highway. Yet "the state owes no person a duty to send traffic past his door."[159] Furthermore, individuals may benefit from governmental largesse, but unless law, contract, or custom makes those benefits irrevocable, government may withdraw them without payment of compensation.[160] Here, as elsewhere, a clear understanding of property rights begins with a clear understanding of just what is, and is not, owned.

A Principled Approach to Property Rights Restoration

The existence today of a vibrant property rights movement is cause for both celebration and concern. That so many individuals are moved to speak up for liberty and for limited government as ordained by the Framers is a tribute to the vibrancy of freedom. At the same time, many individuals have joined the movement because they, their families, or their neighbors have been the victims of abuse, which testifies to the need for vigilance.

As noted earlier, following the Supreme Court's 1926 *Euclid* decision, legislatures in every state authorized comprehensive local zoning measures, and most cities adopted zoning and planning ordinances. In the words of Yale law professor Carol Rose, we went from a situation in which people said "anything goes" regarding land use to one in which they say "'anything goes' for the regulation of private land uses. . . . [L]and use regulators became

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The state property rights protection statutes enacted thus far may be categorized roughly into "takings impact assessment statutes" and "compensation statutes."

accustomed to believing that they were entitled to regulate anything that they pleased under the auspices of *Euclidean* zoning. . . ."[161] But while pre-*Euclid* land use was limited by the common law, post-*Euclid* regulation was all but unlimited, giving regulators and land-use planners all but untrammeled power.

Given that state legislatures and Congress have imposed or authorized land-use restrictions, it may seem paradoxical that citizens now turn to them for relief from government abuses. Yet most of the abuses have come at the hands of local governments and federal agencies, so property rights advocates have increasingly sought aid in the statehouses and in Congress. Almost all states have considered protective legislation, and more than half have passed some type of statute. The U.S. House of Representatives passed substantial property rights bills in 1995 and 1997, but companion bills never were brought to a final vote in the Senate.

Although property rights legislation is important, it should augment litigation, not replace it. Since judges are not insensitive to changing mores, legislative success may hasten judicial success. Thus, protective legislation may encourage judges to reconsider holdings subordinating property rights to political ends. In a word, the property rights movement needs to work in both venues.

The Supreme Court's Property Rights Cases Have Gone from Faltering to Worse

As discussed earlier, The Supreme Court's *Penn Central* ad hoc balancing test is both nebulous and extremely deferential to government.[162] While a few subsequent opinions upheld property rights, they were not solidly rooted in principle. Thus, they sounded an uncertain trumpet. We saw earlier, for example, that *Lucas* applies only when an owner is deprived of all economically viable use. Given that most regulatory restrictions leave owners with at least a modicum of use, it is difficult to see how *Lucas* will be of much practical effect. In fact, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002),[163] the Court extolled *Penn Central* and applied it so as to uphold a restriction that deprived landowners of *all* economically beneficial uses, but for a limited period of time. Justice Stevens wrote that courts must consider not only the geographic dimensions of a parcel but the temporal aspect of the property owner's interest. Thus, he noted, "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[164] Under that logic, "temporary" deprivations of all economically viable use lasting for decades would not fall under the *Lucas* holding but under the *Penn Central* balancing test that is both vague and extremely deferential to government. Indeed, *Tahoe-Sierra* opined that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa."[165]

The Court's continuing reliance on the *Penn Central* "ad hoc" balancing test, and its failure to base its takings jurisprudence on the deprivation of property rights, was made more poignant recently by *Lingle v. Chevron, U.S.A.* (2005).[166] There, the Court repudiated its earlier doctrine, enunciated in *Agins v. City of Tiburon* (1980),[167] that "government regulation of private property 'effects a taking if [such regulation] does not substantially advance legitimate state interests.'"[168] The Court maintained that the "substantially advance" test was directed toward whether a regulation was effective, and hence consistent with due process of law, rather than directed toward the issue of whether the regulation imposed a severe burden that would require just compensation under the Takings Clause. However, the Court's own jurisprudence completely overwhelms this attempt to separate takings from due process. As previously noted, the Court's own *Penn Central* takings test, based on hazy notions of proportionality, fairness, and deference to the state, is itself a due process test of a particularly enfeebled variety.

There is one branch of the Court's contemporary takings jurisprudence that does accord property owners more fairness. But, unfortu-

nately, its reach has been curtailed through an arbitrary limitation. In *Nollan v. California Coastal Commission* (1987), the Court invalidated an agency decision because there was no "nexus" between the decision and the state statute under which it was promulgated.[169] In a subsequent case where there was some degree of nexus, *Dolan v. City of Tigard* (1994), the Court placed the burden on the agency to establish, through an "individualized determination," that a "rough proportionality" existed between restrictions imposed on the owner and public burdens allegedly created by development of the owner's property.[170]

In his *Dolan* opinion, however, Chief Justice Rehnquist noted the deference given to state and local land-use planners in the Court's earlier cases. He then drew a curious distinction between those cases, which he termed "essentially legislative determinations" involving comprehensive zoning, and the "adjudicative decision" to condition the Dolans' building permit on an exaction.[171] However, as Justice Thomas recently observed, "The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference."[172] Rehnquist's suggestion that a local legislative body is somehow less bound by police power limits than is an inspector it employs demonstrates once again the lack of a principled basis for property rights jurisprudence.

The Supreme Court's 1999 decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* was the first in which the Court upheld an award of damages for a regulatory taking. The Court also held that a jury trial for takings damages was permissible and that government arguments that courts have no business "second-guessing" local land-use regulations have no constitutional support. On the other hand, the case rose through the federal judicial system only because, at the time the taking occurred, California had no state provision for paying temporary takings damages. (During the course of litigation the state purchased the land, thus terminating the period for which damages were sought.) Now every state allows for temporary takings compensation (at least in theory). The case provides no assurance that federal courts will hear takings cases or that state courts will have to permit jury trials. Furthermore, it contains troubling dicta (comments not necessary to decide the case and therefore not binding in subsequent cases) that might be construed as limiting the requirement that government demonstrate a "rough proportionality" between harms and corrective requirements in cases involving government demands for forced dedication of property in exchange for development permits.[173] In *Lingle,* the Court cited *Del Monte Dunes* as "emphasizing that we have not extended [the *Dolan* rough proportionality] standard 'beyond the special context of [such] exactions.'"[174]

Among the Supreme Court's other recent property rights cases is *Village of Willowbrook v. Olech*,[175] where the Court found that a local government deprived a landowner of equal protection of the laws. The village had vindictively refused a water hookup and then demanded an easement of twice the normal width because the landowner had earlier sued for an injury on village property. While it is fortunate that Mrs. Olech could prove actual malice, the need for her to prove that she was treated differently from others highlights the lack of a coherent basis upon which a court might have protected her property rights in and of themselves.

In *Palazzolo v. Rhode Island* (2001),[176] the state asserted that the landowner had no right to challenge a regulation depriving his land of all viable economic use, and thus ordinarily constituting a taking under *Lucas,* if the regulation was in place at the time of the owner's purchase. The Court rejected that contention, with Justice Kennedy declaring, "The State may not put so potent a Hobbesian stick into the Lockean bundle."[177] This principled decision was undercut, however, by the concurring opinion of Justice O'Connor, who was one of the 5-to-4 majority. She reasoned that the preexisting nature of the regulation must be taken into account to some unspecified extent.[178]

Palazzolo was remanded back to the state courts to determine whether the landowner

Takings impact assessment statutes define a "taking" using current U.S. Supreme Court rulings. Thus, most regulatory takings are excluded from the outset.

should prevail. The Rhode Island Superior Court ultimately ruled that the landowner would not prevail under the *Penn Central* ad hoc balancing test and that deprivation of all beneficial economic use would not be sufficient under the Supreme Court's *Lucas* holding.[179] That result arose from the application of a careful qualification that Justice Scalia inserted in *Lucas,* even though it was not at issue in the case itself. Even a complete deprivation of use, he said, would not result in a taking if the substance of the restriction "inhere[d] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[180] Given that qualification, the state court concluded that long-established principles of Rhode Island nuisance law inhered in Palazzolo's title, so that he never possessed the development rights he claimed were taken.

State Protective Legislation

Given their limited success in the courts, owners have turned increasingly to the legislative branch, especially at the state level. Each of the state property rights protection statutes[181] enacted thus far differs from the others in important details.[182] However, they may be categorized roughly into "takings impact assessment statutes" and "compensation statutes."[183] Also, all of the statutes operate prospectively only, so they do not pertain to present regulations or past actions. The following discussion compares the two general types of statutes enacted and notes some of the more important state provisions. It then looks briefly at Oregon's new Initiative Measure 7, adopted by the voters in the November 2000 election.

Compensation statutes are intended to provide relief to landowners who have suffered regulatory takings.

Takings Impact Assessment Statutes. Takings impact assessment (TIA) statutes require agency reviews to ensure that agency rules or actions do not constitute uncompensated takings. They define a "taking" using current U.S. Supreme Court rulings. Thus, most regulatory takings are excluded from the outset.

TIA statutes might be inspired by the assessment mechanism in the National Environmental Policy Act of 1969 (NEPA),[184] which imposes broad planning and assessment requirements on federal agencies. More likely, however, state statutes have been inspired by the Reagan administration's Executive Order 12,630, Governmental Actions and Interference with Constitutionally Protected Property Rights.[185] That executive order required that federal agencies evaluate their prospective actions in light of guidelines promulgated by the attorney general based on current Supreme Court jurisprudence. While the sufficiency of the assessment under NEPA has determined the outcome in numerous cases, Executive Order 12,630 precluded citizen enforcement and generally has been disregarded by federal officials, especially during the Clinton administration.[186] Almost all state assessment statutes have been enacted during the past few years.

Some TIA statutes are fairly perfunctory. Indiana and Delaware, for instance, require simply that the state attorney general decide if agency rules are in compliance; as a practical matter, that leads to blanket certification. Idaho, Michigan, and Tennessee require only that agencies make informal determinations about the constitutionality of their actions in accordance with standards promulgated by the attorney general.

The statutes that are apt to prove more efficacious require agencies to prepare formal, written analyzes that must include assessments of alternative actions that might have less impact on property rights. The states with such statutes include Kansas, Louisiana, Montana, North Dakota, Texas, Utah, and West Virginia. Some of those states require an estimate of the cost of compensation and specification of the source of payment (Louisiana, Montana, North Dakota, West Virginia). Some require that the assessment contain an affirmative justification for the restriction (Kansas, Utah, West Virginia, Louisiana, North Dakota).

The scope of such regulations also varies widely. A few states limit the assessment process to select state agencies (West Virginia, Michigan). About half of the states with TIA statutes impose their requirements on all

state agencies, but not political subdivisions. Four states include both state agencies and all or most local governments (Washington, Idaho, Texas, Louisiana).

Three states preclude judicial review of the assessments (Idaho, Kansas, Washington). Two states require limited judicial review (Delaware, to ensure that the attorney general has reviewed the rule in question, and Texas, for voiding the action, but only if no assessment has been prepared). Other states have no explicit rule.

TIA statutes are broadly beneficial in the sense that they force agencies and attorneys general to give at least some thought to property rights and the takings issue. It is unrealistic to think that agencies will zealously police themselves, however, and TIA statutes are apt to be effective only if citizens are given standing to contest decisions made on insufficient assessments, as they are under NEPA.

Compensation Statutes. Compensation statutes are intended to provide relief to landowners who have suffered regulatory takings. They rightly preclude compensation where the proscribed use constituted a common law nuisance, but otherwise they seek to make owners whole when regulations reduce the value of their property by prohibiting otherwise legitimate uses in order to provide the public with various goods.

Five states have enacted compensation statutes. Arizona has enacted an administrative appeals process that is limited to the removal or modification of exactions imposed by a city or county in connection with the granting of a permit.[187] Mississippi requires that just compensation be paid for regulation of agricultural and forest land causing a 40 percent diminution in value.[188] The similar law in Louisiana is triggered by a 20 percent diminution.[189] Both statutes refer to the "affected" land or "part" of land. The two state laws having the greatest potential for property rights protection are those of Texas and Florida. Both are too new, however, for a meaningful assessment of their costs or benefits.

The 1995 Texas Private Real Property Rights Preservation Act[190] provides that an owner may sue for takings damages when an act of the state or a political subdivision results in at least a 25 percent diminution in the value of real property.[191] However, the provision is hedged with broadly defined exceptions for actions to regulate floodplain development, to carry out federal mandates, and the like. In what might be the only reported case to date, a municipal utility district prevailed because the court determined that the standby fee it levied against undeveloped property came under the exception for localities acting responsibly to fulfill state mandates.[192]

Florida's Bert J. Harris, Jr., Private Property Rights Protection Act[193] is the most innovative of the state property rights statutes. Compensation is triggered not by a set percentage of loss—25 percent of the value of the property, for example—but by the imposition of an "inordinate burden."[194]

> The terms "inordinate burden" or "inordinately burdened" mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large. The terms "inordinate burden" or "inordinately burdened" do not include temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, pre-

The two state laws having the greatest potential for property rights protection are those of Texas and Florida.

vention, or remediation of a public nuisance at common law or a noxious use of private property; or impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section.[195]

This provision tracks, in part, the Supreme Court's case law, particularly the "investment-backed expectations" language of *Penn Central*.[196] However, the "disproportionate share of a burden imposed for the good of the public" language is new. While its rhetoric tracks the previously quoted "fairness and justice" language of *Armstrong v. United States*,[197] the language of the Florida act seems to go beyond mere "aspiration" by establishing real legal rights:

> The Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore, it is the intent of the Legislature that, *as a separate and distinct cause of action from the law of takings*, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.[198]

Congress certainly has the power to legislate against the abuse of private property by the federal government or by state and local programs employing federal funds.

The Florida statute also contains innovative and potentially important procedural reforms. The first is its careful provision for the award of damages. The trial court is charged with ascertaining whether the owner had a property right that was inordinately burdened. If so, it is to ascertain the percentage of compensation due from each governmental entity involved, if there is more than one.[199] At that point, a jury is empanelled to determine the amount of compensation owed.[200]

Perhaps most important, the Florida act develops an innovative mandate that requires an agency to issue "a written ripeness decision identifying the allowable uses to which the subject property may be put." That decision "constitutes the last prerequisite to judicial review."[201]The act has been the subject of substantial scholarly commentary.[202] A number of cases are pending under the act.[203]

While the State of Oregon has had a national reputation for being more concerned with environmentalism than with property rights, recent actions by that state's voters have demonstrated that they draw the line at overly intrusive regulations that inflict harm on property owners. Initiative Measure 7, adopted by Oregon voters in November 2000, amended the state constitution to provide for compensation to landowners to the extent that their property was reduced in value because of land use restrictions not directed toward historically recognized nuisances and not withdrawn, as pertaining to affected landowners, within 90 days after a claim for compensation was filed. The Oregon Supreme Court reviewed Initiative Measure 7 in *League of Oregon Cities v. State* (2000).[204] It concluded that the initiative measure made substantive amendments to both the takings and the free expression provisions of the state constitution; that those substantive amendments were not closely related; and, therefore, that the measure violated the state requirement that initiative measures pertaining to separate subjects be put to separate votes.

In November 2004, voters in Oregon again passed a measure aimed at protecting private property.[205] Initiative Measure 37 was titled "Government must pay owners, or forgo enforcement, when certain land use restrictions reduce property value." Measure 37 required that when land use regulations were enacted or enforced the government must pay the owners the reduction in the "fair market value" of the property interest or forgo

enforcement of the regulations. Government has the option to repeal, change, or not apply the restrictions in lieu of payment. And if compensation is not timely paid, the owner will not be subject to the regulation.

State Legislation to Prevent Condemnation Abuse

Although the Supreme Court handed down *Kelo v. City of New London* (2005)[206] in June 2005, already by the broadest measure, bills have been introduced in at least 34 states to preclude or substantially limit the exercise of eminent domain for economic redevelopment.[207] At least three states have already enacted legislation.[208]

In Alabama, a bill signed into law by the governor on August 3, 2005,[209] provides: "Notwithstanding any other provision of law a municipality or county may not condemn property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue . . . however, the provisions of this subsection shall not apply to the use of eminent domain . . . based upon a finding of blight in an area."

In Delaware, legislation signed on July 21, 2005,[210] requires that eminent domain be exercised only for purposes of a recognized public use as described at least six months in advance of the institution of condemnation proceedings in a certified planning document, at a public hearing held specifically to address the acquisition, or in a published report of the acquiring agency. In Texas, new legislation prohibits the use of eminent domain to confer a private benefit on a private party or for economic development purposes, with certain exceptions.[211]

The Need for Congressional Action

Congress certainly has the power to legislate against the abuse of private property by the federal government or by state and local programs employing federal funds. Before considering that type of legislation, however, it is important to note that Congress also has the power to enact legislation enforcing the obligation of states to respect the federal constitutional rights of property owners.

Federal Legislation to Protect Private Property from State and Local Abuses. The Fourteenth Amendment to the Constitution authorizes Congress to legislate against certain abuses by state or local governments. Section 5 declares that "Congress shall have power to enforce by appropriate legislation," the amendment's provisions. Section 1 provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

There are several obstacles to Congress's using section 5 to protect private property. One is the Supreme Court's gutting of the Privileges or Immunities Clause in the *Slaughter House Cases*, which makes that guarantee of liberty practically unavailable. Another is the Court's current view that deprivations of property rights implicate the Takings Clause, which is applied against the states through the Fourteenth Amendment. The Supreme Court has held that the rules governing compensation under the incorporated Takings Clause are different from the rules that would apply if the Fourteenth Amendment were directly invoked under the doctrine of substantive due process.[212] The result is that property owners have no redress for deprivations that do not result in monetary loss. A good illustration is the problem of legal clients whose small deposits of funds with their lawyers must by law be kept in special trust accounts, the interest on which benefits legal services programs. The Supreme Court has held that those funds remain the clients "property."[213] On remand, however, the district court said that the legal client was entitled to no relief. Since under applicable banking laws he could derive no financial benefit from the interest, he suffered no harm when his funds were used for legal services programs against his will.[214]

H.R. 925 exemplified the tendency of legislation not scrupulously tied to clear principle to go astray.

The most important reform a state legislature could provide would be to limit the state's police power to the prevention of harm.

Finally, the Court has been wary of congressional attempts to use section 5 in instances in which Congress is arguably augmenting the Fourteenth Amendment rather than merely enforcing it. The Court has recently invalidated a congressional attempt to use section 5 to regulate state conduct through the Religious Freedom Restoration Act. In *City of Boerne v. Flores*, the Court held that Congress's power to enforce the Fourteenth Amendment does not permit it to augment the amendment.[215] It might be that *Flores* is inapposite since in that case there was no long history of abuse of religious freedom, as there has been of property rights. Also, there is no tension in the property rights area similar to that produced by the conflicting tugs of the Establishment and Free Exercise Clauses of the First Amendment. On the other hand, congressional action requiring the states to be more respectful of property rights would implicate an extensive array of state activities and, to that extent, would raise issues of federalism similar to those that concerned the Court in *Flores*.

The most direct way for Congress to ensure increased federal protection for private property is for it to enact legislation requiring that federal courts review on the merits claims that state and local land-use actions violate property owners' rights under the U.S. Constitution or statutes. Federal district judges often have abstained from deciding such suits, either because the resolution of state law by state courts could eliminate what otherwise would be a difficult federal question[216] or because the cases touch upon complex state regulatory schemes concerning important matters of state policy better addressed by state courts.[217] The Senate Judiciary Committee's Citizens' Access to Justice Act of 1998 would have required federal district courts to forgo abstention and decide many more takings cases on the merits.

F*ederal Legislation to Protect Private Property from Federal Abuses.* Congress has unquestioned authority, and a significant opportunity, to protect property rights from abuse by federal agencies. It can enact both substantive and procedural reforms.

During the 104th Congress (1995–96) each house considered comprehensive property rights legislation designed to provide compensation to owners affected by federal actions not amounting to "takings" under current Supreme Court jurisprudence. The House passed H.R. 925, the Private Property Protection Act of 1995. The Senate Judiciary Committee reported out S. 605, the Omnibus Property Rights Act of 1995, which was not acted on by the full Senate.

The House bill provided, "The Federal Government shall compensate an owner of property whose use of any portion of that property has been limited by an agency action, under a specified regulatory law, that diminishes the fair market value of that portion by 20 percent or more." "Property" is defined to include only land and water rights. The specified laws covered only three federal activities: (1) wetlands regulations under the Clean Water Act and the Food Security Act of 1985, (2) habitat restrictions under the Endangered Species Act, and (3) various restrictions on rights to use or receive water. The bill excluded from the compensation requirement agency actions dealing with hazards to public health or safety and agency actions for navigation servitudes, "except to the extent such servitude is interpreted to apply to wetlands."

The bill exemplified both the intent of the House to apply remedies to areas in which there have been substantial abuses and the tendency of legislation not scrupulously tied to clear principle to go astray. The principal defect of the bill is apparent from its statement of general policy: "It is the policy of the Federal Government that no law or agency action should limit the use of privately owned property so as to diminish its value." The bill's application provision reflects that goal: "Each Federal agency, officer, and employee should exercise Federal authority to ensure that agency action will not limit the use of privately owned property so as to diminish its value."[218] Clearly, nuisance limitations may diminish value, but they are perfectly legitimate. In general, government should be pro-

tecting property rights, not property values. More narrowly, the bill contained no definition of "affected property" (i.e., "that portion" of the land for which diminution in value would be compensated). Thus, an owner who suffered a small overall loss as a result of some regulation could claim that one small portion of his property was affected by a large amount, which would put him over the 20 percent threshold. Those and other details were not well thought out in the bill.

The Senate bill contained provisions that would require takings impact assessments by federal agencies and would provide compensation if the federal regulatory action reduced the fair market value of the "property or the affected portion of the property" by 33 percent or more. While S. 605 had a 33 percent threshold for compensation as opposed to the 20 percent requirement of H.R. 925, the Senate bill was not limited to a few federal programs. Neither the House nor the Senate bill established principles for measuring the physical area of the property "affected" or the analytical nature of the property rights lost.

The principal property rights bills in the House in the 105th Congress (1997–98) were H.R. 992, the Tucker Act Shuffle Relief Act of 1997, and H.R. 1534, the Private Property Rights Implementation Act of 1997. In the Senate those were combined as S. 2271, the Citizens' Access to Justice Act of 1998. That bill was brought to the Senate floor by the Judiciary Committee but failed to obtain the necessary 60 votes to end a filibuster against it.

The Senate bill would have ended the "Tucker Act Shuffle" by giving both the U.S. Court of Federal Claims and U.S. district courts jurisdiction to hear "all claims relating to property rights in complaints against the Federal Government." It also would have eliminated the provision precluding the Court of Federal Claims from entertaining a suit that is also pending in another court. In addition, the bill provided that a case would be ripe for federal court review as soon as a federal agency denied one meaningful application, the owner sought an administrative waiver or appeal, and the waiver or appeal was denied. All appeals from the district court or the Court of Federal Claims would be heard by the U.S. Court of Appeals for the Federal Circuit. A landowner prevailing in court could be awarded attorneys' fees. In addition to those modifications relating to federal agency actions, the Senate bill would have sharply curtailed the ability of district judges to abstain from deciding challenges to state and local land-use regulations brought solely under federal law. Such a challenge could take the form of a claim that a state or locality deprived the landowner of rights secured by a federal statute or by the Constitution, including the Takings Clause of the Fifth Amendment.[219]

The 106th Congress (1999–2000) was devoid of any serious push for property rights legislation. Among the more notable bills introduced were the Regulatory Improvement Act of 1999 (S. 746) and a bill introduced by Sen. Ben Nighthorse Campbell (R-Colo.) (S. 1202) that would mandate a warrant or owner consent before an inspection of land could be carried out to enforce any law administered by the secretary of the Department of the Interior. The Campbell bill did not move from committee.

The Regulatory Improvement Act, introduced by Sen. Carl Levin (D-Mich.) and cosponsored by a broadly bipartisan group of 20 members, would have subjected all "major rules" (i.e., those costing over $100 million each year or having other adverse material consequences) to a substantial cost/benefit analysis. The bill was reported out of the Committee on Governmental Affairs but saw no further action. The House of Representatives passed the Property Rights Implementation Act of 2000 (H.R. 2372) on March 16, 2000. The bill was similar to H.R. 1534, which passed the House during the 105th Congress, as noted above. However, as in the previous Congress, its Senate companion, the Citizens' Access to Justice Act of 1999, died in the Senate Judiciary Committee.

The inability of property rights proponents to pass measures in the House has persisted after 2000 and no new property rights legislation has been enacted. Several potentially significant measures are now pending, however.

Both the Senate and the House are consid-

In general, government should be protecting property rights, not property values.

ering bills intended to roll back the effects of the Supreme Court's decision in *Kelo v. City of New London* (2005),[220] which held that condemnation of nonblighted residences for retransfer to private interests for economic redevelopment did not violate the Public Use Clause of the Fifth Amendment. The "Protection of Homes, Small Businesses, and Private Property Act of 2005" has been introduced by Senator John Cornyn (S. 1313) and Representative Dennis Rehberg (H.R. 3083). The bills provide that "[t]he power of eminent domain shall be available only for public use," which "shall not be construed to include economic development." The act would apply to "all exercises of eminent domain power by the Federal Government; and all exercises of eminent domain power by State and local government through the use of Federal funds."

Also, Representative F. James Sensenbrenner, chairman of the House Judiciary Committee, has introduced the "Private Property Rights Protection Act of 2005" (H.R. 3135). The legislation would forbid the federal government or the states, if federal money is being used, from offering "economic development as a reason for exercising its power of eminent domain." Furthermore, "[t]he term 'economic development' means any activity, including increasing tax revenue, other than making private property available in substantial part for use by the general public or by an entity that makes the property available for use by the general public, or as a public facility, or to remove harmful effects."

Conclusion

The most important reform a state legislature could provide would be to limit the state's police power to the prevention of harm and to limit the state's eminent domain power such that it would be used to acquire property only for legitimate public uses. In large part, that would entail the provision of compensation to all property owners who were deprived by state or local governments of their rights to exclude others from their property, to dispose of it, or to use it, all subject to the rights of others to do the same. The U.S. Congress could achieve similar reforms by enacting similar legislation and by limiting its programs to those necessary and proper to the powers enumerated for the federal government.[221] Without such a principled solution, only partial and improvised remedies are available. The removal of the ripeness and jurisdictional barriers to prompt and comprehensive determinations of individual rights is clearly important as well.

The Supreme Court's decision in *Kelo v. City of New London* has done much to reenergize the property rights movement. With the passage of legislation by Congress likely, at least some limits will be placed on the federal government's ability to condemn land for economic redevelopment and on the states' ability to use federal funds for similar projects. The greatest uncertainty involves the precision of definition of "public use" and "development" that Congress will specify and whether there will be sufficient monitoring by government agencies. The best protective measure might be a provision giving owners who are subjected to condemnations that run afoul of the new federal law access to the federal and state courts to contest the action. Lawyers refer to this as a grant of "standing." The rapid initiation of state legislation against condemnation abuse also augurs in favor of a resurgence in property rights protections.

The adoption of the Florida Harris Act's "inordinate burden" standard by Congress and state legislatures also would help, as would the wider adoption of a recent Arizona provision for the appointment of an "ombudsman for private property rights" to advance the interests of property owners in proceedings involving governmental action.[222]

The enthusiastic and informed actions of the private property rights movement are essential to conforming state and federal law to the principles of individual rights so important to the Framers.

The most important reform a state legislature could provide would be to limit the state's eminent domain power such that it would be used to acquire property only for legitimate public uses.

Notes

1. Federal and state courts first used the term in the late 1970s. Its first Supreme Court articulation was in a dissenting opinion by Justice William Brennan in *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 646–47 (1981).

2. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

3. Bachman S. Smith III, quoted in H. Jane Lehman, "Accord Ends Fight over Use of Land," *Washington Post*, July 17, 1993, p. El.

4. Quoted in ibid.

5. 125 S.Ct. 2655 (2005).

6. See, for example, James V. DeLong, *Property Matters: How Property Rights Are under Assault—And Why You Should Care* (New York: Free Press, 1997), pp. 3–4. For a brief sketch of some of the leaders of the property rights movement, see Richard Pombo and Joseph Farah, *This Land Is Our Land: How to End the War on Private Property* (New York: St. Martin's, 1996), pp. 154–61. See also Philip Brasher, "Farmers Rebel over Wetlands Regulations Environment: The Furor Is Fueling a Movement That Could Lead Congress to Gut Protective Laws in the Name of Property Rights," *Los Angeles Times*, April 23, 1995, p. 9.

7. An umbrella group, the Castle Coalition, is affiliated with the Institute for Justice, which represented Mrs. Kelo. Considerable information may be found on its web site, http://www.castlecoalition.org/.

8. For an overview of activity at the state level, see Nancie G. Marzulla, "State Private Property Rights Initiatives as a Response to 'Environmental Takings,'" *University of South Carolina Law Review* 46 (1995): 613–40. See also Harvey M. Jacobs, "State Property Rights Laws: The Impacts of Those Laws on My Land," Lincoln Institute of Land Policy, Cambridge, Mass., 1999.

9. Alexander Hamilton, *Federalist* no. 78, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library of World Literature, 1961), p. 469.

10. Ibid., p. 467.

11. James Wilson, "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament," pamphlet, 1770. Quoted in Carl Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (1922; New York: Vintage Books, 1958), p. 108.

12. *Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 309 (Circuit, Pa. 1795).

13. Henry S. Commager, *Jefferson, Nationalism, and the Enlightenment* (New York: G. Braziller, 1975), p. 84.

14. Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University of Kansas Press, 1985), p. 13.

15. Ibid.

16. John Adams, *Legal Papers of John Adams*, ed. Lyman H. Butterfield (Cambridge, Mass.: Harvard University Press, 1988), vol. 1, pp. 137–38. Quoted in Ken Gormley, "One Hundred Years of Privacy," *Wisconsin Law Review* (September–October 1992): 1358

17. William Pitt, Speech on the Excise Bill, *Hansard Parliamentary History of England*, vol. 15, 1753–1765 (London: T. Coltansard, 1813), p. 1307.

18. John Locke, *The Second Treatise of Government*, in *Two Treatises of Government*, ed. Peter Laslett (New York: Mentor, 1965), § 123.

19. James Madison, "Property," *National Gazette*, March 29, 1792, reprinted in *The Papers of James Madison*, ed. R. Rutland et al. (Charlottesville: University Press of Virginia, 1983), vol. 14, p. 266.

20. Becker, pp. 27–30, 71–79.

21. Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace, 1955), pp. 50–64.

22. Becker, p. 57.

23. Quoted in *Pennsylvania Gazette*, June 12, 1776, reprinted in Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Alfred A. Knopf, 1997), pp. 126–27.

24. Becker, pp. 27–28.

25. Joseph J. Ellis, *American Sphinx: The Character of Thomas Jefferson* (New York: Alfred A. Knopf, 1997), p. 56. Alternatively, some scholars have conjectured that Jefferson regarded property, unlike certain other rights, as alienable. Jean Yarbrough noted that "it has been persuasively documented that Jefferson's omission was traceable not to a lack of respect for property, but his distinction between natural rights that are inalienable and those that may be transferred." Jean Yarbrough, "Jefferson and Property Rights," in *Liberty, Property, and the Foundations of the American Constitution*, ed. Ellen Frankel Paul and Howard Dickman (Albany: State University of New York Press, 1989), p. 66. Cited in Douglas W. Kmiec, "The Coherence of the Natural Law of Property," *Valparaiso University Law Review* 26 (1991): 367.

26. The revisionist "civic republicanism" account of the American founding deemphasizes the influence of Locke and natural rights theory. It asserts the primacy of republican subordination of individual interests to civic virtue and of the contributions of British Whig, Scottish, and Continental political thought to the Founders' political outlook. For additional discussion of this issue, see, for example, Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass.: Harvard University Press, 1967), pp. xi–xii, 34–54; and Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (New York: Vintage Books, 1978), p. 212.

27. See, for example, McDonald, *Novus Ordo Seclorum*; and Thomas Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (Chicago: University of Chicago Press, 1988).

28. Maier, p. 87.

29. James W. Ely Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York: Oxford University Press, 1992), p. 11.

30. Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic 1776–1790*, 2d ed. (Indianapolis: Liberty Fund, 1979), p. 310.

31. Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt, 1996), p. 388.

32. John Adams, *The Works of John Adams,* ed. Charles Francis Adams (Boston: Little Brown, 1850), vol. 6, p. 280. Quoted in Smith, p. 388.

33. "The great focus of the Framers was the security of basic rights, property in particular, not the implementation of political liberty." Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* (Chicago: University of Chicago Press, 1990), p. 92. There is no inconsistency, of course, between property rights and political liberty, provided the latter means the right to participate in the political process and not the "right," through that process, to redistribute property.

34. Madison, "Property," p. 266.

35. "[N]or shall private property be taken for public use, without just compensation." U.S. Constitution, Fifth Amendment.

36. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . . U.S. Constitution, Article I, § 8.

37. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." U.S. Constitution, Article I, § 10.

38. Ibid.

39. *Edward III*, vol. 28, chap. 3. Quoted in Edward S. Corwin, "Due Process of Law before the Civil War," *Harvard Law Review* 24 (1911): 368, reprinted in *Property Rights in the Colonial Era and Early Republic*, ed. James W. Ely (New York: Garland, 1997), pp. 263–55.

40. Corwin, p. 368, quoting Declaration of Rights, Article XII.

41. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

42. See G. Dietze, *In Defense of Property* (Chicago: H. Regnery, 1963), pp. 32–33.

43. "The right of eminent domain . . . gives to the legislature control of private property for public uses. . . . [But] the constitutions of the United States and of this state, and of most of the other states of the Union, have imposed a great and valuable check . . . by declaring, that private property should not be taken for public use without just compensation." James Kent, *Commentaries on American Law*, 1st ed. (New York: O. Halsted, 1827), vol. 2, p. 275.

44. The provision is explicit in 48 states. Courts in New Hampshire and North Carolina long have construed other elements of their constitutions as implementing the common law requirement for just compensation upon the exercise of eminent domain by the state and its subdivisions. See William B. Stoebuck, "A General Theory of Eminent Domain," *Washington Law Review* 47 (1972): 554–55.

45. U.S. Constitution, Fourteenth Amendment, § 1 (1868).

46. *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872). See Kimberly C. Shankman and Roger Pilon, "Reviving the Privileges or Immunities Clause to Redress the Balance among States, Individuals, and the Federal Government," *Texas Review of Law and Politics* 3 (1998): 1–48.

47. *Corfield v. Coryell*, F. Cas. 546 (No. 3,230) (E.D.Pa. 1823).

48. *Slaughter House Cases* at 97. Note that the final proviso in that passage is qualified by the words "justly," "general," and "the whole." It does not open the door, that is, for restraints that unjustly take or that benefit particular parties or anything less than the whole.

49. Ibid. at 112.

50. *Mugler v. Kansas*, 123 U.S. 623 (1887).

51. The Supreme Court's recent rediscovery that the Privileges or Immunities Clause includes the right of interstate travel gives some hope that the clause may again be interpreted to protect economic liberty and property rights. *Saenz v. Roe*, 119 S. Ct. 1518 (1999) (striking state durational residency requirement for welfare benefits). On the need for such a reinterpretation, see Shankman and Pilon.

52. *Davidson v. New Orleans*, 96 U.S. (6 Otto) 97, 105 (1877).

53. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

54. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 234–35 (1897). Revealingly, the Court now regards *Chicago, Burlington & Quincy R.R.* not as providing substantive due process but rather as beginning the process of incorporating the Bill of Rights into the Fourteenth Amendment. See Ronald D. Rotunda et al., *Treatise on Constitutional Law: Substance and Procedure* (St. Paul: West, 1986) § 15.11 n. 29.

55. *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) ("the police power is 'one of the most essential . . . [and] least limitable' powers of government").

56. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

57. See, for example, Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985), pp. 131–34.

58. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 n. 6 (1980), quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377–78 (1945).

59. Locke, §§ 26–32, 304–7. See also Richard Epstein, "Possession as the Root of Title," *Georgia Law Review* 13 (1979): 1221.

60. See Roger Pilon, "Corporations and Rights: On Treating Corporate People Justly," *Georgia Law Review* 13 (1979): 1277–84.

61. See, for example, *Lucas* at 1030.

62. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

63. *Nixon v. United States*, 978 F.2d 1269, 1275–76 (D.C. Cir. 1992) (citations omitted).

64. William Blackstone, *Commentaries* (1765; Chicago: University of Chicago Press, 1979), p. 2. Blackstone's view of property was more nuanced than this language suggests, but it is indicative of his view that property was in a sense the culmination of the long-developing common law protection of individual rights.

65. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (upholding exclusion of the general public from a private marina).

66. See *Restatement (Second) of Property, Donative Transfers* (Cambridge, Mass.: Harvard University Press, 1983), Introductory Note to vol. 1, part 2, p. 142 (noting that the courts of 13th-, 14-, and 15th-century England were "pursuing, consciously or unconsciously, a policy in favor of the free alienability of land").

67. *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (citing *United States v. Perkins*, 163 U.S. 625, 627–28 (1896)). The statute at issue in *Irving*, slightly modified, was again struck down in *Babbitt v. Youpee*, 117 S. Ct. 727 (1997).

68. Madison, "Property," pp. 266–68. Emphasis in original.

69. Locke, § 129.

70. See Epstein, *Takings*, pp. 107-46.

71. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

72. Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (Buffalo, N.Y.: William S. Hein, 1904), § 511. Quoted in Zev Trachtenberg, "Introduction: How Can Property Be Political?" *Oklahoma Law Review* 50 (1997): 304.

73. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.).

74. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984).

75. See Thomas W. Merrill, "The Economics of Public Use," *Cornell Law Review* 72 (1986): 70.

76. *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988).

77. *Kelo v. City of New London,* 125 S.Ct. 2655, 2675–76 (O'Connor, J., dissenting).

78. Louis D. Brandeis, "The Living Law," *Illinois Law Review* 10 (1916): 11.

79. Dennis J. Coyle, *Property Rights and the Constitution: Shaping Society through Land Use Regulation* (Albany: State University of New York Press, 1993), p. 21.

80. Strictly speaking, "public goods" are goods from which the marginal individual cannot be

excluded and provision of which for the marginal individual imposes no additional cost. A classic example is national defense. Other public benefits are those from which government could feasibly exclude those who chose not to pay or those for which it incurs additional costs for providing the good to additional beneficiaries. In many cases, such as state universities, there are both feasible exclusion and additional costs.

81. See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

82. *County of Wayne v. Hathcock,* 684 N.W.2d 765, 785 (Mich. 2004).

83. See *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972).

84. See *New Jersey Coalition against War in the Middle East v. J.M.B. Realty Corp*, 650 A.2d 757 (N.J. 1994).

85. See *Irving* at 716.

86. *Pennsylvania Coal Co.* at 415 ("If regulation goes too far it will be recognized as a taking").

87. *San Diego Gas & Electric Company* at 652–53 (Brennan, J., dissenting) (quoting *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (other citations omitted)).

88. For example, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

89. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 115 n. 15 (1978) (noting that columns had been built in the terminal's foundation "for the express purpose of supporting the proposed 20-story tower").

90. Ibid. at 124 (internal citations omitted).

91. *Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency*; 535 U.S. 302, 336 (2002) (quoting *Palazzolo v. Rhode Island,* 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

92. Richard A. Epstein, "*Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations," *Stanford Law Review* 45 (1993): 1370.

93. Anthony T. Kronman, *The Last Lawyer: Failing Ideas of the Legal Profession* (Cambridge, Mass: Harvard University Press, 1993), p. 349.

94. *Kaiser Aetna* at 179.

95. *PruneYard Shopping Ctr.* at 84. Emphasis added.

96. *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987).

97. Ibid. (quoting *Loretto* at 419, 433, quoting in turn *Kaiser Aetna* at 176).

98. *New Jersey Coalition against War in the Middle East*.

99. *PruneYard Shopping Ctr.* at 83 n. 6.

100. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

101. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

102. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

103. See, for example, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); and *Craig v. Boren*, 429 U.S. 190 (1976).

104. *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982).

105. *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999).

106. *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979) (internal citations omitted).

107. *Irving* at 716.

108. *Village of Euclid* at 388.

109. *San Diego Gas & Electric Company* at 655 n. 22 (Brennan, J., dissenting) (emphasis in original) (citation omitted) (quoting Longtin, "Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)," in National Institute of Municipal Law Officers *Municipal Law Review* 38B (1975): 192–93).

110. *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (lst Cir. 1991).

111. *PFZ Properties, Inc. v. Rodriguez*, 503 U.S. 257 (1992) (dismissing writ of certiorari as improvidently granted).

112. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

113. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996).

114. Transcript, October 7, 1989, 1998 WL 721087 * 16-17.

115. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 152 (1803).

116. *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) ("the Supreme Court has erect-

ed imposing barriers to guard against the federal courts becoming the Grand Mufti of local zoning boards").

117. In *Coniston Corp.* at 467, Judge Richard A. Posner said that "this case presents a garden-variety zoning dispute dressed up in the trappings of constitutional law."

118. Gregory Overstreet, "The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Decisions," *Journal of Land Use and Environmental Law* 10 (1994): 91, 92 n. 3.

119. John J. Delaney and Duane J. Desiderio, "Who Will Clean Up the 'Ripeness Mess'? A Call to Reform So Takings Plaintiffs Can Enter the Federal Courthouse," *Urban Lawyer* 31 (1999): 195–256.

120. *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992).

121. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997).

122. John L. Marshall, quoted in Bettina Boxall, "California and the West Tahoe Landowner's Suit Settles Little Land Use," *Los Angeles Times*, June 7, 1999, p. A3.

123. See *Preseault v. Interstate Commerce Comm.*, 494 U.S. 1 (1990). The most recent published opinion is *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996).

124. The latest published opinion on the merits is *Florida Rock Industries v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) ("Florida Rock IV").

125. 45 Fed. Cl. 21 (1999)("Florida Rock V").

126. *Florida Rock Indus. v. United States*, Fed. Cl. __, WL 331830 (2000).

127. *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967).

128. Timothy V. Kassouni, "The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights," *California Western Law Review* 29 (1992): 1, 2.

129. Daniel R. Mandelker, Testimony on H.R. 1534 before Subcommittee on Courts and Intellectual Property of the House Judiciary Committee, 105th Cong., 2d sess., September 25, 1997.

130. *Village of Euclid* at 388.

131. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

132. Gregory M. Stein, "Regulatory Takings and Ripeness in Federal Courts," *Vanderbilt Law Review* 48 (1995): 43.

133. *San Remo Hotel, L.P. v. City and County of San Franscisco,* 125 S.Ct. 2491 (2005).

134. Ibid. at 2508 (Rehnquist, CJ., concurring in the judgment).

135. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). I will not attempt an in-depth treatment of *Williamson County* and its progeny here. For a fuller discussion, see Steven J. Eagle, R*egulatory Takings*, 2d ed. (New York: Lexis Law, 2001), § 13-5(b); Michael M. Berger, *Regulatory Takings under the Firth Amendment*: A Constitutional Primer (Washington: Legal Foundation, 1994), pp. 13-19; and Stein, p. 1.

136. *Williamson County* at 200.

137. See, for example, *Dodd v. Hood River County*, 135 F.3d 1219 (9th Cir. 1998).

138. *Rainey Bros. Construction Co. v. Memphis and Shelby County Board of Adjustment*, 178 F.3d 1295 (table), 1999 WL 220128 (6th Cir. 1999), cert. denied 120 S.Ct. 172 (1999).

139. *Rainey Bros. Construction Co. v. Memphis and Shelby County Board of Adjustment*, 967 F. Supp. 998 (W.D. Tenn. 1997).

140. 28 U.S.C. § 1491(a)(1) (1996).

141. 28 U.S.C. § 1500 (1994).

142 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," *Catholic University Law Review* 40 (1991): 566.

143. See Coyle.

144. Examples of the effects of these kinds of regulations on citizens are given in such books as Jonathan Adler, *Environmentalism at the Crossroads* (Washington: Capital Research Center, 1995); Richard F. Babcock and Charles L. Siemon, *The Zoning Game Revisited* (Cambridge, Mass.: Lincoln Institute of Land Policy, 1985); DeLong, *Property Matters*; William Perry Pendley, *It Takes a Hero: The Grassroots Battle against Environmental Oppression* (Bellevue, Wash.: Free Enterprise Press, 1994); Mark L. Pollot, *Grand Theft and Petit Larceny: Property Rights in America* (San Francisco: Pacific Research Institute for Public Policy, 1993);

Pombo and Farah, *This Land Is Our Land*; and *Land Rights: The 1990s Property Rights Rebellion*, ed. Bruce Yandle (Lanham, Md.: Rowman & Littlefield, 1995).

145. *Lucas* at 1029.

146. *Pennsylvania Coal Co*. at 413.

147. Ibid. at 415.

148. *Armstrong v. United States*, 346 U.S. 40, 49 (1960).

149. This point is well elaborated in Justice Scalia's dissent in *Pennell v. City of San Jose*, 485 U.S. 1, 21–24 (1988).

150. John A. Humbach, "Law and a New Land Ethic," *Minnesota Law Review* 74 (1989): 347–48.

151. For a refutation, see Roger Pilon, "Property Rights, Takings, and a Free Society," *Harvard Journal of Law and Public Policy* 6 (1983): 170–75.

152. If there are two or more solutions to a problem, and no clear majority for any of them, there is no rational way to determine a group preference. Logrolling and the order in which bills are introduced often determine legislative outcomes. Professor Kenneth Arrow was awarded the Nobel Memorial Prize in Economics in 1972 largely for his mathematical proof that the problem of determining a method for maximizing social welfare is intractable. See Kenneth J. Arrow, *Social Choice and Individual Values* (New York: Wiley, 1951); and Dennis C. Mueller, *Public Choice II* (Cambridge: Cambridge University Press, 1989), pp. 2–3.

153. The notion that the state could smoothly coordinate the property rights and labor of millions is an illustration of the "fatal conceit" described in F. A. Hayek, *The Fatal Conceit* (Chicago: University of Chicago Press, 1988), p. 27. A planned economy deprives planners of the very information that they need to plan properly, that is, market prices, which embody information about preferences, resources, and technology. See Ludwig von Mises, "Economic Calculation in the Socialist Commonwealth," in *Collectivist Economic Planning*, ed. F. A. Hayek (London: George Routledge & Sons, 1935), pp. 87–130. The free market produces order from what appears to be chaos by apparently effortlessly organizing all kinds of information in coherent patterns that no planner could reproduce through conscious effort. See F. A. Hayek, *Individualism and Economic Order* (Chicago: University of Chicago Press, 1948), chaps. 7–9.

154. *Just* at 767–68.

155. Ibid. at 767.

156. *Avenal v. United States*, 100 F.3d 933 (Fed. Cir. 1996) (rejecting arguments that oyster bed owner had a property right in one government-set level of salinity to preclude subsequent readjustments in salinity).

157. See generally J. Gregory Sidak and Daniel F. Spulber, *Deregulatory Takings and the Regulatory Contract: The Competitive Transformation of Network Industries in the United States* (New York: Cambridge University Press, 1997).

158. *United States v. Willow Run Power Co.*, 324 U.S. 499, 502 (1945).

159. *Department of Transp. v. Gefen*, 636 So.2d 1345, 1346 (Fla. 1994).

160. See *McKinley v. United States*, 828 F. Supp. 888 (D. N.M. 1993) (modification of grazing permit not compensable).

161. Carol M. Rose, "Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach," *Tennessee Law Review* 57 (1990): 577–78. Emphasis in original.

162. *Penn Central Transportation Co.* at 104.

163. 535 U.S. 302 (2002).

164. Ibid. at 332.

165. Ibid. at 323 (footnote omitted).

166. 125 S.Ct. 2074 (2005).

167. 447 U.S. 255 (1980).

168. *Lingle,* 125 S.Ct. at 2077, quoting *Agins,* 447 U.S. at 260.

169. 483 U.S. 825, 837 (1987).

170. 512 U.S. 374, 391 (1994).

171. *Dolan* at 385.

172. *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 115 S. Ct. 2268, 2268 (1995) (mem., cert. denied) (Thomas, J., dissenting).

173. *City of Monterey* at 1635 ("we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use").

174. *Lingle,* 125 S.Ct. at 2086, quoting *Del Monte Dunes,* 526 U.S. at 702 (material in the first set of brackets supplied, material in second set added by *Lingle*).

175. 528 U.S. 562 (2000).

176. 533 U.S. 606 (2001).

177. Ibid at 627.

178. Ibid at 634–35 (O'Connor, J., concurring).

179. *Palazzolo v. State,* 2005 WL 1645974 (R.I. Super. 2005) (not reported in A.2d.).

180. *Lucas,* 505 U.S. at 1029.

181. See Ariz. Rev. Stat. Ann. § 9-500.12 (1996) (city), § 11-810 (West Supp. 1997) (county); Del. Code Ann. tit. 29, § 605 (Supp. 1996); Fla. Stat. Ann. § 70.001 (West Supp. 1997); Idaho Code §§ 67-8001 to 67-8004 (1995); Ind. Code Ann. §§ 4-22-2-31 to 4-22-2-32 (West Supp. 1996); Kan. Stat. Ann. §§ 77-701 to 77-707 (Supp. 1995); La. Rev. Stat. Ann. §§ 3:2609 to 3:3622.1 (West Supp. 1997); Me. Rev. Stat. Ann. tit. 5, § 8056(1) (A) (West 1989); Mich. Comp. Laws Ann. § 24.241:245 (West Supp. 1997); Miss. Code Ann. §§ 49-33-1 to 49-33-19 (Supp. 1996); Mo. Ann. Stat. § 536.017 (West Supp. 1996); Mont. Code Ann. §§ 2-10-101 to 2-10-105 (1995); N.D. Cent. Code § 28-32-02.5 (Supp. 1995); N.C. G.S. § 113-206; Or. Rev. Stat. § 197.772; Tenn. Code Ann. §§ 12-1-201 to 12-1-206 (Supp. 1996); Tex. Gov't Code Ann. §§ 007.041 to .045 (West 1996); Utah Code Ann. §§ 63-90-1 to 63-90-4 (Supp. 1996); Va. Code Ann. § 9-6.14:7.1(G); Wash. Rev. Code § 36.70A.370 (West Supp. 1997); W. Va. Code §§ 22-1A-1 to 2-1A-3 (1994); Wyo. Stat. Ann. §§ 9-5-301 to 9-5-305 (Michie 995). Sources: Mark W. Cordes, "Leapfrogging the Constitution: The Rise of State Takings Legislation," *Ecology Law Quarterly* 24 (1997): 190 n. 16; and Marilyn F. Drees, "Do State Legislatures Have a Role in Resolving the 'Just Compensation' Dilemma? Some Lessons from Public Choice and Positive Political Theory," *Fordham Law Review* 66 (1997): 787–89, 810–13, 841.

182. For discussion, see ibid., p. 787; Cordes, p. 187; and Ann L. Renhard Cole, "State Private Property Rights Acts: The Potential for Implicating Federal Environmental Programs," Note, *Texas Law Review* 76 (February 1998): 685.

183. The categorizations here borrow heavily from the detailed recent compilation in Cordes.

184. 42 U.S.C. § 4321, 4332(2)(C). See 40 C.F.R. § 1500.2.

185. 53 F.R. 8859 (1988), reprinted in 5 U.S.C. § 601.

186. See, for example, Hertha L. Lund, "The Property Rights Movement and State Legislation," in *Land Rights*, pp. 199, 219.

187. Ariz. Rev. Stat. Ann. § 9-500.12 (1996) (city), § 11-810 (West Supp. 1997) (county).

188. Miss. Code Ann. §§ 49-33-1 to 49-33-19 (Supp. 1996).

189. La. Rev. Stat. Ann. §§ 3:3601–02 (West Supp. 1997).

190. Tex. Gov't Code Ann. § 2007.001 et seq.

191. The government action that would constitute a "taking" is limited to that which "affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, . . . and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property. . . ." Ibid. § 2007.002(5)(B). It is unclear whether the 25 percent diminution could be applied to the affected segment of the parcel or must be applied to the parcel as a whole. See Jerome M. Organ, "Understanding State and Federal Property Rights Legislation," *Oklahoma Law Review* 48 (Summer 1995): 191–214.

192. *McMillan v. Northwest Harris County Mun. Utility Dist. No. 24*, 988 S.W.2d 337 (Tex. App. 1999).

193. Fla. Stat. Ann. § 70.001 (West Supp. 1997).

194. Ibid. § 70.001(2).

195. Ibid. § 70.001(3)(e).

196. *Penn Central Transportation Co.* at 124.

197. *Armstrong* at 49.

198. Fla. Stat. Ann. § 70.001(1). Emphasis added.

199. Ibid. § 70.001(6)(a).

200. Ibid. § 70.001(6)(b).

201. Ibid. § 70.001(5)(a).

202. See, for example, Julian Conrad Juergensmeyer, "Florida's Private Property Rights Protection Act: Does It Inordinately Burden the Public Interest?" *Florida Law Review* 48 (1996): 695–707; Nancy E. Stroud and Thomas G. Wright, "Florida's Private Property Rights Act—What Will It Mean for Florida's Future?" *Nova Law Review* 20 (1996): 683–706; and Vivien J. Monaco, "The Harris Act: What Relief from Government Regulation Does It Provide for Private Property Owners?" *Stetson Law Review* 26 (1997): 861–900.

203. Ronald L. Weaver and Nicole S. Sayfie, "1999

Update on the Bert J. Harris Private Property Rights Protection Act," *Florida Bar Journal* 73 (March 1999): 49–70. See also Ronald L. Weaver, "A Vision of the Future of Florida Land Use Law," *Florida Bar Journal* 74 (June 2000): 91–95.

204. 56 P.3d 892 (Or. 2002).

205. Oregon Secretary of State, Unofficial 2004 General Election Results, State Ballot Measures (November 26, 2004), at http://egov.sos.state.or.us/results/2004_G100_all_meas.htm.]

206. 125 S.Ct. 2655 (2005).

207. See the index prepared by the Institute for Justice, http://www.castlecoalition.org/legislation/states/index.asp.

208. See, generally http://www.nesl.org/programs/natres/EmindomainMemo.htm.

209. 2005 AL S.B. 68.

210. 2005 DE S.B. 217.

211. 2005 Second Special Session, SB 7.

212. In *Dolan*, Justice Stevens asserted that *Chicago, Burlington & Quincy R.R.*, at 234–35, made states liable to owners on the basis of a Fourteenth Amendment theory of substantive due process alone. *Dolan* at 405–7. Chief Justice Rehnquist, writing for the *Dolan* majority, denied that claim, heatedly arguing that the rationale was based on the Fifth Amendment's Takings Clause, which is incorporated through the Fourteenth Amendment's Due Process Clause so as to be applicable against the states. Ibid. at 384 n. 5.

213. *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). See Charles E. Rounds Jr., "IOLTA: Interest without Principle," Cato Institute Policy Analysis no. 291, December 18, 1997.

214. *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 86 F. Supp. 2d 624, (W.D. Tex. 2000).

215. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

216. This is known as "*Pullman* abstention." See *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

217. This is known as "*Burford* abstention." See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The *Pullman* and *Burford* doctrines are discussed in Julie A. Davies, "*Pullman* and *Burford* Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases," *U.C. Davis Law Review* 20 (1986).

218. H.R. 925 (1995) §§ 2(a) and 2(b).

219. See 42 U.S.C. § 1983.

220. 125 S.Ct. 2655 (2005).

221. U.S. Constitution, Article § 8.

222. Ariz. Stat. § 41-1311.

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