TAKINGS, REGULATIONS, AND NATURAL PROPERTY RIGHTS

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***Cornell Law Review*, Vol. 88, No. 6, September 2003, pp. 1549-1671**

George Mason University Law and Economics Research Paper Series

08-60

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This Article reexamines federal regulatory-takings law in light of a line of eminent-domain cases decided in American state courts during the nineteenth century. These decisions drew on Founding Era principles of natural law to generate a body of what modern lawyers would call "regulatory takings" law. These principles entitled property owners to the free use of their property. They conceived of a property "regulation" as a positive law ordering an owner's free use of property to accord with the natural rights of her neighbors. If a positive law restrained the free use of property for some other purpose, it constituted an "invasion" of use rights and therefore "took" constitutionally-protected "private property."

The Article offers three main lessons. First, the Article explains why modern federal and state regulatory-takings law suffers from serious doctrinal problems. The nineteenth-century cases fashioned workable doctrinal standards because they consistently followed the principle that the free use of property deserved protection; Penn Central v. City of New York and other leading modern cases respect property's social value inconsistently, if at all. Second, the nineteenth-century cases provide a different way to conceive of property rights. Most modern property theory is strongly utilitarian; the nineteenth-century cases justified the free use of property as an extension of the moral freedom inherent in being human. Finally, the distinction these cases drew between "regulations" and "invasions of right" provide important insights into the original meaning of the Takings Clause in the Fifth Amendment to the U.S. Constitution.

† Assistant Professor of Law, St. Louis University. I am especially grateful to Richard Epstein for encouraging me to explore nineteenth-century state regulatory takings case law. I thank Philip Hamburger, Dennis Hutchinson, Daniel Hulsebosch, Christopher Bracey, Nicole Garnett, Scott Kieff, Adam Mossoff, John Nagle, Troy Paredes, and Pete Salsich for useful criticisms or suggestions. I am grateful to the University of Chicago Legal Scholarship workshop, the University of San Diego School of Law, the Kansas University School of Law, and the St. Louis University School of Law for letting me present draft versions of this Article. Thanks to Richard Brumbaugh for his research assistance, and to the St. Louis University School of Law for a research grant and other support.

INTRODUCTION: NATURAL-RIGHT THEORY IN NINETEENTH-CENTURY STATE EMINENT-DOMAIN LAW

A. Regulations and Takings Now

Regulatory takings law combines the worst of two worlds—constitutional law's arid generalities and property law's substantive difficulties. To hear the Supreme Court tell it, this confusion is the best we can expect. In *Penn Central Transportation Co. v. New York City*, the leading regulatory takings case of our time, the Supreme Court complained that regulatory takings law "has proved to be a problem of considerable difficulty."[1] "[Q]uite simply," the Court confessed, it "has been unable to develop any 'set formula' for determining" regulatory takings cases.[2]

There are many reasons for this problem, but we make it worse by assuming that regulatory takings law is a relatively recent invention. Most lawyers and scholars assume that "regulatory takings" did not even exist as a conceptual category until the U.S. Supreme Court invented it in 1922,[3] and that there is no earlier tradition of American takings cases to teach us how to apply the Takings Clause[4] to regulations. In his 2002 opinion in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, Justice Stevens read the Court's regulatory takings precedents narrowly in large part because he thought those cases were of "recent vintage."[5] Even Justice Scalia, the most respected originalist on the federal bench, conceded a decade ago in *Lucas v. South Carolina Coastal Council* that the regulatory takings principles he was developing for the Court were "not supported by early American experience."[6]

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1 438 U.S. 104, 123 (1978).

2 *Id.* at 124.

3 *See, e.g.*, Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613, 615 (1996) (dubbing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the "Adam" of regulatory takings jurisprudence).

4 U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

5 122 S. Ct. 1465, 1478 (2002).

6 505 U.S. 1003, 1028 n.15 (1992) (stating that although "largely true," the historical account is irrelevant because state practices prior to incorporation of the Takings Clause "were out of accord with *any* plausible interpretation of [the Clause]").

B. "Regulations" and "Takings" During the Nineteenth Century

Were early Americans as oblivious about "regulatory takings" as Justices Stevens and Scalia assume they were? One need not look very far to find examples of Founding Era treatises or cases saying that property rights should be "sacredly protected."[7] The doubts become even stronger if one looks to nineteenth-century state eminent-domain cases. In *Tahoe-Sierra* last Term, the plaintiffs did not win any compensation, even though a bi-state planning agency had stripped them of all development rights in their land for more than two and a half years.[8] In one 1841 case, by contrast, an owner won compensation because a state aqueduct project had deprived him of water rights for just two and a half *months*.[9] If the Founders and nineteenth-century state judges were this solicitous of property rights, can it really be true that they refused to apply their principles about property rights and takings to property regulations?

This Article argues that modern takings law and scholarship profoundly misunderstand nineteenth-century state regulatory takings law.[10] Early state eminent-domain opinions did not organize takings cases under the same categories that we apply now, but it is still possible to identify a series of decisions that closely resemble modern regulatory takings cases. These decisions drew on social-compact and natural-right political theory to develop broad legal distinctions between property regulations and regulatory takings. If property regulations did not live up to the standards for "regulations" prescribed by natural-right theory, state courts held that the restrictions were "violations" or "invasions" of property rights, which we would now call "regulatory takings."

This conclusion is especially striking because many of the foundational state regulatory takings opinions are well known and misread anyway. The confusion arises because modern lawyers and judges read these decisions anachronistically. Quite often, early state court judges did say that "regulations" were not "takings." Modern readers then quickly jump to the conclusion that a state could never trigger takings problems so as long as it exercised its regulatory powers without touching, trespassing, or confiscating property.

For nineteenth-century judges, the concept of "regulation" meant something substantively quite different from what we assume it means now. After several generations of New Deal regulation, we associate

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7 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 319 (2d ed., Halsted 1832); *see* Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 314 (C.C.D. Pa. 1795) (noting that "a more sacred regard should have been paid to property").

8 *See Tahoe-Sierra*, 122 S. Ct. at 1470, 1478.

9 *See* Comm'rs v. Kempshall, 26 Wend. 404, 404, 413 (N.Y. 1841).

10 *See* discussion *infra* Part II.

"regulation" with "any government rule restraining the use of property, for any purpose of the public's choosing." This understanding makes it difficult, if not impossible, to articulate a principled distinction between regulations and takings. By contrast, when nineteenth-century lawyers used the term "regulation," they invoked moral and political principles that *limited* the scope of "regulation" as surely as they *justified* it. To borrow Randy Barnett's definition, property "regulations" were expected to "make" property rights "regular."[11] Regulations were expected to order and encourage the free and equal use of property. In one 1799 case, a lawyer argued that "bye-laws may regulate but not restrain trade."[12] Even as late as 1915, roughly when the early conception of regulation confronted the conception that prevails today, a then-U.S. Senator and future Supreme Court Justice defined "regulation" to mean "adjusting conditions so as to facilitate."[13]

Understood in the earlier, narrower sense, the concept of "regulation" quietly informed and complemented what it meant for government to "take" private property. The law of nature entitled every person to a certain set of rights to control, to exchange, and especially to use her own property.[14] "Regulations" aimed to secure in practice the equal share of control, disposition, and use rights to which owners were entitled in principle.[15] The main line of "regulations" *defined* and *protected* property rights or other personal rights. They prevented one owner from overstepping his own fair and equal share of use rights and grabbing some of his neighbors' in the process.[16] Once these laws had equalized neighbors' use rights, a smaller class of "regulations" restrained and ordered the exercise of rights to *enlarge* every affected owner's practical freedom over her property.[17] Roughly speaking, the former prevented nuisances, while the latter forcibly rearranged owners' uses of property to benefit all of them as a partnership benefits all of its partners.

If, however, a law deprived a person of more rights in practice than necessary to satisfy either of these standards in principle, it stripped owners of "property" in their use rights. In the words of a twentieth-century Supreme Court case, such a law forced "some peo-

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11 *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 139 (2001) (using this definition of "regulation" to explain the meaning of "regulate" as applied to the Commerce Clause).

12 Respublica v. Duquet, 2 Yeates 493, 494 (Pa. 1799).

13 The Hon. George Sutherland, The Constitutional Aspect of Government Ownership, Address at the Missouri Bar Association Meeting 8 (Sept. 29, 1915) (transcript available from the Library of Congress, Justice Sutherland collection).

14 *See* discussion *infra* Part I.A.

15 *See* discussion *infra* Part I.D.

16 *See* discussion *infra* Parts II.B, II.D.1, II.E.2.

17 *See* discussion *infra* Parts II.D.2, II.E.3.

ple alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[18] Because such a law stripped owners of use rights they did not need to relinquish for good "regulation," it "invaded," "violated," or "took" private property.

C. Implications

1. *A New and Old Approach to Federal Regulatory Takings Law (or, Clearing the* Penn Central *Muddle)*

These early state-court decisions teach a simple but powerful lesson about modern federal regulatory takings doctrine: if we really wanted to enforce a coherent doctrine, we could. The state decisions read state takings clauses and other constitutional guarantees to establish sweeping moral distinctions between the proper "regulation" of individual property rights and the "invasion" or "taking" of such rights. These guarantees drew lines much like those that run through other broad guarantees in the Bill of Rights. In constitutional law now, we are perfectly comfortable with the idea that the Free Speech Clause[19] covers not only obvious censorship but also regulations that incidentally restrain speech. We do not hesitate to distinguish among regulations that *prevent abuses* of speech rights (like obscenity and libel laws), regulations that *order* the exercise of speech rights (like time, place, and manner restrictions), and regulations that have no connection to either of these justifications. Our background ideas about obscenity, libel, and time-place-and-manner restrictions inform and complement what comes to mind when we speak of a law that "abridges" free speech. Our predecessors were just as comfortable marking off principled distinctions among nuisance-control regulations, common-benefit regulations, and regulations that "invaded"—and thus "took"—some of an owner's fair and equal share of use rights in her property.

These standards are sorely needed because, to borrow Carol Rose's famous phrase, modern regulatory takings law is widely recognized to be a "muddle."[20] This muddle has become especially severe in recent years. Cases like *Lucas*, *Tahoe-Sierra*, and *Palazzolo v. Rhode Island*[21] have exposed serious conceptual tensions in contemporary regulatory takings doctrine.

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18 Armstrong v. United States, 364 U.S. 40, 49 (1960).

19 *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

20 *See* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); *see also* Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329 (1995).

21 533 U.S. 606 (2001).

The nineteenth-century cases should dispel any notion that *Penn Central*'s "muddle" is a necessary or inevitable legal development. Rather, they suggest, the doctrinal problems that have accreted around *Penn Central* over the last 25 years are a muddle of *Penn Central*'s making. While the idea of a "regulatory taking" is often described now as a contradiction in terms, it does not need to be. Takings law gets muddled only when it applies a certain kind of utilitarian property theory to regulatory takings. In *Property, Utility, and Fairness,* Frank Michelman concluded that "the harm-benefit distinction was illusory as long as efficiency was to be taken as the justifying purpose of a collective measure."[22] This Article suggests that Michelman's conclusion is only as sound as his normative premise. He assumes that his Article's utilitarian definition of social efficiency ought to determine when the government "regulates" and when it "takes." *Penn Central* and subsequent cases follow a utilitarian theory of property regulation much like Michelman's. Regulatory takings law applies internally coherent standards under the natural-right approach; it does not under Michelman's and *Penn Central*'s assumptions.

Specifically, the natural-right approach suggests that *Penn Central*'s approach breaks down because it does not go far enough in respecting the social good associated with "freedom of action" in property rights. If one could ask nineteenth-century jurists to reduce the natural-right approach to a slogan, they might say that the object of all property regulation is to secure to every owner an "equal share of freedom of action" over her own property. On this understanding, every owner is entitled to some zone of non-interference in which to use her possessions industriously, productively, and consistent with the health, safety, property, and moral needs of her neighbors. This concept of "equal and free action" is foreign to most contemporary readers, but it has dramatic consequences for understanding the *Penn Central* muddle.

From the natural-right perspective, *Penn Central* breaks down because it does not use free action over property to mediate between individual property rights and government social action. To settle regulatory takings claims, *Penn Central* balances the owner's lost economic value and expectations against the social value the government hopes to gain by regulation.[23] Even though the natural-right perspective would see utility as a happy consequence of good regulation, not as an end in itself, it can still critique *Penn Central*'s utility balancing. From that perspective, *Penn Central* breaks down when it instructs

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22 Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165, 1235 (1967).

23 *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

courts not to be judgmental when they weigh the social value of regulation. Invoking deferential "rational basis" principles, *Penn Central* requires courts instead to presume that regulation has high social value whenever it is "reasonably related to the promotion of the general welfare."[24] Other balancing tests in property law, by contrast, discount the social value of a given land use if it interferes with owners' free action over their property. In nuisance law, for instance, the *Restatement of Torts* suggests that "it is in the general public interest to permit the free play of individual initiative within limits" and that "freedom of conduct has some social value although in [a] particular case the conduct may not produce any immediate or direct public benefit."[25]

Takings law could get out of the *Penn Central* muddle by recognizing that what the *Restatement of Torts* calls "individual initiative" and "freedom of conduct" goes a long way in shaping what *Penn Central* calls "the character of the governmental action."[26] On *Penn Central*'s facts, for instance, one would have to discount the social value or character of a historic-preservation law to the extent that it scares local owners into worrying that they will no longer be able to change or expand the uses they make of their properties. In practice, that discounting would reduce to two separate, workable doctrinal inquiries. One inquiry would focus on whether a historic-preservation law directly and reasonably controls some nuisance like a health threat or pollution problem. The other would focus on whether such a law enlarges affected owners' remaining property rights in ways that compensate them for the use and development rights it strips from them. Since the answers to both inquiries would almost certainly be "No," a historic-preservation law would not promote social utility unless it first compensated local owners for the demoralization costs they would suffer from losing some of the free use of their property.

Because such an approach is coherent and workable, we should not blithely assume that *Penn Central*'s "essentially ad hoc, factual inquiries"[27] are the best we can hope for in regulatory takings law. Rather, even if we prefer *Penn Central*'s property theory to any other alternative, we must accept that some serious doctrinal costs weigh down *Penn Central*'s advantages. In its justifications, the *Penn Central* approach is admittedly standardless. In its consequences, it leads to all-or-nothing results, awarding nothing much more often than it awards anything. By writing the concept of "equal freedom of action" over property out of regulatory takings law, *Penn Central* makes it

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24 *See id.* at 131.

25 RESTATEMENT (SECOND) OF TORTS § 828 cmt. e (1979).

26 *Penn Central*, 438 U.S. at 124.

27 *Id.*

cheaper for the government to pursue a wide range of social actions it could not afford under the natural-right approach. It probably also facilitates transfers of property-use rights that the natural-right approach would forbid. This Article does not assess which of these two approaches promotes better policy. But it does show that the *Penn Central* approach cannot be defended solely on the ground that the law cannot do any better.

2. *A New and Old Approach to State Regulatory Takings Law*

This Article focuses on *Penn Central* and the main cases in federal regulatory takings law, but it probably has even more far-reaching ramifications for state takings law. In constitutional law, legal scholarship and classroom teaching both tend to focus on U.S. Supreme Court decisions, which are often written by first-rate legal thinkers and in any case are always final. When it comes to regulatory takings, however, federal law is not the best place to start. Because the Fifth Amendment does not apply directly to state eminent-domain proceedings, the federal courts did not even begin to fashion regulatory-takings principles until early in the twentieth century.[28] Meanwhile, state courts had been developing a coherent and unified doctrine for more than a century.[29]

Nineteenth-century state court judges did not wait for Chief Justice Marshall and Justice Story to solve the problems in regulatory takings law for them. Modern-day state court judges need not wait on the U.S. Supreme Court to work out the kinks in federal regulatory takings law now. Nor do modern-day state legislatures, many of which have drafted just-compensation statutes to correct the problems often associated with *Penn Central*.[30] Again, this Article makes no final claim about whether *Penn Central*'s approach to regulatory takings promotes sound policy. But the nineteenth-century cases should help state courts clarify the substantive issues to consider before using *Penn Central* as persuasive authority to interpret state takings clauses. Federal takings guarantees set a constitutionally guaranteed floor, not a constitutionally mandated ceiling.[31] If state officials think that *Penn Central* is too muddled, or that it unfairly denies owners compensation in

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28 *See* discussion *infra* Part III.

29 *See* discussion *infra* Part II.

30 *See* Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187 (1997).

31 *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 80–81 (1980) (announcing that federal law, including the Constitution, "does not . . . limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 1.6(c), at 19 (5th ed. 1995) ("[S]tate courts are always free to grant individuals more rights than those guaranteed by the Constitution, provided [they] do[ ] so on the basis of state law.").

some cases, they can develop state takings law to bring more clarity and fairness to the takings protections in their states.

3. *Introducing Equality and Freedom as Standards in Takings Law*

The nineteenth-century cases also provide two new standards for evaluating not only *Penn Central*, but any other approach to takings law. Utilitarianism and personhood now provide the two main justifications for property rights. On one hand, the nineteenth-century cases show why a utilitarian account of property might require the equal and free use of property. Founding Era natural-right theory started from the insight that people rely on having free control over their labor and their external possessions. If this insight is substantially correct, that reliance must count heavily in a utilitarian justification of property.

Because natural-right theory places so much weight on the concept of equal freedom of action, the nineteenth-century cases anticipate the account of the police power and regulatory takings developed by Richard Epstein. He starts from utilitarian Lockean premises,[32] especially the insight that "[i]n most cases, the right to use one's own land freely is more important than the right to veto one's neighbor's use of his land."[33] He then traces two separate justifications for government takings, nuisance control and implicit in-kind compensation.[34] These justifications closely track the two justifications for property "regulations" used by nineteenth-century American state jurists. As this Article suggests, there are subtle differences between Epstein's approach and the nineteenth-century approach. From the natural-right perspective, Epstein at times underestimates the moral obligations inherent in property rights. The two approaches also part ways on the ultimate relation between utility and freedom. Epstein encourages freedom primarily because it is socially useful, while the American natural-right approach treated utility as a happy consequence that followed when individuals exercised freedom morally.[35] Still, the nineteenth-century cases confirm Epstein's basic insight: if people place great utility in freedom, and particularly in the free use of property, takings law must draw principled distinctions among regulations that abate abuses of property rights, those that pro-

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32 *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 9–18 (1985) [hereinafter EPSTEIN, TAKINGS].

33 Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1386 (1993).

34 *See* EPSTEIN, TAKINGS, *supra* note 32, at 108–25, 195–215.

35 For Epstein's thoughts on the similarities and differences in the two approaches, see Richard A. Epstein, *The "Necessary" History of Property and Liberty*, 6 CHAPMAN L. REV. (2003).

vide implicit in-kind compensation, and those that reduce social welfare because they do neither.

On the other hand, the nineteenth-century reconciliation may be of even more interest to scholars who seek to ground property rights in personhood. Utilitarian property theory dominates property scholarship today, but a small band of dissenters insists that property is better understood as an extension of the human person. As Margaret Radin explains, "Although explicit elaboration of this perspective is wanting in modern writing on property, the personhood perspective is often implicit in the connections that courts and commentators find between property and privacy or between property and liberty."[36] This perspective seems persuasive in areas like copyright or celebrity privacy, where personhood assumes particular significance.[37] However, it does not yet extend to many other areas of property law, including the law of takings. This deficiency is unfortunate because "the personhood perspective can also serve as an explicit source of values for making moral distinctions in property disputes, and hence for either justifying or criticizing current law."[38]

Nineteenth-century natural-right theory provides a personhood-based account of regulatory takings. Considering property rights as simple extensions of a person's absolute freedom, the natural-right account generates a prepolitical and prelegal conception of property. When a person owns an external possession, she also enjoys a series of rights in relation to that possession, which allow her to enlarge her freedom to satisfy her wants and manifest her personal talents. But the theory is also practical and prudential. It identifies as the "natural" legal state the regime that does more than any other feasible regime to secure personal freedom. Because this theory is practical and

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36 Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982) (footnotes omitted).

37 *See, e.g.*, George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443 (1991).

38 Radin, *supra* note 36, at 957. Radin grounds her account in Hegel's philosophy, disclaiming any intent to "emphasize how the notion of personhood might figure in the most prevalent traditional lines of liberal property theory," especially "the Lockean labor-desert theory." *Id.* at 958. As should become clear in Part I, American natural-right theory is quite Lockean, though it is also influenced by medieval and early Enlightenment natural-law writers. The difference in theoretical approach makes for important differences in practice. Radin's account tends to preclude owners from holding property in "fungible" goods—objects not "closely related to one's personhood" but instead "held for purely instrumental reasons." *Id.* at 960–61; *see id.* at 986–88. The American natural-right account recognized property in so-called "fungible" goods, by contrast, because people can use fungible goods as or even more effectively than so-called "personal" goods to fulfill the first object of property rights—to secure the owner's self-preservation by production and acquisition. Still, any differences between Radin's work and the Founders' approach do not make one or the other any less of a "personhood" theory of property; rather, such differences suggest that the Founders analyzed the persona differently from Hegel and Radin's interpretation of Hegel.

prudential, it can reconcile seemingly "absolute" personal rights with neighbors' individual rights and the needs of community living. It orders property in relation to rights and responsibilities that are more essential to one's person, such as health, safety, and morals. Once property has been so ordered, equality principles then order each individual's property rights in relation to the rights of other owners.

We may doubt whether freedom and equality should set standards for takings law. We may also question the specific conceptions of equality and freedom that nineteenth-century jurists applied. But if these conceptions have merit, and if the insights they make about property, personhood, and community living are accurate, the nineteenth-century approach to takings represents a marked improvement over the approach we apply now.

4. *Nineteenth-Century Regulatory Takings Principles and the Original Intent Behind the Takings Clause*

Finally, this Article contributes to the debate over the historical meaning of the Takings Clause in the Fifth Amendment. *Lucas*, decided in 1992, provoked intense scholarly interest in determining how the Founders and early Americans originally understood the Takings Clause.[39] Founding Era natural-right theory could easily generate a principled distinction between regulations and regulatory takings. While this distinction was more or less latent at the Founding, state court jurists gradually made it patent over the course of the nineteenth century. Their decisions presupposed that constitutional property protections invited them to distinguish between laws that "regulated" property and laws that "invaded" and thus took property by restraining property-use rights for purposes not related to the power to regulate. This theoretical distinction deserves consideration as at least one factor shaping the original understanding of the Takings Clause.

It may seem ironic that an Article about early American takings law should draw such a tentative conclusion about the historical meaning of the Takings Clause. Still, the originalism debate covers many more sources of historical evidence than the cases studied in this Article. This Article concentrates on what we would now call "regulatory takings" cases, but those cases constitute a fairly thin slice of nineteenth-century eminent-domain law. Other scholars, especially Wil-

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39 For a recent summary of and contribution to that debate, see Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181 (1999).

liam Stoebuck,[40] William Michael Treanor,[41] and Kris Kobach,[42] have examined what are now called "consequential damage" cases. In these cases, property owners complained not that the government abused its power to regulate, but that it inflicted a publicly-sponsored nuisance on their properties. Though less relevant to the originalism debate, these cases are numerous and do not paint as clear a portrait as the cases studied here.[43] Separately, John Hart has studied colonial land-use practices and concluded that the Founders regulated land use too closely to make room for regulatory takings principles with any bite.[44] William Novak conducted a similar study of state land-use regulation over the first half of the nineteenth century and, though he was not explicit on this point, he hinted at conclusions similar to Hart's.[45]

This Article does not examine all the sources covered in this scholarship, but it does warn that those sources should be reread carefully. This Article shows that modern scholars read nineteenth-century regulatory takings decisions anachronistically, their judgments shaped by the utilitarian commitments that currently predominate in property law. Modern readers are not sensitive enough to the ways in which natural-right theory gave content to key concepts like "private property," "regulation," "takings," and the relation between "private rights and the public good." It may be that much of the other scholarship about early American land use practice repeats these same anachronistic misunderstandings. For instance, in his book *The People's Welfare*, Novak sets out to prove that there was an "overwhelming presence of regulatory governance" in American life during the early nineteenth century.[46] The examples Novak gives, however, closely track a conception of the police powers similar to the portrait sketched in

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40 William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972).

41 William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

42 Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211.

43 The New Hampshire Supreme Court canvassed the takings issues raised and the various lines of precedent addressing these issues in Eaton v. Boston, Concord, & Montreal R.R., 51 N.H. 504 (1872).

44 *See* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996) [hereinafter Hart, *Colonial*]; John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000) [hereinafter Hart, *Original Meaning*].

45 *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996).

46 *Id.* at 6.

Part II of this Article: health and safety laws,[47] public morals controls,[48] and laws regulating the use of public commons.[49]

Of course, it is entirely possible that the state lawmakers whose legislation Novak studies were practicing a theory of regulation markedly different from the natural-right theory that state judges were preaching from the bench. The same possibility holds for the work of scholars like Hart, Treanor, and the others mentioned above. But we will not know definitively until the original sources they cite are studied with closer care.

Separately, the originalism debate raises issues that go beyond the scope of this Article regarding what it means to recover the original "understanding," "meaning," or "intentions" of the Takings Clause. This Article uses "originalism" roughly to classify several different approaches to studying historical sources. At one extreme, "original intention" studies try to determine the meaning and scope of a legal clause by studying how the drafters intended the clause to apply to specific situations.[50] This side of the originalist spectrum tries to recover what Gary Lawson calls "a concrete, subjective understanding—either of some privileged group of founders or ratifiers or of some more amorphous general public."[51] In the regulatory takings field, Andrew Gold has used such a methodology to conclude that the original understanding of the Takings Clause "quite possibl[y]" applied to regulations,[52] while Hart's work suggests that the Clause was not originally intended to apply to regulations.[53]

At the other extreme, "original meaning" studies concentrate on using historical sources to recover the objective meaning of a clause's terms. Lawson describes this side of the spectrum "as the understanding that the general public would have had if all relevant information and arguments had been brought to its attention."[54] Original-meaning analysis differs sharply from original-intention analysis because it allows for what Lawson calls the possibility that "documents can have meanings that are latent in their language and structure even if they

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47 *See id.* at 51–82, 191–234; discussion *infra* Part II.B.

48 *See* NOVAK, *supra* note 45, at 149–90; discussion *infra* Part II.C.

49 *See* NOVAK, *supra* note 45, at 83–148; discussion *infra* Part II.E.

50 *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

51 Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 341 n.51 (2002).

52 *See* Gold, *supra* note 39, at 185–86, 240–42.

53 *See* Hart, *Original Meaning*, *supra* note 44. Hart's scholarship is relevant to both original-intent and original-meaning inquiries, but more to the former than the latter. Hart tends to measure the intentions of the Takings Clause by the intentions and practices of legislators who legislated around the same time as the ratification of the Takings Clause. *See id.* at 1133–47.

54 Lawson, *supra* note 51. Randy E. Barnett has defended this approach to interpretation in *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

are not obvious to observers at a specific moment in time."[55] When Epstein defends his reading of the Takings Clause in light of contemporary principles of constitutional interpretation, his defense accords with this understanding of "original meaning" methodology.[56]

The materials studied in this Article are generally more relevant to an original-meaning interpretation of the Takings Clause than to an original-intent interpretation. The regulatory takings decisions suggest that the Founders and several generations of early American jurists understood and subscribed to a distinction in political theory between property regulations and regulatory invasions of property rights. To be sure, this distinction is not the only piece of evidence to consider, and original-meaning scholars should consider all the evidence before relying on the theory of takings presented here. In particular, the distinction in political principle between "regulations" and "invasions of right" surfaced during the Founding, but it took state court judges several generations after the ratification of the Fifth Amendment to apply this theoretical distinction to the kinds of property-use restrictions that comprise the bulk of regulatory takings law now.

Still, these courts' decisions are probative even if they are not conclusive. They help to answer, in Lawson and Guy Seidman's words, whether "the seemingly transparent meaning of the [plain] language [of the Takings Clause] . . . conceal[s] a deeper, more technical meaning."[57] The nineteenth-century cases help decipher the Takings Clause for the same reasons that a nineteenth-century Greek work would help capture the nuances of a term of art in an eighteenth-century Greek writing. Even if these cases were not contemporaneous with the ratification of the Takings Clause, natural-right theory was quite familiar to both the Founders and nineteenth-century jurists. To most contemporary scholars, by contrast, natural-right theory just reads like Greek.

The theory and cases analyzed in this Article are less important to an original-intent inquiry, which seeks to define what the Takings Clause's drafters subjectively *meant* by what they *did* when they regulated land use themselves. The nineteenth-century cases studied here probably come too late to be relevant to an original-intent inquiry. Furthermore, this inquiry would read the Takings Clause not to call into question land-use practices widely accepted at the Founding. Thus, if colonial and early American local land-use laws regularly stripped land owners of use rights for purposes that strayed beyond

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55 Lawson, *supra* note 51, at 341 n.51.

56 *See* EPSTEIN, TAKINGS, *supra* note 32, at 19–31.

57 *See* Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. CHI. L. REV. 1081, 1086 (1999).

the principles of nuisance control and equal-benefit regulation, one might disregard the materials studied here and still conclude, as Hart does, that the Takings Clause was not intended to cover regulations.[58] In either case, anyone interested in knowing whether there is historical authority for the idea of a regulatory taking must take account of Founding Era political theory and the cases considered in this Article.

D. The Argument

The argument in this Article proceeds as follows. Parts I and II develop the natural-right distinction between bona fide "regulations" and regulatory "invasions of right." Drawing on leading cases and treatises from the fifty years after the Founding, Part I explains how the Founders and the first generation of American law-treatise authors used social-compact and natural-right principles to justify property rights, constitutional takings protections, and limit property "regulations." Part II closely studies nineteenth-century state regulatory takings cases. These cases reflect the same understanding of property rights and the objects of regulation as the social-compact and natural-right principles analyzed in Part I.

Because the nineteenth-century law differs dramatically from modern federal law, Parts III and IV trace the development of modern federal regulatory takings law and critique it using the theoretical principles and legal standards traced in Parts I and II. Part III focuses on the cases of the Progressive Era, the substantive due process decisions from the 1910s and 1920s that set the stage for *Penn Central* later. These cases are crucial for several reasons. From a historical perspective, these decisions shed a great deal of light on why and how the standards that dominated in the state courts during the nineteenth century never took hold in federal law during the twentieth. From a theoretical perspective, the Progressive Era decisions present most of the thorniest substantive questions for any theory of regulatory takings. These cases seem to confirm the intuition that the best that regulatory takings law can do is balance the property rights of owners against the regulatory interests of the state and then punt.

Finally, Part IV compares and contrasts the *Penn Central* takings approach with the nineteenth-century approach. This Part recounts the problems that have accumulated under the law and scholarship since *Penn Central*, giving particularly close attention to the main regulatory takings cases of the last decade—*Lucas*, *Palazzolo*, decided two Terms ago, and *Tahoe-Sierra*, decided in 2002. It identifies the doctrinal problems that have arisen under *Penn Central*, and suggests that the nineteenth-century state cases handle these problems much more

58 *See* Hart, *Colonial*, *supra* note 44; Hart, *Original Meaning*, *supra* note 44.

cleanly from a doctrinal perspective than do *Penn Central* and its progeny.

I
REGULATIONS AND TAKINGS IN NATURAL-RIGHT THEORY

A. The Social Compact

According to the standard story in takings law, the whole idea of a "regulatory taking" was regarded as an oxymoron for more than 130 years. There was no such conceptual category, the story continues, until in a moment of distraction or senility Justice Oliver Wendell Holmes created the doctrine in the 1922 decision *Pennsylvania Coal Co. v. Mahon*.[59] As Justice Blackmun argued in *Lucas v. South Carolina Coastal Council*, regulatory takings ideas are not supposed to have a pedigree in any American "'historical compact' or 'understanding of our citizens.'"[60]

Nevertheless, there *was* a "historical compact" justifying regulatory takings ideas—what early Americans knew as the "social compact." Up through the early twentieth century, courts drew upon natural-right principles to define the "private property" covered by takings guarantees and to draw a principled line between "takings" and "regulations." Now, on the rare occasions that scholars have recognized the connection between natural-right ideas and takings principles, they have not taken such ideas seriously. Like William Stoebuck a generation ago, they suppose that the term "natural law" "is almost meaningless; it is an empty vessel into which one can pour almost anything."[61] For the Founders, however, the idea of a natural

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59 *See* 260 U.S. 393 (1922). For examples portraying *Mahon* as originating regulatory takings doctrine, see Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735, 770–74 (1985); Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 300 (1990); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles: Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1325 (1989); Alfred P. Levitt, Comment, *Taking on a New Direction: The Rehnquist-Scalia Approach to Regulatory Takings*, 66 TEMP. L. REV. 197, 203–04 (1993).

60 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1060 (1992) (Blackmun, J., dissenting).

61 Stoebuck, *supra* note 40, at 573–74. J.A.C. Grant did and Douglas Kmiec does appreciate how important natural-law and -right theory was to early takings law. *See* J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 70–81 (1931); Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367 (1991). That said, neither author focuses on nineteenth-century "regulatory takings" cases as systematically as this Article does, and neither explains in detail how natural-law theory defines "private property" and "takings" when a regulation strips use rights associated with a physical asset or labor. Paul J. Otterstedt does a thorough job with the latter issue in *A Natural Rights Approach to Regulatory Takings*, 7 TEX. REV. L. & POL. 25 (2002). Otterstedt's Article, however, does not connect natural-law principles to nineteenth-century state takings law, and it does not contrast those principles with the theoretical challenges considered in Parts III and IV of this Article.

right delineated a series of principles that governed how that right should be regulated.

The social compact carried with it powerful consequences for regulation because it denoted a partnership among people pledged to their mutual betterment. Three of the characteristics that distinguish man from the other animals are his reason, his freedom, and his conscience.[62] These characteristics give man an inherent object—to become the kind of person who can enjoy his freedom morally and rationally. Man enjoys the power to choose his course of action, but he also has some sense that objects of his free choice should be reasoned and right.[63] The social compact exists because people need help to enjoy freedom and to cultivate their faculties for reasoning and making moral judgments.[64] Civil society is supposed to protect its members' basic personal rights (to life, person, and property), to clarify by its mores and laws the truly good objects in human life, and to create conditions in which all of its members may pursue true happiness in all its forms.[65]

The objects of the social compact obligate citizens and government alike. Every citizen is expected to qualify his own freedom willingly when doing so will benefit the partnership, namely civil society and his fellow partners. Likewise, the social compact requires government to take only those actions consistent with the object of the partnership. Specifically, government must secure to all citizens the opportunity to exercise their freedom in an ordered and moral way.[66]

In the same vein, when government secures natural rights, it must do so on an equal basis for every citizen. Because all men are free, rational, and moral animals, they are equally entitled to their natural rights. They are all entitled to pursue the various goods of life consistent with moral directions that will prevent them from misusing their liberty. As explained in 1791–1792 law lectures by James Wilson—a signer of the Declaration of Independence, a member of the Constitutional Convention, and an early Supreme Court Justice—the idea of "equality" does not mean that all men are equal in "their virtues, their talents, their dispositions, or their acquirements."[67] Still, Wilson explains, "there is an equality in rights and in obligations," and every

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62 *See* JAMES WILSON, *Lectures on Law, in* 1 THE WORKS OF JAMES WILSON 69, 228-29 (Robert Green McCloskey ed., 1967).

63 *See id.* at 232.

64 *See id.* at 242.

65 *See id.* at 227–42; NATHANIEL CHIPMAN, PRINCIPLES OF GOVERNMENT 32–38, 51–54 (1833); 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 7–18 (1795); Eric R. Claeys, *Property, Morality, and Society in Founding Era Legal Treatises*, at 6–10 (Aug. 30, 2002), http://apsaproceedings.cup.org/Site/papers/068/068008ClaeysEric.pdf.

66 *See* CHIPMAN, *supra* note 65, at 59; 1 SWIFT, *supra* note 65, at 12–13; 1 WILSON, *supra* note 62, at 238, 241–42; Claeys, *supra* note 65, at 10–13.

67 *See* 1 WILSON, *supra* note 62, at 240.

person "has a right to exert those powers for the accomplishment of those purposes, in such a manner, and upon such objects, as his inclination and judgment shall direct; provided he does no injury to others; and provided more public[ ] interests do not demand his labours."[68]

B. Property Rights

Within these broad outlines, one of the primary objects of the social compact is to protect the individual and natural right to property. Property is a "natural"—inherent, prepolitical, and prelegal—right because its pursuit secures a wide range of natural goods. These goods include self-preservation, the preservation of one's family, and the wealth needed to practice other virtues that require some minimum of material support.[69] According to Wilson, then, property rights need to be protected because these acquisitive and productive tendencies

> would be rendered ineffectual, if we were not secured in the possession of those stores which we collect; for no one would toil to accumulate what he could not possess in security. This security is afforded by the moral sense, which dictates to all men, that goods collected by the labour and industry of individuals are their property; and that property ought to be inviolable.[70]

Because property rights must protect these acquisitive and industrious tendencies, they must cover the full range of rights associated with property. Thus, civil society is obligated to secure not only the right to own property, but all of the legitimate attributes commonly associated with ownership.[71] In a 1796 treatise restating Connecticut law, Connecticut Supreme Court Justice Zephaniah Swift borrowed from Blackstone to describe these rights as the trinity of disposition, use, and control.[72]

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68 *Id.* at 241–42; *see also* 1 SWIFT, *supra* note 65, at 17–18 ("Men at their birth are all vested with equal rights, but are endowed with unequal powers. . . . We shall find that the operation of these equal laws will be the establishment of a gradation of ranks, and a variety of conditions, essential to the existence of society, and productive of the greatest happiness.").

69 *See* JAMES WILSON, *On the History of Property*, *in* 2 THE WORKS OF JAMES WILSON, *supra* note 62, at 711, 718–19.

70 1 WILSON, *supra* note 62, at 233.

71 *See* 2 KENT, *supra* note 7, at 257–58; 2 WILSON, *supra* note 62, at 719; Claeys, *supra* note 65, at 14.

72 *See* 1 SWIFT, *supra* note 65, at 182; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES 134 (1765) ("The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."); *cf.* Adam Mossoff, *Property: Putting the Pieces Back Together*, 45 ARIZ. L. REV. (forthcoming 2003) (manuscript at 7, on file with author) (identifying "acquisition, use, and disposal" as fundamental elements of the "integrated theory of property").

At the same time, members of society do not enjoy a natural right to every conceivable power of disposition, use, or control that they might enjoy if they had no neighbors. As put by Chancellor James Kent, a New York jurist, in his leading nineteenth-century treatise *Commentaries on American Law*, "[e]very individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order, and the reciprocal rights of others."[73] Because everyone in society enjoys the right to property and is the moral equal of other members, each enjoys the freedom to use, control, and dispose of property on equal terms with his neighbors. Hence, James Madison, author of the Takings Clause,[74] could argue in a political essay that property, "[i]n its larger and juster meaning, . . . embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*"[75]

C. Takings

Ordinarily, government protects property rights by ordering how property may be disposed of and by protecting people's right to use and control their own property. On occasion, however, when the public good demands it, government may take property from a few for the community's general benefit. All benefit from public projects like highways and canals, but these projects cannot be constructed without dislocating some individuals' property. The social compact gives government the power to take property because, as Kent explains, "the interest of the public is deemed paramount to that of any private individual."[76]

Nonetheless, although the public good justifies and requires these takings, they still infringe on citizens' property rights. As a matter of justice, the owners deserve compensation for the rights they have lost. The social compact may obligate an owner to exchange his property for the public's benefit, but it cannot force the owner to relinquish it for free. This protection, Kent emphasizes, "is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law."[77]

This limitation is so important that it needs to be established as fundamental constitutional law. Specifically, a constitutional limitation anticipates the danger that a local majority might co-opt the legislature and persuade it to seize the property of a minority without

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73 2 KENT, *supra* note 7, at 328.

74 Hart, *Original Meaning*, *supra* note 44, at 1136.

75 *Property*, NAT'L GAZETTE, Mar. 27, 1792, at 174, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., 1983).

76 2 KENT, *supra* note 7, at 339.

77 *Id.* (footnote omitted).

paying compensation. Justice William Patterson, an early member of the U.S. Supreme Court, authored the 1795 case *Vanhorne's Lessee v. Dorrance*, one of the first takings cases and one of the first instances of judicial constitutional review. As Justice Patterson explained, "[t]he Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land . . . . It says to legislators, thus far ye shall go and no further."[78] Thus, while "[e]very person ought to contribute his proportion for public purposes and public exigencies," a constitutional takings clause institutes the principle that "no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompence in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large."[79]

Compensation was considered not only a requirement of natural justice, but also an indispensable tool for maintaining American character. According to Justice Patterson, constitutional property protections do for the legislature (and the people at large) what law does for the individual: restrain, direct, and even teach people to follow their true interests.[80] If a people voluntarily respect the injunction not to confiscate the property of any group of citizens, they make it much more likely that they can govern themselves. According to Justice Patterson, if government regulates property regularly, under general laws in established tribunals, the law promotes "security and safety, tranquility and peace. One man is not afraid of another, and no man afraid of the legislature."[81] But the more the people succumb to the temptation to confiscate property, the more they undermine the conditions of self-government. If government can take property suddenly, without paying compensation for the harms it inflicts, Justice Patterson asks rhetorically, "[i]f this be the Legislation of a Republican Government, in which the preservation of property is made sacred by the Constitution, I ask, wherein it differs from the mandate of an *Asiatic* Prince? Omnipotence in legislation is despotism."[82]

D. Regulations, Invasions of Right, and Regulatory Takings

These principles of property rights and eminent domain lay down standards by which to judge exercises of the police power, the power to regulate. When a positive law stays within those standards, it "regulates" property. But when a law transgresses the limits on regulation, it takes more than a fair share of use rights and "injures," "in-

78 2 U.S. (2 Dall.) 304, 308, 311 (C.C.D Pa. 1795).
79 *Id.* at 310.
80 *See id.* at 311–12.
81 *Id.* at 312.
82 *Id.* at 316.

vades," or "violates" property rights just like a private trespass or nuisance. In principle, an invasive regulation is the same as a taking.

In the writings of Founding Era lawyers like Kent, Wilson, and Madison, "regulation" had a precise meaning. As this subpart and the next Part show, regulations ordered the use of property to make sure that individuals exercised their legal rights in ways that accorded with their natural rights. Although property tends to be subject to unusually heavy regulation, Nathaniel Chipman, a U.S. Senator and jurist from Vermont, explained in an 1833 moral treatise that "[t]he right of property itself, still remains founded in natural principle[s;]" all the positive laws "serve only to bring the subjects of property within those principles."[83]

"Regulations" secure to people in reality the equal share of freedom to which they are entitled in principle. This is the sense in which Madison speaks of regulation in *Federalist 10.* Shortly after emphasizing that "the first object of government" is to protect "[t]he diversity in the faculties of men, from which the rights of property originate," he explains that government secures such protection by "[t]he regulation of these various and interfering interests."[84]

Put differently, a "regulation" is a positive law that prevents one citizen from "injuring" another by stealing part of another's equal share of freedom. The allocation of equal-use rights creates a baseline to distinguish innocent or beneficial property uses from harmful or injurious ones. "Regulations" prevent the latter and encourage the former. Thus, Justice Swift could assume "it as a maxim in legislation, that the rule to be adopted in enacting laws, must be to restrain no acts but those which tend to the injury of individuals and the dissolution of government."[85] Similarly, Kent could assume that the lawgiver has the power to issue "general regulations," because he "has a right to prescribe the mode and manner of using [property], so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public."[86]

In either case, whether one defines the power to regulate in relation to enlarging property or preventing injuries, one can determine whether a positive law is really a "regulation" by asking if it promotes equal freedom among all citizens. Because all citizens are equally entitled to the enjoyment of their natural rights, all property owners must respect a duty not to use their property to diminish others' natural rights. As Justice Swift warns, "whether men possess the greatest, or the smallest talents, they have equal claims to protection, and se-

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83 CHIPMAN, *supra* note 65, at 75.

84 THE FEDERALIST No. 10, at 78–79 (James Madison) (Clinton Rossiter ed., 1961).

85 1 SWIFT, *supra* note 65, at 13.

86 2 KENT, *supra* note 7, at 340.

curity in their exertions, and acquisitions."[87] When Madison says that government "secures to every man, whatever is his *own*," he emphasizes that government must do so "*impartially*."[88] When Kent speaks of property rights, he stresses that such rights are consistent with "the reciprocal rights of others."[89]

These ideas of equality, impartiality, and reciprocity establish a powerful substantive limitation on government regulation. Because the social compact creates a partnership for the mutual improvement of morally equal partners, its laws must work to enlarge the advantage of every partner. Early in his *Lectures on Law*, Wilson explains as clearly as any other Founder how this principle applies: citizens enter civil society "to regulate, with one common consent, whatever regards their preservation, their security, their improvement, their happiness."[90] Still, Wilson admonishes that "[t]he natural rights and duties of man belong equally to all."[91] Later in the *Lectures*, he explains how positive laws secure natural rights:

> True it is, that, by the municipal law, some things may be prohibited, which are not prohibited by the law of nature: but equally true it is, that, under a government which is wise and good, every citizen will gain more liberty . . . by the limitation of other men's freedom, than he can lose by the diminution of his own. He will gain more by the enlarged and undisturbed exercise of his natural liberty in innumerable instances, than he can lose by the restriction of it in a few.[92]

When government violates this equal-advantage principle, Wilson says, natural liberty is "abridged," but when government follows this principle, natural liberty is "increased and secured."[93] Thus, "[a]s in civil society, previous to civil government, all men are equal; so, in the same state, all men are free."[94]

Ultimately, the principle of equal freedom for all determines whether a property law regulates or invades natural property rights. Whenever a positive law restrains a right incident to property ownership—whether control, use, or disposition—that law risks impermissibly abridging the free exercise of property rights. The law is not per se invalid, but the restraint on property requires further justification. The law can be justified as a bona fide "regulation" of property rights if it restricts the use rights of every person in order to enlarge both the

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87 1 SWIFT, *supra* note 65, at 17.
88 14 THE PAPERS OF JAMES MADISON, *supra* note 75, at 266.
89 2 KENT, *supra* note 7, at 328.
90 1 WILSON, *supra* note 62, at 239.
91 1 *id.* at 241.
92 2 *id.* at 587–88.
93 2 *id.* at 588.
94 1 *id.* at 241.

personal rights and freedom of action of everyone regulated. By contrast, if some individuals lose more than their equal share of use rights without gain, the law is not a "regulation" of right, but rather an "abridgement," "invasion," or "violation" of right.

In his essay *Property*, James Madison—who drafted the Takings Clause[95]—writes that it "is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens . . . free use of their faculties, and free choice of their occupations."[96] He cites as an example a law that favors woolmaking by outlawing the manufacture of linen shrouds.[97] For Madison, the linenmaker has prepolitical and prelegal "property" in the right to use his labor and possessions to make linen.[98] He has "property" both "in the general sense of the word" and because his business provides "the means of acquiring property strictly so called."[99] The wool-shroud law, however, does not regulate property because it is "partial": It "den[ies] to part of [the] citizens [their] free use of their faculties."[100] Madison concludes:

> If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in . . . their faculties; . . . such a government is not a pattern for the United States.[101]

Thus, in principle, Madison thought that a partial regulation is as "direct" and offensive to property rights as a taking without compensation.

Some scholars acknowledge that Madison thought regulations could violate property rights at the level of political principle but still doubt whether he thought such regulations could violate the Takings Clause as a matter of constitutional law. For instance, while William Treanor recognizes that Madison likened partial regulations to takings in *Property*, he stresses that Madison never actually *called* such regulations "takings."[102] Treanor concludes from this omission that Madison meant to exclude the possibility that the Takings Clause applies to regulations as a matter of constitutional law.[103]

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95 Hart, *Original Meaning*, *supra* note 44, at 1136.

96 14 THE PAPERS OF JAMES MADISON, *supra* note 75, at 267.

97 *See id.*

98 *See id.*

99 *Id.*

100 *Id.*

101 *Id.* at 267–68.

102 *See* Treanor, *supra* note 41, at 840.

103 *See id.* at 838–39.

This is a strained conclusion. Although *Property* tells us clearly that Madison thought partial regulations violate property rights as a matter of principle, it says nothing about what he thought with respect to the constitutional law question. Treanor asks us to make an inference: if Madison had thought the Takings Clause cast judicially enforceable penumbras over property regulations, he would have made legal arguments, not political arguments. Maybe, maybe not. Madison could trust his audience to agree that natural-right principles set the measuring standard for both congressional legislation and the Takings Clause. He might not have needed to make constitutional-law arguments, not when he was appealing to a source with more fundamental moral authority. A better way to answer the constitutional-law question is to examine how judges who subscribed to the same views about property and regulation as Madison applied these general principles to specific laws that purported to regulate use rights.

II
REGULATORY TAKINGS DOCTRINE IN THE NINETEENTH CENTURY

A. Overview

Nineteenth-century state case reports provide most of the early evidence showing how general natural-right ideas could be applied to laws that restrain use rights in property while purporting to "regulate" it. In such challenges, courts did not limit constitutional property guarantees to physical takings. Nor did they send property owners back to legislatures, as Treanor reads Madison to have suggested.[104] Instead, state courts used constitutional guarantees as broad outlines into which they fit a series of doctrines tailored to different government actions.

As Howard Gillman and Philip Hamburger have explained, nineteenth-century judges read constitutions to codify broad principles of natural-law theory. Even though deemed permanently true, constitutional principles still left legislatures, executive officials, and judges to determine how best to apply them to particular problems.[105] Therefore, officials were not supposed to read takings guarantees narrowly simply because they did not include the magic words "regulations that

104 *See id.* at 840.

105 *See* Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 197–213 (1997); Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239 (1989).

strip owners of a fair and equal share of use rights," as the U.S. Supreme Court does so often now.[106] As one court explained:

> These provisions are not to be narrowed down by a literal construction. They are to be largely and liberally expounded. Their object is to secure the enjoyment of the rights to which they refer, and must have an interpretation which will effect that object. . . . Any other rule would place at the absolute disposal of the legislature every right intended to be secured and consecrated by the limitations [of the New York Constitution].[107]

The section of the New York Constitution to which this judge was referring included not only the state's due process and takings clauses but also its double jeopardy and self-incrimination clauses, much like the Fifth Amendment in the Federal Constitution.[108] In other words, this judge stressed, if legislatures could not use technicalities to circumvent the rights against double jeopardy or self-incrimination, they could not similarly circumvent individual rights related to the power of eminent domain.[109]

That said, many of the "regulatory takings" cases this Part presents are anomalous because they cite non-takings positive-law constitutional guarantees to review "takings" natural-law challenges. Many states did not ratify state constitutional takings guarantees until the 1840s. Even then, courts sometimes treated takings and due process guarantees interchangeably. Before the 1840s, state courts sometimes relied on the Contracts Clause,[110] on the theory that states could not use their police powers to strip owners of the substance of property rights in land that the states had previously patented to the owners.[111] State courts also relied on general constitutional declarations of property rights, constitutional limitations on state legislative powers, and even the Federal Takings Clause, notwithstanding that the U.S. Supreme Court later declared the Clause inapplicable to the states.[112] In a few cases, courts went so far as to hold—without any specific positive-law constitutional source—that legislative eminent-

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106 *See, e.g.*, Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1478 (2002) (commenting that the Takings Clause's "plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation," but adding that "the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property").

107 People v. Toynbee, 20 Barb. 168, 195 (N.Y. Gen. Term 1855) (Brown, J.).

108 *See* U.S. CONST. amend. V; N.Y. CONST. art. I, § 6; *Toynbee*, 20 Barb. at 195.

109 *See Toynbee*, 20 Barb. at 195–96.

110 *See* U.S. CONST. art. I, § 10, cl. 1.

111 *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

112 *See* Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243 (1833).

domain powers were limited by general principles of natural law.[113] This fact may complicate attempts to use these cases to recover how the Founders understood the original positive-law intentions behind the Federal Takings Clause. Nonetheless, it is striking that natural-right ideas about property, takings, and regulations unified and directed the development of a uniform body of law, for a uniform problem, even when courts in different states relied on a wide range of positive-law authorities. This uniformity refutes the idea that natural-right ideas were "an empty vessel into which one [could] pour anything."[114]

To construe these different constitutional clauses to secure the natural property rights judges expected them to secure, state courts developed several common themes. To begin with, all agreed that "private property" included all of the rights commonly associated with property—disposition, use, and control—limited only by the equal rights of others. In addition, judges agreed that there were two main rationales by which property rules could be considered "regulations." One set of standards focused on what we now call "harm" or "nuisance prevention." These standards controlled the abuse of property rights that occurred when owners grabbed more than their fair share of use rights—for example, by threatening the public health, safety, morals, or commons, or by threatening neighbors' private-property rights. A few cases ordered the free use of specific classes of property, giving all affected owners more freedom over their own than they might have had without legal regulation. Such laws restrained private property "for the common benefit of all," like the actions of a partnership of equal partners.

Courts also developed different legal tests and different standards of constitutional review to apply to various regulations. These differences should come as no surprise, because the natural-right reasoning upon which these judges drew is both practical and prudential. Nature does not place us in a perfect world; the right to property is one of several manifestations of the requirement that we must make the best of it that we can. Thus, for instance, courts could "regulate" property rights through the common law of nuisance, or legislatures could do the same by exercising the police power, but no law of nature says that one branch will always secure natural rights better than the others. In the same vein, when courts conducted constitutional judicial review of police-power regulation, they had to question whether the legislature was better suited to secure property rights in the regulatory context under review. Courts thus developed different

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113 *See, e.g.*, Crenshaw v. Slate River Co., 27 Va. (6 Rand.) 245 (1828); discussion *infra* notes 214–16 and accompanying text.

114 Stoebuck, *supra* note 40, at 573–74.

lines of doctrine and levels of scrutiny in applying a common understanding of regulation to disparate property conflicts.

The following sections explore how different courts conceived of property, how they conceived of the power to regulate, and how they fashioned standards of judicial review to ensure that legislatures really "regulated" free and equal use rights while still respecting the advantages of legislation. The cases will be examined under four different headings of the police power: protecting the public health and safety, protecting the public morals and order, ordering the use of different forms of private property, and protecting public commons and servitudes.

B. Public Health and Safety

The simplest place to start is with health and safety regulations. If read cavalierly, without sensitivity to the distinctions courts drew between the police and eminent-domain powers, many of these opinions sound like modern regulatory-takings opinions. In one case, for instance, the Massachusetts Supreme Court rejected a takings challenge to a swamp-control law because "[p]olice regulations . . . are not void, although they may in some measure interfere with private rights without providing for compensation."[115]

The more theoretical and discursive opinions, however, make it clear beyond cavil that the very principles that justified the power to regulate property also limited that power. New York judges started writing comprehensive opinions earlier than their brethren in other states. They explained the limits of the police power in the 1826 and 1827 opinions *Brick Presbyterian Church* and *Coates*.[116] An 1823 New York City bylaw had barred people from burying the dead in any part of a designated section of the city.[117] In separate suits, the Brick Presbyterian Church and the Trinity Church argued that the bylaw was invalid because it deprived them of the right to use their plots as cemeteries.[118] New York had not yet ratified a takings clause as of 1826, but the Trinity Church and its employees still had a recognized takings claim, because the 1816 decision *Gardner v. Village of Newburgh* had announced that New York legislative enactments were limited by takings principles articulated in the Fifth Amendment and by general principles of equity.[119] Separately, the church and its employees brought a Contracts Clause claim on the same "takings" theory.[120]

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115 Baker v. City of Boston, 29 Mass. (12 Pick.) 184, 194 (1831).

116 Coates v. City of New York, 7 Cow. 585 (N.Y. Sup. Ct. 1827); Brick Presbyterian Church v. City of New York, 5 Cow. 538 (N.Y. Sup. Ct. 1826).

117 *Coates*, 7 Cow. at 585–86.

118 *Id.* at 604; *Brick Presbyterian*, 5 Cow. at 539–40.

119 2 Johns. Ch. 162, 166–68 (N.Y. Ch. 1816).

120 *See Coates*, 7 Cow. at 606.

The legal issues raised in the two proceedings centered on whether the bylaw constituted a valid "regulation" of burials.[121] According to the law of nature, property may not be used in a manner that threatens others' rights to health or safety. Property rights secure a range of useful goods, but self-preservation takes precedence over the acquisition of property. Every owner benefits equally from a moral command barring all her neighbors from using property to inflict serious health or safety risks on their neighbors. The police powers include the power to write specific regulations to implement this general limitation on property rights.

These principles explain how the *Coates* court understood property and the power to regulate it. Because the city had good grounds for believing the cemeteries constituted a public-health nuisance, "[n]o property has, in this instance, been entered upon or taken."[122] In this sense, the law was not a valid police regulation because it applied the "power so to order the use of private property in the city, as to prevent its proving pernicious to the citizens generally."[123] The churches suffered no "taking" in the natural-right sense because the cemetery law stopped them from doing something they had no natural right to do. In the court's view, "[n]one are benefitted by the destruction, or rather the suspension of the rights in question, in any other way than citizens always are, when one of their number is forbidden to continue a nuisance."[124]

The New York Supreme Court applied what one would now call a weak form of intermediate scrutiny of the city's public-health justification, concluding that the cemeteries posed a real threat to the public health. Without such a connection, the New York bylaw would not have secured the rights of all to their health, but would have instead transferred veto rights to city residents who did not want to live next to cemeteries because they are unsightly or morbid.[125] As modern takings challenges sometimes acknowledge, this line in principle is not always easy to draw in practice.[126] In the 1820s, it was difficult to determine whether the cemeteries posed a real threat to public

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121 *See id.* at 606–07; *Brick Presbyterian*, 5 Cow. at 542.

122 *Coates*, 7 Cow. at 606.

123 *See id.* at 604; *see also* Kincaid's Appeal, 66 Pa. 411, 423 (1870) ("Though at the time [property] may be remote and inoffensive, the purchaser is bound to know at his peril that it may become otherwise, by the residence of many people in its vicinity, and that it must yield to laws for the suppression of nuisances.").

124 *Coates*, 7 Cow. at 606.

125 *See* Barnes v. Hathorn, 54 Me. 124, 124, 126 (1866) (stating that a tomb erected upon one's own land is not necessarily a nuisance "but may become so from location or some extraneous fact").

126 *See, e.g.*, Rose Acre Farms, Inc. v. United States, 53 Fed. Cl. 504, 518–19 (2002) (ordering compensation for a government-ordered seizure of eggs because the government had not made enough of a showing that the eggs were infected with salmonella).

health. Furthermore, assuming, as people of that era did, that cemeteries breed disease, the aldermen had to draw a line saying when residential development had crept close enough to the cemeteries to trigger that threat. The cemeteries were not dangerous in the early 1700s, when the churches received their grants, because at that time the cemeteries were outside the inhabited section of the city.[127] (This time lag also raises conceptually difficult "coming to the nuisance" problems, which will be discussed in detail below in connection with the 1915 decision *Hadacheck v. Sebastian.*)[128] Judges knew all about these uncertainties, because they would have had to confront them directly if the city had not enacted a bylaw and local residents had instead tried to abate the cemetery as a public nuisance.

Even with these uncertainties, the New York Supreme Court upheld the law because "the state of things [was] such as to render the act complained of a nuisance upon actual experiment" and ripe to be abated as "evil[ ] already existing."[129] Elsewhere in the opinion, the court explained that "some exigency should, in the nature of things, always exist, and in legal presumption does exist, to warrant the passage of a positive law."[130] But when the court affirmed that the cemeteries posed an "actual" nuisance and an "evil[ ] already existing," it conducted enough judicial review to satisfy itself that the city had genuine cause for worrying that the cemeteries posed a public-health risk.[131]

Because courts were obliged to uphold state laws as "regulations" whenever legislatures could demonstrate a "real" or "actual" nuisance, in practice legislatures enjoyed the benefit of the doubt. But in the few cases when legislatures passed laws that could not credibly be called "health and safety" regulations, courts made good on *Coates*'s warning that "an unwarrantable interference with private property is unconstitutional and void."[132] The New York Court of Appeals' 1885 case *In re Jacobs* provides one example.[133] Jacobs was arrested for rolling cigars in the apartment in which he and his family resided.[134] He

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127 *See* Brick Presbyterian Church v. City of New York, 5 Cow. 538, 542 (N.Y. Sup. Ct. 1826).

128 *See infra* Part III.B.

129 *See Coates*, 7 Cow. at 605.

130 *See id.* at 607.

131 *See id.* at 604–05; *Brick Presbyterian*, 5 Cow. at 542; *see also Ex parte* Fiske, 72 Cal. 125 (1887); Baumgartner v. Hasty, 100 Ind. 575 (1884); Respublica v. Duquet, 2 Yeates 493, 501 (Pa. 1799) (upholding fire-control laws). *But see* Green v. Mayor of Savannah, 6 Ga. 1, 12 (1849) (upholding regulation barring growing of rice within Savannah's city limits because the Savannah City Council's judgment that there was a nuisance was "conclusive evidence of that fact").

132 7 Cow. at 606.

133 98 N.Y. 98 (1885).

134 *Id.* at 103.

had violated a state law that made it a misdemeanor to make cigars in a residential apartment if the apartment building was situated in a city with more than 500,000 inhabitants and if more than three families rented in it.[135] In effect, the law singled out cigar-making tenement renters in Brooklyn and New York City but nowhere else in the state.[136]

In the Court of Appeals' view, this law deprived Jacobs of a use that was presumptively within his natural property rights over the apartment: "He may choose to do his work where he can have the supervision of his family and their help, and such choice is denied him. He may choose to work for himself rather than for a taskmaster, and he is left without freedom of choice."[137] Because property's "capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived," the court reasoned, "any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."[138] The right to use the apartment was "property" as much as the apartment itself. This showing gave Jacobs a threshold claim.[139]

The court considered Jacobs' arguments primarily under due process principles, but it also assumed that the due process question followed takings principles. The court thought the state's due process clause "would be of little worth, if the legislature could, without compensation, destroy property or its value, deprive the owner of its use, deny him the right to live in his own house, or to work at any lawful trade therein."[140] Citing an early and seminal U.S. Supreme Court takings case, the court also warned that "[t]here may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution."[141] In either case, the key question was whether the cigar-rolling law was a bona fide police regulation. Applying intermediate-scrutiny principles, the court insisted that the law bear "some relation" to health before determining "whether it really relates to and is convenient and appropriate to promote the public health."[142] If the law did promote the public health, "property m[ight] be taken or destroyed without compensation, and without what is commonly called due process of law."[143] Otherwise, "'[t]he law will not allow the rights of property to

135 *Id.* at 103–04.
136 *Id.* at 104.
137 *Id.*
138 *Id.* at 105.
139 *Id.* at 105–06.
140 *Id.* at 105.
141 *Id.* at 106 (quoting Pumpelly v. Green Bay Co., 80 U.S. 166, 179 (1871)).
142 *Id.* at 110.
143 *Id.* at 108.

be invaded under the guise of a police regulation for the promotion of health.'"[144]

The court concluded that it was just too implausible to say that the law promoted the public health.[145] First, there was not substantial evidence that cigar making threatened the Jacobs' health or the health of their neighbors.[146] The court took judicial notice that tobacco had been used for centuries without proof that its *manufacture* was dangerous, and the law under review provided no evidence to change the court's mind.[147] Second, even if there had been evidence of a health risk, the law did not directly control the supposed health problem, and it did not apply equally to all the people supposedly creating a health problem. Otherwise, why did the law single out cigar makers in Brooklyn and New York City, but not in the rest of the state? And even in Brooklyn and New York City, why did the law target small apartment-based cigar-making businesses while exempting home-based cigar-making businesses and cigar factories?[148] On these grounds, the court pronounced the law unconstitutional and void.[149]

C. The Public Morals and Order

Courts applied the same basic approach to takings challenges against prohibition laws, though they disagreed more than in public-health and public-safety challenges about the results. The prohibition cases are instructive because they show how courts applied takings and regulation principles when property rights conflicted with the public morals.

A few courts held that their state legislatures inflicted takings when they prohibited the sale of alcohol. The most comprehensive opinion came from a New York appellate court in the 1855 decision *People v. Toynbee*.[150] As Judge Brown framed the issue, a newly passed prohibition law might be "one of mere regulation—to prescribe by whom and to whom and at what places liquors in certain quantities may be sold."[151] On the other hand, "if it aims at prohibition—prohibition of sales . . . ; if it provides for the seizure, forfeiture and destruction of an article or thing, the product of human industry, hitherto invested with the attributes of property," the court would have to con-

144 *Id.* at 109 (quoting Austin v. Murray, 33 Mass. (16 Pick.) 121, 126 (1834), and citing Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 87 (1872) (Field, J., dissenting), and Coe v. Schultz, 47 Barb. 64, 69 (N.Y. Gen. Term 1866)).

145 *See id.* at 113–14.

146 *Id.*

147 *See id.* at 113.

148 *See id.* at 104, 113–14.

149 *Id.* at 115.

150 20 Barb. 168 (N.Y. Gen. Term 1855).

151 *Id.* at 186.

sider the law's constitutionality under takings and due process principles.[152] "That which cannot be used, enjoyed or sold, is not property," Judge Brown explained, "and to take away all or any of these incidents, is in effect to deprive the owner of his right of property."[153]

In Judge Brown's mind, the issue was clear. Fermented alcohol, "[i]n every sense of the term . . . [,] is property" because it "has been separated from the common stock of nature for private use," "is regarded as an article of diet" and, "by all, as one of trade," and "is bought and sold, lost and acquired, like other property."[154] Furthermore, "[t]he taste for intoxicating drinks is thought to be an instinct of our nature—an operation of the principle of organized life, and not an artificial appetite or desire peculiar to races or tribes."[155]

Judge Brown doubted public-nuisance principles could enjoin moderate drinking. "He who knows how to enjoy [spirits] with reason and moderation, or has the moral courage and self-denial to let them alone, may consider himself free from annoyance and danger."[156] He acknowledged that spirits might be "converted to base uses—uses which produce intemperance, pauperism, and crime, and . . . moral degradation, and grief and anguish unspeakable."[157] But whereas nuisance principles could reach "the places where [spirits] are thus used and those concerned in prostituting them to such uses, . . . intoxicating liquors cannot be deprived of the defenses with which the constitution surrounds the property of the citizen."[158] Judge Brown anticipated Richard Epstein's criticisms of prohibition laws and of the U.S. Supreme Court's decision upholding such laws in *Mugler v. Kansas*.[159] Even accepting that "disease, poverty, and crime [are] held to be the inevitable and injurious consequences of alcoholism," Epstein warns that these general social problems do not establish "whether this public nuisance was properly attributable to these defendants."[160]

More courts, by contrast, were inclined to presume that prohibition prevented alcoholism and its concomitant social problems. In *Santo v. State*, for example, the Iowa Supreme Court took a different view of the causation and public-nuisance problems because the court subscribed to a different understanding about what was "natural" for

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152 *See id.* at 186–87.

153 *Id.* at 196. Again, like the Court of Appeals in *In re Jacobs*, Judge Brown spoke primarily in terms of due process, but treated that inquiry interchangeably with the takings inquiry. *See supra* note 107 and accompanying text.

154 *Toynbee*, 20 Barb. at 192–93.

155 *Id.* at 191.

156 *Id.* at 201.

157 *Id.* (internal quotation marks omitted).

158 *Id.*

159 123 U.S. 623 (1887).

160 EPSTEIN, TAKINGS, *supra* note 32, at 130.

man.[161] The court explained that no matter "how extensive and how difficult the range of argument through which the question carries us," the law has to take cognizance of the fact that man is a "political being."[162]

If one conceives of man as a "political being," the state's public interests take on a different cast. The state is interested not only in preventing problems like alcoholism, crime, and disease but also in forestalling the kinds of public opinions—the "social norms"[163]—that generate these problems. To say man is political is to say he subscribes to opinions about the good life and is susceptible to public opinions explaining what the good life is. Thus, even if a particular liquor seller did not cause a particular crime or alcoholism, he still might contribute to a moral climate in which his neighbors would be far more likely to fall prey to vices.

From this perspective, the state's main concern is preserving a public opinion that reduces alcoholism, crime, and disease. Each citizen holds a corporate interest in this opinion, which reinforces in him the desire not to abuse alcohol or engage in other activities that follow such abuse. To be sure, it is extremely hard to measure in any mathematical way how public opinion shapes human behavior, but that is not to say that opinion has no influence at all. Thus, courts were willing to presume, as the Iowa Supreme Court did in *Santo*, that

> [t]here is no statistical or economical proposition better established, nor one to which a more general assent is given by reading and intelligent minds, than this, that the use of intoxicating liquors as a drink, is the cause of more want, pauperism, suffering, crime, and public expense, than any other cause—and perhaps it should be said, than ALL other causes combined.[164]

On the same basis, the Illinois Supreme Court rejected the argument that that the "natural and constitutional right" to sell liquor "can not be invaded by declaring it to be an offense" because the "sale for use as a common beverage and tippling, is hurtful and injurious to the public morals, good order and well-being of society."[165]

There was also probably another, subtler factor explaining why courts gave states the benefit of the doubt in prohibition cases: a "civic

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161 *See* Santo v. State, 2 Iowa 165 (1855).

162 *See id.* at 189–90.

163 *See, e.g.*, Symposium, *Norms, Law, and Order in the City*, 34 LAW & SOC'Y REV. 129 (2000); Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. 537 (1998).

164 2 Iowa at 190.

165 Goddard v. President of Jacksonville, 15 Ill. 588, 589, 594 (1854); *see* Fisher v. McGirr, 67 Mass. (1 Gray) 1 (1854); People v. Hawley, 3 Mich. 330, 333 (1854) ("The government may, by general regulations, interdict such uses of property as would abate nuisances, and become dangerous to the lives, or health and peace, or comfort of the citizens.") (citation omitted).

republican" concern in public self-governance. The Iowa Supreme Court touched on this concern in *Santo*, after it had already disposed of the owner's takings challenge. In a separate section of the opinion, the court explained, "not only does our government peculiarly stand upon public sentiment, but it is also well understood that a law of this nature especially requires the aid of the public moral sense, as well as its legal authority for its enforcement."[166] In other words, as long as the public was trying conscientiously to control a serious social problem fostered by a "vice" activity, judicial review should allow for political trial and error. Even though overzealous legislation might occasionally invade natural rights, the political process would probably strike a fair compromise sooner or later. The regulations that followed from that compromise would be better obeyed and more popular if they were the product of a long public debate and a trial run. Such debate, trial, and error might teach the public to be more realistic as it learned how to control vice most realistically and effectively.

As these two cases illustrate, sometimes natural-law reasoning may cause confusion. The word "natural" can be used in many different and sometimes conflicting senses. In *Toynbee*, for example, Judge Brown reasoned that alcohol was "natural" because it was used nearly universally.[167] One presumes he was not familiar with the practices of Muslims or many Protestant denominations. Judge Brown was also too quick to draw an "ought" from an "is," to conclude that alcohol use was good because it was popular. Still, he had a point, even if he needed to explain more fully why alcohol may not offend natural right if consumed temperately. The *Santo* court, by contrast, took its bearings about what was "naturally" right from the fact that man is shaped by society and depends on salutary community opinion for the free exercise of some of his rights. The *Santo* court begged some difficult questions about whether the state could have protected opinion without banning alcohol entirely, but it still made some sound observations about public-morals regulations.

Still, prohibition laws presented hard cases. Both sides agreed that the state had *some* role to play in controlling activities that generated public disturbances. Thus, even if prohibition laws presented borderline cases, most other liquor-control laws would not. More importantly, both sides agreed that, at least in principle, liquor laws did not get off scot free from "takings" challenges simply because they were "regulations." Although courts disagreed about the precise public good that public-nuisance controls meant to protect, or how to conduct "means" scrutiny of those controls, all agreed that the state

166 *Santo*, 2 Iowa at 208–09.

167 *See* People v. Toynbee, 20 Barb. 168, 191 (N.Y. Gen. Term. 1855).

needed to make some showing that it was trying to protect the public order before the law would fall out of the "taking" category into the "regulation" category. Thus, modern commentators misread these cases and *Mugler v. Kansas*, in which the U.S. Supreme Court upheld Kansas's prohibition law,[168] when they understand the cases to stand for the proposition that regulations never trigger just-compensation requirements.[169]

D. The Regulation of Private Property: The Equal Rights of All, or Securing an Average Reciprocity of Advantage

Separately, property regulations could also order how individuals used private property next to one another. These regulations fell into two main classes and a tiny third class. One class consisted of nuisance controls. A second consisted of laws that forcibly rearranged legitimate, non-noxious property uses in ways that enabled the owners to enjoy their properties more than they could have without legal coercion. The minor exception regulated how owners behaved toward one another in the rare cases when necessities suspended owners' property rights.

1. *Abating Private Nuisances*

In property-on-property conflicts, the state could regulate private property for the common good. That good in turn consisted of owners' freedom of action over their own property. When more pressing moral goods like the public health, safety, and morals were not at issue, the next object of the common good was to protect each owner's equal opportunity to put her own land or other property to its preferred use. Since all people need, use, and benefit from the free exercise of property rights, it belongs to all equally. No one has a principled basis for claiming a wider share of freedom to use his own external possessions than does anyone else. As Madison defined property, "it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*"[170]

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168 123 U.S. 623, 674 (1887).

169 *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1040 (1992) (Blackmun, J., dissenting) (citing *Mugler* as an example of a case in which "[t]he Court . . . has upheld regulations imposed to arrest a significant threat to the common welfare, whatever their economic effect on the owner"); Treanor, *supra* note 41, at 797 (citing *Mugler* as the leading case in a train of cases in which "police power regulations were not compensable takings").

170 14 THE PAPERS OF JAMES MADISON, *supra* note 75. For contemporary discussions of the moral foundations of property, see Richard A. Epstein, Pennsylvania Coal v. Mahon: *The Erratic Takings Jurisprudence of Justice Holmes*, 86 GEO. L.J. 875, 876–82 (1998) [hereinafter Epstein, *Erratic Holmes*]; Adam Mossoff, *Locke's Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155(2002).

This understanding created two separate types of property-on-property regulations. One set defined use rights and their protected "innocent" uses of property from "noxious" uses of property. Some uses of property are per se "noxious" because they are illegitimate—for instance, because they tend to undermine the public morals. Other uses, while legitimate and productive, are still "noxious" because they restrain neighbors' equal freedom to use their own properties. Such uses violate both of the limitations Kent placed on property, the duty to respect "the general interest of the community" and the duty "so to use [one's] property as not to injure [one's] neighbours."[171]

The law of nature does not prescribe any set formula for measuring these concepts of "equal use rights" and "injury." Many different positive-law tools may execute the principle that owners should sacrifice the right to veto how their neighbors use *their* property in exchange for protection from interference with the use of their own property. Pollution very strongly indicates that a particular land use restrains equal freedom of action and productivity. In real-life practice, most modern zoning schemes presume that heavy-industrial land uses are the most noxious to competing forms of property, residential uses least so, with light-industrial and commercial uses somewhere in between.[172] Pollution ranked low in a measure often seen in nineteenth-century nuisance cases: the extent to which different uses consume a city's quiet, clean air and clean water.[173] Pollution also comes out as noxious under what is perhaps the clearest analytical tool, the physical-invasion test in trespass and nuisance law. As Epstein has explained, nuisance principles have fuzzy edges because one can strengthen or relax the invasion test depending on whether the person who suffers pollution receives reciprocal permission to pollute in other ways.[174] That said, the physical-invasion test is often a useful legal proxy for the moral concept of free action.

In any case, under natural-right theory, when such noxious uses make it impossible for neighbors to dedicate their own properties to

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171 2 KENT, *supra* note 7, at 340; 1 SWIFT, *supra* note 65, at 14 (referring to CHIPMAN, *supra* note 65, at 77–79).

172 *See* NOVAK, *supra* note 45, at 3–6 (quoting Chicago's 1837 legislative charter, which authorized the city to control pollution such as slaughterhouses, wild animals, tanneries, and other activities threatening "the health, comfort and convenience of the inhabitants of said city"). *Compare, e.g.*, ST. LOUIS MO., REV. CODE tit. 26, §§ 26.20–.36 (1994) (giving residential uses top priority), *with id.* §§ 26.40 to -.48 (giving commercial uses next priority), *and id.* § 26.56 (giving industrial uses low priority).

173 *See, e.g.*, Galbraith v. Oliver, 3 Pittsb. Rep. 78, 78–79 (Pa.C.P. 1867).

174 *See, e.g.*, EPSTEIN, TAKINGS, *supra* note 32, at 112–21, 118 ("[T]he central function of a system of private property is to establish the neutral baseline . . . . The function of the *ad coelum* rule is to endow boundary lines with legal significance.") (footnote omitted); RICHARD A. EPSTEIN, TORTS §§ 14.3–.4 (1999).

quiet uses, the state may "regulate" the noxious uses on the same ground as the cemeteries discussed in *Coates*.[175] As that court held, "[A]n absolute ownership in property . . . is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others," and states hold "power so to order the use of private property . . ., as to prevent its proving pernicious to the citizens generally."[176]

2. *Securing a Common Benefit to All Affected Owners*

Once the law had protected innocent property uses from noxious uses, it could reorder the innocent uses to enlarge all owners' free action. If a group of neighbors put their properties to fairly homogeneous uses, the law could force them to cooperate in a way that gave them each more power to enjoy his own. Such a "regulation" followed the principles of a partnership among equals. If the law restrained owners' rights, it had to enlarge the rights retained to make them as or more valuable than the rights lost.

One of the earliest and simplest illustrations of this principle came in a challenge to a traffic regulation, in *Vanderbilt v. Adams*, an 1827 decision by the New York Supreme Court.[177] New York City had cited Vanderbilt for disobeying the orders of a harbor master in New York Harbor.[178] Under city ordinances regulating the harbor, the master had the power to make space for laden boats to unload their cargos by ordering docked boats to move over and make room.[179] Vanderbilt refused to obey these orders because he had docked his boat at a privately-owned dock that he leased, and he did not wish to move his boat to make room for any other boat.[180] When the city fined him, he brought a mixed takings and Contracts Clause challenge against the ordinances, on the ground that the city took his use, enjoyment, and property rights in the dock.[181] The court rejected this constitutional challenge because the ordinance was "not, in the legitimate sense of the term, a violation of any right," but rather an exercise of the power to enforce "a necessary police regulation."[182] However, the court emphasized that "[t]he line between what would be a clear invasion of right on the one hand, and regulations not les-

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175 *See supra* notes 122–31 and accompanying text.

176 *See* Baker v. City of Boston, 29 Mass. (12 Pick.) 184, 194 (1831); Coates v. City of New York, 7 Cow. 585, 604, 605 (N.Y. Sup. Ct. 1827).

177 7 Cow. 349 (N.Y. Sup. Ct. 1827).

178 *Id.* at 349.

179 *Id* at 349–50.

180 *Id.* at 350.

181 *See id.* at 350.

182 *Id.* at 351.

sening the value of the right, and calculated for the benefit of all, must be distinctly marked."[183]

Here, the court applied the equal-partnership or equal-advantage principle Wilson had invoked to distinguish "regulations" of rights from "invasions" of rights.[184] If one knew that the primary object for all dock and boat owners on the harbor was to enter into exchanges to unload boats, and if one also knew that "the harbor is crowded with vessels arriving daily from various parts," the ordinances had the practical effect of enlarging the scope and value of all dock and boat owners' freedom.[185] The ordinances did not take "property" because they did "not proceed to the length of [impairing] any right in the proper sense of that term."[186] In the court's view, "[e]very public regulation in a city may, and does, in some sense, limit and restrict the absolute right that existed previously. But this is not considered an injury. So far from it, the individual, as well as others, is supposed to be benefited."[187]

Sometimes nuisance control and equal advantage combined to produce more supple regulations, as shown in *Inhabitants of Palmyra v. Morton*.[188] The town of Palmyra chose to build footpaths next to homes not by public construction but by requiring homeowners to curb and pave paths in front of their homes.[189] The Missouri Supreme Court rejected a takings challenge, on the ground that the law was a valid police regulation.[190] The court held:

> The right of a municipal corporation to require the owner to pave the side-walk in front of his property may be derived from its duty to protect the public health and to prevent nuisances, and is a mere police regulation. It is the exertion of the same power that prohibits persons from throwing filth into the streets, or from obstructing the side-walks; that regulates awnings . . . and that requires the pavements in front of each house to be kept clear of ice and snow.[191]

It may seem strange that the court chose to defend the law on the ground that an unpaved walkway could be a nuisance. Unkept sidewalks probably did not threaten to evict residents from their homes as

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183 *Id.*

184 *See supra* note 92 and accompanying text.

185 *See Vanderbilt*, 7 Cow. at 351.

186 *Id.*

187 *Id.* at 351–52. The court also took special note that Vanderbilt conceded the harbor master would have had legal power to order him to take on a foreign boat if he were not docking his own boat at his harbor. *See id.* at 351. In other words, Vanderbilt had no principled basis on which to claim he placed great value in his right to exclude all other boats from his dock.

188 25 Mo. 593 (1857).

189 *Id.* at 594.

190 *Id.* at 595–96.

191 *Id.* at 596.

industrial pollution did. Still, unpaved sidewalks imposed some disturbance on neighbors, and everyone benefited from having easier and cleaner access throughout town. The rules of nuisance were supple enough to lower the level of "noxiousness" if all owners benefited from a duty to maintain the sidewalks on their properties. The town of Palmyra, then, could issue a regulation to order everyone's property rights and duties on the same terms as the private law of nuisance and, ultimately, the principle of equal property rights.

Another street-paving case, *Paxson v. Sweet*,[192] shows how the same principles applied not only to distinguish regulations from takings, but also to fix just compensation.[193] When a local resident challenged a street-paving law enacted in Trenton, the New Jersey Supreme Court assumed that the law operated as a taking.[194] But the court still brushed off the takings challenge, on the ground that the law did not have to pay Paxson in cash to compensate him justly. Paxson's takings claim, the court reasoned, turned

> on the adequacy of compensation, which . . . might be proved in ways that are abundant. The citizen receives it in part, by its adding to his private property an increase of its intrinsic value either for sale or enjoyment; by the health and comfort of his own household; by his enjoyment of the like foot ways every where else, in which he freely participates without contributing to their expense . . . .[195]

Taken together, *Palmyra* and *Paxson* anticipate what Frank Michelman and Richard Epstein have described as an "implicit in-kind compensation" justification for a restraint on private property.[196] *Palmyra* applied this justification through the "takings" element, and *Paxson* through the "just compensation" element, but to the same effect.

3. *Cases of Private Necessity, or Regulating When There Is No Natural Property Right*

One exceptional case illustrates how the law might "regulate" a conflict when neither party owned "property" in the natural-right sense of the term. In *American Print Works v. Lawrence*, the New Jersey Supreme Court upheld a New York City law that authorized city offi-

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192 13 N.J.L. 196 (1832). *Paxson* seems strange because the court assumed, contrary to *Barron v. City of Baltimore*, 32 U.S. 243 (1833), that the Takings Clause in the Federal Constitution applied directly to actions by New Jersey, whose constitution did not yet have a takings clause. *Paxson*, 13 N.J.L. at 197, 199. Still, that incongruity does not affect how the court interpreted the Takings Clause.

193 *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation").

194 *Paxson*, 13 N.J.L. at 197, 199.

195 *Id.* at 199.

196 *See* EPSTEIN, TAKINGS, *supra* note 32, at 195–215; Michelman, *supra* note 22, at 1225–26.

cials to blow up private buildings to stop the spread of fire.[197] The challenged law codified the common-law trespass defense of necessity. But instead of leaving the necessity determination to the trespasser, the law vested it in the judgment of elected New York officials.[198] The law compensated owners for the loss of their buildings but not for the loss of any personal property in those buildings.[199] When a New Jersey printing company sued to recover the cost of expensive printing works destroyed in a New York City fire, the New Jersey Supreme Court rejected the company's takings claim on the ground that the law regulated a necessity in which property rights were suspended.

The court made clear that the print works' property rights did not extend to prevent neighbors from destroying printing equipment if that equipment posed a fire hazard.[200] The court acknowledged that eminent domain gave the State of New York the power to take property for public necessities.[201] "But the right to destroy property to prevent the spread of a conflagration," the court reasoned, "rests upon other and very different grounds. It appertains to individuals, not to the State. . . . It is a natural right existing independently of civil government. It is both anterior and superior to the rights derived from the social compact."[202] Because a fire is an act of God or force, which threatens to destroy all property in its wake, the laws of nature do not bar owners from taking steps necessary to protect their property. In such an emergency, the moral duties neighbors usually owe to each other, like the duty to respect the law against trespass, are suspended. As the court explained it, the neighbors stand in the same relation as do two drowning men who contemplate "the exclusive appropriation of a plank in a shipwreck."[203]

The New York law was a valid regulation because it ordered how the parties would behave toward one another during the necessity. Because every neighbor to the printing company enjoyed a "right of destruction . . . prior to the [law's] enactment[,] . . . [t]he statute created no new power. It conferred no new right. . . . It *regulated* the mode in which a previously existing power should be exercised."[204] The statute regulated the law of necessity by transferring "the power

197 21 N.J.L. 248 (1847).

198 *See id.* at 255. *American Print Works* was litigated in New Jersey, but the fire and trespass occurred in New York City. *See id.* at 256.

199 *Id.*

200 *See id.* at 257–58.

201 *Id.* at 257.

202 *Id.*

203 *Id.* at 258.

204 *See id.* at 259 (emphasis added).

of judging of the existence of the necessity" from neighbors' self-serving judgment to public officals' more dispassionate judgment.[205]

American Print Works shows that judges who subscribed to natural-right property theory recognized that this theory could not explain every situation. Still, it did not seem to bother the New Jersey Supreme Court that natural-right principles could not mediate the conflict between two drowning sailors or the conflict between the owners of two buildings in danger of burning down. Most theories of property could not mediate either conflict.

At the same time, *American Print Works* still confirms the nineteenth-century rule. It highlights the only situation in which a law could play favorites between two owners. Modern takings law suggests that *every* regulation pits one form of property against another; there is no distinction in principle between takings and regulation because every regulation forces the public to favor socially valuable uses over less-valued uses.[206] *American Print Works* shows that nineteenth-century case law followed this approach only in the extremely narrow class of cases in which it was impossible to say that either owner had "property" in the contested use. The city official could do what was necessary for the public good without triggering takings guarantees because the fire suspended the property rights all owners normally enjoyed in their buildings. Thus, *American Print Works* confirms, while takings guarantees protected owners from disproportionate burdens when they had rights to the property burdened, the constitutional guarantee extended only as far as the property.

4. *Invasions of Right*

Not many so-called "regulations" failed these tests over the course of the nineteenth century, but a few did. Dam owners received just compensation when fish-conservation laws required them to lower their dams so salmon, shad, or other fish could swim upstream to smelt. These laws raised a complication, to be considered in the next section, regarding whether the dam owners truly had "private property" in their riparian rights. But when a dam owner did hold private water rights, unencumbered by any navigational servitude or any other public servitude, courts routinely declared dam laws to be regulatory takings. The New York Supreme Court of Judicature handed

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205 *See id.* Strange to say, the New Jersey Supreme Court was more solicitous to uphold the challenged statute than the New York courts were. A decade earlier, the New York Supreme Court had ordered compensation for personal property under the same statute, in another suit arising out of the same fire in New York City. *See* Mayor of N.Y. v. Lord, 17 Wend. 285 (N.Y. Sup. Ct. 1837). Still, the New Jersey Supreme Court, and the opinion of dissenting Justice Bronson in *Lord*, are more consistent with general principles of natural property rights and regulation.

206 *See infra* Part III.F.

down the earliest and most influential of these decisions in the 1819 opinion *People v. Platt*.[207] For Chief Judge Spencer, the hard question was whether New York enjoyed any navigational servitude over Platt and his successors' river property. Once he had confirmed that Platt's land grant was not affected with any public interest, the judge quickly concluded that Platt "gained a complete right to the exclusive enjoyment of the river," and he had a threshold Contracts Clause claim on a takings theory.[208]

Chief Judge Spencer framed the question as whether the New York legislature "intended to invade private rights" by depriving private riparians of their exclusive water and fishing rights.[209] Because he concluded that the legislature had not intended what he thought to be an unconstitutional result, he enjoined the law from applying to Platt and his successors.[210] *Platt* was an early and clear "regulatory takings" victory for a property owner. By mid-century, litigants and courts throughout the several states understood *Platt* as a precedent for the principle that a legislature unconstitutionally invaded private rights if a state law arbitrarily restrained the free use of private property.[211]

The Virginia Supreme Court applied the same principles in the 1828 decision *Crenshaw v. Slate River Co.* According to Judge Green,

> the right of fishing in fresh water streams, or within the bounds of any Patent, is . . . confined to the riparian owners; each of whom is entitled to the natural run of fish of passage upwards, as he is to the natural flow of the water downwards . . . . Whilst the Legislature, therefore, might properly yield the public right of navigation to individuals for the sake of securing the public convenience of mills, they could not justly sacrifice to this object, the individual rights in respect to the natural run of fish.[212]

The owners had a right to use the river for fishing, and the fish-dam law restrained their rights without any corresponding benefit. Such a law, Judge Green concluded, acts to "invade private rights" because it acts to "deprive a citizen of . . . property already legally acquired, without a fair compensation."[213] While *Platt* applied natural-law principles through the Contracts Clause, *Crenshaw* and other courts relied explicitly on general natural-law reasoning;[214] the North Carolina Supreme

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207 17 Johns. 195 (N.Y. Sup. Ct. 1819).

208 *Id.* at 212–16.

209 *Id.* at 214.

210 *Id.* at 214–16.

211 *See, e.g.*, Cox v. State, 3 Blackf. 193, 198 (Ind. 1833); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 58 (1853); Eaton v. Boston, Concord, & Montreal R.R., 51 N.H. 504, 520–22 (1872); Woolever v. Stewart, 36 Ohio St. 146, 151 (1880) .

212 27 Va. (6 Rand.) 245, 270 (1828).

213 *Id.* at 276.

214 *See id.* at 264–65 (Carr, J.).

Court held natural-law takings limitations implied within the state's constitution;[215] and other courts invoked the same principles under state constitutional clauses protecting property.[216]

Woodruff v. Neal applied the same takings principles to grazing laws.[217] After a state expropriated an easement for a railroad or highway, it often forced the landowner to relinquish his herbage rights to people who wanted to graze their livestock for free.[218] Like the fire law challenged in *American Print Works*,[219] these laws stripped owners of a right to prevent physical invasions of their property. Unlike that fire law, the grazing laws invaded property rights still in force. In Connecticut, the Connecticut Supreme Court emphasized, the fee owner retained "all rights of property in the land not incompatible with the public enjoyment of the right of way," including "a right to every use and profit which can be derived from it consistent with the easement."[220] Thus, the owner lost "private property" when he lost his herbage rights and the right to exclude other grazers. In the court's view, to grant herbage rights to other grazers, "no compensation having been in any manner provided for the owner of the land upon which it is to be exercised, is beyond the constitutional power of the legislature."[221] On that basis, the court concluded that the law effected a taking.[222]

E. The Protection of Public Property Interests: Public Property and Private Property Affected with a Public Interest

Finally, the most complicated series of legal tests evolved to dispose of takings challenges against two classes of public-nuisance regulations: laws protecting public servitudes and laws protecting public commons. These challenges raised two issues that usually did not present themselves in the other lines of cases: whether the owner really owned the interest he was defending as "private property"; and whether the state was regulating to protect a genuine "public interest" in a public commons or a public servitude. Notwithstanding these hurdles, courts approached public-nuisance cases in the same way as private property-on-property conflicts. Most of the cases focused on whether the law validly regulated private property by stopping the owner from using his own in a way that threatened a public commons

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215 *See* State v. Glen, 52 N.C. (7 Jones) 321, 330–31 (1859).

216 *See Woolever*, 36 Ohio St. at 151; Commonwealth v. Pa. Canal Co., 66 Pa. 41, 50–53, 55 (1870).

217 28 Conn. 165 (1859).

218 *See id.*

219 *See* discussion *supra* Part II.D.3.

220 *Woodruff*, 28 Conn. at 167.

221 *Id.* at 169.

222 *See id.* at 169–70.

or servitude. In at least one case, the regulation tracked the "equal advantage" cases analyzed in Part II.D.2.

1. *Public and Private Ownership*

The public-nuisance cases differed from the other lines of cases primarily because they raised serious threshold questions about whether there was a bona fide "public interest" to protect. These questions created hurdles for both the state and the private owner. If the state had good reason to hold property, either by holding title itself in a public commons or by claiming a servitude on a private owner's property, it could invoke nuisance principles to regulate against interferences with that public domain. But the state needed a real policy interest in protecting a public commons or servitude. On the other hand, if the property at issue was properly held as a public commons, and the owner's takings claim focused on an interest in the commons, the owner might not have any "private property" with which to mount a takings claim.

These lines between public and private property present some of the most treacherous problems in property law. The account that follows in this section is provisional, because I am not aware of any modern scholar who has developed a full justification for public-commons and public-servitude rules explicitly in natural-law or natural-right terms. The cases studied here do not provide any such justification, either. They tended to focus on fact-bound questions like whether a particular river was navigable.[223] Still, it would come as no surprise if a natural-right justification for making a commons out of a resource followed utilitarian justifications by focusing on the resource's physical characteristics and likely uses.[224] If natural property rights enlarge individuals' free use of their own, it makes sense to place certain goods in common if all may use them without diminishing or deteriorating the goods. There is no need to use private-property rights to enlarge people's freedom if all may use a good freely without destroying it. Land and other similar resources tend not to meet this criterion. Land is easy to subdivide, it can be put to many different and conflicting uses, and many of those uses require substantial invest-

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223 For an in-depth analysis of nineteenth-century public-servitude law, see Daniel J. Hulsebosch, *Writs to Rights: 'Navigability' and the Transformation of the Common Law in the Nineteenth Century*, 23 CARDOZO L. REV. 1049 (2002).

224 *See* Richard A. Epstein, *On the Optimal Mix of Private and Common Property*, 11 SOC. PHIL. & POL'Y. 17 (1994). For a useful introduction into public-commons issues, see ROBERT C. ELLICKSON ET AL., PERSPECTIVES ON PROPERTY LAW 119-59 (3d ed. 2002) (excerpting scholarship from four different authors). For a more skeptical view of common-property rules, see Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) [hereinafter Sax, *Takings*]; Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475–76 (1970).

ment. Water, by contrast, often meets this criterion. Water is difficult to subdivide, it is useful for only a narrow and homogeneous range of uses, and those uses tend to require little or no investment. At the same time, land can go into commons if everyone in an area needs it for light grazing, and water may go into private property if it is badly needed for private uses and the demands on public waters are too heterogeneous.[225] In any event, even within a natural-right framework, the overarching moral imperative does not shape the choice between private and public property as much as the physical and economic characteristics of different resources and the likely uses of those resources.

Even then, after most property has been marked off as public or private property, the law still needs doctrines to mark off and connect the two. This function is served by *juris publici* ("affected with a public interest")[226] doctrines, which define the conditions in which private property may be subject to public servitudes. Such servitudes may ensure that members of the public can gain access to public commons, such as a public lake enclosed by private property. Or, they can try to capture the advantages of public property for a few uses while preserving all the advantages of private property for the remaining uses. For instance, if the law imposes a navigational servitude on an otherwise-private river, it preserves most of the benefits of holding land in private while still giving everyone in the community free access to river navigation.

These doctrines raise difficult policy issues, but in many cases the background doctrinal rules are fairly straightforward. Those rules derive from three possible sources: the state's original grant to the owner challenging the state law and any reservations in that grant, state and local legislation allocating property rights, and the background common-law principles. A legislature might want to fine-tune these private-public boundaries, but no system of legal boundaries is perfect. The reliance interests in stable rules of possession are huge. Eminent-domain rules are constitutional guarantees because legislatures occasionally forget about those reliance interests. In most cases, courts are more than competent to interpret land grants, boundary statutes, and background common law. If these sources of law mark off the boundaries between private and public property tolerably well, it makes sense for courts to maintain and enforce them.

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225 *See* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1322-44 (1993) (comparing the merits of individual and collective ownership of land); Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261, 288-94 (1990) (showing how common-law water rules have changed depending on whether water was consumed as a high-investment private resource or used as a low-investment public good).

226 *See* BLACK'S LAW DICTIONARY 855 (7th ed. 1999).

This is how state courts saw the problem, as illustrated in *Crenshaw v. Slate River Co.*, the case involving a challenge to the shad-conservation law discussed in the previous section.[227] Before the Virginia Supreme Court could conclude that the shad-conservation law under review constituted a regulatory taking, it first had to establish that Crenshaw had "private property" in his riparian rights. Before reviewing the ownership issues, Judge Green explained why he had to conduct de novo review of those issues:

> The questions, whether the rights of the owners of mills, or of the public, for the purposes of navigation, are preferred by Law generally, or in any particular case, are emphatically Judicial in their nature, depending on the effect and construction of former Laws; and, if upon a full and careful consideration, we conscientiously differ in opinion in any particular case from the Legislature, we are bound by the highest obligations of duty to ourselves and our country, to pursue our own judgment.[228]

Because the Slate River was not navigable, Judge Green concluded that Crenshaw held his water rights in absolute ownership, and that he had private property protected by takings guarantees.[229] Because the river was private property, the state could not justify the shad-conservation law as a regulation protecting a public servitude or any other public property interest. The law would stand or fall as a regulation of private property, as analyzed in the previous section, and it fell on that basis. *Platt*, the parallel New York dam case, and other dam cases followed the same reasoning.[230]

Cox v. State, by contrast, illustrates how the same background public-ownership principles might nullify the owner's taking claim at the threshold stage. Indiana prosecuted Cox for obstructing the White River with two separate mill dams, in violation of state law.[231] Citing *Platt*, Cox argued that "being the owner of the banks of the river, [he] is by the common law, the owner of the river, and has a right to occupy and use it, in any way or manner he pleases, for his own bene-

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227 *See supra* notes 212–16 and accompanying text.

228 Crenshaw v. Slate River Co., 27 Va. (6 Rand.) 245, 277 (1828).

229 *See id.* at 272–73.

230 People v. Platt, 17 Johns. 195, 209–16 (N.Y. Sup. Ct. 1819); *see* State v. Glen, 52 N.C. (7 Jones) 321, 334 (1859) (holding that "[r]ights acquired . . . by grants from the State . . . cannot be taken from the owners by the government, except in the exercise of the power of eminent domain, and then only for public use, with a provision for just compensation"); Woolever v. Stewart, 36 Ohio St. 146 (1880) (holding that an act requiring a dam owner to construct and maintain a passageway for fish was unconstitutional); Commonwealth v. Pa. Canal Co., 66 Pa. 41, 47 (1870) ("If the state has . . . granted a tract of land to an individual . . . , it cannot, by law, revoke the grant . . . ; and even when taken for necessary public purposes, must pay the owner a full equivalent.").

231 Cox v. State, 3 Blackf. 193, 194 (Ind. 1833).

fit."[232] The court, however, took note that property questions involving the White River were governed not by the common law, but by acts of Congress. These Acts had declared the White River to be a common interstate highway before Indiana incorporated as a state.[233] Because the Indiana law protected the river's use as a common highway, consistent with the federal laws controlling the river's ownership, the Court concluded Indiana had not "infringed the rights of either her own citizens, or the rights of the citizens of other States."[234]

2. *"Regulation" of Public Nuisances*

When an owner proved she owned private property and the state proved it had public property, the principles considered in the previous sections came into play. If the people vest their equal property rights in a commons or public servitude, a neighboring private owner becomes subject to a duty not to use his own in a manner that interferes with the purposes of the public domain. This duty tracks owners' duties not to interfere with their neighbors' health, safety, and property rights. In principle, the public-domain limitation most closely tracks the public morals limitation. In both, private property is qualified to protect a common good enjoyed corporately by all the citizens in the community.

However, this rationale also imposes principled limits on what the state may do to protect public property. The Supreme Court of Massachusetts explained how nuisance principles both justified and limited public-nuisance regulation in the 1808 decision *Inhabitants of Stoughton v. Baker*,[235] which was respectfully cited in *Platt* and many other decisions throughout the nineteenth century.[236] *Stoughton* involved a challenge to a fish-conservation law similar to the laws at issue in *Platt* and *Crenshaw*.[237] Unlike *Platt* and *Crenshaw*, however, the town held a valid public interest in the river, because Massachusetts property law broke with the common law and gave towns the power to require sufficient passages for fish through *all* streams, navigable or non-navigable.[238]

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232 *Id.* at 198.

233 *See id.* at 194–95.

234 *Id.* at 195–96, 198–99. Along the same lines, see Moor v. Veazie, 32 Me. 343, 356–61 (1850), in which the Supreme Court of Maine rejected a takings challenge to a law giving a steamboat owner a patent to introduce the steamboat along a navigable river. Because the river in question was a public river, the challenger had only a commons right to use the river, which could not satisfy the private-property threshold requirement for a takings claim. *See id.* at 356.

235 *See* 4 Mass. (3 Tyng) 522 (1808).

236 *See, e.g.*, People v. Platt, 17 Johns. 195, 211–13 (N.Y. Sup. Ct. 1819).

237 4 Mass. (3 Tyng) at 522–24.

238 *See id.* at 528; *see also Platt*, 17 Johns. at 212 (distinguishing *Stoughton* because New York followed the common law and Massachusetts did not).

Once Chief Judge Parsons had established that the public had a right of passageway for the fish, he drew upon nuisance principles to delineate the scope of that right. Every dam owner, the court explained, holds property "under the limitation, that a sufficient and reasonable passage way shall be allowed for the fish."[239] This phrase, "sufficient and reasonable," both justifies and limits the public's power to regulate:

> [I]f a committee thus appointed should locate and describe a passage way for fish unnecessary and unreasonable, by which the property of the owner of the mill was injured without any public benefit, we do not admit that he would be without remedy. The owner holds his privilege subject to the limitation, that a reasonable and sufficient passage way should be allowed for the fish. Beyond this the public has no interest, and private right is invaded.[240]

The *Stoughton* court found that the sluice ways in question were reasonably necessary. The requirements that the fish need a sufficient sluice, and that the dam be no larger than necessary and reasonable, set principled limitations at both the "ends" and "means" stages of judicial review. "[I]t would be an unreasonable construction of the grant," Chief Judge Parsons warned, "to admit that by it all the people were deprived of a free fishery . . . above the dam."[241] Without such showings, the state could cite fish protection to wipe out the owner's dam even for minor benefits to the fish, and "private right [would be] invaded."[242]

Courts applied this level of scrutiny to a wide range of public nuisances. The Massachusetts Supreme Court applied it in *Commonwealth v. Tewksbury* to uphold a prosecution against a riparian whose digging threatened to undermine an embankment on a public river.[243] On the same basis, the New York Court of Errors upheld an Albany law barring the floating of 120-foot docks on the Hudson River, on the grounds that such docks inflicted a public nuisance by frustrating navigation.[244]

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239 *Stoughton*, 4 Mass. (3 Tyng) at 528.

240 *Id.* at 529.

241 *Id.* at 528.

242 *Id.* at 529.

243 *See* 52 Mass. (11 Met.) 55, 57 (1846). According to the opinion by Chief Judge Shaw, "All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community." *Id.* Therefore, the court continued, "it is competent for the legislature to interpose, and by positive enactment to prohibit a use of property which would be injurious to the public, under particular circumstances, *leaving the use of similar property unlimited, where the obvious considerations of public good do not require the restraint.*" *Id.* (emphasis added).

244 *See* Hart v. Mayor of Albany, 9 Wend. 571, 572, 582–83 (N.Y. 1832) (Sutherland, J.).

This scrutiny had enough bite to exclude some public-nuisance regulations on the ground that they went too far to control too small a public nuisance. For instance, in *State v. Franklin Falls Co.*, the New Hampshire Supreme Court concluded that a fish-conservation law like the ones under challenge in *Platt* and *Crenshaw* could not be upheld as an exercise of the police power, because the state had not substantiated the threat to fishing.[245] "The restoration to the public of the shad fishery in the lake," the court explained, "has not such a direct relation to the public health as the prohibition of interments within city limits; nor the same direct relation to the public safety as the prohibition of the erection of wooden buildings in the midst of a populous village."[246] The court concluded that "[t]he indirect benefits to the public health . . . do not seem to warrant the legislature in depriving the respondents of valuable rights without compensation."[247]

3. *Equal-Advantage Principles in Public-Nuisance Regulation*

As in the property-on-property cases, public-nuisance regulation could also be justified under the equal-advantage principle. If the state wanted to exceed what *Stoughton* had called abating a "necessary" control of a nuisance in a "reasonable" manner, it could do so, but only if it compensated the owner for the use rights he lost.

Commonwealth v. Alger illustrates this principle in action. Separately, *Alger* is an appropriate case with which to conclude this Part. It may be the most comprehensive restatement of natural-right takings theory of all the cases considered here. At the same time, it is almost certainly the most misunderstood takings case from the nineteenth century. Chief Judge Lemuel Shaw's opinion was cited frequently by leading jurists like Thomas Cooley as a textbook restatement of the scope of the police power.[248] But the case is now assumed to stand for the opposite: It is cited more often than any other nineteenth-century case as proof that there was no "limit on the State's power to regulate harmful uses even to the point of destroying all economic value."[249]

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245 *See* State v. Franklin Falls Co., 49 N.H. 240, 251 (1870).

246 *Id.*

247 *Id.* The New Hampshire Supreme Court denied the challenge to the law on another ground, but it did so only after it first concluded that the law could not be sustained as a police regulation. *See id.* at 251–52.

248 *See, e.g.*, Gilbert v. Showerman, 23 Mich. 448, 454 (1871) (drawing on *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1853), in a private-nuisance case to explain the relation between property rights and property regulation).

249 *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1059 (1992) (Blackmun, J., dissenting); *see id.* at 1060 (citing *Alger*, 61 Mass. (7 Cush.) 53 (1853)); Harry N. Scheiber, *The Jurisprudence—and Mythology—of Eminent Domain in American Legal History*, *in* LIBERTY, PROPERTY, AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL 217, 223 (Ellen Frankel Paul & Howard Dickman eds., 1989); Treanor, *supra* note 41, at 793–94 & n.67. For an earlier treatment of *Alger*, see LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 247–54 (Oxford Univ. Press 1987) (1957).

Alger presented a challenge by a wharf owner to a series of Massachusetts laws that redrew the harbor lines for Boston Harbor.[250] A 1641 Massachusetts colony ordinance had governed the property issues prior to the laws under challenge. Under that ordinance, anyone who owned shoreline next to a body of salt water in Massachusetts also owned the flats between the high- and low-water marks, subject to a navigational servitude.[251] In the 1830s and 1840s, however, the Massachusetts legislature redrew the shoreline boundaries by passing a series of laws establishing property lines in reference to visible objects ringing Boston Harbor.[252] The boundary laws also forbade anyone from extending a wharf or any other structure beyond those statutorily enacted lines.[253]

The parties stipulated at trial that Alger had started construction of a wharf within his shoreline flats in 1843, four years before the state drew a boundary line affecting his property.[254] The 1847 line bifurcated Alger's construction. The north wall of the wharf fell on the state's side of the new boundary, while the rest of his construction fell on the side of the shoreline flats still reserved to Alger.[255] Rather than retract the north wall, Alger continued construction and built another small triangular piece of the wharf beyond the new boundary line.[256] Important to Chief Judge Shaw's opinion, the parties stipulated that the state was not regulating to abate an existing public nuisance; Alger's wharf inflicted "no injury to navigation."[257] Also important, the indictment was unclear on whether Alger was liable only for the small triangle built after the 1847 boundary or also for the pre-existing construction.[258]

Consistent with the other cases in this section, Chief Judge Shaw first reviewed de novo whether Alger had private property and whether the state had a valid public interest in that private property. Reviewing English common law, the 1641 colony ordinance, and other authorities, the judge confirmed that Alger did hold the flats above the low-water mark in fee, but that the shoreline flats between high and low tides were *juris publici*, subject to Massachusetts's navigational servitude.[259] *Alger* differs from the other cases discussed in this Part, however, because it was clear that his post-1847 construction did

250 *Alger*, 61 Mass. (7 Cush.) at 64–65.
251 *Id.* at 67–68.
252 *Id.* at 54–55.
253 *See id.*
254 *Id.* at 56.
255 *See id.* at 56–57.
256 *See id.*
257 *Id.*
258 *See id.* at 55–56, 103–04.
259 *Id.* at 65–79.

not create a real public nuisance. As the state had stipulated at trial, Alger's construction posed "no injury to navigation."[260] Thus, the state could not argue that Alger had no "private property" in using the triangular section of shoreline flats on the ground that the triangle was presently and actually impeding navigation.

Nevertheless, Chief Judge Shaw upheld the 1847 boundary line because, when passed, it worked to the equal advantage of Alger and the state. The lines between private and public property were fuzzy because Alger held his flats *juris publici.* Because the flats belonged privately to Alger, he had the potential right to build a wharf on them. But because the flats were subject to a navigational servitude, Alger would always be exposed to the possibility that his wharf might impede navigation. The 1847 law stripped Alger of use rights outside the new lines to give him more security within them.

Chief Judge Shaw's opinion followed this logic. On one hand, he read the colony ordinance to give Alger full property rights to use his flats as he wanted. The object of the ordinance, the court reasoned,

> seems to have been, to secure to riparian proprietors in general, without special grant, a property in the land, with full power to erect such wharves, embankments and warehouses thereon, as would be usually required for purposes of commerce, subordinate only to a reasonable use of the same, by other individual riparian proprietors and the public.[261]

In other words, when Alger acquired private property by his original grant, he acquired property not only in the possession of the flats but also the right to use the flats to their fullest extent consistent with the rights of others. This holding differs drastically from modern law, which recognizes no "property" right in undeveloped use potential.[262] *Alger* required a long and comprehensive court opinion, by contrast, because Alger's use potential was property, he had a presumptive takings claim, and the state had to compensate him in some other way.

On the other hand, the private property Alger held in that use potential was subject to some police regulation. "[E]very holder of property, however absolute and unqualified may be his title," Chief Judge Shaw stressed, "holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community."[263]

If Chief Judge Shaw had conflated the police power with the eminent-domain power, he could have dismissed the challenge to the

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260 *Id.* at 56–57.

261 *Id.* at 89.

262 *See infra* Parts III.B, III.E, IV.A.

263 61 Mass. (7 Cush.) at 84–85.

boundary law summarily. Instead, he insisted that the police power "is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor."[264] A valid police regulation, he explained, "is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain."[265]

Chief Judge Shaw concluded that the law "regulated" and did not "appropriate" use rights because, while it stripped Alger of development rights, it gave him greater security that the rights he retained would not expose him to public-nuisance liability later:

> The tradesman needs to know, before incurring expense, how near he may build his works without violating the law or committing a nuisance . . . . This requisite certainty and precision can only be obtained by a positive enactment, fixing the distance, within which the use shall be prohibited as noxious, and beyond which it will be allowed, and enforcing the rule thus fixed, by penalties.[266]

The boundary laws did not appropriate Alger's property, because they forced him and every other riparian owner into an advantageous exchange. "[A] more precise and definite law," Chief Judge Shaw noted, would allow everyone to "more certainly know their own and the public rights, and govern themselves accordingly."[267]

Confirming the same point, the court construed the statute not to apply retroactively to any portion of Alger's wharf built before the statute's effective date.[268] "If any portion of [the wharf's] erection . . . had been actually made and placed in its position before the [1847] act was passed," the court went out of its way to instruct, "the court are all of the opinion that the owner is not liable to its penalties."[269] Before the boundary laws "were passed, every man had a right to build on his own flats, if the erection did not in fact operate to impede navigation, and render him indictable as at common law . . . and . . . the common law . . . would be sufficient to secure the public against encroachments."[270] Here, Chief Judge Shaw politely suggested, the legislature could not have intended to create liability for the free use of property when that use of property was lawful at the time. Otherwise, he tacitly implied, the legislature would have created serious ex

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264 *Id.* at 85.
265 *Id.* at 86.
266 *Id.* at 96–97.
267 *Id.* at 103.
268 *See id.* at 103–04.
269 *Id.* at 103.
270 *Id.*

post facto and takings problems.[271] If the 1843 construction *had* been part of the forced exchange, any reasonable observer would have had to conclude that the exchange was a loss for Alger as of 1847. In this scenario, Alger would have gained a potential security from prosecution, while losing the use of a wharf into which he had already sunk a great deal of time and money. By removing the 1843 construction from the equation, Chief Judge Shaw ensured that Alger's tradeoff focused strictly on the use potential in the 1847 triangle and his liability potential later. It was at least plausible to say this exchange worked to the equal advantage of Alger and the state.

Nevertheless, *Alger* is an exceptionally close case, and it is fair to question Chief Judge Shaw's conclusions. In particular, he assumed that owners gained because, if they did not build beyond the new boundary lines, the state would not prosecute them for inflicting a public nuisance. But the boundary laws did not promise any such tradeoff explicitly. They only enforced the side of the bargain advantageous to the state, the prohibition against building on the state's side of the line. Thus, if Alger had engaged in new construction on his side of the line, the state might have prosecuted him for a public nuisance anyway. The court's decision would have given Alger good dicta, but no airtight arguments.

Chief Judge Shaw's opinion does not recite enough of the factual background to erase these doubts. Still, the court did protect Alger's most concrete and valuable right, his right to continue to run a wharf that was lawful when built. And if there were any residual doubts, Chief Judge Shaw also thought, probably correctly, that he was obligated to apply an especially weak form of intermediate scrutiny. The bottom half of Alger's flats was under water most of the day, and subject to the navigational servitude, in contrast to dry land like farm land. In these circumstances especially, Chief Judge Shaw observed,

> it is competent for the legislature to interpose, and by a specific enactment to declare what shall be deemed a dangerous or noxious trade, under what circumstances and within what distance of habitations it may or shall not be set up, how the use of it shall be regulated, and to prohibit any other than such regulated use.[272]

Chief Judge Shaw lowered the level of scrutiny here for reasons analogous to those the U.S. Supreme Court cites for lowering the level of First Amendment scrutiny appropriate to communications media like television and radio: the overlap between private communications and public common-carrier obligations requires especially close legislation

271 *See id.* at 103–04.
272 *Id.* at 96.

and regulation.[273] Still, Chief Judge Shaw warned that the shoreline "should be held subject to somewhat more restrictive regulations in its use, than interior and upland estate remote from places in which the public have a common right."[274] When it came to land-use regulation, "there is little occasion to impose any restraint upon the absolute dominion of the owner, because such restraint is not necessary to prevent it from being injurious."[275] It was one thing to defer to a *juris publici* regulation; it would be quite another to extend the same deference to a zoning law.

Though a close case, *Alger* was probably decided consistently with the principles Chief Judge Shaw became famous for restating. His opinion accords with all of the nineteenth-century state regulatory takings cases discussed thus far. All agreed that people held "private property" in the free use of property. Such "property" was qualified by the duty to use one's own consistent with use norms that would allow everyone else to use their own on the same terms. "Regulations" were legislative enactments that secured to each person in real life the "property" to which she was entitled as a matter of natural right. If a law restrained the free use of property more than these equal-rights limitations required, it "appropriated" property, "invaded" or "violated" property rights—and effected a "taking." Courts generally applied intermediate-scrutiny principles, though they varied the level of scrutiny in specific cases in ways that seem attentive to particular characteristics of the regulations at issue.

III
THE PROGRESSIVE ERA: THE TURN TO UTILITARIAN PROPERTY THEORY

A. The Demise of the Nineteenth-Century Approach

These nineteenth-century state cases have either been overlooked or badly misread. Conventional lore now holds that takings principles were not originally meant to cover regulations, only condemnations and government trespasses. The first *real* regulatory takings decision, this story continues, came in the 1922 Supreme Court decision *Pennsylvania Coal Co. v. Mahon.*

The reality is much more interesting than the narrative. American regulatory takings law tracks the massive changes that took place in the rest of American constitutional law from the late nineteenth century to the early twentieth. In *The Constitution and the New Deal*, G.

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273 *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375 (1969) (holding that the First Amendment was enhanced rather than infringed by FCC order and regulations promulgated under the fairness doctrine).

274 *Alger*, 61 Mass. (7 Cush.) at 95.

275 *Id.*

Edward White rendered a very useful service by showing that what most scholars accept as "the New Deal revolution" was actually the tail end of a two-generation-long revolution in academic and jurisprudential thought.[276] The nineteenth-century constitutional order did not recede during the New Deal in the face of an external political assault; it collapsed from 50 years' worth of internal dry rot. Although White did not cover takings law in his book, it provides powerful corroboration for his thesis.

Regulatory takings law provides an excellent test case for White's thesis because federal judges took a century longer than their state brethren to start hearing takings cases. The state cases analyzed in the last Part display all the features of what White calls "guardian review."[277] State judges marked off broad distinctions among regulations that stopped owners from using property to interfere with their neighbors' rights, regulations that enlarged property owners' freedom to pursue common uses, and regulations that restrained the property because they did neither. White describes such rights in terms of "prepolitical, essentialist constitutional principles,"[278] but that is just a historian's nonpartisan locution for what nineteenth-century jurists called "constitutional protections securing natural rights." Courts in different states and at different times applied this doctrine through different positive-law constitutional authorities, but the doctrine itself remained strikingly consistent with natural-right principles.

Federal courts, by contrast, developed no corresponding body of regulatory takings case law over the course of the nineteenth century. It is not that federal courts were hostile to regulatory takings per se; they just did not hear many takings cases, of any sort. *Barron v. Baltimore* cut off the federal courts from hearing takings challenges to state legislation,[279] except when such challenges arose in diversity jurisdiction.[280] Moreover, there were extremely few federal judicial proceedings over *federal* takings claims during that period. For most of the nineteenth century, when Congress needed to take land, it tended to rely on state eminent-domain powers or to pay compensation itself by private-bill legislation.[281] This system did not really change until 1887, when Congress enacted the Tucker Act, which removed compensa-

276 *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000).

277 *Id.* at 4.

278 *Id.*

279 *See* Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243 (1833).

280 For a review of federal diversity-jurisdiction takings cases, see Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1288–91 (2000).

281 *See* Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 643–62 (1985); Stoebuck, *supra* note 40, at 559 & n.18 (citing Kohl v. United States, 91 U.S. 367 (1875).

tion from the legislative process, waived the federal government's sovereign immunity, and established a comprehensive statutory scheme for seeking compensation through the judicial process.[282]

Given these facts, the federal courts were not in a position to hear regulatory takings cases until 1897, when the Supreme Court held that the Due Process Clause of the Fourteenth Amendment incorporated takings principles.[283] As this Part demonstrates, the Supreme Court did draw upon nineteenth-century takings principles—to a limited extent—once it got into the regulatory takings game. But even though natural-right ideas made some headway, other factors ultimately caused the Court to take the law in a different direction. One factor was that the Court heard particularly difficult cases during the Progressive Era. The cases from the 1910s and 1920s present some of the most challenging problems in due process and takings law.[284] From the nineteenth-century perspective, the Court decided some of these decisions correctly, others incorrectly, but the wrong decisions unsettled the law, at an early and critical stage.

The most important factor was that, by the 1920s, courts were abandoning what White calls "guardian review" for what he calls "bifurcated review."[285] Courts gave extra protection to freedoms with what White terms a "preferred position," but not to a property-centered freedom like takings.[286] The legal academy was revolutionizing the study of law. Natural-right property theory was out; Benthamite social utilitarianism was in.[287] In 1911, Frank Goodnow, a Professor of Constitutional Law at Columbia, explained that "most American lawyers regard[ed] even the two great theories of social compact and natural rights as of themselves inapplicable as legal principles."[288] Some

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282 Ch. 359, 24 Stat. 505 (1887); *see* Langford v. United States, 101 U.S. 341, 342–43 (1879) (rejecting argument that a government taking without just compensation created an implied obligation to pay, enforceable in the Court of Claims).

283 *See* Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897). Even here, the Court did not "incorporate" the Fifth Amendment selectively; it took a page from earlier state courts and held that takings principles were implied from the Due Process Clause because they were "'founded in natural equity'" and "'laid down by jurists as a principle of universal law.'" *Id.* at 236 (quoting JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1790 (5th ed. 1891)); *see also* William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813, 831–32 (1998) (noting *Chicago, Burlington & Quincy Railroad*'s reliance on natural-law principles instead of selective incorporation).

284 For a useful summary of "takings" challenges decided by the Supreme Court under the Contracts Clause and the Fourteenth Amendment, see Joseph Gordon Hylton, *Prelude to* Euclid*: The United States Supreme Court and the Constitutionality of Land Use Regulation, 1900–1920*, 3 WASH. U. J.L. & POL'Y 1 (2000).

285 *See* WHITE, *supra* note 276, at 4.

286 *See id.* at 145.

287 *See* discussion *infra* Part III.D.2; DAVID M. RICCI, THE TRAGEDY OF POLITICAL SCIENCE: POLITICS, SCHOLARSHIP, AND DEMOCRACY 29–56, 90–94 (1984).

288 FRANK J. GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 4 (1911).

federal judges, like Holmes and Brandeis, led the charge against the social compact and natural rights in the academy before being elevated to the bench.[289] Others who were not academics themselves had been educated by "academic scribbler[s] of a few years back"[290] with views similar to those of Holmes and Brandeis. One of the main complaints about the old regime under the social compact was that it gave too much constitutional protection to property. Thus, when regulatory takings ideas finally percolated into the federal courts, a significant segment of the bench reflected the hostility to natural property rights emanating from the legal academy.

This Part canvasses the leading Supreme Court takings and due-process challenges to land-use regulations over the course of the 1910s and 1920s, illuminating two features. From the historian's perspective, this Part highlights the tension evident in the law between the natural-right theory that informed the nineteenth-century state law and the utilitarian theory that has prevailed ever since. From the lawyer's perspective, this Part canvasses the seminal decisions to see how the natural-right approach handles their respective problems. These cases stand as metaphors for the assumptions that regulatory takings law is inescapably arbitrary and standardless. As this Part will show, as a matter of law, natural-right theory was able to generate tolerably clear standards for evaluating all of the cases, while the brand of utilitarianism in vogue during the Progressive Era was not. If early twentieth-century utilitarian property theory has other redeeming features over natural-right theory, doctrinal clarity is not one of them.

B. *Hadacheck v. Sebastian*: Regulating Pollution over Time

1. *The Natural-Right Approach*

One of the earlier decisions from this period is the 1915 brickyard case *Hadacheck v. Sebastian*.[291] Los Angeles had enacted an ordinance outlawing brickyards and brick kilns in a zone of the city and then arrested Hadacheck for operating a brickyard in violation of the ordinance.[292] Hadacheck raised several different constitutional challenges to the ordinance, including a federal substantive due process challenge.[293]

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289 *Id.* at 273–84; *see also* G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 581 (1995) (remarking that both Holmes and Brandeis believed that "humans had the freedom and power to change the meaning of legal principles if they so chose").

290 *See* JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY 383 (1936).

291 239 U.S. 394 (1915).

292 *Id.* at 404.

293 *See id.* at 398, 407, 413.

The California and United States Supreme Courts rejected Hadacheck's challenge on the same grounds as many of the pollution cases discussed in the previous Part. Both courts recognized that the city was trying to abate a documented nuisance.[294] When the California Supreme Court considered whether Hadacheck's brick kilns might "be rendered entirely innocuous by proper regulation prescribing the manner of doing the work," it implied that time-and-manner regulations were more ideal "regulations" than prohibitory regulations.[295] When the court determined that brick burning was too dirty and sooty to be compatible with residential living, it concluded that the evidence overcame the "contention that the prohibition was a mere arbitrary invasion of private right."[296] The U.S. Supreme Court affirmed on the same basis.[297]

2. *The "Coming to the Nuisance" Problem*

Nevertheless, *Hadacheck* is a conceptually difficult decision because it highlights a phenomenon known as "coming to the nuisance."[298] Hadacheck did not build his brickyard in the middle of an already-residential section of Los Angeles. He had been operating in an undeveloped neighborhood for at least eight years. It was his neighbors' development that crept up to the limits of his brickyard.[299] The California and U.S. Supreme Courts dismissed this fact offhand, saying "that no complaint could be based upon the fact that petitioner had been carrying on the trade in that locality for a long period."[300] Their treatment of the coming-to-the-nuisance problem was typical. Almost a century earlier, the *Coates* court had allowed New York City to exclude cemeteries that had been operating in that locale for sixty and one-hundred years.[301] New York City could wait, the court confi-

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294 *See id.* at 409 (noting that the court below found that the local residents were "seriously incommoded by the operations" of Hadacheck's brickworks); *Ex parte Hadacheck*, 132 P. 584, 586 (Cal. 1913) (assuming that the ordinance was enacted because Hadacheck's business was "detrimental to the welfare of others").

295 *See Ex parte* Hadacheck, 132 P. at 586 (distinguishing *Ex parte* Kelso, 82 P. 241 (Cal. 1905)).

296 *Id.*

297 *See Hadacheck*, 239 U.S. at 409–12.

298 I am grateful to participants at a University of San Diego Law School workshop, including Sai Prakash, Steven Smith, and Larry Alexander, for convincing me to explain more fully the logic behind freedom of action in property. I am especially grateful to Professor Alexander for convincing me to analyze the coming to the nuisance problem in depth.

299 *See Ex parte* Hadacheck, 132 P. at 585–86.

300 239 U.S. at 408–09; *see* 132 P. at 586.

301 *See* Coates v. City of New York, 7 Cow. 585 (N.Y. Sup. Ct. 1827); Brick Presbyterian Church v. City of New York, 5 Cow. 538 (N.Y. Sup. Ct. 1826).

dently explained, until "the state of things [was] such as to render the act complained of a nuisance upon actual experiment."[302]

This position strikes most observers as strange. Hadacheck seems like a sympathetic litigant because he built his brickyard in an undeveloped location. Los Angeles might condemn the brickyard later to make way for development, the intuition runs, but at least it could have paid Hadacheck to move.[303] The churches complaining in *Coates* and *Brick Presbyterian Church* have even stronger claims because they ran their cemeteries for decades before New York City shut them down.

This intuition presents a serious challenge to the nineteenth-century view of regulatory takings. *Hadacheck* encapsulates a problem that any zoning system must confront. Land-use conditions change over time, and the transitions between one planning arrangement and the next can be abrupt. If the nineteenth-century approach could not explain why Hadacheck was inflicting "harm" on his neighbors, it would be fair to wonder whether natural-right principles could regulate everyday land-use problems. Frank Michelman thus criticizes the decision in *Hadacheck* relentlessly to prove "that there is no basis for a general rule dispensing with compensation in respect of all regulations apparently of the 'nuisance-prevention' type."[304]

3. *The Centrality of "Freedom of Action" to Property Regulation*

In fact, however, it *is* possible to draw the line between "harmful" or "noxious" and "legitimate" activities in coming-to-the-nuisance cases—provided one really wants to draw it. Michelman doubts such a line may be drawn, but only because his theory of property erases it. He believes owners do not acquire "property" in specific uses of property until they support those uses with "investment-backed expectations."[305] If the homeowners in *Hadacheck* had developed the neighborhood before Hadacheck first fired his brick kilns, Michelman would readily agree that the cinders and smoke from the kilns would cause the homeowners "harm." When homeowners sink "expectations" into their clean and quiet neighborhood, Michelman says, "[s]ociety, by closing the brickworks, simply makes you give back the welfare you grabbed; and, since you were not authorized in the first place to make distributional judgments as between you and me, you have no claim to compensation."[306] By contrast, when the brickmaker

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302 *Coates*, 7 Cow. at 605.

303 *See, e.g.*, DANIEL R. MANDELKER, LAND USE LAW § 2.10, at 25 (4th ed. 1997) ("The equities of the case lay strongly with the brick works owner.").

304 Michelman, *supra* note 22, at 1197; *see id.* at 1236–37, 1242–44.

305 *See id.* at 1211–13.

306 *Id.* at 1236.

builds first (as he did in the actual case), Michelman concludes that the brickmaker has "property" in his brickworks because he has been running it for a long time, but his neighbors have no "property" in their lots because they have not yet invested time, money, or labor in their lands.[307] Michelman doubts that Hadacheck was the culpable party, but his skepticism is unwarranted unless his expectations theory makes sense and natural-right nuisance controls do not.

The natural-right approach differs from Michelman's because it grounds use rights, and all other rights incident to property, in the concept of "freedom of action." Freedom of action measures how much freedom people and groups possess to pursue their own distinct goals with as little outside interference as possible. This concept may be abstract in certain respects, but no more so than "expectations," "utility," and a wide range of other concepts that abound in modern property theory.[308] Freedom of action can explain behavior and goals in a wide range of situations. It is relevant in foreign affairs.[309] While the United States may be as concerned about North Korea's intentions toward us as it was about Iraq a year ago, it has less freedom of action to deter or pre-empt North Korea.[310] China's military power and North Korea's nuclear-arms programs limit America's strategies toward North Korea in ways that the Iraqi conflict has not.[311] Freedom of action provides a useful way to describe the harms people suffer from non-bodily torts. When a person is defamed, for instance, the defamation causes other members of society to shrink from doing business with the victim in public.[312] There are other ways to characterize each of these situations. Still, in each case, freedom of action provides a useful way to describe the interests of or consequences on the actor.

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307 According to Michelman,

> when the destiny of land areas is indeterminate or unclear[,] . . . [t]here is no denying that the brickmaker may be grabbing some value for himself, but the value he grabs may be value in suspense, value unowned, value unspecified, vacant value. He acquires "possession" of it not by theft or conversion but by original occupation, which by all common understanding gives him title.

Id. at 1244–45.

308 *See supra* Part I.B; *see also* Epstein, *Erratic Holmes*, *supra* note 170, at 876–82 (discussing the historical background of the Takings Clause); Mossoff, *Locke's Labor Lost*, *supra* note 170 (examining Locke's theory of property within his natural-law philosophical framework).

309 *See, e.g.*, Harold W. Rood, *The War for Iraq: A Study in World Politics* (Apr. 14, 2003), http://www.Claremont.org/writings/030320rood.html.

310 *See* James T. Laney & Jason T. Shaplen, *How to Deal with North Korea*, 82 FOREIGN AFF. 16, 18–19 (2003).

311 *See id.* at 21–22.

312 *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771–85 (5th ed. 1984); *see also* 2 WILSON, *supra* note 62, at 593–96 (discussing the importance and effect of honor and reputation).

Natural-right theory centralizes the concept of freedom of action in property law. Property is an individual right. It gives owners a moral entitlement to a zone of freedom because that freedom encourages people to respond to self-centered motivations, like the acquisitive and industrious passions that spur them to work. By encouraging these productive passions, property encourages people to pursue obvious personal goods like self-preservation and advancement. Because property encourages such useful, selfish tendencies, the freedom associated with property is a self-centered freedom.[313] To borrow from a classic property case, if two neighbors build competing duck-decoy ponds, in ordinary circumstances each should prefer to compete by improving his own pond rather than by scaring ducks off the other's pond. In both arrangements, each pond owner stands in the same relation to the other. But in the former, each pond owner has a great deal of freedom of action to use his own pond and labor to make a living; in the latter, each has the power to stop the neighbor from making a living, but little freedom to use what is nearest and dearest to him for his own preferred purposes.[314]

This principle of freedom of action supplies the logic by which the law of nature orders property rights in close quarters. Unlike the decoy-pond conflict, most land-use conflicts pit two heterogeneous property uses against each other. Some land uses are presumptively "noxious." To borrow Michelman's phrase, to conduct a noxious use on one's own land, an owner must also "grab" a chunk of neighbors' equal shares of free action and control over their own property.[315] To return to the international-relations analogy, the North Korean government is currently grabbing more than its fair share of free action in the international community because it is developing nuclear weapons and it cannot be trusted to use them defensively;[316] gunpowder plants grab more than their fair share of property-use rights in most neighborhoods because they may explode accidentally. In the former case, it is the government that is volatile, in the latter it is the gunpowder that is volatile, but the principle remains the same.

At the other extreme, some land uses are presumptively "dainty."[317] These uses are so delicate that neighbors disturb and upset them even when the neighbors stay within their fair share of use rights. In other words, a dainty and delicate use exploits the law just as a noxious use exploits the absence of law. To continue the international-relations analogy, there is a perceptible difference between

313 *See supra* Part I.C.

314 *See* Keeble v. Hickeringill, 103 Eng. Rep. 1127, 1128 (K.B. 1707).

315 *See* Michelman, *supra* note 22, at 1236.

316 *See* Laney & Shaplen, *supra* note 310, at 19–21.

317 This discussion relies on a distinction set forth and discussed at length in Tuttle v. Church, 53 F. 422, 425–27 (C.C.R.I. 1892).

agreeing to control a rogue state like North Korea and agreeing to a pact in which each signatory agrees to police how all the others enforce their domestic highway-traffic laws. In land-use law, there is a similarly perceptible difference between complaining when a neighbor builds a gunpowder plant and complaining when she puts an unsightly style of siding on her home.[318]

Equal freedom of action does not rank conflicting land uses; it focuses on the extent to which each use restrains the free action available for other land uses in the neighborhood. To be sure, it is not always easy for the law to quantify freedom of action or describe it concretely. But this problem does not mean that freedom of action is a meaningless concept. Courts still enforce the law of libel and slander even though it is difficult to quantify how a damaged reputation injures its owner. The law of nature can sketch out a continuum like the distinction between noxious and delicate land uses. But to give real-life force to this distinction in principle, the law of nature needs fact-based tests to apply through the positive law.

As Part II.D explained, nuisance law has a few such tools. General community opinions provide some guidance, and the law can also try to measure how much different land uses consume common resources like air, water, and quiet, but the physical-invasion test probably provides the sharpest positive-law standard.[319] None of these factors—opinion, pollution quotas, or the invasion test—is an end unto itself; each serves as a proxy for the extent to which different land uses restrain neighbors' free action over their own property. Properly applied, these tests establish the "nuisance prevention" principle that Michelman and others criticize.

4. *Freedom of Action When a Homeowner Comes to a Nuisance*

When land-use law takes its bearings from the principle of equal freedom of action, *Hadacheck*'s resolution of the "coming to the nuisance" problem logically follows. To be sure, the main issue is which substantive theory—Michelman's expectations-based theory, natural-right theory, or some other theory—best describes the scope of the moral entitlement that owners ought to enjoy in their property. Still, if the natural-right theory makes sense on its own terms, the result in *Hadacheck* is not as arbitrary or absurd as Michelman suggests.

On one side, Hadacheck's brickworks are presumptively noxious. Brickmaking is a lawful and useful trade, but the smoke and cinders it generates make it difficult or impossible for neighbors to use their own properties as residences, offices, or a wide range of other uses.

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318 *See, e.g.*, KEETON ET AL., *supra* note 312, § 88, at 626–30; 2 KENT, *supra* note 7, at 276 (contrasting the public nature of charities with the private character of corporations).

319 *See supra* note 174 and accompanying text.

Measured by any of the positive-law tools mentioned above, brickmaking grabs more than its fair and equal share of free action in a mixed-use neighborhood.

On the other side, Hadacheck's neighbors still have property in the use potential in their land—even when they have not yet developed it. According to Michelman, the neighbors acquire no "property" right to object to Hadacheck's pollution until they put psychological "expectations" into the land by building a home and living in it.[320] Under the natural-right approach, land, like any other species of property, automatically carries with it a right to use it for one's own ends. In principle, an owner has equal right to enjoy land for a use she has already developed, to change uses, or to develop on undeveloped land. Use potential may be more speculative and less valuable than actually exploited rights, but that is different from saying that there is no property in use potential at all. Recall how Madison defined property, to reach beyond dominion over external possessions to cover "every thing to which a man may attach a value and have a right."[321] In *Jacobs*, the New York Court of Appeals did not ask whether the Jacobs family's rent reflected any psychological expectations that they might use the apartment as both a residence and a small business. Rather, the family had presumptive "property" in the business use because property's "capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived."[322]

Because Hadacheck's neighbors have "property" in the potential of their land while that land is undeveloped, the law can say that Hadacheck "harms" the neighbors as soon as he starts firing his brick kilns. Brickmaking is a legitimate and useful trade, and Hadacheck acted commendably by running brick kilns where he would not pollute anyone's home. These facts, however, do not prove that his brickmaking is any less noxious. While the land surrounding his brickworks was undeveloped, Hadacheck may not have inflicted a "harm" in the sense that he constructively evicted any neighbors from their properties. But he still harmed them by foreclosing the range of choices his neighbors held for developing their lots.

At the same time, this harm is harder to regulate than that inflicted on an owner who *has* developed her land. Neighbors may have "property" in the use potential in their undeveloped land, but such potential is not very sharply defined. Recall how Alger took the use potential in his wharf rights subject to liability potential if navigation

320 *See supra* notes 305–07 and accompanying text.

321 14 THE PAPERS OF JAMES MADISON, *supra* note 75, at 266.

322 *In re* Jacobs, 98 N.Y. 98, 105 (1885).

patterns changed in Boston Harbor.[323] Similarly, even if Hadacheck may not stamp the neighborhood with an industrial character by his own land uses, his brickmaking may attract subsequent industrial development and tip the neighborhood under the locality rule.[324] On the other hand, Hadacheck probably will not acquire any "property rights," strictly speaking, unless and until the neighborhood tips toward industry.

Furthermore, although the neighbors have property rights, it is obvious that Hadacheck's brickmaking business is worth much more to him than their undeveloped use potential is to them. Michelman's analysis is insightful to this extent. Hadacheck has invested considerable time, labor, and capital in his brickworks. The neighbors are losing choices, but their losses must be offset by the fact that their land remains compatible with and valuable for industrial uses. If a neighbor had made clear that she prefers residential to industrial uses, the law would certainly have to respect her wishes and protect her rights. It is not clear, however, whether the law should respect anything she says regarding which uses she values most until she puts her money and her mailbox where her mouth is. Otherwise, the law would make it too cheap and easy for residents who are not using their land to harass industrial polluters before conflicts arise.

As a result, the better course is to defer action against the potential harm now to see whether actual harm develops later. The logic here is similar to that in *Alger*, in which Chief Judge Shaw concluded the boundary law "regulated" Alger's flats only because better-defined boundary lines enlarged Alger's wharf rights more than they stripped him of use potential.[325] Epstein has explained the exchange in "coming to the nuisance" cases. If nuisance liability does not attach until neighbors build next to the brickworks, it temporarily strips the neighbors of the right to sue to protect their lost use potential, but it also strips Hadacheck of the right to assert a limitations or laches defense after liability attaches and the neighbors sue. Indeed, this approach enlarges the rights of all, because it offers each side legal protection when its rights are most valuable. Before the neighbors develop their land, Hadacheck's brickworks are more valuable to him than the neighbors' undeveloped use potential is to them. But when the neighbors decide to invest time, money, and labor into their land, the law protects their right to make of their lands what they want.[326]

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323 *See supra* notes 248–71 and accompanying text.

324 *See* discussion *infra* Part III.E.5.

325 *See supra* Part II.E.3.

326 *See* EPSTEIN, TAKINGS, *supra* note 32, at 119–20; EPSTEIN, TORTS, *supra* note 174, §14.6.2; Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 72–73 (1979).

There still may be an equitable case for compensating Hadacheck. Because changing land-use patterns create problems for any system of land-use regulation, Hadacheck still seems sympathetic to many observers. Within the natural-right framework, however, it is important for takings law to be clear that payment to a Hadacheck is not a property or constitutional entitlement but rather an act of legislative grace. When payments to the Hadachecks of the world come to be seen as a matter of right, they suggest that first-in-time owners can acquire "property" not only in the use on their own land but also in the use potential of land next door. Powerful political forces in most towns want to use land-use laws to protect their preferred uses of property and exclude outsiders who prefer competing uses. Any theory of property that confers to Hadacheck a property right in his brick kilns automatically gives insiders in every town a principled basis for freezing current land-use patterns. Such a theory empowers them to strip new owners of the airspace over their undeveloped land. This danger surfaces with a vengeance in modern zoning law.[327]

C. The Billboard Cases: Eyesores and the Free and Equal Use of Property

As *Hadacheck* shows, when it came to presumptively noxious activities, the Supreme Court was comfortable enough with natural-right harm-prevention principles to decide difficult cases in the spirit of those principles. At the other end of the spectrum, however, when reviewing regulations protecting "dainty" or "delicate" uses of property, it is harder to judge the Supreme Court's work. In two laconic and ambiguous decisions, *Cusack Co. v. Chicago* and *St. Louis Poster Advertising Co. v. St. Louis,* the Court upheld city billboard controls as reasonable exercises of the state's power to control nuisances.[328] *Cusack* and *St. Louis Poster Advertising* have been cited as further proof that it is impossible to apply natural-right principles to regulations. Michelman cites billboard controls as proof that there is no such thing as a nuisance-control rationale, because there is no principled way to determine whether a billboard law "prevents the 'harms' of roadside blight and distraction, or . . . secur[es] the 'benefits' of safety and amenity."[329] Nevertheless, while *Cusack* and *St. Louis Poster Advertising* did not settle all the questions raised, it is possible in principle to distinguish the harms and benefits that billboards cause.

Billboard laws test the natural-right conception of the police power because the most frequent complaints about billboard laws re-

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327 *See infra* Part III.E.

328 *See* St. Louis Poster Adver. Co. v. City of St. Louis, 249 U.S. 269 (1919); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917).

329 Michelman, *supra* note 22, at 1197.

late to aesthetic problems. If industrial pollution lies at the "noxious" end of the free-action spectrum, aesthetic complaints lie at the "dainty" and "delicate" end.[330] With industrial pollution, the danger to the equal and free use of property lies in *under*regulation; with aesthetic controls, the danger lies in *over*regulation. It is just as legitimate to dislike a billboard or a large advertisement as it is to like operating a factory. But just as pollution exploits the absence of law to grab a disproportionate share of free-use rights, aesthetic controls exploit the law to do the same. Consider, for example, how aesthetic controls fare under the positive-law test on which natural-right-based nuisance law used to rely. Nuisance law used to gauge whether an owner was using more than her fair share of a common resource like air, water, or quiet.[331] In most neighborhoods, by contrast, there *is* no common pool for aesthetic tastes. People tend to disagree more about what kinds of art and décor are annoying than they do about how heavy pollution must be before it becomes annoying. Separately, the physical-invasion test highlights the same free-use problem from a different perspective.[332] If a land use is noxious because it generates pollution, the only residents who may sue are those who directly suffer from the pollution. If the use is noxious merely because it is unsightly, anyone in town has a principled basis for complaining.

If local land-use law tries to abate billboards for purely aesthetic reasons, then, it can turn in one of two directions. On one hand, if it stays principled, the law will give the billboard owners and everyone else in town legal power to complain about a wide range of potential eyesores. Since eyesores are a matter of taste, in principle billboard restrictions would quickly generate a series of other equally plausible aesthetic restrictions. As such restrictions proliferated, neighbors could do to each other with the law what pond owners could do without it.[333] On the other hand, local land-use law might try to regulate some eyesores, but not all. But, excepting moral nuisances involving violence or pornography, for example, most eyesores are interchangeable. If beauty lies in the eye of the beholder, it is equally legitimate to like or dislike a certain use of property. If the law restrains owners' free use of their property to abate some eyesores and not others, it imposes deep restraints on some owners' use rights to protect their neighbors' aesthetic tastes. The law encourages a narrow majority in a locality to impose its aesthetic and cultural tastes on nonconforming minorities, in violation of equal rights.

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330 *See* discussion *supra* note 317 and accompanying text.

331 *See* discussion *supra* note 173 and accompanying text.

332 *See* discussion *supra* note 174 and accompanying text; *see also* EPSTEIN, TAKINGS, *supra* note 32, at 118 (noting that "advertisements beside the public highway . . . cannot be enjoined as public nuisances" but can be enjoined under the physical-invasion test).

333 *See supra* note 314 and accompanying text.

Some state courts grasped the natural-right implications of these controls.[334] Shortly before it decided *Hadacheck*, for instance, the California Supreme Court spoke to this problem in the 1909 decision *Varney & Green v. Williams*.[335] The court concluded that the reason the town council of East San Jose

> acted is that the appearance of billboards is, or may be, offensive to the sight of persons of refined taste. That the promotion of aesthetic or artistic considerations is a proper object of governmental care will probably not be disputed. But, so far as we are advised, it has never been held that these considerations alone will justify, as an exercise of the police power, a radical restriction of the right of an owner of property to use his property in an ordinary and beneficial way. Such restriction is, if not a taking, pro tanto of the property, a damaging thereof, for which . . . the owner is entitled to compensation.[336]

Quoting a New Jersey case on point, the California Supreme Court continued: "Æsthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."[337]

Of course, in some circumstances, billboards might raise problems that go beyond aesthetic judgments and require nuisance regulation. In *Varney & Green*, the California Supreme Court distinguished many of the billboard precedents it reviewed on the ground that they dealt with indecent advertisements, billboards that had a serious chance of collapsing, or signs that tended to be dangerous to the safety of the public.[338] Each of these concerns could justify a billboard regulation, but takings law would need intermediate scrutiny to be certain. When legislatures could point to substantiated health, safety, and pollution concerns, courts would be perfectly justified in giving them the benefit of the doubt. But if legislatures had fairly thin records, courts would have to reserve judgment. Courts might have principled reasons to give legislatures the benefit of the doubt when it came to determining whether alcohol causes crime, but it would dis-

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334 *Compare, e.g.*, People v. Norton, 288 P. 33 (Cal. App. Dep't Super. Ct. 1930) (deferring to legislative attempts to control billboards), *and* Preferred Tires, Inc. v. Village of Hempstead, 19 N.Y.S.2d 374 (N.Y. Sup. Ct. 1940) (same), *with* Pac. Rys. Adver. Co. v. City of Oakland, 276 P. 629, 632–33 (Cal. Dist. Ct. App. 1929) (declaring advertising restrictions invalid), *and* Scbloss Poster Adver. Co. v. City of Rock Hill, 2 S.E.2d 392, 394–95 (S.C. 1939) (same).

335 100 P. 867 (Cal. 1909), *overruled by* Metromedia, Inc. v. City of San Diego, 592 P.2d 728 (Cal. 1979).

336 *Id.* at 868.

337 *Id.* (quoting Passaic v. Paterson Bill Posting, Adver. & Sign Pointing Co., 62 A. 267, 268 (N.J. 1905)).

338 *See id.*

tort natural-right principles to apply similar deference to claims that billboards attract crime.[339]

Cusack and *St. Louis Poster Advertising* are ambiguous decisions because they were not thorough enough to address these concerns. In *Cusack*, the Supreme Court recited record evidence showing that, because the owners of billboard lots did not monitor them closely, they tended to accumulate garbage, generate fires, and encourage vagrants to assault passers-by.[340] If substantiated, this evidence might have supported the city's determination to abate billboards as an anti-crime and anti-pollution measure. Still, the Court could have remanded with instructions that the trial court press the city to explain why the same nuisances could not have been controlled with restraints less severe than a blanket prohibition on billboards. The Court did not take this extra step in *Cusack* or in *St. Louis Poster Advertising*, which upheld a St. Louis billboard ordinance essentially on *Cusack*'s authority.[341]

These decisions created threatening precedents but did not alone upset the Court's developing land-use case law. On one hand, the Court probably did not scrutinize the Chicago and St. Louis ordinances as closely as intermediate scrutiny required. In failing to do so, the Court suggested that it might turn a blind eye to other aesthetic land-use regulations. On the other hand, these decisions did not upset the broad distinctions in principle between legitimate and problematic nuisance-control regulations. They recognized that aesthetic regulations fell on the problematic end of the spectrum.[342] Because billboard ordinances could be justified on several grounds, these constitutional challenges were bound to be hard cases, of limited precedential value in starker cases. As long as cities continued to defend billboard ordinances by pointing to documented pollution and crime-control problems, the contours of the nuisance-control rationale would remain intact.

D. *Pennsylvania Coal Co. v. Mahon*, or Natural-Right Principles' Half-Hearted Entrance into Federal Takings Law

Because *Hadacheck* and the billboard cases were due process decisions, the Supreme Court's first real "regulatory takings" case came in

339 *See supra* Part II.C; *infra* Part III.E.7.

340 *See* Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 529 (1917).

341 *See* St. Louis Poster Adver. Co. v. City of St. Louis, 249 U.S. 269, 274 (1919) (quoting *Thomas Cusack Co.*, 242 U.S. at 529–30).

342 *See, e.g.*, *St. Louis Poster Adver. Co.*, 249 U.S. at 274 (upholding the St. Louis ordinance on nuisance-control grounds and emphasizing that aesthetic considerations were only "trifling requirements" in the ordinance).

Pennsylvania Coal Co. v. Mahon.[343] Here, the natural-right approach experienced both its greatest advances and its worst setback in federal takings law. *Mahon* was ironic because the Court's opinion was written not by any of the conservatives on the bench, but by progressive icon Justice Holmes, famous for dissenting in *Lochner v. New York*.[344] If one understands the natural-right theory at work in the early state cases, the irony becomes even stronger. Justice Holmes's decision reads like a fusion of nineteenth-century takings black-letter law and twentieth-century property theory.

1. *Natural-Right Takings Doctrine*

The Pennsylvania Coal Company sued the Mahons to challenge the constitutionality of a state statute forcing it to bear a duty of ground support, which the company had contracted away decades earlier.[345] In 1878, the company executed a deed conveying surface rights to the homeowners above its coal mines.[346] The deed reserved to the company the right to mine for coal beneath the surface and expressly assigned to the surface owners the risk of subsidence.[347] Margaret Mahon's father was one of the original owners, and his house passed to her.[348] More than 40 years later, however, the Pennsylvania legislature enacted the Kohler Act, which stripped the company of its mining rights by barring it from mining for anthracite coal in any way that might cause the subsidence of houses.[349]

Justice Holmes's opinion for the Court is surprisingly modern in many respects, but each of the crucial legal steps in his opinion draws upon nineteenth-century natural-right black-letter law. Like earlier state court judges, Justice Holmes held that "private property" was at stake. He was quite confident that the Kohler Act "destroy[ed] previously existing rights of property and contract" because it imposed on the company a duty of ground support that the company had previously deeded away.[350]

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343 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); *see* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1148–51 (5th ed. 2002).

344 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting).

345 *Mahon*, 260 U.S. at 412–13.

346 *Id.* at 412.

347 *Id.* Ironically, many coal companies still fixed subsidences they had caused, at their own expense, even though the deeds assigned the risk of subsidence to the surface owners. *See* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 37–41 (1995).

348 *See* Treanor, *supra* note 283, at 818.

349 *Mahon*, 260 U.S. at 412–13 (citing 1921 Pa. Laws 1198).

350 *See id.* at 413.

The bulk of the Court's opinion focused on the question whether the Kohler Act was a legitimate exercise of the police power[351]—that is, whether it was a bona fide regulation of a safety threat to the Mahons and surface owners like them. Here, Justice Holmes applied principles of intermediate scrutiny, far from the deference he had recommended in *Lochner*,[352] more consistent with earlier state takings and police-power cases. He doubted that the Kohler Act was "justified as a protection of personal safety," because such protection "could be provided for by notice" to the Mahons before the coal company started excavating beneath their house.[353]

Even more interesting, Justice Holmes applied a concept of "reciprocity of advantage" that strongly parallels the equal-benefit principle reflected in cases like *Vanderbilt*, *Palmyra*, and *Paxson* a century earlier.[354] In *Mahon*, the state cited *Plymouth Coal Co. v. Pennsylvania*, which upheld a law requiring mining companies to leave a pillar of coal at the edge of their subterranean coal fields.[355] Justice Holmes distinguished the case in part because the pillar-support law "secured an average reciprocity of advantage that has been recognized as a justification of various laws."[356] In other words, although the pillar-support law restrained every mining company's freedom to mine, on the whole it enlarged such freedom. The law reduced each company's incentive to dig quickly and force its competitors to assume a duty to support its excavations.[357] Justice Holmes had previously cited the reciprocity-of-advantage concept in *Jackman v. Rosenbaum* to uphold a law that gave landowners the right to enter their neighhors' lands to build a dividing wall between the two properties.[358] This concept did not apply in *Mahon*, obviously, because the coal company secured no advantage in compensation for losing some of its mineral rights.

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351 *See id.*

352 *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.").

353 *Mahon*, 260 U.S. at 414.

354 *See* discussion *supra* Part II.D.2.

355 *See Mahon*, 260 U.S. at 415 (citing Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914)).

356 *Id.*

357 Justice Brandeis had other problems with Justice Holmes's opinion, but his dissent conceded the soundness of the reciprocity-of-advantage concept where public safety is not at issue. *See id.* at 422 (Brandeis, J., dissenting). Justice Brandeis readily acknowledged that mandatory drainage laws and residential party-wall laws could pass muster on the ground that they secured a reciprocity of advantage to affected owners. *See id.* (citing Jackman v. Rosenbaum Co., 260 U.S. 22 (1922); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896); Wurts v. Hoagland, 114 U.S. 606 (1885)).

358 *See Jackman*, 260 U.S. at 30–32.

Many commentators have wondered how Justice Holmes fashioned this concept of "average reciprocity of advantage."[359] Although nineteenth-century state takings cases cannot answer this question definitively, they do provide a strong clue. *Jackman* and *Mahon* were both handed down in 1922, but the New York Supreme Court had described the same idea using the phrase "calculated for the common benefit of all" in *Vanderbilt*, the harbor-traffic case from 1827.[360] Just as the pillar-support law in *Plymouth Coal* increased every coal-mining company's coal take and protected its operations against ground collapse, so the harbor-traffic law in *Vanderbilt* increased every boat owner's and dock owner's chance to dock. Similarly, the party-wall law Justice Holmes upheld in *Jackman* had the same justification as the footpath laws upheld in *Palmyra* and *Paxson*. In each case, the improvement enhanced every owner's home more than it restrained her free use of it.[361] Justice Holmes, the scourge of natural law,[362] settled the key questions in *Mahon* by applying doctrinal concepts first developed to secure equal and natural property rights.

2. *Utilitarian Takings Theory*

Even stranger, Justice Holmes interlaced all this natural-right doctrine with utilitarian property theory. *Mahon* is now described as the first case to describe regulatory takings law in terms of utilitarian interest balancing, a twentieth-century development.[363] The key passage of property theory from *Mahon* reads as follows:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.[364]

This passage marks a fundamental shift from the property theory at work in the natural-right-based decisions. The nineteenth-century cases started with property rights; Justice Holmes starts with "values." Natural-right theory makes law's object the equal enjoyment of freedom. Utilitarianism sets as its object maximization of social utility, or,

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359 *See, e.g.*, Lawson & Seidman, *supra* note 57, at 1098 (calling reciprocity of advantage "an obscure but powerful concept that has been seriously underanalyzed"). Robert Brauneis provides useful insights into Justice Holmes's development of this idea. *See* Brauneis, *supra* note 3, at 654–56.

360 *See supra* notes 176–85 and accompanying text.

361 *See supra* notes 185–94 and accompanying text.

362 *See* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES, 26–27, 91–94 (2000).

363 *See, e.g.*, DUKEMINIER & KRIER, *supra* note 343, at 1140 ("Rules Based on Measuring and Balancing").

364 Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

as Justice Holmes put it in another context, "the greatest good of the greatest number."[365] Utilitarianism holds that social action is desirable whenever it increases the sum of the utility profiles of all members of society.

Utilitarianism can dramatically change the object of regulation and takings law. In a natural-right account of regulatory takings law, free control and action over property is primary, the value of use rights secondary. Property regulation seeks to increase the welfare of all, but (at least as applied to property-on-property conflicts) natural-right property theory holds that the welfare of all consists of each person enjoying an equal share of freedom of action to use her own property as she wishes. Nuisance-control regulations restore owners who have been stripped of use rights to their fair and equal share; reciprocity-of-advantage regulations enlarge that equal share when local conditions make it possible to do so. Still, both principles complement each other in securing the free and equal use of property. Value plays a role in the natural-right approach, but merely a secondary role. It comes into play at the just-compensation stage, because the measure of damages is an objectively reasonable valuation of the property rights taken. More subtly, value may also become pertinent if there is an equal-advantage or reciprocity-of-advantage question about the law under challenge. A law works for the common benefit of all affected owners only if it enlarges the value of the rights that each affected owner retains more than the value of the rights each owner loses.

Utilitarian property theory reverses the priority between free use and value. As Justice Holmes's opinion suggests, value is primary, and freedom is entirely derivative of value. Property consists of "value," and this value is subject to "implied limitation[s]" to make room for government action.[366] The government is presumed to have the power to pursue any object that has public value for society at large. To secure public value, the government may increase, diminish, transfer, or even abolish private uses of property. In many versions of utilitarianism, it does not matter whether useful social actions reduce the value of an individual owner's property; social action should be taken whenever its gains outweigh the private value lost by the owner. If value is the basic building block in utilitarianism, the free use of prop-

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365 Oliver W. Holmes, Jr., *The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 584 (1873), *reprinted in* 1 THE COLLECTED WORKS OF JUSTICE HOLMES 323, 325 (Sheldon M. Novick ed., 1995). *But see* David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 481–84 (1994) (doubting that Justice Holmes was a utilitarian). For the classic exposition of the utilitarian principle to seek the "greatest good for the greatest number," see JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Methuen 1982) (1789).

366 *See Mahon*, 260 U.S. at 413.

erty is derivative. An owner has a "right" to use his property freely only when the proposed social action increases the public's utility less than it decreases the value of his property and diminishes social welfare in other respects. An owner cannot demand compensation for *every* drop in the value of his property because, as Justice Holmes makes clear, government actions always affect the value of property.[367]

At one end of the spectrum, a Lockean utilitarian might track the natural-right approach and conclude that most people, most of the time, place a great deal of utility in the free use of their own property. On these generalizations, utilitarian interest balancing must discount the social value of actions that scare, or in technical terms demoralize, other owners who stand to lose the free use of their properties because of the precedents set by the actions. As Richard Epstein explained this view in his analysis of *Mahon*: "[i]ndividuals normally—which is not to say invariably—act to advance their self-interest, which includes benefits to those close to them . . . . From that simple observation stems the presumption that individuals should be allowed to do what they want."[368] Property regulation thus ought to avoid depriving owners of what Epstein calls "liberty of action" except when truly necessary, because "each person's gains" from being left alone to use her property freely "carry through to the societal bottom line."[369]

Understood in such Lockean terms, utilitarianism generates most of the same prescriptions in takings law as does nineteenth-century natural-right theory. This similarity should come as no surprise. Many Founders believed that the free exercise of personal rights contributes more to social utility than any other good.[370] Applying such a perspective to *Mahon*, the coal company could include on its side of the balance not only its economic losses but also the social dislocations the Act would inflict when it upset other property owners' expectations that they could use their own property freely. These demoralization costs would weigh far more heavily in the balance than would the coal company's lost value. On the other side of the balance, such utilitarianism reserves independent judgment about

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367 *See id.*

368 Epstein, *Erratic Holmes*, *supra* note 170, at 877 (emphasis omitted).

369 *Id.* Epstein cites John Locke's *Second Treatise of Government* to support his theoretical account. *See id.* at 877 n.11 (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 72 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1689)).

370 *See, e.g.*, CHIPMAN, *supra* note 65, at 36. As Nathaniel Chipman stated in an 1833 treatise:

> [T]he laws of nature, rightly understood, are found to aim, as well at the promotion of the individual as the general interests—or rather the promotion of the general interest of the community, through the private interests of the individual members;—for the general interest consists of an aggregate of the individual interests, properly estimated.

Id.

whether a legislative action promotes public utility. Because this utilitarianism insists that virtually all people derive large utilities from the free use of property, it can measure legislative actions by how well they promote utility consistent with this principle. Thus, Epstein thinks Justice Holmes was right to doubt the Pennsylvania legislature's safety findings, because the parties to the original land deeds "were in privity and had, by agreement, allocated the relevant risks among themselves."[371]

At the other end of the spectrum, other utilitarian theories hold that it is impossible to generalize human utility functions. Because such theories cannot predict that confiscatory regulations lower utility by demoralizing similarly situated owners, an owner has nothing to balance on her side of the scales except her own economic losses. No matter how severe her losses, they probably will not weigh very heavily against the benefits expected by society at large. This tendency exists in Jeremy Bentham's utilitarianism, which treats social welfare as the sum of the utility preferences of all members of society.[372] The tendency is even stronger in theories, like John Dewey's, that combine utilitarianism with historicist theories like progressivism or pragmatism. In these theories, the public interest transcends the sum of individual preferences; it is the expression of a historically evolving communal rationality higher than the interests of any one individual.[373] Because all such theories decline to hold that people place great utility in the free use of their property, they generate balancing tests that tilt sharply in the government's favor.

Justice Brandeis's dissent in *Mahon* illustrates this end of the utilitarian spectrum. Justice Brandeis agreed with Justice Holmes that the Court needed to balance public and private interests, but he insisted more clearly than Justice Holmes that this balance needed to pit the individual against the state—the coal company's economic losses against the state's interest in protecting surface owners' safety. He insisted that "values are relative."[374] The coal company lost economic value when the Kohler Act imposed a duty of support, but that loss of value was relative to "the value of the whole property," mineral rights and topsoil together, and to the interests of the public.[375] If the legis-

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371 Epstein, *Erratic Holmes*, *supra* note 170, at 889.

372 *See* BENTHAM, *supra* note 365, at 11–13; *see also* J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, *in* J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 3, 9–12, 30–57 (1973) (distinguishing between "act" and "rule" utilitarianism and endorsing act utilitarianism).

373 *See, e.g.*, JOHN DEWEY, *Liberalism and Social Action*, *in* 11 JOHN DEWEY: THE LATER WORKS, 1925–1953, at 17–22 (Jo Ann Boydston ed., 1987) (reading British and American social history to have produced a governing political ideology combining features of Benthamite utilitarianism, English romanticism, and German progressive historicism).

374 Pa. Coal Co. v. Mahon, 260 U.S. at 393, 419 (1922) (Brandeis, J., dissenting).

375 *See id.*

lature thought that the coal company threatened Mahon's and other owners' safety, Justice Brandeis was not about to question the legislature's judgment.[376]

3. *Justice Holmes's Utilitarian Dilemma, and* Mahon*'s Ambivalent Legacy*

In *Mahon*, Justice Holmes took a position between these two extremes, though much closer to Bentham and Dewey than to Locke. Like Justice Brandeis, Justice Holmes framed the takings question as a conflict between public and private interests. Unlike Justice Brandeis, however, Justice Holmes insisted on scrutinizing some property regulations aggressively. His opinion is most famous for announcing, unhelpfully, "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[377]

Justice Holmes was quite confident that the Kohler Act went "too far," but he had trouble explaining why. He first tried to tip the scales in the coal company's favor by saying that the company had suffered a massive loss. For Justice Holmes, "the extent of the diminution" of property values was severe.[378] Because he found that the Kohler Act "ma[d]e it commercially impracticable to mine coal, . . . the Act ha[d] very nearly the same effect for constitutional purposes as appropriating or destroying" the right to mine for coal.[379] But so what? Even if the coal company had lost all the value of its mineral rights, a utilitarian could easily respond that Pennsylvania simply placed more utility in public safety than the coal company placed in its lost rights.

Justice Holmes then tried to rig the public side of the balance by suggesting there was hardly any public interest at issue. The *Mahon* litigation arose out of a private suit, a bill in equity by homeowners to enforce the Act.[380] Justice Holmes suggested that public utility was not very high because it was only "the case of a single private house."[381] But, as he grudgingly recognized, the public interest can always be a factor in an injunctive proceeding, and the coal company made the public interest relevant as soon as it challenged the constitutionality of the Kohler Act.[382] Justice Brandeis caught Justice Holmes's dodge and made him pay for it,[383] and Justice Holmes was

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376 *See id.* at 417–19.

377 *Id.* at 415.

378 *See id.* at 413.

379 *Id.* at 414.

380 *See id.* at 412.

381 *See id.* at 413.

382 *See id.* at 413–14.

383 *See id.* at 421 (Brandeis, J., dissenting) ("[T]o protect the community through invoking the aid, as litigant, of interested private citizens is not a novelty in our law. . . . And it is for a State to say how its public policy shall be enforced.").

forced to acknowledge that "the case has been treated as one in which the general validity of the [Kohler Act] should be discussed."[384]

One way or another, then, Justice Holmes needed to explain why the Kohler Act made for bad policy—why it went "too far." He needed to explain why the public did not have any "real" social value in shifting the risk of subsidence from Mahon and other homeowners back to the coal company. Much ink has been spilt trying to decipher Justice Holmes's explanation. William Michael Treanor, for example, argues that Justice Holmes, while generally deferential to property regulations, was willing to strike down acts like the Kohler Act on the ground that they were arbitrary and the product of bad political processes.[385] Robert Brauneis suggests that Justice Holmes was concerned that the Kohler Act unfairly disrupted coal companies' property expectations, and he doubts that Justice Holmes was as deferential to legislatures as other progressives like Justice Brandeis.[386] In private correspondence, Justice Brandeis offered a simpler explanation. He speculated to a friend that Justice Holmes was going senile.[387]

Whatever motivated Justice Holmes, the striking fact is that he drew on natural-right legal principles—intermediate scrutiny, nuisance control, and reciprocity of advantage—to translate his frustrations into legal arguments. The only doctrinally plausible way he found to explain why the Kohler Act had low utilitarian social value was to say that it did not advance the public interest as measured by constitutional doctrines fashioned to secure natural rights.

Needless to say, Justice Holmes's reasoning was bound to confuse federal regulatory takings law no matter how it developed. If the federal courts had remained sympathetic to natural-right property theory, they would have needed to lift the natural-right doctrines from Justice Holmes's opinion while discrediting his rendition of utilitarian property theory. If, as happened in reality, the courts continued to shift toward utilitarianism, they would need to embrace the favorable theory in *Mahon* but discredit the result, the discussion about reciprocity of advantage, and the heightened scrutiny. These tensions in law and theory would remain as long as natural-right and utilitarian theory competed for influence in the federal bench.

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384 *Id.* at 414.

385 *See* Treanor, *supra* note 283, at 859–60.

386 *See* Brauneis, *supra* note 3, at 642–60; Robert Brauneis, *Treanor's* Mahon, 86 GEO. L.J. 907, 920–24 (1998).

387 *See* Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 321 (noting that "[h]eightened respect for property has been part of Holmes' growing old" and that "intellectually [Holmes] may try to rid himself of undue regard for property but emotionally he can't").

E. *Euclid*: Deference in Regulatory Takings Law

If *Mahon* was a mixed bag for the nineteenth-century approach to takings, the next case was an outright setback. In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court rejected a series of serious constitutional property-rights challenges to modern zoning.[388] Practically, *Euclid*'s stakes were staggering. Modern zoning was just coming into its own at the time, and virtually all American cities use it now.[389] Doctrinally, the Court's opinion in *Euclid* did more than any other decision to discredit the natural-right approach to regulatory takings. Euclid's scheme had serious constitutional problems in the nineteenth-century framework. When the Court cited natural-right principles to uphold Euclid's scheme, it sent a strong message that these principles no longer needed to be taken seriously.

1. *Euclid's Zoning Scheme*

Euclid is a sixteen square-mile suburb on the east side of Cleveland.[390] At the time of the litigation, the village was largely undeveloped farm land, with only a few thousand residents.[391] Ambler Realty owned sixty-eight acres of vacant and undeveloped land on the southwest side of town, immediately east of the Cleveland border.[392] The company's land was an 1800-by-1950 square-foot parcel; one of the 1800-foot sides ran along Euclid Avenue, the busiest street in town.[393] The trial court found that most of the land was likely to be converted to industrial uses but that the land along Euclid Avenue was likely to be converted to retail stores and other commercial uses.[394]

Euclid's zoning ordinance drastically changed Ambler Realty's plans. The ordinance zoned the first 620 feet off of Euclid Avenue for one- and two-family dwellings only. It zoned the next 130 feet for one- and two-family dwellings and also apartments, hotels, churches, schools, and other similar noncommercial uses.[395] The ordinance left the 1050 feet farthest from Euclid Avenue free for industrial use.[396] The trial court found that, but for the ordinance, the company probably would have converted the land along Euclid Avenue into

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388 272 U.S. 365 (1926) [hereinafter *Euclid*].

389 *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 692 (1973) (noting that, as of 1973, more than 97% of American cities with populations over 5,000 residents relied on zoning).

390 *See* Ambler Realty Co. v. Vill. of Euclid, 297 F. 307, 308–09 (N.D. Ohio 1924) [hereinafter *Ambler Realty*].

391 *Id.* at 309.

392 *See id.*

393 *See id.*

394 *See id.*

395 *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 380–82 (1926).

396 *See id.* at 383.

storefronts and other commercial uses and converted most of the rest of the restricted 750-by-1950 square-foot area to industrial uses.[397] Because the ordinance stripped the company of valuable industrial- and commercial-development rights, the value of the restricted lots dropped from $10,000 per acre to $2500 per acre,[398] and Ambler lost several hundred thousand dollars.[399]

2. *The District Court Opinion: The Distinction Between Police Power and Eminent-Domain Power*

Judge Westenhaver, the district court judge, applied natural-right takings principles to strike down the ordinance. His opinion suggests how regulatory takings law could have developed after *Mahon* if federal judges had remained sympathetic to natural-right property theory. The judge began by describing property in sweeping terms. In its briefs, the Village of Euclid argued for what is now the modern view, "that so long as the owner remains clothed with the legal title [to property] and is not ousted from the physical possession thereof, his property is not taken."[400] Judge Westenhaver rejected this view: "The right to property, as used in the Constitution, has no such limited meaning. As has often been said in substance by the Supreme Court: 'There can be no conception of property aside from its control and use, and upon its use depends its value.'"[401] Like James Madison, Zephaniah Swift, and many nineteenth-century state judges, Judge Westenhaver conceived of property as an extension of personal freedom.

Judge Westenhaver then held that the power to "regulate" property was limited by the principles he thought justified "property." The Village of Euclid made another modern argument when it suggested in its briefs that mere "regulations" never trigger eminent-domain limitations. "[S]ince the ordinance in question does not take away plaintiff's title or oust it from physical possession," the village argued, "the power of eminent domain has not been exercised, but . . . the police power has been."[402] Judge Westenhaver rejected this argument as well: "Obviously, police power is not susceptible of exact definition . . . . And yet there is a wide difference between the power of eminent domain and the police power; and it is not true that the public welfare is a justification for the taking of private property for the general good."[403] To distinguish between these two powers, Judge Westen-

397 *See Ambler Realty*, 297 F. at 309.
398 *See Euclid*, 272 U.S. at 384.
399 *See Ambler Realty*, 297 F. at 309.
400 *Id.* at 313.
401 *Id.* (quoting Block v. Hirsh, 256 U.S. 135, 165 (1921)).
402 *Id.*
403 *Id.* at 314.

haver relied on the principles discussed in the state cases studied in Part II. He drew on concepts of intermediate scrutiny and harm prevention in announcing that "[a] law or ordinance passed under the guise of the police power . . . can be sustained only when it has a real and substantial relation to the maintenance and preservation of the public peace, public order, public morals, or public safety."[404] Separately, Judge Westenhaver invoked and applied the "average reciprocity of advantage rule" that Justice Holmes had applied in *Jackman* and *Mahon*.[405]

Ultimately, Judge Westenhaver concluded that Euclid's zoning scheme was unconstitutional because "it takes plaintiff's property, if not for private, at least for public, use, without just compensation" and "is in no just sense a reasonable or legitimate exercise of police power."[406] Substantively, he thought "that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket," and that "[t]he only reasonable probability is that the property values taken from plaintiff and other owners similarly situated will simply disappear."[407]

3. *Pollution Control*

Although Judge Westenhaver's opinion distinguished between the police power and eminent-domain power, the opinion applied that distinction broadly and conclusorily. The judge conceded that many of the zoning restrictions might be valid by themselves, but he did not sift the wheat from the chaff because he thought the valid regulations were inseparable from the takings.[408] Still, read closely, Judge Westenhaver's opinion illustrates when zoning secures and when it invades natural property rights.

Under a natural-right analysis, zoning may serve an important function by protecting delicate uses of property from heavy industry. The Supreme Court approved of this function in *Hadacheck*. Pollution control gives cities a rationale for cordoning off smokestack industries, garbage dumps, and other noxious uses of property from family homes, apartments, and light commercial uses like office buildings and retail stores. However, at least in neighborhoods that lack a uniform pattern of land use, pollution control does *not* give cities license to segregate light commercial uses from residential buildings, or to zone apartments, multiple-family homes, and single-family homes

404 *Id.*

405 *See id.* at 315 (citing Jackman v. Rosenbaum, 260 U.S. 22 (1922)); Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

406 *Ambler Realty*, 237 F. at 317.

407 *Id.* at 315–16.

408 *See id.* at 316.

apart from one another. Retail stores and office buildings might be noisier and busier than apartments, and apartments more so than residences. In general, however, such noise and traffic do not become so egregious that they constructively evict residential owners from their properties. Homeowners may not like the sounds of cars parking, doors slamming, and people bustling, but these disturbances do not preclude them from enjoying their houses as homes. The Euclid ordinance was problematic in part because it zoned more of Ambler Realty's lots into residential-only uses than it needed in order to control pollution.

4. *Aesthetic Control*

Judge Westenhaver also noted that the Euclid zoning scheme had "an esthetic purpose; that is to say, to make this village develop into a city along lines now conceived by the village council to be attractive and beautiful."[409] Zoning has been used even more aggressively since *Euclid*'s time to arrange and beautify the appearances of towns and cities.[410] Judge Westenhaver was confident that such beautification restrictions could "not be done without compensation under the guise of exercising the police power."[411]

The Euclid zoning scheme thus raised the issue that the Supreme Court had finessed in the billboard cases: whether a locality could enforce a beautification scheme as a police regulation. Judge Westenhaver said no.[412] Beautification plans restrain owners' free action over their own property because they enforce dainty or delicate use patterns across an entire city. Again, one can express this suspicion by saying that unsightly houses do not physically invade neighbors' property, but that is a technical way to make a more substantive point. As Part III.C explained, because beauty is in the eye of the beholder, aesthetic legislation tends to freeze the use of property and to encourage what Judge Westenhaver called "class tendencies."[413] People usually do not pursue the beautiful until they have earned enough money to take care of basic life necessities. In Judge Westenhaver's words, "[t]he true reason why some persons live in a mansion and others in a shack . . . is primarily economic. It is a matter of income and wealth, plus the labor and difficulty of procuring adequate domestic ser-

409 *Id.*

410 *See, e.g.*, State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970).

411 *Ambler Realty*, 297 F. at 316.

412 *See id.* at 315 (distinguishing St. Louis Poster Adver. Co. v. City of St. Louis, 249 U.S. 269 (1919), and Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917), because the Illinois and Missouri Supreme Courts were more hostile to zoning ordinances than the U.S. Supreme Court was to local billboard ordinances from their states). For the billboard cases, see *supra* Part III.C.

413 *See Ambler Realty*, 297 F. at 316.

vice."[414] Taking these factors together, Judge Westenhaver thought the aesthetic tendencies of Euclid's zoning scheme would not secure free property use but rather would "classify the population and segregate them according to their income or situation in life."[415]

5. *Zoning and the Locality Rule*

Zoning is also useful when and to the extent that it enforces the principles of the locality rule in nuisance law. When most of the owners in a neighborhood dedicate their lands to similar industrial uses, the locality rule protects them all from nuisance liability by sharply increasing the degree of interference a plaintiff must show before she can establish a nuisance.[416] Conversely, when most of the owners in the neighborhood dedicate their lands to residential uses, the locality rule increases the bite of nuisance law, protecting the owners against interferences that might be considered trivial or insubstantial in a mixed-use neighborhood.[417]

It may seem strange that an approach based on avowedly permanent laws of nature could generate a legal system in which an owner receives different levels of legal protection for the same land use in different neighborhoods. Nevertheless, the natural-right approach is practical and prudential. It prescribes whichever land-use arrangement most enlarges owners' freedom of action. Owners have more freedom to use their land as they see fit if they reside next to like-minded neighbors. Homeowners can still put their homes to residential uses even if they are forced to tolerate nearby business and restaurant traffic, but most residents would prefer to follow stronger norms for peace and quiet with like-minded neighbors. Because manufacturing is incompatible with so many other forms of land use, industrial parks and zones dramatically increase the freedom to manufacture. This principle aggravated Ambler Realty's complaint. Euclid's zoning restrictions split in two what the company had planned to sell as a single industrial-use park. When the restrictions outlawed Ambler from using forty percent of the land for industrial uses, they decreased the value of the other sixty percent for industrial uses.[418]

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414 *Id.*

415 *See id.*

416 *See, e.g.*, Gilbert v. Showerman, 23 Mich. 448 (1871); *see also* EPSTEIN, TORTS, *supra* note 174, § 14.9, at 374 ("The locality . . . performs a useful sorting function by exempting from liability nuisances that are appropriate to particular districts.").

417 *See, e.g.*, Robinson v. Baugh, 31 Mich. 290 (1875).

418 *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 382–84 (1926); *see also* Richard A. Epstein, *A Conceptual Approach to Zoning: What's Wrong with* Euclid, 5 N.Y.U. ENVTL. L.J. 277, 287 (1996) (noting that the land's value dropped to about $200,000 from $700,000).

Furthermore, zoning enforces the locality principle more effectively than nuisance law. Legislation can provide certainty and precision that nuisance law cannot. In *Alger*, Chief Judge Shaw defended the Boston Harbor boundary laws because "certainty and precision can only be obtained by a positive enactment, fixing the distance, within which the use shall be prohibited as noxious, and beyond which it will be allowed, and enforcing the rule thus fixed, by penalties."[419] Zoning can serve the same function. If a neighborhood has "tipped" to the point where one land use predominates, local legislation can increase certainty and reduce litigation by confirming the shift and defining the boundaries of the "uniform" neighborhood.[420]

At the same time, any legislative version of the locality rule breaks down if the legislative plan does not provide nonconforming owners somewhere to relocate. If a city zones manufacturers out of a residential district, its zoning plan must provide enough industry-only or mixed-use areas to ensure that the zoning restriction is not a disguised prohibition on manufacturing. Of course, practical complications may arise, especially when small towns in a large metropolitan area exclude manufacture and industry and count on other towns to host them. Even so, if a city establishes a residential-only zone, one may ask whether it has left enough mixed-use and industry- or commerce-only neighborhoods for other land uses. In *Euclid*, for instance, Judge Westenhaver was extremely suspicious of Euclid's zoning scheme because it made no provision to expand highway access.[421]

6. *Undeveloped Property*

The most crucial issue, however, relates to the regulation of undeveloped property. This is the feature that most differentiates the natural-right approach from modern zoning. Euclidean zoning operates on the assumption that owners do not have "property" worthy of the name until zoning regulations *give* them property in the land uses permitted in the neighborhood. By contrast, as the *Hadacheck* discussion in Part III.B illustrates, the natural-right approach holds that owners have property in the full range of use potential in their land—before they dedicate it to any one use, and before any zoning board zones the land for a limited number of permissible uses. That right limits how undeveloped land may be zoned consistent with natural-right principles. It is difficult to say that one land use poses a "real" threat to another when one of the two properties does not yet have a distinct use.[422]

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419 Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 97 (1851).

420 *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 821B(2)(b), 828(b) (1979).

421 *See* Ambler Realty Co. v. Vill. of Euclid, 297 F. 307, 316 (N.D. Ohio 1924).

422 *See* discussion *supra* Part III.B.4.

Similarly, it is virtually impossible to conclude that a zoning plan secures equal benefit or an average reciprocity of advantage to all owners when much or most of the affected land is undeveloped. There is simply not enough information to determine whether the plan will preserve or enlarge every affected owner's preferred land use. From time to time in recent years, the Supreme Court has suggested that zoning does secure an average reciprocity of advantage,[423] but these suggestions have only diluted the principle so much that it is now meaningless. Judge Westenhaver viewed zoning quite differently and emphasized that Ambler Realty's land was undeveloped.[424] Considering the reciprocity-of-advantage issue, he concluded:

> It is a futile suggestion that plaintiff's present and obvious loss from being deprived of the normal and legitimate use of its property would be compensated indirectly by benefits accruing to that land from the restrictions imposed by the ordinance on other land. It is equally futile to suppose that other property in the village will reap the benefit of the damage to plaintiff's property and that of others similarly situated . . . . [T]he property values [lost] are either dissipated or transferred to unknown and more or less distant owners.[425]

7. *The Supreme Court's Opinion and Its Legacy*

One may fairly question the theories of property and politics on which Judge Westenhaver relied. But his reservations about the scope and purposes of Euclid's zoning laws directly follow from those theories. His opinion may also seem aggressive because he second-guessed the motives behind and the effects of the Euclid zoning plan. Intermediate scrutiny, however, was part and parcel of the natural-right project for property regulation. In *Alger*, when Chief Judge Shaw deferred to the Massachusetts legislature's harbor-line regulations, he emphasized that he was writing an exceptional case. He warned that the whole edifice of constitutional takings principles would collapse if such deference ever extended to property regulations on dry land.[426]

Judge Westenhaver saw this danger vividly. He learned from several decisions in which the Supreme Court had upheld rent-control laws. These laws were supposed to be two-year "temporary expedient[s]" in response to housing shortages created by World War I, but they remained in effect seven years after the war and showed no signs

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423 *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 133–35 (1978); *id.* at 139–40 (Rehnquist, J., dissenting).

424 *See Ambler Realty*, 297 F. at 309–10, 315–16.

425 *Id.* at 315–16.

426 *See supra* notes 274–75 and accompanying text.

of going away.[427] Judge Westenhaver concluded that it is better "to withstand at the very beginning every invasion of a constitutional guaranty of life, liberty, or property."[428]

Even more on point, *Euclid* presented many of the issues litigated in *Buchanan v. Warley*.[429] In that case, the Supreme Court had invalidated a zoning scheme designed to segregate blacks and whites throughout Kentucky.[430] The Court delivered several sweeping statements about the rights to buy and use property[431] and about the grounds a state could cite to regulate those rights in zoning law.[432] In Judge Westenhaver's estimation, "no gift of second sight [was] required to foresee" that if race-based zoning had been upheld in *Buchanan*, "its provisions would have spread from city to city throughout the length and breadth of the land."[433] Judge Westenhaver foresaw that Euclidean zoning threatened to become a tool of anti-immigrant, anti-growth, and class-based tendencies.[434]

In contrast, the Supreme Court was less concerned about zoning's potential for abuse than about the fact that zoning had become a staple in local land-use regulation in many states.[435] Justice Sutherland, one of the Court's most articulate defenders of natural property rights,[436] authored an opinion upholding Euclid's zoning scheme under traditional police-power principles. Nowhere in his opinion did he confront the problems aesthetic zoning posed for the free exercise of property rights. Justice Sutherland also held that the city of

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427 *See Ambler Realty*, 297 F. at 311 (citing Block v. Hirsh, 256 U.S. 135 (1921); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922)).

428 *Id.* (citing Boyd v. United States, 116 U.S. 616, 635 (1886)).

429 245 U.S. 60 (1917).

430 *See id.* at 81–82.

431 *See id.* at 74 ("Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property.").

432 *See id.* at 74–75. The Court stated:

> The disposition and use of property may be controlled in the exercise of the police power in the interest of the public health, convenience, or welfare. Harmful occupations may be controlled and regulated. Legitimate business may also be regulated in the interest of the public. Certain uses of property may be confined to portions of the municipality other than the resident district, such as livery stables, brickyards and the like, because of the impairment of the health and comfort of the occupants of neighboring property.

Id.

433 *Ambler Realty*, 297 F. at 313.

434 *See id.*

435 *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926); Charles M. Haar & Michael Allan Wolf, Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2191–92 (2002).

436 *See, e.g.*, HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS 20–24 (1994).

Euclid had ample police power to anticipate and control nuisances.[437] Judge Westenhaver had doubted that Euclid's scheme had a real connection to any pollution-control ends, and he was concerned that the scheme restrained the development of undeveloped property.[438] Justice Sutherland brushed aside these doubts, on the ground that Euclid could include "a reasonable margin" for erring on the side of controlling industry "to insure effective enforcement."[439] Justice Sutherland recognized that Euclid's zoning scheme strained the pollution-control rationale when it purported to segregate apartments from standalone houses.[440] After canvassing state precedents, however, Justice Sutherland chose to defer to the findings of zoning experts. He deferred to expert findings that apartments inflicted nuisances on standalone homes because any apartment can act as a "mere parasite" on the air, open spaces, and scenery available in residential neighborhoods.[441]

Justice Sutherland's opinion for the Court bowed to the experts' findings more than a natural-right conception of the police power could allow. He faithfully restated the case for natural-right-based regulation, but no one takes his restatement seriously anymore. When the Court turned a blind eye to the discrepancies between zoning and nineteenth-century conceptions of the police power, it sent a strong message that zoning was unproblematic. *Euclid* is now understood, in one leading casebook's characterization, "as a generous endorsement of social engineering in the name of public health, safety, and welfare."[442] The Supreme Court cites *Euclid* routinely as proof that it can uphold land-use regulations promoting health, safety or welfare, even when the regulations "destroy[ ] or adversely affect[ ] recognized real property interests."[443] This deference seriously discredited the case for constitutional takings principles.

F. *Miller v. Schoene*, Public Necessity, and the Embrace of Utilitarian Property Theory

The final blow came in *Miller v. Schoene*, the "cedar rust fungus" case.[444] *Miller v. Schoene* applied the same utilitarian property theory as Justice Brandeis did in *Mahon*, without any of *Mahon*'s complications or distractions. *Miller v. Schoene* now stands for the principle that regulations pass muster whenever the law under review increases soci-

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437 *See Euclid*, 272 U.S. at 387–88.
438 *See Ambler Realty*, 297 F. at 314–16.
439 *Euclid*, 272 U.S. at 388.
440 *See id.* at 388–90.
441 *See id.* at 390–94.
442 DUKEMINIER & KRIER, *supra* note 343, at 1010.
443 *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1978) (citing *Euclid*).
444 276 U.S. 272 (1928).

ety's utility more than it diminishes the economic value of the affected owners' property.[445] This holding conflated police power with eminent-domain power and undermined any principled constitutional distinction between the two.

1. *Cedar Rust Fungus and Other Weed- and Pest-Control Laws*

Miller v. Schoene arose out of a conflict between apple- and cedar-tree owners in Virginia. Wild cedar trees seriously threatened the Virginia apple-growing industry because they carried a fungus called cedar rust, which is harmless to cedar trees but deadly to apple trees.[446] To control cedar rust, Virginia enacted a statute deeming to be a public nuisance any cedar tree carrying the cedar rust fungus.[447] The statute authorized the state entomologist to inspect cedar trees for the fungus when requested to do so by ten freeholders in the local county.[448] If the entomologist found that cedar trees were harboring the fungus and were within two miles of any apple orchard, he was required to order the owner to cut down the trees and destroy them.[449] The Virginia law followed the same inspect-and-destroy scheme as many other turn-of-the-century agricultural laws protecting agricultural interests from pests, weeds, and animal diseases.[450]

The Virginia Supreme Court rejected the constitutional challenges to the cedar rust law.[451] It cited as controlling precedent its decision in the 1920 case *Bowman v. Virginia State Entomologist.*[452] *Bowman* followed the same approach that the U.S. Supreme Court used in *Cusack, St. Louis Poster Advertising,* and *Euclid* to uphold billboard controls and zoning: cite traditional nuisance-control principles, but then defer to the legislature to explain away any tensions between those principles and the law under review. The *Bowman* court declared that the public may regulate to protect not only "the safety, health, and morals of the people, but also, under certain circumstances, . . . the protection of property."[453] At the same time, the court warned, "every possible presumption is to be indulged in favor of the validity of a statute."[454] On that basis, the *Bowman* court deferred to the Virginia

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445 *See, e.g., Penn Cent.*, 438 U.S. at 125–26 (citing *Schoene*, 276 U.S. at 279).

446 *See Schoene*, 276 U.S. at 277–78.

447 Miller v. State Entomologist, 135 S.E. 813, 814 n.1 (Va. 1926).

448 *Id.*

449 *Id.*

450 *See* Bowman v. Va. State Entomologist, 105 S.E. 141, 145–47 (Va. 1920) (citing examples of laws passed by the U.S. Congress and nine states).

451 *Miller*, 135 S.E. at 814–15.

452 *See id.* (citing *Bowman* as controlling precedent).

453 *Bowman*, 105 S.E. at 145.

454 *Id.* at 147.

legislature's findings that apple growing was affected with a public interest and that cedar rust fungus constituted a public nuisance.[455]

The Virginia Supreme Court leaned too heavily on judicial deference and interbranch comity. The property-regulation principles the *Bowman* court cited did not justify treating the cedar rust law as a "regulation." Indeed, the court recognized that, at common law, the cedar trees would not have constituted a nuisance, public or private.[456] Still, the court asserted, "whatever constitutes a real menace to [the agricultural] supply may be legitimately declared by statute to be a public nuisance and abated as such, although it may not have been such a nuisance . . . at common law."[457]

2. *Changing Circumstances in Natural-Right Constitutional Interpretation*

The Virginia Supreme Court glossed over a crucial ambiguity in the idea of "changing circumstances." Natural-right-minded jurists freely admitted that new conditions might require new laws. When they spoke of the principle of changed circumstances, however, they meant something far narrower than what is usually understood now. Constitutional provisions expressed broad and permanent declarations of moral principle. Although factual conditions could and often did change, the ends of government did not. Judges and legislators were supposed to adapt positive laws to changing real-life conditions, always to secure permanent moral principles as well as possible.[458] In present-day legal thought, by contrast, "changed circumstances" arguments allow legislators to adapt laws not only when times change the factual conditions that need to be regulated, but also when the people change their basic opinions about how the government should regulate property.[459] The former approach presumes that lawmakers will apply permanent equal-rights principles to a changing world; the latter frees lawmakers to experiment with equal-rights principles, progressivism, social utilitarianism, or some other political theory that might capture the public's fancy.

This distinction makes a huge difference in understanding *Miller v. Schoene.* According to the narrower view, the conflict was never about "apples versus cedars." Within a scheme of equal rights, the object was to preserve to every affected owner an equal share of free-

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455 *See id.* at 145, 147–48.

456 *Id.* at 144.

457 *Id.* at 145.

458 *See supra* note 105 and accompanying text. For a famous defense of this view, see Justice Sutherland's dissent in Home Bldg. Loan Ass'n v. Blaisdell, 290 U.S. 398, 448 (1934) (Sutherland, J., dissenting).

459 *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 89, 92–93 (1980) (Marshall, J., concurring).

dom to put her own property to her own preferred use. The Virginia legislature could still try to regulate the conflict even if traditional nuisance law could not. Still, if and when the legislature tried a new approach, it was bound by equal-rights principles.

3. *Regulating Cedar Rust Consistent with Natural-Right Principles*

As it turned out, the cedar rust was not a "nuisance" in the traditional sense. The fungus was a natural condition on the land. The owners of the cedar trees did not put the trees, or the rust fungus, on their property. In general, nuisance law incorporates act and causation requirements because it holds owners responsible for how they use their properties. The Virginia Supreme Court recognized as much in *Bowman* when it cited precedent holding that a harmful condition is not a "nuisance" unless it is proximately caused by some act or omission of the defendant.[460] Since the cedar trees grew naturally on Miller's property, he could not be held responsible under common-law nuisance principles for damage they might inflict on neighboring property. Richard Epstein has concluded that *Miller* was wrongly decided on similar grounds.[461]

This conclusion does not make it impossible to "regulate" the cedar rust problem under natural-right principles, however. If the Court had declared the cedar rust law unconstitutional, it would have preserved conditions that were "natural" in a low, Hobbesian sense. The law would have restrained Miller and his apple-growing neighbors from using fraud or force on each other, but it would have left the apple growers exposed to a huge risk. Striking down the cedar rust law would also have preserved conditions that were "natural" in the sense that the Legal Realists meant when they lampooned natural-law theory. The law would have stayed within the traditional and customary confines of the common law of nuisance, even if those traditions and customs applied imperfectly to the problems posed by cedar rust fungus.[462] It was still possible, however, that property legislation could create conditions that were "natural" in the sense understood by Founders like James Wilson.[463] Such legislation could adjust Miller's and his neighbors' property rights so that all could pursue their own preferred property uses, no one would be inclined to fight over property, and all would have the greatest realistic chance of entering into society with one another.[464] To secure such "natural" con-

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460 *See Bowman*, 105 S.E. at 144 (citing Roberts v. Harrison, 28 S.E. 995 (Ga. 1897) (excluding dangerous natural conditions on land from the reach of nuisance, on the ground that nuisances must be proximately caused by the defendant actor's omission)).

461 *See* EPSTEIN, TAKINGS, *supra* note 32, at 113–14.

462 *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 51 (1993).

463 *See* discussion *supra* Part I.B.

464 *See* discussion *supra* Part I.A–C.

ditions, Virginia legislators could step outside the confines of nuisance common law to resolve this conflict, while always judging their results by natural-right principles.

The cedar rust law probably could not have been saved as a regulation securing an equal and reciprocal advantage. Still, it is conceivable that some regulations of natural hazards might pass muster under this category. For instance, even if the owners of swamps are not responsible for mosquitoes and other health threats in their swamps, as contemplated by traditional rules of causation and nuisance, a law forcing each to drain his respective portion of the swamp might well secure to all the mutual benefit of freedom from disease. Some of the weed- and pest-control laws in other states could have been justified on this basis. If virtually all residents in a given locale grow a few crops threatened by one weed, all would benefit enough from the control law to assume a duty to watch for the weed on their own lands. Even if different crops were threatened by different weeds, the control scheme could still secure a common benefit to all owners if it protected each from weeds especially dangerous to farming. However, it is not likely that the cedar rust law could have passed muster on this basis. The neighbors received no new rights to make up for the cedar trees they chopped for the apple growers.

Nevertheless, it would still have been possible to adjust the cedar rust law to make it "regulate" the fungus conflict as a harm-prevention measure. Even if Miller committed no nuisance, the cedar rust in his cedars still posed a "harm" to the apple groves in the natural-right sense of the word. Miller might not have been negating his neighbors' right to grow apples, but the fungus was. If the law could not regulate this harm by analogy to nuisance, it could analogize to the law of necessity instead. Cedars tended to grow wild on rural grazing lands or homes; they were not grown for commercial purposes, and they were useful only as decoration.[465] Assuming that Miller was a rural ranch or homeowner, the cedars may have provided him with incidental benefits, but he could still enjoy the main use of his property without them. At the same time, chopping down the cedars would leave his apple-growing neighbors with what James Madison had called "the like advantage" over their properties.[466] Miller should have ceded "property" in the cedars to save his neighbors' main use of their lands. Thus, he should also have ceded his right to exclude the apple growers from entering his land to destroy infested cedars themselves.

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465 *See* Miller v. State Entomologist, 135 S.E. 813, 814 (Va. 1926); *Bowman*, 105 S.E. at 148.

466 *See* 14 THE PAPERS OF JAMES MADISON, *supra* note 75, at 266 (emphasis omitted).

Seen in this light, the Virginia Supreme Court should have analyzed the cedar rust law as the New Jersey Supreme Court had analyzed the fire-control law under challenge in *American Print Works*. The necessity in *Miller v. Schoene* was less stark than the necessity in *American Print Works*. Miller could give up his cedars without losing the primary use of his land, while the New York City fire in *American Print Works* was bound to destroy completely one of the two parties' property.[467] Still, the cedar rust law could be judged by whether it regulated the parties' property rights by ordering how the apple-grove owners exercised their natural right of necessity.

A few subtle changes would have saved the law. The law could not, and should not, have made Miller responsible for clearing the cedars free of charge. It could have authorized local apple growers to enter and destroy infested cedars once the state entomologist had found an infestation. State officials could have chopped down the trees and billed the apple growers. If the legislature was bent on making Miller chop down the infested trees on his property, it should have forced the apple-grove owners to compensate Miller for doing their work, or perhaps itself compensated Miller. The latter possibility shows how closely the police power approaches the eminent-domain power in cases involving necessity. Still, any of these laws would have captured the distinct character of the "harm" generating the conflict and "regulated" that harm consistent with natural-right property principles.

That said, *Miller v. Schoene* is often assumed to present an irreconcilable conflict between the cedars and the apple groves.[468] This portrayal is misleading because the conflict was between the owners and not their trees. From this perspective, the conflict was easy to regulate, because home- and pasture-owners could relinquish "property" in the cedars without losing the primary uses of their lands. Still, as will be seen, the U.S. Supreme Court *did* present the case as an all-or-nothing conflict between the cedar trees and apple trees, and this rendition plays a significant role in constitutional law.[469] The following assumes, then, that Miller owned and operated a commercial cedar grove, and that there were about as many cedar groves as apple groves throughout the local region.

In this rendition, the natural-right approach cannot say in any principled way whether the cedar trees pose "harm" to the apple trees. Cedar rust is too unusual a pollutant to draw any clear conclusions.

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467 *See supra* notes 201–05 and accompanying text.

468 *See, e.g.*, LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 26–27 (1996); SUNSTEIN, *supra* note 462, at 54; Michelman, *supra* note 22, at 1198–99.

469 *See* discussion *infra* Part III.F.4.

Because the fungus carries with the wind whether or not anyone actively grows the cedars,[470] Miller's cedar grove would teeter on the edge of the act requirement of nuisance. One could argue that Miller exposes himself to nuisance liability by growing cedar trees in large quantities, but this interpretation would stretch the act requirement for policy reasons peculiar to one case.

The better course would be to treat the conflict as a case of pure necessity. In this rendition, the conflict between apple and cedar growers would indeed be as stark as the city fire in *American Print Works* or the case of drowning sailors fighting over a ship-plank.[471] In the real case, the apple growers should have enjoyed "property" in their trees; in the hypothetical rendition, no apple grower could claim "property" in growing apples next to cedar groves, and no cedar grower could claim "property" in being free from apple growers' complaints. If the state did not intervene, the parties could and probably would fight it out. Because neither side had "property," however, the state could also settle this conflict by protecting whichever species of tree it chose. As in the real-life case, however, if the state forced cedar owners to cut down their own trees, it would need to compensate the cedar owners for doing apple growers' extermination work.

4. *The Supreme Court's Embrace of Utilitarianism and Legal Realism*

These issues are close, difficult, and perhaps obscure, but it is critically important to get them right in order to maintain consistency in the natural-right approach to takings.[472] By the end of the 1920s, the natural-right approach had little room for error. The dominant academic trend found this approach incoherent. Any mistake by natural-right-minded judges was bound to bolster that perception. These dangers surfaced when the U.S. Supreme Court upheld the Virginia Supreme Court's decision.[473]

The Court's opinion, written by Justice Harlan Fiske Stone, later appointed Chief Justice by President Franklin Roosevelt,[474] was strongly sympathetic to utilitarian and Legal Realist ideas about property regulation. Justice Stone boldly broke with the nuisance-control rationale:

> [T]he state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by

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470 *See* Miller v. State Entomologist, 135 S.E. 813, 818 (Va. 1926).

471 *See supra* notes 198–206 and accompanying text.

472 *See* EPSTEIN, TAKINGS, *supra* note 32, at 114.

473 *See* Miller v. Schoene, 276 U.S. 272, 281 (1928).

474 *See* SEIDMAN & TUSHNET, *supra* note 468, at 27.

> doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.[475]

Justice Stone turned the natural-right understanding on its head. He embraced a sweeping understanding of necessity. In the natural-right framework, *American Print Works* and the hypothetical rendition of *Miller v. Schoene* present two exceptional cases in which natural-right principles cannot say which of two property uses has a right. Justice Stone made these exceptions the rule. In the natural-right approach, the state could play favorites between two uses of property only when there was property in neither. Justice Stone's gloss on *Miller* suggests that the state can play favorites whenever it wants. Thus, Frank Michelman uses *Miller v. Schoene* as he uses *Hadacheck*, to demonstrate what he calls "the frequently illusory quality of the 'antinuisance' perception."[476]

Second, Justice Stone endorsed the Legal Realist principle that all law is political. He said that there "would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked."[477] This statement endorses the notion that constitutional rights always depend on prior legislation or court decisions. As Cass Sunstein explains it, *Miller v. Schoene* encouraged a change of attitudes, in which "adherence to common law or status quo baselines no longer seemed neutral, and departures from those baselines were no longer impermissibly partisan. Both the common law and the statute amounted to legal choices."[478]

From the perspective of natural-right-minded jurists, however, Justice Stone and the Realists begged the question. Founding Era jurists freely admitted that law was political. As Vermont jurist Nathaniel Chipman explained, "In the United States of America, political opinions, though considered as merely theoretical, cannot be wholly inconsequential. In these States, government is, professedly, founded in the rights of man."[479] In Chipman's and other Founders' view, the principle of the equal rights of man set a political standard for judg-

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475 *Schoene*, 276 U.S. at 279.

476 Michelman, *supra* note 22, at 1198.

477 *Schoene*, 276 U.S. at 279.

478 SUNSTEIN, *supra* note 462, at 54.

479 NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT 16 (1793) ("The opinions entertained of government, of the necessity of laws, of the end to be attained by them, and the means of attaining that end, will have an influence on the sentiments of the people, and the reasonings of the legislator.").

ing property conflicts. In land-use law, for instance, the law needed to protect residential uses of property from pollution and moral nuisances. Otherwise, by doing nothing, the law would encourage polluters to steal equal-use rights from homeowners, just as the law tacitly favors defamers and harms libeled victims if it does nothing to restrain excesses of speech. Thus, the Realists did not make any new discovery when they claimed that the law was political. Their argument suppressed the main question: whether the Realists had a property theory to beat natural-right theory.[480]

The Realists did have their own theory—the utilitarianism evidenced in *Mahon.* Ultimately, Justice Stone's most important point in *Miller v. Schoene* was his claim that "the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public."[481] Justice Stone believed that Miller and his neighbors acquired value in their land uses only to the extent that the local community thought their uses had social value. If Miller and his neighbors disliked each others' land uses, their dispute ought to be decided not by adjusting their rights, but by determining whether there was "a preponderant public concern in the preservation of the one interest over the other."[482] Nuisance and private-necessity principles could not mediate such conflicts; every cedar-versus-apple problem presented a public-necessity issue. And the local legislature was best situated to determine what was publicly necessary; it knew best what the local community thought was required by sound "considerations of social policy."[483]

5. Miller v. Schoene *and the Redundancy of Regulatory Takings with Legislation*

Whatever the merits of this version of utilitarianism, it undermines the distinctions that keep regulatory takings law conceptually separate from the kinds of judgments that legislatures generally make in the legislative process. In cases of property conflict, *Miller v. Schoene* suggests, "the State might properly make 'a choice between the pres-

480 If the Realists were off-target, it may have been because they were not shooting directly at Founding Era natural-right theory, but at late nineteenth-century political theory known as "Legal Formalism" or "Classical Legal Thought." Classical Legal Thought *did* try to establish a science of law independent from more political disciplines like law and sociology, and formalists tried to find "neutral principles" and general apolitical American customs that might seal American law off from normative political theory. *See* ALSCHULER, *supra* note 362, at 86–94; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 27–31 (1992); SEIDMAN & TUSHNET, *supra* note 468, at 31–33.

481 *Schoene,* 276 U.S. at 279.

482 *See id.*

483 *Id.* at 280; *cf. id.* (deferring to the legislature's judgment if "not unreasonable").

ervation of one class of property and that of the other,'" and favor whichever "'is of greater value to the public.'"[484] Thus, every takings question raises a question of public necessity, a choice between the social values of the two kinds of property at issue.

So understood, takings law collapses. It cannot serve as a meaningful constitutional check on regulation. *Miller v. Schoene* makes regulatory takings law turn on the same considerations that motivate the public to regulate in the first place. Surely the Virginia legislature passed the cedar rust law because Virginia residents thought apples were more important to state interests than cedar trees. Miller and other cedar owners might complain and bring takings claims, but such claims were bound to fail because they turned on . . . whether Virginia residents thought apples were more important to state interests than cedar trees. Because the residents made their preferences clear when the legislature voted, the constitutional claim is meaningless.

IV
PENN CENTRAL, AD HOC INTEREST BALANCING, AND THE TAKINGS MUDDLE

It took another fifty years, but the Supreme Court fully endorsed *Miller v. Schoene*'s approach in the landmark 1978 decision *Penn Central Transportation Co. v. New York City*. In *Penn Central*, the Court combined the most government-friendly features from the cases previously considered: *Mahon*'s property theory, *Euclid*'s deference, and *Miller v. Schoene*'s legal realism. The turn to utilitarian takings principles was complete.

This Part re-examines *Penn Central* and subsequent decisions from a natural-right approach. Generally speaking, regulatory takings law raises two main complaints. In the vast majority of cases, the law is muddled, though the muddle never quite seems to stop the government from winning. In the remaining cases, the law is too rigid and too friendly to owners. The natural-right approach to takings has a simple diagnosis for both tendencies. From this perspective, the *Penn Central* regime distorts regulatory takings law because it does not attach enough importance to equal freedom of action over property. When a law restrains the equal and free use of property, it inflicts demoralization costs on the rest of society. Such a law scares owners who are not directly affected, by threatening that they will be stripped of use rights like owners who *are* directly affected. These demoraliza-

484 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 126 (1978) (quoting *Schoene*, 276 U.S. at 279).

tion costs should reduce the law's social value and require just compensation whenever they outweigh the law's social gains.

By and large, *Penn Central* interest balancing disregards these costs. This disregard makes *Penn Central*'s interest balancing ad hoc and government friendly. In a few extreme situations, as subsequent cases confirm, the interest balancing places too much weight on demoralization costs. This excessive reliance makes the extreme cases too rigid and owner friendly.

The natural-right approach also prescribes a cure as simple as the diagnosis. If one is truly interested in resolving *Penn Central*'s doctrinal problems, the simplest way to do so is to count free-use demoralization costs in takings interest balancing. From the standpoint of natural-right theory, when a court considers the social value of a property regulation, it should discount that social value by the extent to which it threatens all owners' free use of property. Property regulations are likely to have low or negative social value when they fail both of the tests applied in the nineteenth-century cases. When a property regulation neither directly abates a substantial threat to private property or to the public health, safety, morals, or commons, nor secures "common benefit" or an "average reciprocity of advantage" to all regulated owners, takings law should presume the law has little or negative social value. This approach restores the middle ground that has been missing ever since *Penn Central.* It anticipates the muddle and the rigidities, and it focuses takings law on the merits of the "regulation" under challenge. Because this approach is successful on its own terms, it shows why and how takings law need not follow either of the extremes it follows now.

A. *Penn Central*: Completing the Utilitarian Turn

Penn Central established the basic framework for all subsequent federal regulatory takings challenges. The Penn Central Transportation Company owned Grand Central Station, a famous railroad terminal in New York City.[485] The company sought to build a multistory office building on top of the station, but the addition threatened to spoil Grand Central's value to the city as a famous landmark.[486] Because New York City's Landmark Commission had already declared the station a city historical site, the owners could not build the extension unless the Commission gave them permission to do so.[487] When the Commission dismissed their request as "nothing more than an aesthetic joke," the owners sued for just compensation.[488]

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485 *Penn Central*, 438 U.S. at 115.
486 *See id.* at 115–16.
487 *See id.*
488 *See id.* at 117–19.

Penn Central would have been an easy case for compensation under nineteenth-century takings principles. Presumptively, Penn Central had private property in the right to use the airspace above Grand Central, and the Commission's action restrained the free exercise of those rights. Even though the company had not yet developed its airspace, the use potential in that airspace was private property, like Alger's undeveloped potential in his shoreline flats or the Jacobs family's potential in their home cigar business.[489]

Penn Central's use rights could not be excised from the company's property on the ground that they were noxious. Because the Commission's ruling cited only aesthetic concerns, it raised the same concerns as billboard laws.[490] Separately, it was probably impossible to find that the Commission's ruling, or the historic-preservation law generally, secured equal and mutual advantages to all property owners throughout New York City. Most residents enjoyed the scenery value of Grand Central and similar buildings for free; affected owners lost use and development rights worth hundreds of thousands, or even millions, of dollars.[491] In short, the preservation law would have "taken" the private property the company held in its use rights.

Instead of following this approach, however, the Supreme Court used *Penn Central* to write a comprehensive opinion settling all of the questions left open by the cases examined in the previous Part. In his opinion for the Court, Justice Brennan grounded federal takings law in utilitarian terms. He drew on Justices Holmes's and Brandeis's opinions in *Mahon*,[492] Justice Stone's opinion in *Miller v. Schoene*,[493] and the scholarship of authors like Joseph Sax[494] and Frank Michelman.[495] Federal regulatory takings law has followed *Penn Central*'s conceptions of property and interest balancing ever since.

Penn Central recast what it means to hold "private property" in a possession. Like Justices Holmes and Brandeis in *Mahon*, Justice Brennan grounded "property" interests not in the freedom associated with property, but rather in the value associated with it. He suggested that an owner has a threshold takings inquiry whenever a regulation has an

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489 *See supra* notes 132–49, 250–72 and accompanying text.

490 *See* discussion *supra* Part III.C.

491 *See Penn Central*, 438 U.S. at 116.

492 *See* discussion *supra* Part III.D.

493 *See* discussion *supra* Part III.F.4.

494 *See Penn Central*, 438 U.S. at 125 (citing Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964)); *see also* Joseph L. Sax, *Takings*, *supra* note 223, at 150 (stating that "[o]nce property is seen as an interdependent network of competing uses, . . . property rights and the law of takings are open for modification" and noting that "a new view of property rights suggests that current takings law stands as an obstacle to rational resource allocation").

495 *See Penn Central*, 438 U.S. at 128 (citing Michelman, *supra* note 22, at 1226–34).

adverse "economic impact" on her,[496] and more particularly when the regulation interferes with "distinct investment-backed expectations."[497] Like Justice Stone in *Miller v. Schoene*, Justice Brennan made the owner's constitutional "property" in those expectations turn on a balancing of private and public interests. To determine whether a taking has occurred, *Penn Central* instructs courts to balance the owner's economic harm and lost expectations against "the character of the governmental action."[498] On these standards, the Penn Central company lost because it had no concrete expectations in developing its airspace, while the New York preservation law had positive social value.[499]

Now, a takings regime does not assume a specific character simply because it balances utilitarian interests. The regime's character varies depending on which social and individual interests count in the balance, and on whether those interests count often enough to create general rules or presumptions in the balancing. Theoretically, for instance, Justice Brennan could have followed Richard Epstein's Lockean conception of interest balancing.[500] Doctrinally, he could have borrowed from the approach the *Restatement of Torts* uses to balance utilities in nuisance law. Comment (e) to section 828 makes clear that this utility balancing includes in part the equal and free use of property, which the *Restatement*'s comments recognize as "freedom of conduct" and "the free play of individual initiative."[501] Modern nuisance law, though not without its problems, sets coherent "regulatory" standards because courts continue to recognize that "individual property rights," including especially a "landowner's right to use his property lawfully to meet his legitimate needs," remain "important policy considerations."[502] Either approach would have generated principles of intermediate scrutiny, nuisance control, and equal advantage much like the cases considered in Part II. From the natural-right perspective, of course, these approaches confuse the cart with the horse. They draw normative conclusions from utility before examining whether utility is consistent with human reason and morality. Still, Epstein's and the Restatement's approaches would generate results satisfactory to most natural-right-minded jurists.

But Justice Brennan chose a different approach, making federal law agnostic about the character of the government's action. He in-

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496 *Penn Central*, 438 U.S. at 124.

497 *See id.*

498 *See id.*

499 *See id.* at 130–32.

500 *See* discussion *supra* notes 368–69 and accompanying text.

501 *See* RESTATEMENT (SECOND) OF TORTS § 828 cmt. e (1977); *see also id.* § 826 (using utilitarian interest balancing to define the unreasonability element of nuisance law).

502 Sher v. Leiderman, 226 Cal. Rptr. 698, 704 (Cal. Ct. App. 1986).

structed that the character of the government action be deemed high whenever the challenged law is "reasonably related to the promotion of the general welfare."[503] As a matter of law, this instruction is quite deferential because it incorporates "rational-basis" principles of judicial deference. As a matter of policy, it applies the utilitarian property theory in Justice Brandeis's *Mahon* dissent and Justice Stone's opinion in *Miller v. Schoene.* According to this theory, the greatest good for the greatest number does not require the law to recognize social utility in freedom of action over private property. If this requirement is not a controlling theoretical principle in property regulation, courts should not impose it as a constitutional requirement on legislatures. Because legislatures balance social values before passing generally applicable legislation, Justice Brennan's approach makes regulatory takings law an empty check on legislation.

When Justice Brennan adopted this deferential understanding of utilitarian interest balancing, he transformed regulatory takings law into the "muddle" it is widely accepted to be today. For Justice Brennan, regulatory takings law is inherently muddled. He complained that this branch of the law "ha[s] proved to be a problem of considerable difficulty," and that the Court "has been unable to develop any 'set formula' for determining" regulatory takings problems.[504] But Justice Brennan had refashioned takings law consistent with a theory within which regulatory takings law would *never* be solvable. Of course, the Court might have had substantive reasons for saying that its utilitarian approach makes for better regulatory policy than the nineteenth-century approach, Epstein's approach, or modern nuisance law. But that is a substantive choice, not a doctrinal problem inherent to takings law. Justice Brennan never confronted this issue, and neither has anyone else on the Court to date.[505]

B. *Loretto*: Regulatory Touchings

Penn Central leaves regulatory takings law with two strong impressions: there are no clear standards for sorting out whether government regulations are invasive, and it is almost always the government that benefits from the lack of standards. These impressions are unsettling, but it is one thing to doubt *Penn Central*'s result or its rational-basis deference, quite another to frame a better approach. Anyone who subscribes to *Penn Central*'s basic intellectual foundations must confront the same problems that plagued Justice Holmes in *Mahon.* If

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503 *Penn Central*, 438 U.S. at 131.

504 *Id.* at 123–24.

505 For example, Hanoch Dagan developed a thoughtful rehabilitation of *Penn Central* in *Takings and Distributive Justice*, 85 VA. L. REV. 741, 795–99 (1999), but the Court has not considered this critique. *See infra* Part IV.E.

the free control and use of property does not produce enough utility for enough people enough of the time to weigh in takings interest balancing, it is virtually impossible to define the exceptional circumstances in which "regulation goes too far" and is "recognized as a taking."[506]

To define those exceptional circumstances, jurists must draw on political theory and property theory. They must generalize human behavior and then apply those generalizations to the third prong of the *Penn Central* balancing test, relating to the character of the government's action. Justice Holmes tested the other available options in *Mahon*, and none of them worked.[507] If a jurist wants to follow standard utilitarian principles but leave an exception for "excessive" regulations, eventually she must formulate rules of utility specifying when and why certain kinds of regulations have low social value or character because they demoralize other owners.

Loretto v. Teleprompter Manhattan CATV Corp. provided one early sign that the Court was struggling with this challenge. The case carved out a per se exception to *Penn Central* balancing whenever the government permanently and physically occupies some segment of the owner's property. New York State had passed a law requiring landlords to allow cable companies to install cable television junction boxes on their properties.[508] Under this law, the Teleprompter cable company installed a junction box on the roof of Loretto's apartment building to extend cable coverage to her tenants.[509] If the Court had decided *Loretto* within the framework of *Penn Central*'s balancing test, Loretto should have lost. The cable installation caused a tiny intrusion on her property, it caused her little economic harm, and it certainly did not lower her expectations of renting out apartments. If anything, the installation probably *benefited* her, by giving her cable-ready apartments to rent. Meanwhile, the cable-access law improved state residents' social welfare by increasing their access to cable television.[510]

Instead of following *Penn Central*, however, Justice Marshall distinguished the case on the ground that regulatory trespasses are special. When a regulation strips an owner of the right to prevent a trespass, *Loretto* holds, the character of the government action has a low value in *Penn Central*'s balancing test: "[W]e have long considered a physical intrusion by government to be a property restriction of an unusually

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506 *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *supra* notes 372–76 and accompanying text.

507 *See supra* notes 378–84 and accompanying text.

508 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982).

509 *See id.* at 422.

510 *See id.* at 442–56 (Blackmun, J., dissenting).

serious character for purposes of the Takings Clause."[511] On this point, the Court followed a recommendation made by Michelman,[512] who argued in *Property, Utility, and Fairness* that "[t]he psychological shock, the emotional protest, the symbolic threat to all property and security, may be expected to reach their highest pitch when government is an unabashed invader."[513]

This per se rule is not implausible, but one may still wonder whether it provides the most sensible approach. First, *Loretto*'s rationale makes sense only if the law under challenge regulates land or chattels. It cannot apply to regulations of incorporeal species of property, which by definition leave the right to exclude out of the proverbial bag of rights. As a result, *Loretto*'s balancing of *Penn Central*'s interests has little or nothing to say about takings in intellectual property, when today Congress is raising serious takings questions by passing laws modifying the lengths of patent and copyright terms.[514] Nor can *Loretto* say anything insightful about takings principles as applied to franchises, when states are raising serious takings questions by revising franchise agreements drastically in a wave of deregulation.[515]

Second, even as applied to land and chattels, *Loretto* seems incongruous next to *Penn Central*. From a financial standpoint, the state inflicted a relatively cheap taking on Loretto while New York City stripped *Penn Central* of development rights worth tens of millions of dollars.[516] From a theoretical standpoint, *Penn Central* and *Loretto* paint a strange picture of human psychology. According to *Penn Central*, when a regulation strips use rights, people tend not to suffer any loss of utility—even when they lose tens of millions of dollars. But according to *Loretto*, when a regulation restrains the right to exclude, demoralization profiles spike off the charts. Not only is the affected owner massively demoralized, many of her neighbors—who would have been indifferent had she lost only use rights—now fear that they, too, may lose their exclusionary rights. Are human beings naturally this schizophrenic, and is it reasonable to found a system of takings law on the assumption that they are?

By contrast, if one agrees with nineteenth-century jurists that the rights to exclude and use are different manifestations of the same ac-

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511 *Id.* at 426.

512 *See id.* at 427 n.5 (quoting Michelman, *supra* note 22, at 1184).

513 Michelman, *supra* note 22, at 1228.

514 Eldred v. Ashcroft, 123 S. Ct. 769 (2003) (upholding the Copyright Term Extension Act).

515 *See* William J. Baumol & Thomas W. Merrill, *Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996*, 72 N.Y.U. L. Rev. 1037 (1997).

516 *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 116 (1978) (noting that the lease for Grand Central Station's development rights was worth at least $2 million net annually for fifty years).

quisitive and industrious passions,[517] the middle ground is obvious. Theoretically, different owners may value different uses or exclusionary rights differently, but as a starting presumption all owners value both. Doctrinally, it then follows that the "private property" element of takings law should remain conceptually separate from the "regulation/takings" element. Thus, when a regulation invades or occupies an owner's land, the trespass does not automatically trigger just-compensation requirements; it merely creates a threshold takings issue, just like any use restraint. In each case, the focus then shifts from the rights lost to the government's justifications for excising those rights from the owner's bundle. The same principles of intermediate scrutiny, harm prevention, and reciprocity of advantage should then apply to invasive and noninvasive regulations alike. That is why, for instance, the fire-prevention law at issue in *American Print Works* "regulated," and did not per se "take," the right of building owners to stop outsiders from tearing down their buildings.[518] Even though the law stripped an owner of the right to exclude trespassers, the court was satisfied that the law ordered the application of a background fire-prevention public-necessity exception inherent in every owner's right to exclude. By contrast, the *Woodruff* court could state that the grazing law "took" grazing rights and exclusionary rights, because the law neither prevented harm nor enlarged pasture owners' remaining rights.[519]

Under this approach, the result in *Loretto* would remain the same, but the analysis would focus less on what Loretto lost and how she felt, and more on whether the government inflicted a disproportionate burden. The law would presume that Loretto lost private property when she lost the right to exclude the cable company from her premises. Contrary to the Supreme Court's opinion, however, that loss would not give Loretto an open-and-shut case for just compensation. A court would need to determine whether Loretto's lack of cable created some nuisance or necessity-based harm comparable to the cedar rust fungus in *Miller v. Schoene*.[520] Because the building almost certainly posed no such threat, the court would then need to ask whether the installation law worked to the equal advantage of Loretto, her tenants, and other cable customers. Probably not, because the installation of cable into apartments is not quite like the installation of footpaths, as in *Palmyra* or *Paxson*.[521] True, Loretto would gain access to cable for her own use and the use of her tenants, and a court would

517 *See supra* notes 69–72 and accompanying text.

518 *See supra* notes 196–206 and accompanying text.

519 *See supra* notes 216–22 and accompanying text.

520 *See* discussion *supra* Part III.F.3.

521 *See supra* notes 187–96 and accompanying text.

need to discount her just compensation for these gains.[522] Nevertheless, by any fair measure, Loretto lost more than she gained. Before the New York law took effect, cable companies usually compensated owners at the rate of five percent of gross revenues from the cable service attributable to the cable line on the owner's property.[523] Because the installation law neither prevented harm nor secured an equal advantage to all affected owners, it constituted a taking.

C. *Lucas*: Total Use Restrictions and the "Denominator" Problem

Reasonable minds may disagree over *Loretto*'s per se rule, but it has not been particularly difficult or controversial to apply. Local land-use planners now know there can be "no taking without a touching." The Supreme Court fashioned a much more controversial and problematic per se rule in *Lucas v. South Carolina Coastal Council*.[524] *Lucas* holds that a noninvasive regulation automatically triggers compensation requirements if the regulation "denies all economically beneficial or productive use of land."[525] This holding strains regulatory takings law because it creates two radically different legal rules for use restrictions.

Lucas presented a takings challenge to a total ban on coastal development. In 1986, Lucas paid $975,000 for two beachfront lots on the Isle of Palms, intending to build single-family homes on them.[526] In 1988, South Carolina enacted the Beachfront Management Act, which directed a coastal commission to establish an erosion line along the Isle and barred all new development within 20 feet of that line.[527] Because Lucas's lots were seaward of the erosion line, he could not build on them.[528] The trial court found as a matter of fact that the Act deprived Lucas of any reasonable economic use of the property and rendered it valueless.[529]

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522 On remand, the city cable-television commission used this principle to set Loretto's compensation at one dollar, an award affirmed by the New York Court of Appeals. *See* Loretto v. Teleprompter Manhattan CATV Corp., 446 N.E.2d 428 (N.Y. 1983); DUKEMINIER & KRIER, *supra* note 343, at 1178. The one-dollar award was far too low, *see infra* text accompanying note 523, but the Court of Appeals was correct to discount Loretto's just-compensation award to *some* extent.

523 *See Loretto*, 458 U.S. at 423; *see also* Richard A. Epstein, *Not Deference, but Doctrine: The Eminent Domain Clause*, 1982 SUP. CT. REV. 351, 379 ("[I]t was established that before the statute the company had as a general practice paid royalties in the amount of five percent to landlords for the privilege of laying its cables.").

524 505 U.S. 1003 (1992).

525 *Id.* at 1015.

526 *Id.* at 1006–07.

527 *See id.* at 1008–09 (citing S.C. CODE ANN. §§ 48-39-280(A)(2), -290(A) (Supp. 1988)).

528 *See id.* at 1007–08.

529 *See id.* at 1009.

The parties, amici, and Supreme Court Justices illustrated just how ambiguous *Penn Central*'s conception of property and regulation can be in practice. Justices Blackmun and Stevens argued there was no taking.[530] Their explanation accorded with the most straightforward reading of *Penn Central*. As the Beachfront Management Act made clear, beachfront conservation has a wide range of social values. Sound beaches act as storm barriers to adjacent properties, attract tourism, and protect indigenous flora and fauna.[531] Assuming, as Justices Stevens and Blackmun did, that there is no public utility in owners enjoying the free use of their property, the utility of public goods like these could easily outweigh any private utility Lucas and other owners might have in developing their lots. Justices Blackmun and Stevens were emphatic that the balance tipped in the state's favor even if Lucas and other affected owners lost all of the economic value in their lots.[532] Justices Blackmun and Stevens followed *Penn Central*'s substantive pro-government tilt to its logical conclusion.

Meanwhile, Lucas, his amici, and the Court's opinion demonstrated just how difficult it is to develop a principled rule predicting when owners should win within *Penn Central*'s framework. Because *Penn Central*'s conception of the public's utility does not include any private good comparable to the principle of equal freedom of action, the goods on the private scale are incommensurable with the goods on the public scale. It then becomes extremely difficult to explain why owners should ever win, even when one thinks an owner has been treated unfairly in a particular case. Lucas tried to make the same bad argument that Justice Holmes had tried in *Mahon* when he argued that the balance tipped heavily in favor of the Pennsylvania Coal Company because it lost all the value of its mineral rights.[533] Lucas framed his main legal challenge to the Beachfront Management Act as an all-or-nothing proposition: because the Act stripped his property of all economically viable use, he was automatically entitled to compensation. As far as he was concerned, the merits of the Act made no difference to his claim.[534] An amicus brief filed on behalf of Lucas took an even more extreme position. The American Farm Bureau's lead argument boldly claimed that regulations triggered compensation requirements whenever they diminished the value of property to *any*

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530 *See id.* at 1036 (Blackmun, J., dissenting); *id.* at 1061 (Stevens, J., dissenting).

531 *See* Beachfront Management Act, 1988 S.C. Acts 634, *quoted in* Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 896–97 (S.C. 1991), *rev'd*, 505 U.S. at 1003.

532 *See Lucas*, 505 U.S. at 1036 (Blackmun, J., dissenting); *id.* at 1064 (Stevens, J., dissenting).

533 *See supra* notes 378–80 and accompanying text.

534 *See* Petitioner's Brief on the Merits at 35–37, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (No. 91-453).

extent.[535] But as extreme as this position was, it was not unreasonable, given that *Penn Central* provides no way to reconcile private and public utilities in property.

Justice Scalia's opinion for the Court reflected these same tensions. The Justice was obviously bothered by the impact of the Act on Lucas's property, but he had trouble articulating his dissatisfaction within the framework of *Penn Central*'s doctrine and property theory. Thus, he framed the basic issue in *Lucas* in terms of a competition between public and private values.[536] Justice Scalia agreed with Justice Holmes that a regulation could go "too far" in diminishing the value of property.[537] Like Justice Holmes, however, he ran into trouble when forced to explain why the government regulation went "too far."

To solve his dilemma, Justice Scalia made the daring move of triple-counting Lucas's loss. He agreed with Lucas (and Justice Holmes in *Mahon*) that the private interest weighed heavily because all viable uses of property were lost.[538] But after counting the magnitude of Lucas's loss once on Lucas's scale, Justice Scalia then counted it *twice* on South Carolina's scale. First, when a regulation strips a property of all viable uses, Justice Scalia presumed, that fact rebuts *Penn Central*'s general presumption that the character of the government regulation is high. Total restrictions "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[539] Second, "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."[540] In other words, an owner's demoralization costs stay low when she loses a few uses of her property, but when she loses all uses, they spike as high as they would if the regulation sanctioned a trespass. Her neighbors then suffer the same sympathy demoralizations they would feel after watching a neighbor suffer a regulatory trespass.

Justice Scalia's opinion largely rejected traditional nuisance principles. The Justice showed little patience or inclination to come to grips with the natural-right roots of those nuisance principles. Indeed, he soon complained that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of

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535 *See* Brief of Amicus Curiae American Farm Bureau Federation and the South Carolina Farm Bureau Federation at 8–11, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (No. 91-453).

536 *See, e.g.*, *Lucas*, 505 U.S. at 1018 ("'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,'" (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

537 *Id.* at 1014 (quoting *Mahon*, 260 U.S. at 415).

538 *See id.* at 1017–18.

539 *Id.* at 1018.

540 *Id.* at 1017.

the beholder."[541] It was inevitable, then, that he would conclude that it "is difficult, if not impossible, to discern on an objective, value-free basis" whether a given regulation exercises the police power or the eminent-domain power.[542] Strangely, however, Justice Scalia then drew on traditional nuisance-control principles to carve out an exception to his per se exception to *Penn Central.* After *Lucas,* the state must pay compensation to an owner who loses all economically viable uses of her property, but not if the regulation enforces a limitation on property rights inherent in background state property and nuisance law.[543] He offered as an example the case in which a power company tries to build a nuclear plant on an earthquake fault.[544] Justice Scalia did not create this exception because he thinks it makes for good social policy or protects individual rights. Instead, he merely presumes that owners have no utilitarian expectations to put their properties to uses that have always been proscribed by background law.[545]

Observers disagree whether Lucas deserved compensation for the economic loss he suffered, but virtually everyone agrees that *Lucas*'s reasoning is contorted.[546] *Lucas*'s intellectual difficulties illustrate just how hard it is to lay down a series of workable principles for distinguishing between compensable and noncompensable regulations within the intellectual confines of *Mahon* and *Penn Central. Penn Central* is easy to apply as long as one does not mind if the government always wins. It was obvious that Justice Scalia had reservations about this tendency, but he was not familiar enough with relevant history or American political theory to see what was good and bad in *Mahon.* Indeed, it is doubtful that Justice Scalia *could* have become familiar enough because in his own way he is as resistant to relying on natural-law or natural-right ideas as Justice Holmes. While he professes to subscribe to natural-law theory personally, he thinks it has no place in the judicial interpretation of constitutional text. He does not stop to consider whether the natural law might inform the meanings of morally-laden terms like "private property" or "taken."[547]

These theoretical problems aside, *Lucas* and *Penn Central* also create a serious doctrinal tension. After these decisions, the most important factor in takings cases is whether the use restriction restrains all

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541 *Id.* at 1024.

542 *See id.* at 1026.

543 *See id.* at 1029–30.

544 *See id.* at 1029.

545 *See id.* at 1030.

546 *See, e.g.,* Symposium, *Lucas v. South Carolina Coastal Council,* 45 STAN. L. REV. 1369 (1993).

547 *Compare* Antonin Scalia, The Common Christian Good, Address at the Gregorian University (May 2, 1996) at 11 ("I love the natural law.") *with id.* at 13 ("To say, 'Ah, but it is contrary to the natural law' is simply to say that you set yourself above the democratic state and presume to decide what is good and bad in place of the majority of the people.").

or only some of the affected property owner's use rights. This distinction invites owners and local governments to play strategic games. The owners' game is known as "conceptual severance."[548] Owners have an incentive to turn "partial" regulations into "total" ones by "severing" their parcels into affected and unaffected estates. When Pennsylvania passes a law like the Kohler Act, for example, the coal company is in a better position to mount a takings claim if it owns mineral rights and conveys away the surface rights.[549] Governments, on the other hand, have an incentive to play the "denominator" game.[550] Rather than let a regulation "totally" wipe out the use of a lot, the government can avoid *Lucas*'s per se coverage by applying regulations piecemeal.

The earliest state cases foresaw these problems with *Lucas*'s "total value" argument. In *Coates*, one of the early New York cemetery cases, the Trinity Church argued that even if its cemetery created a health nuisance, it still deserved compensation because the anti-cemetery ordinance "work[ed] a total destruction of the right, and fails in the character of a mere regulation."[551] (Because the church's land grant specified that the plot could be used *only* as a cemetery,[552] the anti-cemetery ordinance rendered the plot even less useful to the church than Lucas's beachfront was to him.) The court brushed aside this argument: "The absolute ownership must reside somewhere; and it should not be in the power of the owner so to cut up and sub-divide the uses of his property, as to evade the salutary application of police powers."[553]

Under the nineteenth-century approach, then, the proper way to resolve *Lucas* would be to inquire not how many rights in his fee simple Lucas lost, but why South Carolina wanted to deprive him of them. On this approach, it makes no difference whether Lucas lost some or all of the development rights inherent on his beachfront property. In either case, the Act would trigger a threshold takings claim.

The important question would be whether the restrictions on beachfront development were bona fide exercises of the police power. One provision of the Act, not challenged in the *Lucas* litigation,

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548 *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

549 *Compare* Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (noting that "the extent of the taking is great"), *with* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493–502 (1987) (distinguishing *Mahon*, even though both cases reviewed challenges to coal-support laws, on the ground that the use rights lost in *DeBenedictis* were a small percentage of the total coal owned by the companies).

550 *See* Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663 (1996).

551 Coates v. City of New York, 7 Cow. 585, 605 (N.Y. Sup. Ct. 1827).

552 *Id.* at 604–05.

553 *Id.* at 605.

barred owners from "armoring" their parcels by building erosion-control walls along the shoreline.[554] That provision surely fell within the police power for the same reasons as the river-bank erosion law challenged in *Tewskbury*[555] or the boundary law challenged in *Alger*.[556] Both protected the interest shared by the public and private beachowners to maintain the shoreline as a storm barrier. However, the section of the Act under challenge went further than the anti-armoring law; it barred all new construction between the shore and designated erosion setback lines.[557] Following nineteenth-century cases like *Tewksbury* and *Stoughton*, the state needed to prove that home-building presented a real threat to neighbors' shorelines or homes, or to the state's interests in the ocean, and that a total ban on home-building was a reasonable and necessary response to these threats.[558]

These questions were not addressed in *Lucas*, because Lucas made his argument in all-or-nothing terms. In some cases, these questions might force triers of fact to draw close lines. But in many others, it would be fairly easy to say that laws like the challenged section of the Beachfront Management Act are excessive. In any case, the nineteenth-century approach does not create the discontinuities and perverse incentives created by the Supreme Court's current approach. And, even with some gray areas, the lines drawn by the nineteenth-century approach are clear enough to suggest that Justice Scalia was fundamentally wrong when he complained that it is "difficult, if not impossible, to discern" the line between bona fide regulations and regulatory takings "on an objective, value-free basis."[559]

D. *Palazzolo*: Complications with Expectations

Lucas points to another set of problems with the *Penn Central* approach: "expectations" theory may not settle hard property and takings questions. *Penn Central*, *Lucas*, and *Loretto* all ground constitutional property rights in "investment-backed expectations."[560] There are serious theoretical limits to this approach. Expectations theory seems attractive because, in Justice Scalia's words, it sounds "objective" and "value-free."[561] In reality, however, expectations-based theory cannot settle hard cases without smuggling in normative as-

554 *See* S.C. CODE ANN. § 48-39-10, -250(5) (Law. Co-op. 1987 & Cum. Supp. 2002).
555 *See supra* note 243 and accompanying text.
556 *See supra* notes 248–72 and accompanying text.
557 *See* S.C. CODE ANN. § 48-39-10, -280(A) (Law. Co-op. 1987 & Cum. Supp. 2002).
558 *See* discussion *supra* Part II.D–E.
559 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026 (1992).
560 *See id.* at 1015–19; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
561 *Lucas*, 505 U.S. at 1026.

sumptions about when expectations are "reasonable" enough to deserve legal protection.

Lucas hinted at this problem. On the surface, the *Lucas* categorical exception sounds objective and value-free: the owner wins just compensation whenever a court makes the value-neutral determination that she has lost all economically viable uses of her property.[562] But on a closer reading, Justice Scalia was not prepared to go so far. He was not prepared to say, for instance, that a company could claim compensation for losing the right to build a nuclear power plant over a fault line even if the plant was the only viable use of the land.[563] To avoid that consequence, Justice Scalia drew on nuisance law to limit the reach of his total-diminution rule. But when Justice Scalia made this limitation, he embraced the substantive commitments of nuisance common law and exposed himself to the Realist criticism that he was legislating from the bench while pretending he was not.[564] Justice Scalia fared no better under Justice Blackmun's criticisms on this score than the Formalists did against the Realists a century ago.[565]

Lucas is not unique. Expectations theory complicates what ought to be simple and routine rulings in takings cases because it tries to make important value determinations seem wholly value-neutral. The most recent proof of this tendency came in the 2001 decision in *Palazzolo v. Rhode Island*.[566] In the 1950s, Palazzolo organized a small corporation to develop twenty acres of salt-water marsh flats in a small Rhode Island beach town.[567] State agencies denied three applications for development by the corporation in the 1960s.[568] In 1971, the Rhode Island Coastal Council promulgated regulations that designated salt marshes like the company's as "coastal wetlands" and thus greatly limited development.[569] In 1978, Palazzolo assumed ownership of the company's property when another state agency revoked the company's corporate charter.[570] After the Council denied several

562 Even this determination is not entirely value-free. There are always bound to be questions at the margins about whether an owner has *any* valuable use of a property. For instance, Lucas could have "used" his property by selling it off to a neighbor who could have used it to keep a pretty vista for her already-built home. One might answer "no," because sale is not the same as use, but this answer makes a value judgment about what constitutes the "use" of property.

563 *See Lucas*, 505 U.S. at 1029–30.

564 *See* Seidman & Tushnet, *supra* note 468, at 32–33 (describing realists' claims that politics of logic explained formalists' opposition to Progressive Era legal reforms).

565 *See Lucas*, 505 U.S. at 1054–55 (Blackmun, J., dissenting); *see* Symposium, *supra* note 546.

566 533 U.S. 606 (2001).

567 *Id.* at 613–14.

568 *See id.* at 614.

569 *Id.*

570 *See id.*

other proposals to fill and develop the marshes, Palazzolo brought an inverse condemnation proceeding.[571]

Palazzolo percolated to the Supreme Court primarily to settle whether and in what circumstances a subsequent owner may acquire the takings claims of previous owners. If Palazzolo had an "expectation" in using the property in the same manner that his development company had first intended to use it, the 1971 coastal-wetlands designation upset his expectations, and he had a legitimate takings claim. But if he took title in 1978 as a brand new buyer, under *Lucas* the 1971 designation would have become part of the background law of property limiting his expectations.[572] From that perspective, he bought nothing more than a lottery ticket on his company's takings claim, and there would be no reason to encourage such speculation.

If takings law cannot resolve this problem clearly and unequivocally, it will stymie title transfers and land sales routinely. The problem, however, is deceptively difficult to answer within the premises of expectations theory. This is not a problem that any court could answer by looking to an "objective" and "value-free" fact; the law needs a thoughtful, substantive definition of legitimate expectations and a clear rule. The Supreme Court certainly came up with no general answer. Five Justices were convinced that Rhode Island could not argue that Palazzolo lost his claim simply by virtue of the fact that he "purchased or took title with notice of the limitation" imposed by the wetlands designation,[573] but they were not sure why. Without much elaboration, Justice Kennedy's opinion for the Court stated that some prospective regulations are accepted "as reasonable by all concerned," while others "are unreasonable and do not become less so through passage of time or title."[574] In concurring opinions, Justices O'Connor and Scalia recharacterized the Court's opinion to match their own views. Justice O'Connor thought that the transfer of title ought to be balanced as one of several factors relating to the owner's reasonable expectations under the *Penn Central* inquiry; Justice Scalia thought the transfer of title made no difference at all in the *Penn Central* analysis.[575]

The nineteenth-century approach would easily have avoided this problem. Doctrinally, it conceived of property in terms of rights, not expectations or lost value. Theoretically, this approach would have

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571 *See id.* at 614–15.

572 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) (holding that a state "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with").

573 *See Palazzolo*, 533 U.S. at 626–27.

574 *See id.* at 627.

575 *See id.* at 632–35 (O'Connor, J., concurring); *id.* at 636–38 (Scalia, J., concurring).

deemed it reasonable for an owner to expect to take title to property with the right to use it however he wished, consistent with the rights of neighbors and the interests of the public.[576] This approach makes easy work of the title-transfer problem, because it separates purchase price and expectations from the takings inquiry. The owners would pass on takings claims with the property just as owners pass on control rights, use rights, encumbrances, adverse-possession problems, and all the other rights and liabilities that go with property in the private law. The nineteenth-century approach would confirm that Justice Scalia's position was right: Palazzolo could claim an interest in challenging the merits of the wetlands regulations on the very same terms as his predecessor in interest. To be sure, Palazzolo would not win just compensation simply because he had a cause of action, but Rhode Island would have to defend the enforcement of its wetlands regulation on the merits.

E. *Tahoe-Sierra*, or Conceptual Severance Run Amok

1. *A Total Restriction for a Temporary Period*

Palazzolo shows how expectations theory can confuse some of the most basic procedural points in regulatory takings law, but the main substantive issue continues to be the tension between *Penn Central*'s balancing test and *Lucas*'s per se rule. This tension was resolved for the most part in the 2002 decision *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[577] *Tahoe-Sierra* confirms *Penn Central*'s status as the dominant case in regulatory takings law and relegates *Lucas* to the status of a narrow exception.[578] But the decision also shows how the Court's utilitarian property theory is distorting the substantive issues raised in federal takings law.

The regulations at issue in *Tahoe-Sierra* temporarily barred all development around Lake Tahoe to protect the lake's natural blue color and clarity.[579] Lake Tahoe attracts tourism, hiking, skiing, and also residential development.[580] As landowners have developed their properties within the basin created by the hills and mountains next to the lake, the owners have stripped away the soil along the basin and replaced it with asphalt and concrete.[581] Rain formerly absorbed by basin soil now runs down the asphalt and concrete into the lake.[582] Because that extra rain increases soil erosion, it funnels into the lake

576 *See* discussion *supra* Part II.
577 122 S. Ct. 1465 (2002).
578 *See id.* at 1485–87.
579 *See id.* at 1470–71.
580 *See id.* at 1471.
581 *See id.*
582 *See id.*

nutrients that feed algae and spoil the lake's clarity.[583] California and Nevada created a bi-state planning agency and instructed it to set air-, water-, and soil-quality standards to abate the pollution.[584] The agency issued a series of land-use moratoria halting development around the Tahoe basin while it determined how to execute its mandate.[585]

These moratoria tested the limits of *Penn Central* and *Lucas* because they "totally" restricted development around Tahoe for a "temporary" period. They were "total" because they restricted all development around the lake while they were in effect.[586] They were "temporary" because they lasted somewhere between thirty-two months and six years. The circuit court and a majority of the Supreme Court held that the moratoria under review lasted thirty-two months; Chief Justice Rehnquist, writing for Justices Scalia and Thomas, read the trial court's record to show that the moratoria at issue lasted more than six years.[587] If *Lucas* controlled, the affected owners suffered a "total" taking of all viable uses of leasehold interests in their lands, and they would win compensation. If *Penn Central* controlled, the use rights the owners lost would have to be balanced against the reversionary rights they retained and the social benefits of the moratoria, and the owners would not win compensation.[588]

2. *Land-Use Moratoria Under the Natural-Right Approach*

Under the natural-right approach, this total-temporary classification problem would be a sideshow. Instead, "private property" in land would include the right to carve out a leasehold interest in the land, and also the right to use and develop the land during the lease. Because the natural-right approach focuses on the rights lost, not on the rights retained or the entirety of the estate, it avoids *Tahoe-Sierra*'s classification problems. The case would not turn on technical distinctions between fees simple and leaseholds. The real issue would be substantive—whether the moratoria, in principle, regulated or invaded the Tahoe basin owners' property rights.

This substantive issue would break down into two separate questions. First, many moratoria laws, *ex ante*, redound to the equal and mutual advantage of all residents. As the Supreme Court noted, land-use moratoria and permit delays "are used widely among land-use

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583 *See id.*

584 *See id.*

585 *See id.* at 1472–73.

586 *See id.* at 1475 (citing Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1245 (D. Nev. 1999)).

587 *Compare id.* at 1474 & n.8 (noting the moratoria lasted thirty-two months), *with id.* at 1490–91 (Rehnquist, C.J., dissenting) (calculating the taking as lasting six years).

588 *See id.* at 1475–76 (citing *Tahoe-Sierra*, 34 F. Supp. 2d at 1240–41, 1250–51).

planners to preserve the status quo while formulating a more permanent development strategy."[589] As long as such restrictions apply only for short time periods, no single set of owners can know in advance whether the restrictions will protect or interfere with their land-use goals. All owners will probably gain from forcing development—theirs or their neighbors'—to proceed through the zoning process. On the other hand, the longer a moratorium runs, the more substantive effect it has. Long-term moratoria can be used to the same effect as the zoning scheme in *Euclid*—to protect the interests of first-in-time owners, slow-growth advocates, and preservationists, at the expense of developers, new-home buyers, and people who need apartments or other affordable housing.[590]

Natural-right theory cannot generate any hard-and-fast time limit to distinguish between these two extremes. It can, however, focus the takings inquiry on the proper substantive questions. A two-plus-year moratorium likely did not secure an average reciprocity of advantage to all affected owners around Lake Tahoe. As Chief Justice Rehnquist's dissent noted, the first moratorium issued by the Tahoe planning agency lasted only ninety days, fairly typical for a temporary moratorium.[591] Many other states limit the maximum length of moratoria to anywhere from six months to two years, and California usually limits moratoria to approximately two years total.[592] A strong substantive argument could be made that the moratoria ceased securing an average reciprocity of advantage after one year.[593] Even assuming the Tahoe planning agency's land-use practices were consistent with most states' approaches, the moratoria were in force for more than two years, thereby exceeding the length allowable as a reciprocity-of-advantage regulation.

The other possibility to consider is whether the moratoria were part of a plan to regulate a nuisance against a public commons. Lake Tahoe is a public water, and California and Nevada could probably claim a commons interest specifically in the lake's natural clarity. This argument tests the legal and policy limits behind background public-

589 *See id.* at 1487.

590 *See supra* notes 429–34 and accompanying text.

591 *See Tahoe-Sierra*, 122 S. Ct. at 1496 (Rehnquist, C.J., dissenting).

592 *See* CAL. GOV'T CODE § 65858(a) (West Supp. 2003); *see also* COLO. REV. STAT. § 30-28-121 (2002) (six months); MINN. STAT. ANN. § 462.355(4) (West 2001) (two and a half years); N.J. STAT. ANN. § 40:55D-0(b) (West 1991) (six months); *Tahoe-Sierra*, 122 S. Ct. at 1495–96 (discussing state-imposed maximum time limits on moratoria).

593 This argument was raised in an amicus brief, and Justice Stevens's opinion for the Court went to considerable trouble to refute it. *See Tahoe-Sierra*, 122 S. Ct. at 1484 & n.28 (citing Brief of Amicus Curiae Institute for Justice at 30, Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002) (No. 99-1167)); *id.* at 1486–88 (refuting this proposal). Perhaps some of the swing votes on the Court considered this argument seriously before joining Justice Stevens' opinion.

commons and public-nuisance principles. The alleged "nuisance" does not occur because owners discharge any substance directly into the lake; it occurs because owners reroute rain and soil erosion into the lake after they pave their own properties.[594] This conduct might test the limits of the "act" and "invasion" ideas inherent in the idea of a nuisance, like the cedar rust fungus in *Miller v. Schoene*.[595] On the other hand, the owners around the lake are all in the same position, unlike the pasture, home, and apple-grove owners in *Miller*. It would not be unreasonable for the law to presume that these owners should submit to nuisance liability for the pollution caused by runoff. As a group, they stand to gain more than anyone else from maintaining Lake Tahoe in its pristine state. Thus, it is fair to say that the moratoria satisfy the "ends" element of intermediate scrutiny, because owners' development really threatens to harm the lake's clarity.

Even so, the moratoria would still fail intermediate scrutiny because they were not reasonable and necessary means to the states' proper ends.[596] The moratoria stopped owners who had not yet built from making the lake dirtier, but they did nothing to abate the very same pollution by owners who had already built up their properties. They singled out some owners at the expense of others, much like the law in *Jacobs*, which singled out small cigar shops in Brooklyn and New York tenements while leaving shops alone everywhere else.[597] Because any paving facilitates nutrient erosion into the lake, every owner of developed land around the Tahoe basin inflicts a new nuisance on the lake whenever it rains. The moratoria did nothing to stop such continuing pollution.[598] To be sure, the planning agency would need to find some other tool to reach the pollution caused by existing homeowners, because moratoria could not undo past erosion. Nonetheless, the planning agency could pursue some other regulatory approach, like a compensatory tax or a rule requiring better drainage. In natural-right terms, the moratoria made some of the nuisance-makers bear all of the burden of cleaning up the nuisance.

As one can see, the natural-right approach confronts some conceptually difficult problems. But this approach does honestly assess the merits of the land-use moratoria. At the end of the day, it focuses the close questions on the merits and generates a clear answer to the question whether those moratoria are exercises of the police power or the power of eminent domain. The same cannot be said about *Lucas*, *Penn Central*, or the different opinions in *Tahoe-Sierra*.

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594 *See supra* notes 580–84 and accompanying text.

595 *See* discussion *supra* Part III.F.

596 *See supra* notes 236–42 and accompanying text.

597 *See supra* notes 133–49 and accompanying text.

598 *See* Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the* Lake Tahoe *Case*, SH025 A.L.I.-A.B.A. 247, 253 (2002), *available at* WL SH025 ALI-ABA 247.

3. *Faux Formalism*

The Court's opinion began by relying on several controversial formalist arguments to disparage the plaintiffs' claims. Justice Stevens began his legal analysis for the Court by purporting to interpret the Takings Clause's text. While the Fifth Amendment's "plain language," Justice Stevens asserted, "requires the payment of compensation whenever the government acquires private property for a public purpose, ... the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.[599]

This plain-language interpretation begs too many questions to be persuasive. It is not sufficient to focus, as Justice Stevens does, on the fact that the word "regulatory" appears nowhere in the Takings Clause. Individual-rights guarantees are not read so literally. Imagine what regulators could do to freedom of speech if courts took their cue from the fact that the Free Speech Clause does not expressly extend to "regulations."[600] In the Takings Clause, the term "private property" may be read to refer to *all* of the traditional rights associated with property, like control, use, and disposition. If so, then the verb "taken" is easily supple enough to protect owners against the deprivation of any of those rights, and it is also supple enough to incorporate some showing of cause excusing or justifying the government for having restrained such rights. The same distinction between "invasion" and "regulation" runs through the Free Speech Clause, which bars Congress from enacting laws "abridging the freedom of speech;"[601] the Contracts Clause, which bars states from enacting laws "impairing the Obligation of Contracts;"[602] and the Second Amendment, which prevents the right to bear arms from being "infringed."[603]

Indeed, the Second Amendment illustrates more clearly than any other constitutional clause just how "regulation" complements and contrasts with the "invasion" of a constitutional right. Although the Amendment guarantees that the right to bear arms may not be "infringed," it anticipates that the militia will be "well regulated,"[604] specifically by laws necessary and proper "[t]o provide for organizing, arming, and disciplining, the Militia" under Article I, section 8.[605] The term "infringe" thus both presupposes and implicitly excludes "regulations" that encourage the orderly and sensible exercise of the

599 Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1478 (2002).

600 *See* U.S. CONST. amend. I.

601 *Id.*

602 U.S. CONST. art. 1, § 10, cl. 1.

603 U.S. CONST. amend. II.

604 *Id.*

605 U.S. CONST. art. I, § 8, cl. 16.

right to bear arms.[606] Whether or not one can say that the plain meaning of the Constitution requires a judge to interpret the Takings Clause in similar fashion, it certainly permits and probably even invites such an interpretation.

Justice Stevens continued the Court's opinion with an equally controversial originalist argument. He challenged *Lucas* and other recent cases by questioning the pedigree of the regulatory takings enterprise. While the Court's "jurisprudence involving condemnations and physical takings is as old as the Republic," he argued, its "regulatory takings jurisprudence . . . is of more recent vintage."[607] This statement is true but irrelevant, because federal courts had extremely few opportunities to hear regulatory takings cases until the early twentieth century.[608] And if this statement were meant to be a claim about the history of "regulatory takings" law generally, as should be clear by now, the statement would be flatly wrong. Regulatory takings principles have a respectable pedigree in state court opinions going back early into the nineteenth century. There may be substantive reasons to reject those state courts' approach to regulatory takings cases, but it is not possible to dismiss their approach out of hand by suggesting that *Mahon* was the first genuine regulatory takings decision.

4. *All-or-Nothing Doctrinal Pressures*

When Justice Stevens turned to substance, he discredited the plaintiffs' claims by framing the question as an all-or-nothing issue: The Court could not compensate the affected Tahoe owners under *Lucas* without making local governments pay just compensation for every moratorium—including "numerous normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like."[609] But Justice Stevens found himself forced upon this all-or-nothing choice only because *Penn Central* and *Lucas* make it virtually impossible to make principled distinctions between garden-variety, short-term moratoria and the moratoria under challenge in *Tahoe-Sierra*. Doctrinally, *Penn Central* cannot make such distinctions, because it holds that regulatory takings determinations are ad hoc and fact-specific.[610] Substantively, *Penn Central* compresses the difference between long- and short-term moratoria by instructing courts to defer a great deal to any claim that a government regulation has a good char-

606 For further elaboration on this analogy to the Second Amendment, see Barnett, *supra* note 11, at 141.

607 Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1478 (2002).

608 *See* discussion *supra* notes 276–82 and accompanying text.

609 *Tahoe-Sierra*, 122 S. Ct. at 1485 (internal quotation marks omitted).

610 *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

acter.[611] On the other hand, because *Lucas* held that distinguishing between "harm-preventing" and "benefit-conferring" regulations is only "in the eye of the beholder,"[612] *Lucas*'s per se rule also restricts the ability to distinguish between long- and short-term regulations on the merits.[613]

In short, if Justice Stevens faced an all-or-nothing choice in *Tahoe-Sierra*, that choice was forced upon him not by the facts but by the Court's doctrine and property theory. The Court's law and policy made it easy for Justice Stevens to make it appear as if the Court could only remedy any injustice that might have been done to these owners by creating serious and systematic problems throughout local land-use law.[614] This appearance of inevitability also helped Justice Stevens make it seem as if the Court had no choice but to confine *Lucas* to its facts. Justice Stevens thus announced that *Lucas* applies only when a land-use regulation strips an owner of all economically viable uses in an "unconditional and permanent" way.[615]

The same conceptual problems came out even more clearly in the *Tahoe-Sierra* dissents, by Chief Justice Rehnquist and Justice Thomas. It should be no surprise that Justice Stevens emphasized the flexible and deferential features of *Penn Central* and the rigid and categorical features of *Lucas*. He subscribes to *Penn Central*'s substantive commitments, and he dissented in *Lucas*.[616] In *Tahoe-Sierra*, he was obviously interested in creating the appearance that there was no other realistic option besides construing *Lucas* as a narrow exception to *Penn Central*. Chief Justice Rehnquist and Justices Scalia and Thomas, by contrast, were all quite interested in using *Lucas*'s per se rule to reorient takings law. But they could not formulate cogent substantive responses to Justice Stevens's basic policy argument.

In their dissents, Chief Justice Rehnquist and Justice Thomas focused more on the facts than they did on takings policy. *Tahoe-Sierra* did present them with a useful fact. Even by the majority's grudging calculation, the *Tahoe-Sierra* plaintiffs lost "temporary" development rights for thirty-two months.[617] A decade earlier in *Lucas*, by contrast, Lucas lost "permanent" development rights, but he lost them for a

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611 *See id.* at 125.

612 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1024 (1992).

613 *See* discussion *supra* Part IV.C.

614 *See, e.g.*, *Tahoe-Sierra*, 122 S. Ct. at 1485 ("A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking.").

615 *Id.* at 1483 (quoting *Lucas*, 505 U.S. at 1012).

616 *See, e.g.*, *Lucas*, 505 U.S. at 1071 (Stevens, J., dissenting) (endorsing *Penn Central*); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 473–506 (1987) (opinion for the Court by Justice Stevens applying *Penn Central*'s approach to scale back the impact of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)).

617 *See Tahoe-Sierra*, 122 S. Ct. at 1474.

shorter time period than the *Tahoe-Sierra* plaintiffs. The South Carolina Beachfront Management Act barred Lucas from any construction on his beachfront in perpetuity,[618] but the South Carolina legislature amended the Act in 1990, only two years after its enactment, to allow owners to apply for special construction permits in designated coastal zones.[619] As Chief Justice Rehnquist pointed out in dissent, to deny the petitioners coverage under *Lucas*'s per se rule for total restrictions would make "the takings question turn[ ] entirely on the initial label given a regulation, a label that is often without much meaning."[620]

Strictly at the level of the facts, the Chief Justice seemed right. It seems unfair to say that the *Tahoe-Sierra* plaintiffs did not win compensation only because of the technicality that they lost all use rights in a lesser land estate than a fee simple. Still, one clever contrast does not make for a sound takings theory. To have any chance of expanding *Lucas*, the dissenters had to develop their intuition about *Lucas*'s and *Tahoe-Sierra*'s results into a robust theory explaining why regulatory takings law makes a fundamental mistake when it emphasizes, as *Penn Central* does, that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[621] The dissenters had to confront and refute the serious practical objection raised by Justice Stevens: If any moratorium inflicts a taking, land-use planners will be forced "to rush through the planning process or to abandon [moratoria] altogether," and "landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted."[622]

In other words, it takes a theory to beat a theory, and none of the dissenters had one. Chief Justice Rehnquist did not confront Justice Stevens on the merits; he only argued that the Court would not raise the problems Justice Stevens was worrying about if *Lucas*'s per se rule were extended to long moratoria. Relying on *Lucas*'s background-law exception, the Chief Justice argued that all states carve out background exceptions to property rights to make room for short-term moratoria on development, lasting no more than two years.[623] This was a technical and legalistic response to an important substantive problem. The Chief Justice never explained why these background reservations on property rights made for sound policy. Nor did he explain why, if land use conditions have changed drastically over the

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618 *See Lucas*, 505 U.S. at 1008–09 (citing S.C. CODE ANN. § 48-39-290(A) (Supp. 1988)).

619 *See id.* at 1010–11 (citing S.C. CODE ANN. § 48-39-290(D)(1) (Supp. 1991)).

620 *See Tahoe-Sierra*, 122 S. Ct. at 1492 (Rehnquist, C.J., dissenting).

621 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 (1978).

622 *Tahoe-Sierra*, 122 S. Ct. at 1488.

623 *See id.* at 1494–96 (Rehnquist, C.J., dissenting).

past century, local land use planners should not be free to try a different legal approach.

To make such substantive arguments, the Chief Justice would have needed to recover the crucial feature that distinguishes the natural-right-based approach to regulatory takings from the *Penn Central* and *Lucas* approaches. *Penn Central* and *Lucas* place almost no weight on value judgments about a government regulation's substantive merit; the natural-right approach places almost all the weight on such judgments.

Because the natural-right approach connects doctrine to substantive merits, it cuts through Justice Stevens's all-or-nothing arguments. Justice Stevens worried that the Court could not compensate the plaintiffs in *Tahoe-Sierra* without forcing local governments to pay compensation whenever they cordon off crime scenes, close infested restaurants, or bar access to fire-damaged buildings.[624] Not so. Under the natural-right approach, the state can regulate a harm-prevention limitation inherent in the free use of property as long as the regulation is consistent with the harm and the logical means for preventing it. Crime- and building-access orders usually follow this logic; the moratoria at issue in *Tahoe-Sierra* did so too selectively to deserve treatment as noncompensable "regulations." Separately, Justice Stevens worried that the *Tahoe-Sierra* plaintiffs could not win just compensation without calling into question most permit delays and development moratoria.[625] Again, not so. Under the natural-right approach, permit delays and development moratoria are justifiable as long as the state can make a plausible showing that the restrictions caused by these delays even out over the long run. Three- and six-month delays can be justified on this basis, perhaps even twelve- and eighteen-month moratoria as well, but the delays in *Tahoe-Sierra* probably went past the breaking point.

Because the natural-right approach connects doctrine to substance, it focuses the legal arguments on substantive issues. Conversely, because *Lucas* purports to be value free, neither Chief Justice Rehnquist nor Justice Thomas managed to connect law to policy in a comprehensive way. This deficiency was especially striking because the substantive rejoinder to the Court's opinion was fairly simple. No one needed to question California's and Nevada's power to clean up Lake Tahoe, but it was fair to ask whether the states' planning agency allocated the cleanup costs in a proportion roughly equal to the extent to which owners were making the lake dirty. As soon as the planning agency broke from this principle of equal and free use of property, its cleanup scheme turned into a tool for exclusion. Judge

624 *See id.* at 1485.

625 *See id.*

Westenhaver anticipated all the problems eighty years ago in his opinion in *Euclid*.[626] Because the moratoria lasted so long, they gave owners who had already built ski resorts, casinos, and posh homes a powerful regulatory lever with which to exclude new owners, new competition, new development, and new classes of residents and to preserve the enjoyment of Lake Tahoe for themselves.

CONCLUSION

In the first Lincoln-Douglas debate, Abraham Lincoln boldly claimed that "public sentiment is everything."[627] "[H]e who moulds public sentiment," Lincoln explained, "goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed."[628]

Whether or not Lincoln was right as a general matter, American regulatory takings law certainly proves his point. For more than a century after the Founding, natural-right theory molded the sentiments of the American state court judges who pronounced decisions in what we now know as regulatory takings cases. In the early twentieth century, natural-right property theory fell out of fashion in the law and academy, and utilitarian property theory took its place. Because the U.S. Supreme Court did not start hearing regulatory takings cases until then, its earliest cases dramatize the tensions and differences between these two competing approaches to property regulation. By the 1970s, when the Court established *Penn Central* as the leading contemporary regulatory takings case, utilitarian theory had been in ascendancy for so long that the nineteenth-century state cases might as well have been written in a foreign language. To paraphrase Lincoln, legal sentiment had been molded so thoroughly in utilitarian casts for so long that no one on the bench appreciated the spirit unifying nineteenth-century regulatory takings law.

That loss of perspective has affected regulatory takings doctrine profoundly. At least since *Penn Central*, regulatory takings law has had a desperate tone. The Supreme Court admits that its takings doctrines operate without unifying standards or principles, but it doubts the law could do better under any other approach. The Court is wrong. The conceptual problems follow from the type of utilitarian property theory the Court applies, but the Court cannot see this connection because it has no way to step outside of the intellectual horizons shaping its law. Within the Court's horizons, *Pennsylvania Coal*

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626 *See* discussion *supra* Part III.E.

627 I ABRAHAM LINCOLN, *First Lincoln-Douglas Debate, Ottawa, Illinois*, *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1832–1858, at 495, 524–25 (Don E. Fehrenbacher ed., 1989).

628 *Id.* at 525.

Co. v. Mahon is the foundational regulatory takings case. But within *Mahon*'s horizons, *Penn Central* makes more sense. To appreciate the possibilities and limitations of takings law, one must step out of *Mahon*'s horizons and look at the development of the law from the outside.

The nineteenth-century state cases provide that perspective. The natural-right theory they apply articulates principled reasons why the state must compensate owners when it forces them to bear more of the burden for a new public project than their neighbors. That theory is supple enough to apply to many different sticks in the proverbial bundle of rights—including use rights. Unlike *Mahon*'s and *Penn Central*'s expectations theory, the natural-right approach generates a series of meaningful distinctions between "property" in use rights and "injurious uses of property." Unlike *Mahon*'s and *Penn Central*'s utility balancing, the natural-right approach generates two principled definitions of the "regulation" of property. One restores to affected citizens the equal share of rights taken from them by injurious uses of property; once this body of law has done its job, the other forcibly rearranges legitimate uses of property to benefit the affected owners like a group of equal partners. If a law discharges neither of these functions, it strips an owner of more use rights than he should have to contribute for a public project, it "extracts a benefit" from the owner, and it inflicts a regulatory taking.

Not only does this approach highlight the doctrinal problems in federal law, it also suggests a simple solution. Ultimately, *Mahon*'s and *Penn Central*'s interest balancing breaks down because it balances apples and oranges. One scale weighs individual interests unrelated to any wider social good; the other weighs a conception of social efficiency that takes little or no account of how much society depends on owners to exercise free initiative. Modify *Penn Central*'s balancing test to take account of the utility society enjoys when owners get as much free action over their property as is consistent with the neighbors' needs, and this commensurability problem disappears. The law can then develop the doctrinal standards it lacks now—intermediate scrutiny, harm prevention, and equal advantage.

To be sure, coherent and principled doctrinal standards are not an end in themselves. This Article has not shown that the natural-right approach represents a better substantive theory of property regulation than that of *Penn Central*. But the earlier approach does expose and test many of the assumptions we hold about *Penn Central* and its legacy. Many of our assumptions about ad hoc principles are a crutch. They help us suppress whatever doubts we may harbor about the merits of modern land-use laws. If we choose to keep *Penn Central*, we should have the integrity to accept that we are making takings law

less clear than it could be, and the probity to admit that we keep the law the way it is now because we prefer the utilitarian theory *Penn Central* endorses and the substantive political results it delivers.