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Ten Arguments for the Abolition of Regulatory Takings Doctrine

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Ten Arguments for the Abolition of the Regulatory Takings Doctrine

J. Peter Byrne*

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INTRODUCTION

The Takings Clause of the Fifth Amendment prohibits the federal government from "taking" property for a public purpose without paying just compensation. The Supreme Court has come to interpret the clause to require that the government compensate real property owners in some unclear class of cases when regulation of the property has resulted in severe economic losses. The proposition that regulation alone, without appropriation, occupation, or use by the government, can work a taking is known as the "regulatory takings" doctrine.

The regulatory takings doctrine is a pernicious mess. It should be dispatched to whatever afterlife sustains the spirits of such deceased doctrines as constitutional review of ratemaking and measurement of "direct effects on commerce." The current rules are a hodgepodge that the Court has been unable to explain. But worse, the doctrine protects economic interests in the development of land against otherwise valid enactments of the democratic process, thereby inhibiting experimentation with new environmental initiatives. The effect the

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1. U.S. CONST. amend. V.
2. See infra parts I-III.
4. At one time the Court reviewed regulated rates under the Due Process Clause to ensure that public utilities received a fair return on a fair present value of their property. See, e.g., Smith v. Ames, 169 U.S. 466, 522-25 (1898). At the same time, the Court sought to distinguish between valid and invalid congressional exercises of the commerce power by ascertaining whether the regulated activity had a "direct" or "indirect" effect on interstate commerce. See, e.g., United States v. E.C. Knight Co., 156 U.S. 1, 15-16 (1895); Schechter Poultry Corp. v. United States, 295 U.S. 495, 546-48 (1935). Both efforts were eventually abandoned as doctrinally and politically untenable. See Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36-41 (1937).
doctrine has of frustrating democratic attempts to protect the environment is reminiscent of the way judges once used the notion of substantive due process to frustrate legislative attempts to regulate the hours and conditions of work.\(^6\)

Most authors view takings as including the entire field of reduction of economic value due to government action. My focus in this article is narrower: I consider only regulatory actions and accept the constitutional propriety of requiring compensation for most appropriations and permanent physical invasions.\(^7\) I do not directly address the abstract issue of when justice requires compensation for regulatory losses, although at the end of the article I do argue that this question is essentially political.

I will present ten arguments why the Supreme Court should overrule *Pennsylvania Coal Co. v. Mahon*\(^8\) and its progeny, the line of cases that established the regulatory takings doctrine. My ten arguments are heterogeneous and grounded in different traditions of constitutional interpretation. Nonetheless, the article proceeds logically: each argument builds on the previous one. In an addendum, I provide an example of a compensation statute designed to crystalize landowner expectations to promote better and less wasteful land use control.

I

NEITHER THE TEXT, THE INTENTION OF THE FRAMERS, NOR THE FIRST ONE HUNDRED THIRTY YEARS OF JUDICIAL INTERPRETATION SUPPORT APPLICATION OF THE TAKINGS CLAUSE TO REGULATION OF LAND USE

Neither the text of the Fifth Amendment nor the circumstances of its adoption suggests that its proponents had any expectation that the Takings Clause would provide an enforceable limitation on government regulation of land use. The Fifth Amendment provides that: "Private property [shall not] be taken for public use, without just compensation."\(^9\) The term "taken" indicates a prohibited governmental

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6. See *Lochner v. New York*, 198 U.S. 45, 64-65 (1905) (finding that the 60-hour work week imposed upon the bakery violates the right of private parties to contract); *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2327 (1994) (Stevens, J., dissenting) ("The so-called 'regulatory takings' doctrine . . . has obvious kinship with the line of substantive due process cases that *Lochner* exemplified.").

7. I also sidestep issues raised by conditional appropriations or exactions. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan*, 114 S. Ct. at 2309-31. These raise distinct and subtle problems: they address circumstances under which the government may assume ownership of private property without paying compensation because the transfer mitigates concerns about a development project that could have led the government to prohibit it had the government not imposed conditions.

8. 260 U.S. 393 (1922).

9. U.S. Const. amend. V.
act, emphasizing the passing of property from the owner to the government. The Takings Clause provides no standard to evaluate governmental actions, as would have been the case if the clause included the words "too far" or "unreasonable." The status of being taken, like that of being pregnant, is a matter of fact, not of degree. In short, the clause prohibits only expropriation; facially it says nothing about the economic effects of regulation or other government activity.

The language of the first ten amendments, ratified together in 1791, confirms the limited scope of the word "taken" in the Fifth Amendment. The drafters employed both words of category and words of degree in other amendments and could easily have used either in the Takings Clause. Instead they chose to use a categorical expression for governmental takings.

Comparison with other amendments elucidates this point. On the one hand, the drafters clearly state that, "Congress shall make no law respecting an establishment of religion" and that, "[n]o soldier shall, in time of peace be quartered in any house, without the consent of the owner." These commands prohibit all acts that fall within the designated categories. Other amendments, in contrast, prohibit "unreasonable searches and seizures" and "excessive fines." In the Fifth Amendment, the drafters, using absolute language, required compensation only when property was "taken" by government. They neither commanded Congress to "make no law" respecting private property nor prohibited "excessive" or "unreasonable" regulation of property use.

10. See Richard E. Levy, Escaping Lochner's Shadow: Towards a Coherent Jurisprudence of Economic Rights, 73 N.C. L. Rev. 329, 432-33 & n.442 (1995) (arguing that the term "take" connotes acquisition and thus is hard to reconcile with the regulatory takings doctrine).

11. U.S. Const. amend. I.
12. U.S. Const. amend. III.
13. See Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (describing the "wall of separation" between church and state under the First Amendment); Engblum v. Carey, 677 F.2d 957, 961-62 (2d Cir. 1982) (suggesting that the crux of a Third Amendment argument is the nature of the property interest since the Constitution proscribes all quartering of soldiers in any house without the owner's consent).

14. U.S. Const. amend. VIII.
15. Id.
16. This is not to say that categorization (i.e., a per se rule) never admits of evaluations of degree. For example, contemporary courts may struggle with whether particular government aid to religious schools violates the Establishment Clause. See Aguilier v. Felton, 473 U.S. 402 (1985). But when the framers used categorical language, they had in mind a rather specific abuse, and subsequent extension of the constitutional prohibition to a wider range of activities should be consonant with the spirit or tradition of the Constitution, the competence of the judiciary, and the needs of contemporary policy. In arguing that the framers did not anticipate a regulatory takings doctrine, I am only trying to clarify the criteria by which we should judge the judicially evolved rules.
Historical studies of the adoption of the Takings Clause confirm that the drafters intended it to reach only appropriation. A comprehensive study found that James Madison, the author of the Fifth Amendment, intended the Takings Clause "to apply only to direct physical taking of property by the federal government." The drafters apparently wrote this clause because colonial and early state legislatures had regularly taken property without paying any compensation, particularly by expropriating unimproved land for roads and impressing goods for military purposes. The Takings Clause prohibited the federal government from engaging in these hotly debated practices. It did not constrain the commonplace and politically accepted regulation of land use by state and local governments.

Proponents of a broad reading of the Takings Clause do not really dispute this analysis. They argue, instead, that the framers entertained a broad and absolute notion of the meaning of property protection commanded by natural law. Proponents conclude on this basis that the Takings Clause requires compensation whenever regulation reduces the value of any economic asset. Whatever power this analysis might have to invigorate polemicists or confuse Members of Congress, courts and constitutional scholars understand that the Fifth Amendment creates no property rights at all; such rights are established and defined by state law.

For more than one hundred years after the adoption of the Fifth Amendment, judicial interpretation of the Takings Clause confirmed


18. Treanor, supra note 17, at 695-98.

19. FRED P. BOSSelman ET AL., THE TAKING ISSUE 104 (1973); see also WILLIAM CRONON, CHANGES IN THE LAND 73, 149 (1984) (noting regulations against, inter alia, the sale of private land without town approval and grazing cattle on eroded sand dunes). Recent historical research has emphasized that in America before the Civil War, regulation of all economic activity was pervasive and viewed as supportive of a "well-ordered market." William J. Novak, Public Economy and the Well-Ordered Market, Law and Economic Regulation in 19th Century America, 18 L. & Soc. INQUIRY 1, 2 (1993).


21. See POLLITT, supra note 20, at 69-83.

the narrow, historically grounded interpretation. Until 1922, virtually no court found a taking when regulation restricted use but amounted neither to outright expropriation nor to permanent physical occupation.23 The 1887 Supreme Court decision in Mugler v. Kansas24 is the paradigm case. In Mugler, the Court stated the broad principle that a regulatory measure passed to protect the health, safety, and welfare of the public does not effect a taking, even if it severely diminishes the value of an owner’s property.25 Mugler was no sport, but instead the leading decision of a line firmly entrenched before the advent of Pennsylvania Coal thirty-five years later.26

Mugler has sometimes been said to embody a “nuisance exception” to the general rule requiring compensation when regulation is too burdensome.27 Such an anachronistic reading misinterprets Mugler in at least two ways: it incorrectly limits the holding of the case to common law nuisance, and it mistakes the general rule for an exception. A brief review of Mugler will elaborate this criticism.

The dispute in Mugler arose from the 1880 Kansas constitution, which enacted total prohibition of the manufacture, sale, or consumption of alcoholic beverages.28 Two brewers challenged its application on the ground that it rendered their breweries and inventory nearly valueless.29 The Court unanimously rejected this argument, stating in sweeping terms:

A prohibition simply upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals, or safety of the community, cannot, in any just sense be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.30

As the passage above indicates, the Mugler Court interpreted government’s power to regulate without paying compensation as extending to the whole field of legitimate state regulation under the po-

23. For a rare exception, see Wynehamer v. People, 13 N.Y. 378 (Ct. App. 1856).
25. Id. at 668.
29. Id. at 653-55.
30. Id. at 668-69.
lice power. The Court in no sense confined regulation to the abatement of common law nuisances. The Court referred to the maintenance of a brewery as a nuisance, but only because the Kansas Legislature so declared it. In relying on this declaration, the Court not only expressed indifference to whether breweries were nuisances at common law, but emphatically stated that the power to declare a use as injurious to the public interest "is lodged with the legislative branch." Moreover, the Mugler Court acknowledged the power of the legislature to characterize its action as the prevention of a harm, rather than the appropriation of a public benefit, subject to judicial review. The Court limited its judicial review of this power to ascertaining that the law has a "real and substantial relation" to harm prevention.

Rather than creating an exception, Mugler unanimously announced a broad and important rule that faithfully implemented the intention of the drafters of the Fifth Amendment. Numerous state cases had already firmly established the principle adopted by Mugler. In the once famous Commonwealth v. Alger, Chief Justice Shaw stated the general rule:

We think it is a settled principle, growing out of the nature of a well ordered civil society, that every holder of property, however absolute and qualified may be his title, 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 of enjoyment of their property, nor injurious to the rights of the community. . . . This is very different from the right of eminent domain, the right of a government to take and appropriate to public use, whenever the public exigency

31. Id. at 660-61.
32. Id.; see also Lawton v. Steele, 152 U.S. 133, 140 (1894) ("While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed.").
33. Id.
34. Thus, in effect this case holds that regulations that satisfy the Due Process Clause do not raise takings concerns. See id. at 661.
35. The only other Supreme Court decision of the nineteenth century that indicates any intention to give a broad reading of the Takings Clause is Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897), where the Court held that the Fourteenth Amendment applied the Fifth Amendment's Takings Clause to the states. After arguing at some length that providing compensation for appropriated property was a matter of fundamental fairness, however, the Court affirmed the state court's decision to award the railroad only nominal compensation for the city's taking of railroad land for a public street. Id. at 258.
37. 61 Mass. (7 Cush.) at 84-85.
requires it; which can be done only on condition of providing a reason-
able compensation therefor ... Nor does the prohibition of such a
noxious use of property [i.e., injurious to the public,] although it may
diminish the profits of the owner, make it an appropriation to public
use, so as to entitle the owner to compensation.38

It is instructive to consider the paucity of precedent for compen-
sation that the brewers were able to urge upon the Court in Mugler.39
The prior decision chiefly at issue was Pumpelly v. Green Bay Co.,40
the only decision in the nineteenth century in which the Court ordered
payment of compensation when the government had not appropriated
title to property.

In Pumpelly the defendant had built a state-authorized dam that
flooded the plaintiff's land." While acknowledging the general valid-
ity of many cases holding that the state is not liable for "consequential
injury" to property arising from the construction of improvements, the
Court held: "[W]here the real estate is actually invaded by super-
induced additions of water, earth, sand, or other material, or by hav-
ing any artificial structure placed on it, so as to effectively destroy or
impair its usefulness, it is a taking, within the meaning of the Constitu-
tion."42 Counsel for the brewers in Mugler argued that, under
Pumpelly, measures that in any way destroy the value of property re-
quire just compensation.43 The Court had little difficulty distin-
guishing Pumpelly as involving a "permanent ... physical invasion" and a
"practical ouster of possession."44 The Court saw these problems as
conceptually distinct, and to this day the Supreme Court treats cases
of "permanent physical invasion" quite differently from those of use
regulation.45

38. Id.
39. The validity of prohibition laws that rendered valueless the equipment and inven-
tory of the merchant of alcoholic beverages was one of the most litigated constitutional
issues of the period around the Civil War. The New York Court of Appeals held that such
uncompensated impairments of value violated due process of law. Wynehamer v. People,
13 N.Y. 378 (1856). However, all other state courts of appeal to address the issue upheld
uncompensated prohibition for reasons similar to those relied on in Mugler. See, e.g.,
Fisher v. McGirr, 67 Mass. (1 Gray) 1, 27-28 (1854). Note also that prohibition shares with
abolitionism and environmentalism a protestant reformist urge to establish that certain
subjects ethically cannot be the objects of property rights.
40. 80 U.S. (13 Wall.) 166 (1872).
41. Id. at 166, 171.
42. Id. at 180-81.
44. Id. at 668.
45. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434
(1982) (upholding the historical rule that "when the 'character of the government action is
a permanent physical occupation of property our cases uniformly have found a taking ... without regard to whether the action achieves an important public benefit or has only
minimal economic impact on the owner' "). As in Mugler's construction of Pumpelly, the
The modern doctrine of regulatory takings sprang without obvious antecedents from the decision in *Pennsylvania Coal Co. v. Mahon*. Courts and commentators have looked back to Justice Holmes' decision as the touchstone for later doctrinal development—and as the origin of the immense confusion that engulfs contemporary takings law. In fact, it is a wretched decision, inadequately explained and having no foundation in precedent.

*Pennsylvania Coal* held unconstitutional the Kohler Act, a Pennsylvania statute that made it unlawful to mine coal beneath the property of another in such a way as to cause the collapse of the surface. The Pennsylvania Legislature had passed the Act in the wake of technological developments in coal mining that had led to the sinking of numerous dwellings, streets, churches, and railroad lines. Pennsylvania law had long treated support as a separate estate in land, distinct from surface ownership and mineral rights. Until passage of the Kohler Act, state law had permitted mining companies to sell surface lots while retaining the legal right to extract coal.

The case began when the coal company sent the Mahons a letter informing them that in less than two weeks the mining operations beneath their home would reach a point where their house and land would start to sink. Forty-four years earlier, their predecessor in interest had bought the land but not the support estate from the company. When the Mahons sought an injunction against continued mining on the grounds that it violated the Kohler Act, the company answered that the Act was unconstitutional because it impaired the obligations of contract and took property without paying just compensation. After the state court upheld the Act as a valid exercise of the

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Court has also continued to resist the conflation of physical invasion and regulation cases. See *Yee v. City of Escondido*, 112 S. Ct. 1522, 1529, 1531 (1992).

46. 260 U.S. 393 (1922).


51. *Id.* at 493.


53. *See Mahon*, 118 A. at 492.

54. *See id.* at 495.

police power, the U.S. Supreme Court reversed, holding that the Act violated the Takings Clause.\textsuperscript{56}

Given the significance of the decision, the opinion by Justice Holmes is remarkably brief. Holmes gives little guidance as to the basis for his decision. He concedes that the government must be able to diminish property values to some extent in the course of regulation without paying compensation,\textsuperscript{57} but simply asserts that when the diminution reaches a certain magnitude, it exceeds implied limits, requiring the government to pay compensation.\textsuperscript{58} He suggests that judges must determine whether an economic loss is "too great" on the basis of the particular facts of each case and in light of the gravity of the public interest served.\textsuperscript{59}

Holmes' opinion is seriously defective in several respects. First, he gives no hint as to why he thinks \textit{Mugler}, its state antecedents, and numerous Supreme Court antecedents were wrong or inadequate. Holmes later wrote privately to Laski that "old Harlan's decision in \textit{Mugler v. Kansas} was pretty fishy,"\textsuperscript{60} but nowhere provides reasoned justification for his failure to follow precedent. This lacuna has not only sown confusion about the continued meaning of those precedents, but has also obscured the ground upon which \textit{Pennsylvania Coal} itself stands.

Second, Holmes fails to address the related question as to what constitutional values the new rule may further. All he offers is the observation that, unless the power of government to diminish economic values in property is somehow limited, "the contract and due process clauses are gone."\textsuperscript{61} But this is plainly untrue, since the Takings Clause would still require compensation in cases of appropriation or permanent physical invasion.\textsuperscript{62}

Third, although the decision appears to turn on the magnitude of economic harm suffered by the coal company, the opinion offers little insight into how great that harm was. For example, the decision evinces no attempt to quantify the loss in dollar figures.\textsuperscript{63} Holmes does state that the company lost all of the coal that remained in place as surely as if it were appropriated. But he acknowledges that the

\textsuperscript{56} \textit{Id.} at 412, 414.
\textsuperscript{57} \textit{Id.} at 413.
\textsuperscript{58} \textit{Id.} at 415.
\textsuperscript{59} \textit{See id.} at 413. Justice Brandeis dissented, invoking the long line of cases holding that, absent an appropriation, regulation of property to protect the public does not effect a taking even if it diminishes economic value. \textit{Id.} at 417, 420, 422 (Brandeis, J., dissenting).
\textsuperscript{60} \textsc{1 Mark D. Howe, The Holmes Laski Letters} 346 (1963).
\textsuperscript{61} \textit{Pennsylvania Coal}, 260 U.S. at 413.
\textsuperscript{62} \textit{See supra} notes 43-45 and accompanying text.
\textsuperscript{63} The company certainly did not suffer as great a proportional economic loss as did the brewery owner in \textit{Mugler}. \textit{See supra} text accompanying note 28 (describing plaintiff's loss in \textit{Mugler v. Kansas}, 123 U.S. 623 (1887)).
state can require coal to be left in place for some safety purposes, so that even if the diminishment is 100% loss, such a wipeout would not be dispositive. Moreover, Holmes notoriously does not explain why the coal left in place rather than the entire mineral estate is the appropriate benchmark against which to measure the diminished value.

Fourth, the opinion is woefully inadequate in its appraisal of the legislative purpose of the Kohler Act. In the first half of his opinion, Holmes eccentrically insists on treating the case as a private dispute, as if the legislation were restricted to benefitting the Mahons. He notes that their safety is not at risk because they received timely notice. Proceeding in this fashion, he concludes that the Act does not “disclose a public interest sufficient to warrant so extensive a destruction of the defendant’s constitutionally protected rights.”

We know that the first draft of the opinion ended at this point. Chief Justice Taft, who supported the result, then sent Holmes a memo suggesting that he had not adequately addressed the full reach of the Act as urged by amici, particularly the state and the city of Scranton. Influenced by Taft’s correspondence, Holmes then tacked on additional paragraphs acknowledging (rather sardonically) that the Act addressed a legitimate public concern, but arguing that it imposed too great a loss upon the coal company. He concludes this section by writing: “So far as private persons or communities have seen fit to take the risk of acquiring only the surface rights, we cannot see that the fact that their risk has become a danger warrants giving to them greater rights than they bought.”

Holmes’ assessment of the Kohler Act is flawed in three ways. First, the bargains struck in the sale of surface rights plainly impose negative externalities; various parties who had no part in the contracts suffered from the subsidence, as the brief of the city of Scranton related in lurid tones:

Broken brick and rubble [cover] great areas formerly improved with handsome business blocks but now permitted, in the words of Governor Sproul, “to revert to the wilderness of abandon.” Our once level streets are in humps and sags, our gas mains have broken, our water mains threatened to fail us in time of conflagration, our sewers spread their pestilential contents into the soil, our buildings have collapsed

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64. Pennsylvania Coal, 260 U.S. at 415 (construing Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914)).
65. See id. at 413.
66. Id. at 414.
67. Id.
69. Id. at 406-07.
70. See id. at 406-08.
under their occupants or fallen into the streets, our people have been swallowed up in suddenly yawning chasms, blown up by gas explosions or asphyxiated in their sleep, our cemeteries have opened and the bodies of our dead have been torn from their caskets.”

Even discounting the talent for melodrama of the Scranton solicitor, it seems plain that in enacting the Kohler Act, the Pennsylvania Legislature might well have been responding to concerns about public safety and economic well-being far beyond the interests of those who made or profited from a bad bargain.

Second, to the property owners who suffered from their bargain, the terrible consequences of that bargain might far exceed the reasonable expectations of the parties at the initial sale. The Kohler Act seems no broader than necessary to prevent the widespread catastrophe created by coal extraction and the increased population of the coal mining region.

Finally, there is a more general objection: however much skeptical scholars and justices may doubt such rationales, more public-spirited legislators may have found them persuasive. Holmes’ opinion contains no justification for his jaundiced view of the legislative purpose. The Constitution no more enacts the theories of James Buchanan than it does those of Herbert Spencer. It is disquieting that a justice inaugurating a new, nontextual constitutional limitation

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73. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 474-75 (1987) (stating that coal mining subsidence can have “devastating effects,” such as damage to foundations, walls, other structural members, and the integrity of houses and buildings); H.R. REP. No. 218, 95th Cong., 1st Sess. 1126-27 (1977) (finding that subsidence in urban areas causes “substantial damage” to surface improvements, including private homes, commercial buildings, public roads, and schools).
75. The views of James M. Buchanan (winner of the 1987 Nobel Prize in economics) are in the libertarian wing of the law and economics school. For example, in James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (1962), the authors treat government as a cooperative endeavor on the part of a number of people of differing tastes to increase their abilities to reach their separate objectives. As in economics, the basic question becomes one of efficiency—which set of governmental institutions will best serve the individual ends of the citizens. See James M. Buchanan, The Economics and The Ethics of Constitutional Order (1991) (elaborating Buchanan’s contractarian approach to economics and applying it to the U.S. Constitution and the American social order); Geoffrey Brennan & James M. Buchanan, The Power To Tax: Analytical Foundations of A Fiscal Constitution 164-65 (1980) (questioning the power of the state to pass legislation to provide clean air and clean water—or, in fact, to secure any public good—without compensation).
on the legislative power should assume without argument such a pessimistic attitude toward the process of self-government. 77

Observers have long wondered what Holmes thought he was doing in *Pennsylvania Coal*. 78 No similar difficulty clouds the evaluation of what the justices who joined Holmes thought they were about. The Taft Court was the Silver Age of substantive due process; essentially the same court that struck down the Kohler Act in 1922 also struck down the federal minimum wage law in 1923 79 and thirty exercises of state power between 1923 and 1937. 80 In fact, the regulatory takings doctrine was born in the era of substantive due process and reflects that heritage. 81

The subsequent history of *Pennsylvania Coal* is full of irony. The New Deal Court left the decision untouched while it swept away substantive due process. 82 Numerous subsequent decisions treated its establishment of a limit on the economic burden that land use regulation can impose as a settled issue of constitutional law. 83 Yet the Supreme

77. In contrast, a strength of the *Mugler* line is that it accepts the public interest goals of legislation so long as they have a rational basis. See *Mugler v. Kansas*, 123 U.S. 623, 663 (1887).
78. Holmes' closest associates, Brandeis and Frankfurter, were embarrassed by the opinion. See *DiMento*, supra note 68, at 415-16. Brandeis even suggested that the conservative justices somehow had pulled one over on the octogenarian Holmes in the wake of a prostate operation. *Id.* at 416. Professor Fischel suggests that Holmes was reacting to fears about inadequate coal supplies in light of widespread strikes in the anthracite fields. William A. Fischel, Of Coase and Coal: Regulatory Takings in the Supreme Court 13 (Oct. 1993) (unpublished manuscript, on file with the *Ecology Law Quarterly*). The most thoughtful assessment, by Daniel Ernst, attributes *Pennsylvania Coal* to Holmes' belief, grounded in his historicist jurisprudence, that he could "divine in tradition, custom, and social practices" those legislative victories that did not accord with dominant social practices. Daniel R. Ernst, *The Critical Tradition in the Writing of American History*, 102 *Yale L.J.* 1019, 1054-57 (1993). Ernst also remarks that a proper understanding of Holmes' attachment to now implausible jurisprudential views should render *Pennsylvania Coal* "less valuable than it is to today's opponents of land use regulation." *Id.* at 1055.
80. *Felix Frankfurter, Mr. Justice Holmes and the Supreme Court* 97 app. I at 113-18 (1938) (listing cases holding state action invalid under the Fourteenth Amendment). Frankfurter discreetly passed over *Pennsylvania Coal* in the text of this volume, in which he sought to credit Holmes with a liberal vision of judicial deference to legislative judgments. *Id.* at 213-45.
82. Indeed, no economic legislation has been invalidated on substantive due process grounds since 1937. *Gerald Gunther, Constitutional Law* 472 (11th ed. 1985).
Court promptly went out of the regulatory takings business for fifty years.\(^{84}\)

When the Supreme Court finally took up the issue again in 1987, it confined its decision to the facts. The Court in *Keystone Bituminous Coal Ass’n v. DeBenedictis*\(^ {85}\) upheld a Pennsylvania statute, the Subsidence Act, nearly identical to the Kohler Act. Focusing on a few differences between the laws and relying on a crabbed reading of *Pennsylvania Coal*, the Court reached the sensible conclusion that the Subsidence Act did not work a taking.\(^ {86}\) The desire to distinguish *Pennsylvania Coal* may be due to the closeness of the vote, 5-4, or to veneration for the shade of Holmes. The ability to distinguish *Pennsylvania Coal* points up the conceptual obscurity of the earlier opinion. The need to distinguish it argues for the overturning of the doctrine it called into being.

III

THE REGULATORY TAKINGS DOCTRINE IS AN UNWORKABLE MUDDLE

The regulatory takings doctrine has generated a plethora of inconsistent and open-ended formulations that have failed to make sense of the underlying constitutional impulse. No constitutional inquiry has generated more complaints or satire. The Court itself readily admits that its doctrine lacks coherence. In *Penn Central Transportation Co. v. City of New York*, for instance, it confessed that it “has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action” demand compensation.\(^ {87}\) Rather, the Court now explains itself as delving into relying on “ad hoc, factual inquiries into the circumstances of each particular case,”\(^ {88}\) relying “as much on the exercise of judgment as on the application of logic.”\(^ {89}\) Justice Stevens has acknowledged that: “Even the wisest lawyers would have to ac-

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\(^{84}\) It has been suggested that the very low profile of regulatory takings doctrine enabled it to survive the overthrow of economic substantive due process. See Bruce Ackerman, *Private Property and the Constitution* 114 (1977).


\(^{86}\) The Court also based its decision partly on the grounds that the Pennsylvania Legislature had adopted the Subsidence Act to protect public safety and environmental well-being and that the law left the coal companies with substantial amounts of valuable coal. *Id.* at 485-502.


knowledge great uncertainty about the scope of this Court's takings jurisprudence."90 Scholars have been less kind, describing the regulatory takings area as a "muddle,"91 "a chaos of confused argument,"92 and "a welter of confusing and apparently incompatible results."93

On occasion, the Supreme Court has found that it must abandon an innovation in constitutional law simply because the Court is unable to develop judicially manageable standards.94 Judges must be able to administer standards so they can consistently enforce constitutional values without randomly invalidating laws reasonably adopted by democratic processes. The standards ought also to give some reasonable guidance to legislatures, lower courts, and potential litigants about how future cases will be decided. Obviously, few constitutional rules are so precise that judges lose all discretion or that litigants will be able to predict accurately the outcomes of all litigation. Thus, the suggestion that a line of constitutional decisions ought to be abandoned because it has failed to generate workable rules will rarely deserve much attention. However, when the confusion suggests some larger impropriety infecting the doctrine, attention is warranted.

The confusion about the Takings Clause doctrine stems in the first instance from Holmes' refusal to provide a formulation of when land use regulations go too far.95 He insisted that every case must be considered on its own "particular facts" and briefly sketched the factors that influenced his judgment.96 However much such reticence suggests Holmes' jurisprudential sophistication, it has nonetheless pointed a disastrous pathway for his less subtle descendents.

If a lawyer wished to state current takings doctrine for a legally trained client, she would need to identify four separate clusters of

91. Rose, supra note 47, at 561.
92. ACKERMAN, supra note 84, at 8.
94. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47 (1985). The Court's appreciation that a legal problem does not generate judicially manageable standards may lead the Court to hold that such a problem is a political question, which the Constitution commits to another branch of government. See Baker v. Carr, 369 U.S. 186, 217 (1962). Short of finding a political question, the absence of judicially manageable standards has persuaded the Court to conclude that it lacks authority and competence to review legislation, see Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955), or administrative regulations, see Board of Pardons v. Allen, 482 U.S. 369, 382 (1987) (O'Connor, J., dissenting).
95. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (stating that the determination of when the police power has gone too far "depends upon the particular facts" of each case).
96. See id. at 413-15.
rule-like utterances, any one of which might be taken from the shelf to decide a particular case. But she would also have to acknowledge the distinct possibility that a case might be decided on some entirely different basis.

The oldest and most frequently invoked formulation comes from the *Penn Central* case: the Court will weigh in ad hoc balance the "character of the government action" (which seems in practice to include both the type of intrusion involved and the significance of the public purpose being served), the economic consequences for the owner, and the degree to which the law upsets justifiable, investment-backed expectations. Each of these factors invites the Court to engage in open-ended value judgments; moreover, the weight to be afforded conclusions under any separate category must itself depend on the facts of the particular case.

But it gets worse. Two years after *Penn Central*, the Court held in *Agins v. City of Tiburon* that "the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies the owner economically viable use of the land." This inquiry seems quite different: it requires a finding of unconstitutionality if either of two independent criteria are met. The first criterion reintroduces to takings law the means-ends analysis familiar in due process cases, further blurring the distinction between these constitutional doctrines. The second criterion predicates the conclusion of unconstitutionality purely on the ground of economic loss, without regard to the need for the regulation or the expectations of the owner, an approach later confirmed to some extent in *Lucas v. South Carolina Coastal Council*.

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98. Id.
100. Id. at 260 (citations omitted).

*Nollan* dealt with exaction, an owner's voluntary concession of a property right in exchange for development permission that otherwise could have been lawfully denied. Nicholas V. Morosoff, "'Take' My Beach Please!": *Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. Rev. 823, 824-25, 826 (1989). Because an exaction results in transfer of ownership to the government or a permanent physical occupation, it raises issues analytically distinct from regulatory takings and is not addressed in my proposal here. See supra note 7.

The last two formulations stem from the peculiar case of *Loretto v. Teleprompter Manhattan CATV Corp.*,103 where the Court found a taking in a city ordinance that required apartment building owners to permit the placement of cable television wires across the building facades.104 The Court found a taking despite the fact that the wires did not materially diminish and probably enhanced the value of the buildings.105 The Court reasoned that the wiring constituted a "permanent physical occupation" of part of the owner's property and concluded that such an occupation must be condemned as a taking *per se*.106

On the one hand, *Loretto* expresses a yearning for *per se* rules that are easy to apply. Thus, the Court insists that a permanent physical occupation always constitutes a taking, without regard to its economic impact or to the degree of inconvenience it causes. On the other hand, the Court justifies its new rule by emphasizing its prior holding in *Kaiser Aetna v. United States* that "the right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."107 This justification raises but cannot settle the question of what other uses are so "fundamental" that compensation must always be provided. In attempting to answer this question, the Court has stumbled into a thicket of natural law adjudication.108

The doctrinal confusion recounted here is neither incidental nor temporary. It arises from the immensity of the task that the Court has set for itself in regulatory takings cases: to mark as a matter of principle when limitation of property use becomes unfair. Not only have serious philosophers differed utterly in their approaches to these questions, but the trends of adjudication have changed so often over time that observers understandably view any answers as contingent. Moreover, the Constitution itself affords no guidance, except to proscribe outright confiscation.109 The Court simply does not have a basis in law, history, or consensual community standards to persuasively explain why one use restriction reflects the ordinary government adjust-

103. 458 U.S. 419 (1982).
104. *Id.* at 441.
105. *Id.* at 434-35. Of course, once the fact of occupation is shown, a court should consider the extent of the occupation as a relevant factor in determining the compensation due. *Id.* at 437.
106. *Id.* at 434, 441.
109. *See supra* part I.
ments of conflicting interests and another violates fundamental fairness.

IV

NO OTHER COUNTRY IN THE WORLD PROVIDES CONSTITUTIONAL OR GENERAL PROTECTION FOR THE “DEVELOPMENT VALUE” OF LAND

Proponents of robust judicial enforcement of regulatory takings tend to equate such a constitutional rule with protection of private property per se. The merest glance at the laws of other countries with firm commitments to the market and to private property reveals this assertion as specious. No other nation in the world suffers under a judicial claim of constitutional authority to determine whether any land use regulation is too onerous. Whether in the common law jurisdictions, European civil law jurisdictions, or the emerging nations of Eastern Europe and Asia, the law frankly accepts the necessity of extensive government regulation of land use. Other nations award compensation to owners only according to statutory standards or in cases of outright expropriation or reversal of site-specific planning permission. The peculiar importance of constitutional judicial review in general in the United States cannot explain the uniqueness of our approach to regulatory takings.

I introduce first the situation in the nation whose laws most closely resemble our own. Britain maintains a comprehensive statutory system of planning control in which an owner of property must obtain the consent of local planning authorities before engaging in most construction or renovation.110 The deciding agency grants or denies permission based on plans and policy statements, so legal recourse for aggrieved parties is quite limited.111 Although for centuries Britain provided compensation for public appropriations of land, it does not require compensation for losses attributable to denial of permission for new uses.112 The leading scholarly authority in the field has explained the policy:

The fundamental principle of British planning, therefore, is that no compensation is payable to landowners for planning restrictions im-

111. See Town and Country Planning Act, 1990, §§ 12, 36, 70.
112. See id. §§ 107-120 (discussing the limited circumstance under which a property owner is granted compensation rights).
posed on the development of their land. To that rule there are some limited and largely anomalous exceptions, but the general idea that the costs of regulation of new development should fall where they are imposed has found general acceptance, largely because over a period the market has adjusted accordingly and without causing excessive hardship. Planning assumptions and expectations now govern land prices, and the unpredictability of a discretionary planning system has come to be seen as a risk inherent in land investment.\(^{113}\)

The British justify this approach to noncompensation on the basis of several policy considerations that go beyond the absence of a written constitution. British courts have declined to find a right to compensation for regulatory losses even when the apparent statutory authority exists.

In the oft-discussed decision of *Belfast Corp. v. O.D. Cars Ltd.*,\(^{114}\) the House of Lords rejected the rationale of *Pennsylvania Coal* on exemplary grounds. The appellants owned land upon which they had operated a car repair shop for many years.\(^{115}\) They applied for permission to build additional garages and related buildings.\(^{116}\) The city corporation denied the application on the ground that its development plan provided for other uses, namely shops and residences.\(^{117}\) The appellants claimed that the denial violated the relevant planning act and, alternatively, that the planning act violated the Government of Ireland Act of 1920,\(^{118}\) which provided that the Parliament of Northern Ireland could not “take any property without compensation.”\(^{119}\)

The House of Lords upheld the denial of permission in all respects.\(^{120}\) Lord Radcliffe noted that British statutes and courts had scrupulously protected the principle that: “[T]he title to property or the enjoyment of its possession was not to be compulsorily acquired . . . unless full compensation was afforded in its place.”\(^{121}\) But he also noted the nineteenth century development of “the great movement for the regulation of life in the cities and towns in the interests of public health and amenity.”\(^{122}\) He concluded that English law had

\(^{113}\) Malcolm Grant, Urban Planning Law 645 (1982).
\(^{114}\) 1960 App. Cas. 490 (appeal taken from N. Ir.).
\(^{115}\) Id. at 492.
\(^{116}\) Id.
\(^{117}\) Id. at 493.
\(^{118}\) Government of Ireland Act, 1920, 10 & 11 Geo. 5, ch. 67 (Eng.).
\(^{119}\) Id. § 5(1); Belfast Corp. v. O.D. Cars Ltd., 1960 App. Cas. 490, 495 (appeal taken from N. Ir.).
\(^{120}\) Belfast Corp., 1960 App. Cas. at 492.
\(^{121}\) Id. at 523.
\(^{122}\) Id.
conclusively rejected the idea that a taking included any regulation of use.123

A second ground for Britain's rejection of compensation for regulatory losses was the nation's experience under early twentieth-century planning acts. The 1932 act provided that owners could recover for any losses in the value of their land caused by new planning restrictions.124 The act also provided a logical corollary: the municipality could recover 75% of any increase in value caused by the adoption of the planning ordinance.125 Thus, the funds for payment for "worsement" could be obtained by recapturing "betterment." In practice, the scheme was unworkable.126 Localities found that they could not recover betterment, both because of severe valuation problems and because owners had no proceeds with which to pay.127 Without funds to pay for worsement, localities simply did not adopt plans, and England endured a decade of suburban sprawl and ribbon development.128 This result contributed to the strong post-war demand for effective planning laws with much more limited provision for compensation.129

The Australian Constitution requires the payment of compensation when the federal government appropriates land from private or state ownership.130 The Australian High Court has explicitly and repeatedly held, however, that the constitutional provision does not apply to regulations of property use.131 Although the statutory law of

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123. Id. at 525. The absence of a general right of compensation has not led to a narrow reading of the planning powers of a local government unit. An interesting example is Westminster Bank Ltd. v. Minister of Hous. & Local Gov't, 1971 App. Cas. 508 (appeal taken from Eng.), where the House of Lords found that a borough council had general authority under the Planning Act to deny permission for development. The Lords reached this decision even though the only reason for the denial was the desire of the council not to pay enhanced compensation should the land be needed for road widening, in the face of a statute prescribing a specific procedure for designating lands for future transportation needs and requiring compensation immediately upon designation. Belfast Corp., 1960 App. Cas. at 509.
124. Town and Country Planning Act, 1993, ch. 48, § 21(1) (Eng.).
126. Id. at 20.
127. Id.
128. Id.
129. Id. at 22-23. Under the 1947 Act, no compensation was payable from the imposition of development controls, except that 1947 owners could pursue a one-time claim against a total fund of L 300 million under a distribution scheme that was to be in effect in 1953. Id. at 23. At the same time, a tax (or development charge) of 100% was imposed upon the increase in value of land resulting from permission to develop under the Act. Id. When the Conservatives returned to power in 1951, they eliminated both the development charge and the compensation scheme. Id. at 23-24.
most states promises compensation for "injurious affection," the term for regulatory losses bequeathed by the 1932 English Law, the rule has been swallowed by exceptions.\textsuperscript{132} Virtually every restriction as familiar as zoning, subdivision approval, and permit denial is exempt from the compensation requirement.\textsuperscript{133}

Canada has no constitutional provision providing for compensation for regulatory takings. The Canadian Charter of Rights does not protect any right of property.\textsuperscript{134} Rather, section 7 protects the rights of everyone to "life, liberty, and security of the person."\textsuperscript{135} Concern about limiting the legislative powers of the provinces led to deletion of property rights protection from an earlier draft.\textsuperscript{136} Section 1(a) of the Canadian Bill of Rights protects "the right of the individual to . . . enjoyment of property, and the right not to be deprived thereof except by due process of law."\textsuperscript{137} But the courts have not read this provision as imposing any substantive limit on the authority of Parliament to expropriate or regulate without compensation. Professor Hagman summarized the Canadian law as follows:

Canada provides little grist for one looking for precedent for generous compensation for damages for mere regulation. The Canadian courts are not wont in this environmental age to save landowners from harsh land-use controls, let alone order that some compensation be paid absent some statutory base for doing so.\textsuperscript{138}

In the civil law countries of Europe, compensating landowners for the cost of regulation finds even less support. Professor Glendon has noted that, for Europeans, it is nearly unthinkable to treat prop-

(Austl.), available in LEXIS, INTLAW Library, AUSCAS File ("[T]he extinction or the limitation of property rights does not amount to acquisition. . . . Unless the Commonwealth gains some property from the State or person, there is no acquisition."); Australia v. Tasmania, 158 C.L.R. at 1 (Murphy, J.) (stating that the limitation in § 51, paragraph xxxi of the Constitution "has not been thought hitherto to apply to a regulatory law that did not affect an acquisition of property"); Australia v. Tasmania, 158 C.L.R. at 1 (Brennan, J.) (stating that laws "which merely prohibit or control a particular use . . . plainly do not constitute an 'acquisition'").


132. A.S. Fogg, AUSTRALIAN TOWN PLANNING LAW: UNIFORMITY AND CHANGE 425-88 (1982); Donald G. Hagman, Compensable Regulation, in WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 280-81 (1978) [hereinafter WINDFALLS FOR WIPEOUTS] (stating that "compensation provisions have been emasculated in Australia by the courts and legislatures").

133. See Fogg, supra note 132, at 445-59.


135. Id. § 7.


137. Id. at 34.

Property as a basic human right. Such a disposition runs deeply in European legal culture. The French Civil Code defines ownership (propriété) as "the right to enjoy and dispose of things in the most absolute manner, provided that they are not put to a use prohibited by statutes or by regulations." The concept of property, having been created by law, must be bound by the law.

Germany has a robust real estate market despite what property rights advocates might fear. German law does not treat property rights as pre-political entitlements sheltered from restraint. Thus, the German Civil Code permits an owner to use his property as he pleases "to the extent that it is not contrary to the law or the rights of third parties." Likewise, the German Basic Law (i.e., Constitution) guarantees property rights, but also insists that such rights should serve the common good. The Basic Law provides that statutes shall determine the "content and limits" of property rights. Moreover, the Basic Law imposes a public duty on property, proclaiming that its use should serve the public welfare. In the German legal system, therefore, restrictions on property use, however severe, do not violate fundamental legal understandings about the nature of property rights or the constitutional rights of ownership.

In limited circumstances, German land use statutes do provide for compensation when losses are due to use restrictions. The framework statute is a federal law, the Baugesetzbuch, which regulates how localities develop plans and adopt land use regulations. The law provides for compensation for some planning losses. The potentially broadest ground is given in BauGB section 42, which facially requires compensation for any substantial diminution in property value caused by a locality's adoption of a new comprehensive zoning ordinance. This provision makes it possible for an owner to obtain

140. Code civil [C. civ.] art. 554 (Fr.).
142. Grundgesetz [Constitution] [GG] art. 14 (F.R.G.) provides:
   1) Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws.
   2) Property imposes duties. Its use should also serve the public weal.
   3) Expropriation shall be permitted only in the public weal. It may be effected only by or pursuant to a law which shall provide for the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts.
143. Id.
145. Id. at 38-39.
146. Id. at 58.
compensation for the lost development value of land, but then seri-
ously limits when it will be paid. Compensation is available only
when: (1) the municipality has improved the land by providing infra-
structure, (2) the landowner requested a building permit to which he
was legally entitled except for the change in use restrictions, (3) the
owner actually intended and had the financial resources to undertake
the proposed development, (4) the landowner had been entitled to
build for less than seven years, and (5) the proposed development
must be compatible with a safe and healthy environment. Given
the breadth of these exceptions, it is not surprising that localities pay
little compensation for planning changes. Both the English and German compensation provisions seem
designed primarily to allow a developer to rely on governmental per-
mission to undertake a particular project. In England, development
permission must be explicitly granted. In Germany, the owner of im-
proved land may undertake ordinary forms of development permitted
by zoning ordinances less than seven years old, but the extensive and
professional planning process that precedes German zoning gives its
map greater finality than would seem reasonable in most American
jurisdictions. These rules appear to be measured attempts to lessen
the risks of planning loss in systems that presuppose few limits on the
initial decision of what use may be permitted on any parcel.

V
FEDERAL COURT ENFORCEMENT OF THE REGULATORY TAKINGS
DOCTRINE AGAINST THE STATES UPSETS APPROPRIATE NOTIONS
OF FEDERALISM

As adopted, the Fifth Amendment posed no problem of federal-
ism. It prohibited the federal government from appropriating land
and other resources from citizens for a public purpose without paying
compensation. An extension of the Takings Clause's prohibition to
permanent occupation similarly did not abridge the power of a
state. However, the incorporation of the Takings Clause into the
Fourteenth Amendment obviously limits the authority of the states to
appropriate or permanently occupy property. This is no small con-
straint on the states' discretion, but does not intrude on their basic
lawmaking function; expropriation does not change any legal rules but

147. Id. at 58-60.
148. See id. at 63 nn.110-11.
149. See supra notes 44-46 (discussing the Supreme Court's extension of the Takings
Clause to permanent, physical invasions of property in Pumpelly v. Green Bay Co., 80 U.S.
(12 Wall.) 166 (1872)).
merely transfers assets to the state. However, the application of the regulatory takings doctrine to the states impairs their authority to adjust the limits of property interests created by the states themselves. Such interference by federal courts in a traditional state function suggests, at the very least, the need for a stronger justification for the exercise of national power.

Property makes an anomalous constitutional right. Unlike rights to freedom of speech or due process of law, federal courts do not have authority to elaborate the meaning and dimensions of property. Rather, as the Supreme Court has often reiterated: "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law." 151 The Constitution does not embody any natural law of property rights. In exerting the power to nullify land use regulations, the Supreme Court has taken upon itself an authority to insist on the natural form of a property right that the Constitution does not confer.

We are accustomed to thinking in legal categories. A fee simple estate in Blackacre is a property interest under which the owner exercises wide dominion over the land. 152 On the other hand, a statute or regulation prohibiting open-air burning is a use regulation that constrains the uses that the property owner may enjoy. Lawyers are wont to think of the former simply as a species of private law and the latter as an instance of public law. But from a historical and logical—rather than legal—perspective, such a distinction makes no sense. In fact, the burning ordinance actually changed the definition of the fee simple in this jurisdiction.

Theoretically, the legislature could have restricted use by enacting a statute amending the meaning of a fee simple. Instead, it enacted a different kind of statute, one that put the prohibition on burning in another section of the state code or that delegated the authority to regulate burning to a locality or special administrative office. The effect on the owner under state law would be identical in any case.

Thus, the regulatory takings doctrine effectively shrinks the state's control over its own property law. The legal consequence of an appropriation highlights this effect. When the state exercises eminent domain, it does not change property law, but extinguishes one owner's


152. See, e.g., Olin L. Browder Jr. et al., Basic Property Law 233 (4th ed. 1984) (stating that a fee simple in Blackacre gives the owner the right to possess, to use, to enjoy, and to exploit a given piece of land).
property rights and transfers the resource to itself.\textsuperscript{153} Requiring compensation to each expropriated party does not limit the state’s ability to define property law except in the obvious narrow sense that the state cannot assume the authority to terminate individual interests without compensation.\textsuperscript{154}

Lucas v. South Carolina Coastal Council\textsuperscript{155} illustrates the damage that results from this judicial intrusion into state property law. Lucas would require compensation whenever a land use regulation deprives an owner of all economic use unless the regulation duplicates a provision of nuisance law or of some other state common law property doctrine.\textsuperscript{156} Such a rule reverses the majoritarian premise of every state’s constitution, namely, that legislation supersedes common law rules.\textsuperscript{157} In no other area of law does the federal Constitution subordinate state legislation to the common law and require the former to duplicate the latter.

Even worse, the Supreme Court has chosen perhaps the worst area within which to impose such a requirement. The vagueness of nuisance law requires courts to make loosely guided policy judgments about the comparative harms and benefits of competing uses of land.\textsuperscript{158} Litigation may begin only after the use has begun and the harm felt.\textsuperscript{159} Such a proceeding may be indispensable to accommodating conflicting uses between neighbors, but courts deal poorly with cases where a defendant’s use injures many people, though no one individual seriously enough to give that individual an incentive to bring suit.\textsuperscript{160} Moreover, judges lack the expertise to effectively ad-

\textsuperscript{153} See Duckett & Co. v. United States, 266 U.S. 149, 151 (1924) (stating that “ordinarily an unqualified taking in fee by eminent domain takes all interests and as it takes the res is not called open to specify the interest that happens to exist”); RESTATEMENT OF THE LAW OF PROPERTY § 565 cmt. d (1944) (stating that in a condemnation of land, the thing that is being condemned is the aggregate of rights that go to make up the ownership of the land).

\textsuperscript{154} As Justice Scalia explicitly stated: “A law or decree with such an effect [i.e., prohibiting all economically beneficial activity] must . . . do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners . . . or by the State under its complementary power to abate nuisances.” Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 (1992). Justice Scalia instructed that evaluation of this question on remand would be a matter of state common law. See id. at 2901; cf. Milwaukee v. Illinois, 451 U.S. 304 (1981) (holding that enactment of the Clean Water Act eliminated the basis for the federal law of nuisance for pollution of interstate waters).

\textsuperscript{155} 112 S. Ct. at 2886-2926.

\textsuperscript{156} Id. at 2901-02.

\textsuperscript{157} Liberty Warehouse Co. v. Burley Tobacco Growers’ Co-op Mktg. Ass’n, 276 U.S. 71, 89 (1928) (“A state may freely alter, amend, or abolish the common law within its jurisdiction.”).


\textsuperscript{159} See id. at 178-79 (stating that nuisance law is remedial in nature).

\textsuperscript{160} Rational individuals will not pursue even meritorious legal claims if their expected recovery is less than the attorney’s fees, costs, and other expenses in-
dress pervasive, scientifically complex harms to the public within the context of private litigation.\textsuperscript{161}

The difficulty of adjudicating instances of nuisance led the states in the early years of this century to adopt legislative and administrative control mechanisms to deal with land use and environmental problems.\textsuperscript{162} These mechanisms allow use preferences to be determined through democratic processes and applied prospectively in light of expert assessment.

One result of this shift to statute was that nuisance law atrophied. One historian of nuisance observed:

\begin{quote}
[N]uisance law could not adequately respond to the problems of air and water pollution. Information, procedural, and financial barriers would preclude many affected parties from bringing nuisance suits against pervasive nuisances with widespread impact on the general public health and welfare . . . . Due to its inherent limitations, nuisance law generally has been relegated to marginal cases, involving small-scale, localized land use conflicts.\textsuperscript{163}
\end{quote}


The doctrine of public nuisance, which permits suit to vindicate common public interests, has generally been restricted (ironically) to suits for violation of criminal statutes and common law crimes. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 90, at 645-46 (5th ed. 1984). In the early years of legal activism to protect the environment, there were hopes that the lumpy and narrow doctrine of public nuisance could be refurbished to provide a vehicle for common law suits to protect environmental values not protected by statute. See, e.g., John E. Bryson & Angus MacBeth, Public Nuisance, the Restatement (Second) of Torts, and Environmental Law, 2 Ecology L.Q. 241, 275-81 (1972). But judicial reluctance, see United States v. County Bd., 487 F. Supp. 137 (E.D. Va. 1979), and the dynamic pace of environmental legislation, see Milwaukee v. Illinois, 451 U.S. 304 (1981), have rendered such promise unfulfilled.


162. Modern land use regulation dates from the adoption of comprehensive zoning ordinances, beginning with New York City in 1916. See Donald G. Hagman & Julien C. Juergensmeyer, Urban Planning and Land Development Control Law 20 (2d ed. 1986). Earlier land use regulations addressed specific problems, frequently by declaring a particular use to be a public nuisance. See, e.g., Lawton v. Steele, 152 U.S. 133, 140 (1894). Still, the move to comprehensive zoning ordinances, with their utilization of administrative mechanisms and professional planning, represents a fundamental shift from reliance upon individual common law litigation. Cf. Lawrence M. Friedman & Jack Ladinsky, Social Change and Law of Industrial Accidents, 67 Colum. L. Rev. 50 (1967) (analyzing the shift in addressing employee accidents from tort litigation under various employer-protective doctrines to workers' compensation systems).

Until *Lucas*, courts and scholars had generally considered nuisance to be marginalized. In the most widely studied modern case, for example, the court refused to apply nuisance law to enjoin injurious air pollution but deferred to the legislature. The court reasoned that the legislature was better equipped than the judiciary to balance the costs and benefits of differing rules for society as a whole in light of available scientific evidence. As the authors of a leading casebook conclude bluntly: "[N]uisance litigation is ill-suited to other than small scale, incidental, localized, scientifically uncomplicated pollution problems."

Thus, the *Lucas* Court upset the state allocation of lawmaking function, whether understood as a matter of state constitutional law or as a pragmatic legal response to the harms of pollution. Now, when the Court employs the Takings Clause to strike down state regulations under *Lucas*, it deprives the state of its basic power to define property rights.

VI

CHANGES IN THE SCOPE OF PROPERTY INTERESTS IN LIGHT OF EVOLVING UNDERSTANDINGS OF THE PUBLIC INTEREST ARE A CONTINUOUS AND APPROPRIATE FEATURE OF AMERICAN LAW THAT OUGHT NOT RAISE SPECIFIC CONSTITUTIONAL CONCERNS

Property does provide security to the owners of resources, allowing them to profit in the future from prudent investment and conservation decisions today. This security has permitted private gains and made possible broad public benefits, such as the increase in aggregate material welfare and the broad diffusion of economic decision-making. But property rights have continuously evolved to accord with social conceptions of public welfare.

In general, the law recognizes as "property" those interests that promote the ends favored by the lawmakers. Though such interests may incidentally be valuable to owners, they will perish if in conflict with sufficiently powerful interests of the community at large. This dynamic lies behind Justice Jackson’s statement that: "[N]ot all economic interests are ‘property rights’; only those economic advantages are ‘rights’ which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." In other words,

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165. *Id.* at 871.
only when the law secures the cooperation of others in respecting an interest in a resource is there a property right in that thing.\textsuperscript{168}

Accordingly, the property rights recognized by law have changed over time with the economic needs, cultural understandings, and political arrangements of succeeding generations. Among other changes, professor Sax has recently noted:

In eighteenth century America, the states abolished feudal tenures, abrogated primogeniture and entails, ended imprisonment for debt, and significantly reduced rights of alienation, as well as dower and curtesy. In the nineteenth century, to promote industrialization by hydropower mills, courts redefined the traditional rights of natural flow in a water established during a preindustrial economy. In the arid west, landowners’ riparian rights were simply abolished because they were unsuited to the physical conditions of the area. As the status of women changed, laws abolished husbands’ property rights in their wives’ estates.\textsuperscript{169}

The emancipation of the slaves, arguably the most significant stroke of public policy in our history, terminated property rights without compensation. Although many schemes for emancipation before the Civil War had included compensation for slave owners and Congress’ first statutory emancipation (for the District of Columbia) had provided compensation, the growing commitment to freedom bred during the bloody struggle made respect for the property rights of even Union-loyal slaveholders appear incoherent by 1865.\textsuperscript{170}

Emancipation provides a vivid example of the necessary process of accommodation between social needs and property rules and the potentially disastrous effects of aggressive application of the Takings Clause.\textsuperscript{171} Property is not a characteristic imminent in some determinate set of similar phenomena. Rather, calling an asset “property”


\textsuperscript{170} See Eric Foner, \textit{Reconstruction: America’s Unfinished Revolution} 1863-1877, at 6, 74 (1988). In 1862, President Lincoln lobbied for compensated emancipation, but he abandoned the idea in April 1865. \textit{Id.} at 6-7. Common law decisions also cut down dramatically on the scope of property rights to further perceived important social goals. For example, courts reduced the protection of ownership by developing the doctrine that a person who obtains possession of an owner’s goods by fraud can convey to a good faith purchaser for value title superior to that of the original owner. The rule protected market exchanges after distribution of goods expanded beyond local interchange. See Grant Gilmore, \textit{The Commercial Doctrine of Good Faith Purchase} 1057 (1954). Obviously, the state did not compensate owners for losses suffered in reliance upon the older rule.

\textsuperscript{171} Indeed, the recent expansion of takings prohibitions seems designed to prevent the evolution of property law toward redefinitions of rights to protect broad ecological understandings. \textit{See infra} part X.
merely indicates that the law will protect the owner's interest in the asset against adverse claims. The set of interests so protected is quite heterogeneous and dynamic. The choice of which interests to protect at any one time reflects contemporary social values acting upon received tradition.

Evolution in values and needs reshapes the set of interests so protected without casting doubt on the continuing commitment to the idea of property. The landlord's power to evict the tenant at the end of the lease term may wane; at the same time, the right of a celebrity to exploit her public image waxes. To the extent that strong enforcement of the regulatory takings doctrine succeeds, ironically, it deprives the institution of property of its strong utilitarian support.

The regulatory takings doctrine protects those individuals who wish to preserve a particular property right. But this desire remains unfulfilled in the long run. If one regulation does not reshape a property right, another regulation or a common law decision will. Moreover, the great breadth of the doctrine leads inevitably to inconsistent results; the courts end up declaring that they cherish some property rights but are indifferent to others. But inexplicable, inconsistent results weaken the doctrine. Thus, invocation of the regulatory takings doctrine will be not only wrong but ultimately futile.

VII
THE RECENT CONSERVATIVE DEPARTURES IN REGULATORY TAKINGS DOCTRINE REFLECT AN ILLEGITIMATE ATTEMPT TO EMPLOY THE CONSTITUTION TO ROLL BACK ENVIRONMENTAL REGULATION

Expansive interpretation of the regulatory takings doctrine has become the focal point of efforts by a school of conservative jurists and political activists to undermine the constitutional foundations of


174. White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1401-02 (9th Cir. 1992), reh'g denied, 989 F.2d 1512 (9th Cir. 1993), cert. denied, 113 S. Ct. 2443 (1993) (holding that a television model can sue a firm for converting her "marketable celebrity identity value" by using a robot that resembled her in an advertisement).

the regulatory state. The push to protect property rights has spawned both judicial innovation and legislative campaigns. In my view, the underlying rationale for these endeavors is unpersuasive. The judicial intervention is illegitimate, and the lobbying effort legitimate but wrongheaded.

To begin, an embarrassing inconsistency is obvious in judges who give expansive readings to the Takings Clause but otherwise denounce judicial protections of liberty interests as naked judicial activism. The epitome of this hypocrisy is volume 112 of the *Supreme Court Reporter*, where Providence has juxtaposed Justice Scalia’s opinion for the Court in *Lucas v. South Carolina Coastal Council*176 with his dissent in *Planned Parenthood v. Casey*.177 In the dissent, Justice Scalia complains bitterly about the retention of constitutional protection for a woman’s right to have an abortion by condemning the activism of an “Imperial Judiciary”178 based on “philosophic predilection and moral intuition.”179 The thrust of his dissent is that questions of public policy not settled by the text and “tradition” of the Constitution must find their answers in the political arena.180 This is, of course, a familial argument that dates back to conservative opposition to the Warren Court181 and to liberal opposition to the regime of substantive due process.182 Justice Scalia’s contributions to this constitutional tradition are among the most vigorous and intelligent.

But where is this restraint when Justice Scalia regards South Carolina’s attempt to reduce economic and environmental losses due to beachfront erosion and flooding? *Lucas* establishes, without apparent grounding in the Constitution, the new per se rule that a regulation works a taking, regardless of the severity of the harm it seeks to prevent, if it deprives the owner of all economically beneficial use of his property.183 A single exception provides that no taking occurs if the regulation enforces a use limitation inherent in the property, such as through nuisance law.184 Scalia describes this as a “long established” principle, even though none of the cases he citewas in support of it actu-

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178. *Id.* at 2882 (Scalia, J., dissenting).
179. *Id.* at 2884 (Scalia, J., dissenting).
180. *Id.* at 2873-85 (Scalia, J., dissenting).
184. *Id.* at 2901-02.
ally so held. The opinion dismisses the long contrary line following *Mugler* as "the Court's early attempt." The opinion also draws the astonishing distinction between personal and real property. An owner of personal property, "by reason of the State's traditionally high degree of control over commercial dealings, ought to be aware of the possibility that new regulations might even render his property economically worthless." For owners of land, however, such arguments are "inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." However, not only does the "historical compact" not address use restrictions, it makes no discernible distinction between personal and real property. Moreover, the "constitutional tradition" extolled consists largely of poorly considered dicta: *Lucas* plainly engages in constitutional innovation to further the justices' political preferences.

*Lucas* may be seen in retrospect as the high water mark of constitutional property rights inflation. Justices Kennedy and Souter declined to join the opinion, and in the subsequent case of *Concrete Pipe & Products of California Inc. v. Construction Laborers Pension Trust for Southern California*, the Court returned to its traditional reluctance to displace legislative burdens. In the recent decision of *Dolan v. City of Tigard*, in which the Court held that a city's requirement that an owner dedicate a strip of land for a greenway as a condition for approval of a construction project violated the Takings Clause, a bare majority joined the Chief Justice's opinion. Moreover, that opinion emphatically affirmed the importance of local land use regulation. Finally, President Clinton's appointees to the Court

185. All of the decisions cited by Scalia upheld land use regulations except *Nollan v. California Coastal Comm'n*, which found a taking on quite different grounds. *See id.* at 2893-94 n.6.
186. *Id.* at 2897-98. These cases rather hold that regulations on use that satisfy the Due Process Clause do not raise takings concerns. Under the Due Process Clause, the appropriate inquiry is whether the legislature has prohibited conduct that reasonably could be believed to contribute substantially to a public evil; there is no direct concern with the utility to the actor of the prohibited conduct. For a discussion of these cases, see *supra* text accompanying notes 24-45.
190. 113 S. Ct. 2264 (1993).
191. *Id.* at 2289-92.
193. *Id.* at 2321-22.
194. *Id.* at 2310.
are most unlikely to find regulatory takings to be a comfortable vehicle for judicial activism.  

Of more immediate concern are recent decisions of the United States Court of Appeals for the Federal Circuit and the Court of Federal Claims, where the courts have found takings in denials of permits by the Army Corps of Engineers to fill wetlands. These decisions have had a peculiarly strong influence for two reasons. First, these courts were created only in 1982 and until very recently all the appointments had been nominated by Republican presidents; thus, these courts are more likely than other federal courts to be receptive to takings claims. Second, the Supreme Court's clear indications that plaintiffs can press claims (in excess of $10,000) against the federal government for regulatory takings only through actions for compensation under the Tucker Act have given the Claims Court and the Federal Circuit exclusive federal jurisdiction over such cases. Thus, decisions of these courts will be controlling de facto in the federal system until reviewed by the Supreme Court.


198. Clint Bolick, a Washington conservative activist, was quoted in the National Journal:

The Claims Court is a place where the Reagan and Bush Administrations have been able to place top-notch conservative judges without getting much attention. That is the result of liberals being somewhat asleep at the switch and the Administrations being extremely sophisticated in their selection and placement of judges.


When the United States Claims Court was created out of the United States Court of Claims in 1982, the 16 active Commissioners of the Court of Claims automatically became article I judges of the Claims Court; their terms extended to no later than October 1, 1986 unless the President reappointed them. § 167, 96 Stat. at 50. The name of the court was changed again to the Court of Federal Claims. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(b), 106 Stat. 4506, 4516.


These decisions have frequently been excoriated—and properly so. First, they brandish a wilful ignorance of the ecological value of wetlands, even going so far as to reject the premise of Congress’ grant of permit authority to the Army Corps of Engineers: that preventing destruction of wetlands substantially advances the public interest in water quality. Moreover, several decisions have manipulated the doctrinal ambiguities in the measurement of a property owner’s regulated property to exaggerate his losses.

In the executive branch, President Reagan’s Executive Order No. 12,630, issued in 1988, reveals the objectives of the property rights activists. The order instructs agencies to assess the effect of proposed actions on constitutionally protected property rights. Such assessments are unlikely to generate much useful guidance, given the Supreme Court’s repeated insistence that takings claims can be evaluated only in concrete applications to particular properties and upon a fully developed factual record. This order would amount to no more than a bit of harmless symbolism were it not for the highly partisan account of regulatory takings doctrine that the Executive order directs agencies to apply.


202. Florida Rock Indus., Inc. v. United States, 8 Cl. Ct. 160, 171 (1985), aff’d in part, vacated in part, 791 F.2d 893 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987) (“[S]imple invocation of the term pollution cannot foreclose a plaintiff’s right . . . . ‘Mere labels’ of this sort afford ‘no talismanic immunity from constitutional limitations.’ ”); Florida Rock Indus. v. United States, 791 F.2d 893, 904 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987) (“[T]he concern of the district engineer is almost exclusively the continued existence of the wetlands, not . . . pollution. . . . Denial of the [mining] permit requires it to maintain . . . a facility, the wetlands, which by presently received wisdom operates for the public good. . . . This . . . reveals a private interest . . . deserving of compensation.”); Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 389 (1988) (stating that the “pollution caused by the plaintiff . . . cannot be considered harmful since the possible pollution . . . is merely incidental to any human action undertaken”).

203. See Loveladies Harbor, 15 Cl. Ct. at 388-90.

204. Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 168-74 (1990). The Court of Federal Claims has also granted relief to plaintiffs who purchased land knowing that a wetlands fill permit could be withheld, thus making a mockery of the frequent statements that regulatory takings law protects reasonable investment-backed expectations regarding the freedom to develop. See Ciampetti v. United States, 18 Cl. Ct. 548, 557-59 (1989).

207. See, e.g., Pennell v. City of San Jose, 485 U.S. 1, 2, 8-11 (1988).
The Executive order and its implementing guidelines\textsuperscript{208} present a more restrictive reading of the Takings Clause than does the Supreme Court's opinions. While the Court looks two ways, occasionally incorporating means-ends analysis from due process jurisprudence into some takings decisions,\textsuperscript{209} the order stares resolutely in the direction of compensation. For example, although the Court has not clearly articulated whether the law must rationally or substantially advance the public interest, the guidelines firmly conclude that the agency action must "substantially advance" the purpose, announcing that: "[I]t is not enough that the policy or action rationally advance the purpose purported to be served."\textsuperscript{210} To take another example, the order also resolves the open issue of the size of the property interest diminished by a regulation in favor of each "separate and distinct interest" within a holding.\textsuperscript{211} The examples of this doctrinal distortion are far less significant than the fact of the attempt. The order's dramatic expansion of constitutional protection for property interests puts into effect a central goal of a school of conservative legal activists driven by ideological passion.\textsuperscript{212}

These activists have now turned their efforts toward passing various species of property rights legislation. Advocating generous statutory compensation for regulatory losses is, of course, a constitutionally legitimate project, but the legislation proposed is misguided for a host of reasons. What remains most disturbing about the legislative advocacy is the asserted rationale of securing constitutionally protected property rights.\textsuperscript{213} Many of the bills have sought to give a legislative base to the Executive order and its bogus takings doctrine.\textsuperscript{214} Others go beyond the order in mandating compensation whenever legislation reduces the market value of the "affected portion" of a property by as


\textsuperscript{209} See supra note 34 and accompanying text.

\textsuperscript{210} GUIDELINES, supra note 208, at 35,172.

\textsuperscript{211} 53 Fed. Reg. 8861.

\textsuperscript{212} Charles Fried, the Solicitor General at the time, noted in his memoirs:

Attorney General Meese and his young advisors—many drawn from the ranks of the fledgling Federalist Society and other devotees of the extreme libertarian views of Chicago Law Professor Richard Epstein—had a specific, aggressive, and it seemed to be, quite radical project in mind: to use the takings clause of the fifth amendment as a severe brake upon federal and state regulation of business and property. The grand plan was to make government pay for a taking every time its regulations impinged too severely on a property right. If the government labored under so severe an obligation there would be, to say the least, much less regulation.


\textsuperscript{213} See Letter from 126 American Law School Professors to Members of the United States Congress (June 29, 1994) (on file with the Ecology Law Quarterly).

little as 20%. Such compensation would exceed that guaranteed by
the Constitution by even more than does enforcement of the current
judicial takings doctrine.

Some consideration of the approach of professor Richard Ep-
stein, both the ablest and most influential proponent of constitutional
property rights, may help illuminate the constitutional underpinnings
of this new judicial activism. A basic premise of Epstein’s approach is
a wide-ranging contempt for the political process. Epstein views the
Takings Clause

[a]s part of a comprehensive effort to discipline the excesses of gov-
ernment by demanding that it pay when it takes private property for
general public purposes. In so doing, the Clause forces government
officials to put their money where their mouth is when they assert that
certain social gains are worth the private costs that they impose.

Even authors sympathetic to Epstein’s political preferences have re-
jected his theory due to its failure to consider the distribution of con-
stitutional authority. Epstein’s preferred approach would eliminate
the presumption of validity that the Constitution affords the demo-
cratic political process. He would thus make payment—rather than
representation and procedural regularity—the criterion for legiti-
macy. Whatever the merits of Epstein’s views as matters of philo-
sophic speculation or political mobilization, they depart so profoundly
from constitutional tradition that enacting these views through inter-
pretation of the Takings Clause would greatly imperil the institutional
role of the federal courts. The courts would be sharply constricting
the scope of democratic self-government without the cover of consti-
tutional text or tradition.

VIII
THE REGULATORY TAKINGS DOCTRINE DOES NOT
ADVANCE ECONOMIC EFFICIENCY

The mere fact that government action imposes losses on a prop-
erty owner does not justify compensation on economic grounds alone.
If the government puts the property to a higher value use than the

bill has now been referred to the Senate Environment and Public Works Committee. See

(citations omitted).

217. See, e.g., Thomas A. Merrill, Rent Seeking and the Compensation Principle; Essay
on Takings: Private Property and the Power of Eminent Domain, 80 NW. U. L. REv. 1561,
1564-69 (1986). Epstein’s book, Takings, received an unusually thorough drubbing from
[hereinafter Sax, Takings]; Mark Kelman, Taking Takings Seriously: An Essay for Centrists,
REv. 21 (1986); Thomas Ross, Taking Takings Seriously, 80 NW. U. L. REv. 1591 (1986).
private owner would, then compensating the owner reduces aggregate efficiency, *ceteris paribus*. Apart from this simple point, there seem to be two types of arguments concerning whether compensation for takings promotes efficiency. The first focuses on how compensation affects the incentives of individual landowners, asking whether compensation keeps such takings from unduly discouraging valuable investments in land. The second focuses on the legislature or other regulator, asking whether a compensation requirement curbs a tendency to pursue projects without substantial public benefit.

The incentive effects of appropriation on owners have drawn a great deal of attention. Some theorists have expressed concern that uncompensated takings will discourage owners, so that they will invest too little in wealth-creating enterprises. In other words, if owners believe that government seizure will prevent them from reaping what they sow, they will not sow in the first place. To some extent this must be true, as demonstrated by the adoption of antiexpropriation clauses in formerly socialist countries to encourage foreign investment.

Closer examination reveals serious doubts about the incentive effects of appropriation. The risk of loss from government action resembles many other risks that investors face and mitigate through insurance, such as the threat of fire. Thus, the proponent of compensation must show some special feature of appropriation that justifies government compensation, since we typically leave it to owners to insure their property through the market. Although theorists have attempted to show that reliance on private insurance for takings faces insuperable obstacles, their efforts have not held the field. It may be that insurance would increase the probability of appropriation, because owners who have privately contracted for compensation have less incentive to resist appropriation through the political process. But this problem of "moral hazard" is endemic to insurance in gen-

218. My understanding of these issues owes a large debt to Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279 (1992), a lucid critique of the literature.

219. *Id.* at 280-81.


222. For further discussion, see POSNER, *supra* note 160, at 58 (explaining that the risk of a government taking is far less than the risk of loss due to earthquakes (which is readily insurable) and that insurance is available against expropriation of property by foreign governments).

eral. Moreover, the problem already exists under the Just Compensation Clause, which guarantees compensation for outright appropriation. It would be better addressed by outlawing compensation in all cases.

A cost of mandating compensation as compared with relying on market insurance is that compensation imposes costs on all taxpayers, who must pay the award. If private insurance were the norm, many citizens would decline to buy it since they might either own little or no property or own so much property that the loss of a little could be easily borne. In particular, substantial business enterprises with diverse holdings might rarely seek outside insurance. Socializing these risks requires these parties to purchase (through taxes) insurance that they rationally would have concluded was not in their interests.

Mandated compensation may also encourage overinvestment in wasteful uses of property. Such wasteful investment may occur, for example, when an owner develops property that she anticipates may be taken soon for a road or park, discounting prospective capital losses by expected "just compensation." Such perverse incentives reach grotesque proportion under recently proposed regulatory compensation legislation, which encourages landowners to propose illegal and environmentally destructive uses of their property, such as filling in prime wetlands, so that they can be paid for losses stemming from government prohibitions. Thus, consideration of both the doubtful benefits and the real costs of mandated compensation leads to the conclusion that eliminating the compensation requirement would not reduce owners' incentive for productive use to an extent that would harm overall welfare.

In today's ideological wars, the argument that a compensation requirement reins in the lust of government to transfer wealth wastefully is even more common—but is equally flawed. The argument

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224. Louis Kaplow, An Economic Analysis of Legal Transitions, 99 Harv. L. Rev. 509, 537 (1986) (noting that to "the extent that insurance covers losses, actors have less incentive to avoid them"); Farber, supra note 218, at 284.

225. See supra part I.

226. See Kaplow, supra note 224, at 532 n.61 (stating that the "notion that a high expectation of loss supports the need for compensation seems counterintuitive from many perspectives, and if private incentives are taken into account the notion seems, if anything, backwards").

227. See Farber, supra note 218, at 282-83.

228. Kaplow, supra note 224, at 603 (stating that for "firms that have diversified ownership, special insurance for takings may be unnecessary").

229. The common law terminates several species of property rights, such as servitudes, when they become economically wasteful over time. But see Richard A. Epstein, Notice and Freedom of Contract in the Law of Servitudes, 55 S. Cal. L. Rev. 1353, 1364 (1982) (arguing that servitudes should not be defeasible due to changed conditions).
supposes that having to pay for the losses caused by regulation will limit a legislature to those projects that actually increase overall welfare. 230 But professor Farber has convincingly shown that, even assuming that individual legislators invariably act mean-spiritedly in their own interest, this argument is nonsensical. 231 A legislator who supports an appropriation of property in order to satisfy some special interest should welcome the requirement of compensation because such a payoff will blunt the ferocious opposition of the property owner and those who fear similar large losses. 232 Property owners' opposition will often be more difficult for the legislator to face than the muted concerns of taxpayers who would absorb the diffused costs of compensating the property owners. 233 Professor Farber concludes: “Assuming that the dispossessed will usually be a stronger political force than the alternative cost-bearers, a compensation requirement will lead to more rent-seeking (pork barrel) projects than an anti-compensation rule.” 234

Finally, any merits the arguments for compensation may have disappear when we turn from appropriation to regulation. Even Richard Posner argues that losses caused by the redefinition of property rights should not be compensated. 235 He begins from the premise that: “[Property] rights will be redefined from time to time as the relative values of different uses of land change.” 236 Depriving an owner of

230. Epstein states:
Under the present law the institution of private property places scant limitation upon the size and direction of the government activities that are characteristic of the modern welfare state. . . . [T]he eminent domain and parallel clauses [including the Takings Clause] in the Constitution render constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century; zoning, rent control, worker's compensation laws, transfer payments, progressive taxation.


Pollitt states:
[The] rights of people to acquire, own, use, and enjoy property may themselves be viewed as a subset of a larger class of rights, the economic liberties. These liberties have been virtually stripped of all protection and forgotten. . . . [Further, a] second related function of the takings clause is to encourage government to more carefully design its regulatory programs to enhance the likelihood that they will achieve their objectives in a cost-effective manner. . . . At present regulators and those who advocate more governmental regulation see regulations as essentially costless because the public does not spend money directly to acquire a resource controlled by regulation.

Pollitt, supra note 20, at xxii, xxx.

231. Farber, supra note 218, at 292-94.
232. Id. at 293.
233. Id.
234. Id. As Farber notes, these incentives would lead one to expect that legislators generally would voluntarily offer compensation for appropriated property when no fundamental rule required it. Id. at 295.
236. Id. at 54.
a right to make a particular use of his property for these reasons reflects not the law forcing a suboptimal use on an owner, but a devaluation of the proposed use to the point where it is no longer optimal.\textsuperscript{237} Accordingly, paying compensation for not undertaking a suboptimal use cannot improve efficiency. Moreover, even though such uncompensated changes in property rights will reduce the incentive to invest generally in current land uses, this may be an efficient hedge against eventual decreases in the values of current uses. Ironically, paying compensation may induce overinvestment in currently favored land uses.\textsuperscript{238}

The argument that legislators need to be restrained by a compensation rule seems incoherent on another score. The argument depends on the hypothesis that legislators are unlikely to take regulatory losses into account unless they are monetized through payment of compensation. But to the extent this is true, it must hold for benefits as well, legislators are as unlikely to accurately measure regulatory benefits as regulatory losses. Thus, to the extent that regulatory compensation is required, legislators will underregulate because they will value paid-for losses more than gains of greater or equal value for which no money is recouped.\textsuperscript{239} Thus, either both regulatory losses should be compensated and gains taxed (the "windfalls for wipeouts" approach) or neither should be.\textsuperscript{240}

Land use regulations cannot logically be distinguished in their capacity to inflict regulatory losses from the ubiquitous business and social regulations.\textsuperscript{241} But the Supreme Court has shown absolutely no interest in applying the regulatory takings doctrine to assets other than land.\textsuperscript{242} Doing so would approach denying the legitimacy of legislation \textit{tout court}. The imposition of such a universal compensation

\begin{itemize}
\item \textsuperscript{237} See id. at 54-55.
\item \textsuperscript{238} Id. at 60.
\item \textsuperscript{239} This argument about incentives complements the pragmatic difficulties encountered in trying to value both regulatory gains and losses, as described above in the discussion of Great Britain's experience with "worsenment" and "betterment." See supra part IV. In any case, even if a mandatory compensation rule provided appropriate incentives for investment, the great unpredictability of the regulatory takings doctrine would negate \textit{ex ante} the benefits of providing compensation for such takings.
\item \textsuperscript{240} This point builds on a seminar comment by professor David Dana. See Donald G. Hagman, \textit{Wipeouts and Their Mitigation}, in \textit{Windfalls for Wipeouts}, supra note 132, at 5-14; Donald G. Hagman, \textit{Windfalls and Their Recapture}, in \textit{Windfalls for Wipeouts}, supra note 132, at 15-19.
\item \textsuperscript{241} This is a point that Richard Epstein repeatedly stresses. See, e.g., \textit{Private Property and the Power of Eminent Domain}, supra note 230, at 101 ("The differences among these various forms of [land use and economic] regulation are sure to be important in any assessment of their economic consequences or their legal justification. . . . Yet these protean forms of regulation all amount to partial takings of private property.").
\item \textsuperscript{242} See, e.g., Concrete Pipe \& Prods. of Cal. Inc. v. Construction Laborers Pension Trust for S. Cal., 113 S. Ct. 2264 (1993); United States v. Sperry Corp., 493 U.S. 52 (1989).
\end{itemize}
requirement would displace voting as the principal means for ensuring that legislation furthers the public interest. But that is the point, there is no logical place to draw the line between compensated and uncompensated regulatory losses. The regulatory takings doctrine draws a line at the boundary between real and personal property, but that drawing is neither historically informed nor consonant with our common law traditions.

Even putting aside all these problems, the extent to which a court committed to economic analysis could evaluate the benefits gained from land use regulation would remain doubtful. Development of a parcel may cause harms that are widespread but that cannot be quantified with any reliability. In principle, the value of a plot of land when a certain use is permitted can be compared to its value when that use is not permitted. But permitting (or prohibiting) the use will have secondary effects on land in the area. My neighbor's land might be much more valuable to him if he could build an office block on it, but such development might greatly reduce the value of surrounding homes; moreover, it might alter commuter traffic patterns in a way that would have economic repercussions well beyond the immediate neighborhood. Of course, there is no market for these externalities, they cannot be bought or sold, so their magnitude and direction can at best be estimated using crude analogies. As ill-equipped as legislators and administrative agencies are to make these complex calculations, courts have even less aptitude for them. Moreover, court decisions are not legitimated by the political process the way legislative actions are.

IX
ABOLITION OF THE REGULATORY TAKINGS DOCTRINE WILL NOT LEAD TO ANY FUNDAMENTAL UNFAIRNESS TO OWNERS OF REAL PROPERTY

Perhaps the most common justification for the regulatory takings doctrine is that fairness and justice require that some losses imposed through regulation not be borne by the owner alone but be shifted to the public at large. Preventing fundamental unfairness has some-

244. See, e.g., Pollitt, supra note 20, at 161.
246. The language usually cited or paraphrased comes from Armstrong v. United States, 364 U.S. 40, 49 (1960). The Court there stated: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Id.; see also
times been a justification for the crafting of protective constitutional doctrines from the grand generalities of the Fourteenth Amendment. But eliminating the regulatory takings doctrine will not lead to the kinds of systematic or socially divisive losses that have been thought to justify other constitutional doctrines restraining the authority of democratic majorities. The point is not that there never can, nor ever will, be regulations that impose unfair burdens on some individuals, but that there is no constitutional basis for supposing that the political process cannot adequately address such cases.

Justice Stone put forward the most widely accepted explanation for invoking constitutional generalities to displace legislative judgments in the famous footnote four of United States v. Carolene Products, Inc. Justice Stone suggested that laws that do not violate specific prohibitions of the Constitution but restrict the political process or reflect prejudice against "discrete and insular minorities" might require judicial activism. This point has evolved into the familiar principle that legislation that disproportionately burdens members of disfavored groups will more likely be fundamentally unfair because the members of the groups may not be able to control the legislature either alone or in coalition.

Invoking such an argument to defend the regulatory takings doctrine would, however, be ludicrous. Real property ownership in the United States is very widely dispersed, and property owners have the means to be—and are—very politically active in defense of their interests. Property owners are found in all political camps and coalitions. Furthermore, legislatures cater to the concerns of property owners. Local governments, which are dependent on property


248. Id.
249. Id.
250. JOHN H. ELY, DEMOCRACY AND DISTRUST 135 (1980) ("No matter how open the process, those with most of the votes are in a position to vote themselves advantages at the expense of others, or otherwise to refuse to take their interests into account. 'One person, one vote,' under these circumstances, makes a travesty of the equality principle.").
251. In 1990, 64.2% of occupied housing units were occupied by the owner, leaving only 35.8% occupied by renters. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993, at 725 (1993).
252. Home ownership, for example, is supported by a famous tax subsidy. 26 U.S.C. § 25 (1988 & Supp. V 1993). Moreover, high income owners of beachfront property, very often expensive vacation homes, have succeeded in obtaining heavily subsidized flood in-
taxes to finance basic services, are ever eager to promote and preserve
the aggregate value of local real estate.253 The point immediately
seems belabored: no constitutional doctrine can be predicated on a
failure of the political process to properly account for the interests of
property owners.

One argument for constitutional protection of owners emphasizes
the unfairness of surprise: the owner bought property expecting to be
able to develop it for a profit.254 While every case will see argument
about what the owner knew or should have expected at the time he
bought the property, such frustration can be guarded against as effec-
tively by eliminating the expectation as by guaranteeing it. Abolishing
the regulatory takings doctrine would mean that no person could form
justifiable expectations about profit until he had some irrevocable per-
mission to build. Indeed, elimination of the regulatory takings doc-
trine may be fairer to the average developer than the current vague
mishmash of doctrine, under which he frequently may be surprised to
discover that courts will not compensate him for the loss of his
epectancy.

It is difficult to formulate any other argument for unconstitu-
tional unfairness in land use regulation. In enumerating losses that
seem maddeningly unfair and ought to be borne by society at large,
few would begin with losses from unexpected inability to develop land
for profit. Catastrophic illness and birth into poverty seem like losses
much easier to justify spreading on grounds of fairness than losses stem-
ing from a voluntary and considered act like purchasing a parcel of
land for development. Why should the Constitution be inter-
preted to socialize losses disproportionately falling on moderate and
high income citizens?

It may be argued that intentional infliction of loss on a property
owner through regulation is more objectionable from an ethical stand-
point than the losses that may befall any of us through natural disas-
ters, like illness or floods. But this is unpersuasive for two reasons.
First, social policies contribute substantially to the losses people suffer
from natural disasters; in the United States, we allocate health care by
ability to pay,255 and we subsidize insurance for construction in flood

254. A good example of this expectation is that of Mr. Lucas in Lucas v. South Caro-
zones. Second, insofar as regulations enhance overall social well-being, the losses they inflict as a byproduct may be less regrettable than losses imposed by blind natural or social forces, even when mediated through politics.

Other constitutional rules will prevent specific types of unfairness to landowners. Singling out a particular group to bear losses raises distinct problems dealt with by other constitutional doctrines. The rule treating a permanent physical invasion as a *de facto* appropriation might protect against cases where the government seeks to press property into a public use through regulation to avoid payment of compensation. Finally, the Due Process Clause may be interpreted to strike down laws that seek intentionally to avoid these restrictions or that fail reasonably to advance the public interest.

THE REGULATORY TAKINGS DOCTRINE PRECLUDES EMERGING ECOLOGICAL UNDERSTANDINGS

Accumulating scientific research and analysis and the evidence of our own experience declare that contemporary patterns of human activity, including real estate development, severely damage particular ecosystems and the global biosphere. Prophetic voices have urged for some time now that owners must develop a new land ethic that does not undermine the environment.

Legal scholars and activists


259. See, e.g., Marks v. City of Chesapeake, 883 F.2d 308 (4th Cir. 1989) (holding that the denial of a permit for a fortune telling business in a commercial zone was arbitrary).


261. Aldo Leopold stated in *The Ecological Conscience*:

"[A]s I understand it, the content [of conservation education] is substantially this: obey the law, vote right, join some organizations, and practice what conservation is profitable on your own land; the government will do the rest. Is not this formula too easy to accomplish anything worth-while? It defines no right or wrong, assigns no obligation, calls for no sacrifice, implies no change in the current philosophy of values. In respect of land-use, it urges only enlightened self-interest.

ALDO LEOPOLD, *The Ecological Conscience* in *A SAND COUNTY ALMANAC WITH ESSAYS ON CONSERVATION FROM ROUND RIVER* 243-44 (1966). In addition, in *The Land Ethic* he stated:
have begun to incorporate these data and moral visions into proposals to reshape property law to restrict owners' authority to disrupt the land's ecological integrity and to elaborate owners' duty to preserve ecosystems for their own sake and for future generations.262

Regulatory takings cases nearly always involve prohibitions on schemes to develop a site for profit or pleasure, not restrictions on existing uses.263 In constitutionalizing an owner's right to develop his land according to the promptings of the market, the courts have promulgated a doctrine that stands in stark conceptual opposition to emerging notions of green property. Abolition of the regulatory takings doctrine will permit reformulations of property and land use law to emerge incrementally and practically from the political process. This evolution must progress lest our descendants inherit a sick, degraded planet.

A new land ethic will differ substantially from classical property rules, which treat land as an economic resource that must be enclosed and placed under unified ownership to promote efficient economic deployment.264 Costs not borne by the property owner have been considered incidental "nuisances" that can be accounted for economically

To sum it up: a system of conservation based solely on economic self-interest is hopelessly lopsided. It tends to ignore, and thus eventually to eliminate, many elements in the land community that lack commercial value, but that are (as far as we know) essential to its healthy functioning. It assumes, falsely, I think, that the economic parts of the biotic clock will function without the uneconomic parts.


More radical voices have emerged as ecological debate has expanded:

Ecological consciousness and deep ecology are in sharp contrast with the dominant world view of technocratic-industrial societies which regard humans as isolated and fundamentally separate from the rest of Nature, as superior to, and in charge of, the rest of creation. Deep ecological consciousness allows us to see through these erroneous and dangerous illusions."


263. The conspicuous exception is the prohibition of a current nuisance, which does not require compensation, probably even after Lucas. See Hadacheck v. Sebastian, 239 U.S. 394 (1915). For preexisting uses that conflict with valid regulations, but are not nuisances, courts require at least that the use continue for some time so the owner can recover a substantial part of his previous investment. Harris v. Mayor of Baltimore, 371 A.2d 706 (Md. App. 1977), cert. denied, 280 Md. 731 (1977); Art Neon Co. v. City of Denver, 488 F.2d 118 (10th Cir. 1973), cert. denied, 417 U.S. 932 (1974); Board of Supervisors v. Miller, 170 N.W.2d 358 (Iowa 1969).

through bargaining or litigation among affected parties. However, the science of ecology has taught that the connections among parcels are their essence and that the flows of biological support among organisms and sustaining resources do not respect legal bounds. Property rules that are fair and efficient among contending people may not account for environmental externalities.

Wetlands have been an obvious subject for conflict between these differing ideas of property. Huge public investments in highways and demographic changes have made living close to the shore attractive to more people. Improved technology has enabled developers to more easily fill wetland areas for housing, agriculture, and commercial development. But awareness of the importance of wetlands to overall environmental quality also has grown rapidly. The filling of wetlands is now known to exacerbate flooding and water pollution and to de-

266. ROBERT E. RICKLEFS, ECOLOGY 5 (3d ed. 1990) ("Although the plight of endangered species may arouse us emotionally, there is a beginning realization that the only means of preserving and using natural resources is through the conservation of entire ecological systems and of broad-scale ecological processes."); Daniel H. Jenzen, The Eternal External Threat, in CONSERVATION BIOLOGY 286, 287 (Michael E. Soule ed., 1986) (stating that "while a preserve's boundaries may serve well enough to stop direct human transgressions, the boundaries per se will mean nothing to most organisms"); David S. Maehr, The Florida Panther and Private Lands, 4 CONSERVATION BIOLOGY 167 (1990) (explaining that the Florida Panther's range includes private lands that are undergoing intensive agriculture and urban development).
267. See FREYFOGLE, supra note 262, at 32-38.
268. For several reasons, some may argue that property law has fully incorporated ecological norms for those resources covered by the public trust doctrine. First, the doctrine provides that certain resources, notably lands beneath tidal waters and navigable waters, are owned by the sovereign in trust for the use and benefit of the public. See generally Joseph L. Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970). Second, courts have employed the public trust doctrine in some notable victories for ecological preservation. See, e.g., National Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1982), cert. denied, 464 U.S. 977 (1983). Finally, total prohibitions on private property may survive regulatory takings review, even under Lucas, because the public trust restraints inhere in the owner's title. See Babcock, supra note 3, at 3.

On the other hand, the public trust is blunt, overbroad, and underinclusive. See Richard Delgado, Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection and Some Dark Thoughts on the Possibility of Law Reform, 44 Vand. L. Rev. 1209 (1991); Richard J. Lazarus, Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine, 71 Iowa L. Rev. 631 (1986). For those resources to which it applies, it precludes private ownership entirely and may upset long held expectations. In addition, it does not and cannot apply to most natural resources long traded in private control. Its application defeats regulatory takings because of the lame fiction that the sovereign's interest has inhered in the title forever, but became manifest only through common law adjudication. Perhaps a balanced view would credit the public trust doctrine primarily for expanding our understanding of how environmental concerns may reshape property, but look elsewhere for a workable maturation of that process.
crease fish and waterfowl stocks by destroying spawning and migration areas.269

State and federal governments have responded to the destruction of wetlands with numerous laws and programs designed to protect these resources.270 Though these regulatory regimes have met with criticism from numerous perspectives, the basic principle, that the public ought to have a say about the decision to fill a wetland, has become firmly established through the political process. Nonetheless, administrative denials of permits to fill wetlands provide the archetypal occasion for regulatory takings cases.271

On a larger scale, similar environmental effects can occur in all ecosystems: forests, prairies, rivers, beaches, slopes, and deserts.272 An environmentally concerned public has a valid interest in all private decisions to alter natural conditions anywhere because they may contribute to air and water pollution, flooding, decreasing biodiversity, ozone depletion, broadcasting of toxins, or global warming. While new construction for vital human needs will certainly continue, recog-

269. Wetlands serve many functions in natural ecosystems. The periodic flooding of some wetlands provides breeding and foraging grounds for birds and fish of neighboring waterways and forests. Jon A. Kusler et al., Wetlands, Sci. AM., Jan. 1994, at 64. Wetlands are also havens for many rare organisms. Of the endangered species listed in 1991, 43% were dependent on wetlands. Mark S. Dennison & James F. Berry, Wetlands: Guide to Science, Law, and Technology 57 (1993). Wetlands are also among the most productive ecosystems in the world, equaling or exceeding tropical rain forests. Id. at 57-60.

The benefits to humans are equally impressive. Floodplains absorb and contain floodwater, reducing property damage caused by flooding. Id. at 99. Recent floods on the Missouri and Mississippi rivers were exacerbated by the loss of wetlands that could have absorbed or stored floodwaters. Kusler et al., supra, at 67. Estuarine wetlands help protect the shoreline from erosion. Dennison & Berry, supra, at 130. Wetlands can also capture and process nutrients and toxins, reducing pollution of lakes, rivers, and aquifers. Id. at 84, 89, 111, 131. Wetlands provide exploitative benefits as well as environmental buffering. Between 60% and 90% of the U.S. commercial fish catch is attributable to wetlands. Id. at 55. Valuable timber is produced by many swamps. Id. at 89.

This illustrates only a small fraction of the functions and values of wetlands. Economist F. Gregory Hayden identified 26 specific benefits provided by pristine wetlands. F. Gregory Hayden, Wetlands Provisions in the 1985 and 1990 Farm Bills, 24 J. Econ. Issues 575 (1990).


271. See supra notes 202-10 and accompanying text.

nition of the pervasive externalities of development provides a principled basis for strong public controls.\footnote{273}

Much of the Supreme Court’s activism in this area seems designed precisely to forestall whatever political advances green property may make. Thus, the Court has ridiculed the idea that ownership does not include the right to build;\footnote{274} has established that economic loss alone can work a taking without regard to public harms (except in the context of preventing nuisances where specific harms are visited upon specific neighbors);\footnote{275} and has assumed the authority to proclaim which rights of property are essential.\footnote{276} All this has been done to constitutionalize development rights and to put the private choice to change the physical conditions of land beyond political control. At the same time, it seems designed to prop up the classical legal culture of property rights and to give constitutional sanction to the idea that legal title gives lordly authority over the Earth.

Of course, it is far from certain that the political process will embrace the version of strong environmentalism that I have sketched here. Few politicians are prepared to run on a platform of more extensive government power that may well lead to a decrease in aggregate individual wealth as conventionally measured. But the challenge of the greens should be mediated by the political process, not blunted by judicial fiat. Political compromises will produce specific, contingent limits on development hedged with exceptions and protections; only over time and after protracted argument could a green paradigm emerge. Perpetuating constitutional protection for development rights will both ensure continued degradation of American ecosystems

\footnote{273. One should not underestimate the difficulties of establishing the political machinery necessary to control development so as to preserve environmental health without exacerbating rent seeking and exclusionary regulation. In general, strong environmentalists have been long on ideals and short on political architecture.}

\footnote{274. Nollan v. California Coastal Comm’n, 483 U.S. 825, 834 n.2 (1987) (“The right to build on one’s own property . . . cannot remotely be described as a governmental benefit.”).}

\footnote{275. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 (1992) (“Regulations that prohibit all economically beneficial use of land . . . cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”).}


\footnote{276. Kaiser Aetna v. United States, 444 U.S. 164, 179-88 (1979) (“In this case we hold that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.”).}
and force strong environmentalists out of the political process into more extreme denunciations of established orthodoxies.

CONCLUSION

Judged by the traditional criteria of constitutional law, the regulatory takings doctrine lacks substantial justification. Neither the text of the Constitution nor the intent of the framers provides any basis for using the Just Compensation Clause as a check upon regulation. Courts for the first 130 years of constitutional adjudication consistently so held. No compelling ethical principle nor structural defect in the political process justifies permitting judges to determine that some regulatory laws go "too far." The experience of other democratic nations suggests that no such extraordinary judicial power is needed to maintain a vital system of private property.

The contest between property rights advocates and ecologists reveals fundamental disagreements about the place of people in the world. The former stress individualism, self-interest, liberty, and the creation of measurable wealth. The latter stress mutual dependence, cooperation, moral duties toward other forms of life, and spiritual enrichment. Not surprisingly, the Constitution of the United States does not enshrine either vision. It creates imperfect representative institutions through which the polity can determine its own future. Inevitably, the clash of differing visions and interests engenders compromise and inconsistency. The law must accommodate the ecological perspective for there to be any hope of preserving an environment in which future generations can flourish.

ADDENDUM: DETERMINING COMPENSATION FOR REGULATORY LOSSES IN THE LEGISLATIVE PROCESS—THE NEED FOR FURTHER EXAMINATION

My contention that the Constitution cannot be made to yield a principled standard for determining when compensation should be paid for regulatory loss requires some discussion of how legislation should address the compensation issue. Since I have insisted that compensation for such losses must reflect political judgments about fairness and efficiency, it seems responsible to indicate what statutory base for compensation I think appropriate. In this addendum, I briefly review several bills introduced in Congress and state legislatures to prevent or compensate takings. Then I turn to a statutory proposal of my own for awarding landowners compensation for changes in regulations after effective approval for their projects. By explaining and arguing for this reform, I attempt to indicate a benefi-
cial avenue for public debate about when compensation for regulation should be paid.

Numerous "property rights bills" have surfaced in recent years. Unfortunately, they are a sorry lot.\textsuperscript{277} They reflect more the desire of legislators to affirm their rhetorical fidelity to the myth of Property as a cornerstone of American freedom than they do careful consideration of the actual effects of this concept. To no small extent, they appear to be vehicles for politicians who wish to derail existing environmental protections without directly confronting the consequences of doing so.

The bills fall into two categories, which might be labelled "prophylactic" and "compensation." The prophylactic bills\textsuperscript{278} mandate that agencies follow certain procedures to protect property rights when a proposed action might result in a taking. These bills descend from President Reagan's Executive Order No. 12,630.\textsuperscript{279} Some follow the Executive order in requiring each agency to establish its own mechanism to avoid impairing property rights.\textsuperscript{280} Others actually provide the mechanism, even going so far as to require a "takings impact analysis" before initiation of some agency actions.\textsuperscript{281}

The prophylactic bills certainly raise the cost of regulation and provide stimuli for opponents of regulation. Whether they actually protect property rights is doubtful. The bills suppose that an agency can rationally consider whether a proposed regulation will effect a taking on any piece of property in the United States. But the Supreme Court has understandably insisted that any regulatory takings litigation must be property-specific, based upon a full record exploring all the constitutional factors.\textsuperscript{282} Thus, in states that have adopted such prophylactic bills, the issuing agency merely issues a circumlocution concluding that whether a taking will occur depends on the facts.\textsuperscript{283} In practice, the prophylactic bills will merely churn the

\textsuperscript{277} Protecting Private Property Rights from Regulatory Takings: Hearings on H.R. 9 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) (statement of J. Peter Byrne) ("In brief, I believe that it would be difficult to denounce H.R. 9 with sufficient vehemence. It is profoundly stupid and deeply cynical.").


\textsuperscript{279} See supra text accompanying notes 204-14.

\textsuperscript{280} See H.R. 3875, supra note 278; S. 1915, supra note 278.

\textsuperscript{281} See S. 605, supra note 278; S. 22, supra note 278.

\textsuperscript{282} See supra part III.

regulatory waters and allow interested parties another opportunity to argue about the effects of proposed action.

The most prominent compensation bills require federal payment to property owners whenever wetlands or endangered species regulations reduce the market value of "an affected portion" of an owner's land by some percentage. These bills depart dramatically from constitutional doctrine, authorizing compensation for any designated diminution in value without regard to justification for the restriction or to an owner's expectations. Moreover, the bills require compensation in nearly every instance that a regulation affects a parcel, since the bills take the narrowest possible baseline to determine decreases in value. That is, they measure the decrease in value only of the affected portion of land, not of the entire parcel. If enacted, such bills will either require massive transfers to owners of environmentally sensitive lands or halt federal land use regulation.

Though the current debate in Washington, as exemplified by the bills described above, rarely allows the realities of environmental degradation to intrude, legislation can provide for compensation in a way that promotes justice to landowners without precluding substantive restrictions on use to secure environmental protection. I suggest that states and the federal government adopt statutes that confer property rights upon landowners once they have received site-specific regulatory permission for a development. A statute that did this could mandate compensation for losses imposed by subsequent changes in applicable requirements for, say, three years. Not only would such a statute protect owners against frustration of justifiable reliance upon regulatory permission, but it would shape those expectations ex ante to promote more socially beneficial behavior by both owners and regulators. In short, such a statute would be a sensible adjustment to the ubiquity of land use regulation rather than an attempt to destroy it.

Owners permitted to develop their property under existing laws have very limited protection against changes in the law that may render their intended project unlawful. Certainly, the purchase of land or the formulation of a development project grants them no

284. S. 1915, supra note 278; H.R. 3875, supra note 278. House Bill 925, recently passed by the House of Representatives and currently pending before the Senate, requires compensation when agency action reduces the value of property by more than 20%, but this appears to be a device to numb opponents to compensating slightly larger losses. Senate Bill 605, also pending in the Senate, sets the threshold at 33% reduction. S. 605, supra note 278.

285. See supra parts I-III.

286. S. 605, supra note 278, § 204(a)(2)(B)-(C).

287. Most are designed to gut regulatory enforcement through the single technique of requiring compensation awards to be paid from the responsible agency in operating appropriation. See S. 605, supra note 278, § 204(f).
rights against changes in zoning or other broadly applicable regulations (other than those unpredictably conferred by the Takings Clause). Even the issuance of a subdivision approval or building permit does not give per se protection against changes.

The judge-made doctrine of equitable estoppel, which in some states takes on a constitutional dimension, does afford some limited protection. Under this doctrine, courts may thus enjoin application of new requirements or order compensation when the owner makes concrete investments in development, such as construction costs, in reasonable reliance upon a specific government permission. But judicial protection under equitable estoppel remains weak and uncertain. States vary greatly in the point at which an owner's actions gain protection and in the type of investments that should be compensated. Judicial reluctance to tie the hands of local legislators and the proliferation of permitting authorities have in many jurisdictions postponed the point at which a developer can be assured that she will be able to recover her investment. Moreover, courts differ on which investments precipitate a reliance interest. Few will compen-


Kentucky courts, although professing that "there is no justification for reliance on [an invalid] permit," apply the "honest error" doctrine to allow a landowner to estop the government from blocking a development that proceeds under a bad permit. City of Berea v. Wren, 818 S.W.2d 274, 276-77 (Ky. Ct. App. 1991). Delaware courts reject the "honest error" doctrine, allowing the government to revoke an invalid building permit. Miller v. Board of Adjustment, 521 A.2d 642, 647 (Del. Super. Ct. 1986).
292. Despite the "unrecoverable [financial] loss" caused by new regulations affecting a parcel, New Hampshire courts conclude that "money spent for the acquisition of property itself is properly excluded from consideration [as reliance]." Gosselin v. City of Nashua, 321 A.2d 593, 596 (N.H. 1974). Florida courts, on the other hand, consider the purchase of a specific parcel and investment in architectural fees, when combined with the fact that the city had previously rezoned the land at the purchaser's request, as a sufficient reliance to estop the city from revoking its approval. Town of Largo v. Imperial Homes Corp., 309 So. 2d 571, 573 (Fla. Dist. Ct. App. 1975). Without specific comment, a Missouri court included the purchase price in measuring reliance. May Dep't Stores v. County of St. Louis, 607 S.W.2d 857, 869 (Mo. Ct. App. 1980); see also Mandelker, supra note 288, § 6.21 (citing additional examples of courts granting and denying reliance after excavation).
sate for the decreased market value of the property under the new restrictions. 293

This regime creates perverse incentives for both developers and regulators. The uncertainty of future regulation increases the cost of development. Developers may delay expenditures or underinvest due to uncertainty about whether they will be able to proceed as planned. Some may overinvest in an attempt to demonstrate sufficient reliance to support an equitable claim. The ability of regulators to change their minds also encourages the ad hoc, amateur quality of much local land use regulation, where response to short-term political pressures substitutes for comprehensive, informed, long-term planning. 294

A statute providing a developer with a property right to pursue an approved development plan upon the issuance of a crucial permit would foster several systematic benefits. A reasonable time limitation for permits, perhaps three years, would allow government to respond to changes in circumstances and overall goals. It would also authorize government to take action needed to address hazards that pose serious threats to public health and safety. But the thrust of the statute would be to give property status to the approved development plan at a clear point in the process, so that non-excepted subsequent prohibitions on completion would require payment of compensation to the owner. 295

Such a statute would have several advantages over existing law. It would allow the developer of a permitted project to proceed with investments in her plan at a pace dictated by market considerations rather than by regulatory concerns. The statute would guide the development of the owner’s expectations: before the permit, all expectations are speculative; afterward, they receive the concrete protections inherent in traditional property law. Establishing such a clear vesting point in the permitting process improves both fairness and efficiency.

This statute (in conjunction with the abolition of constitutional regulatory takings review) would give regulators substantial discretion to determine what uses will be allowed on any parcel. 296 But it would also require them to assemble information and make decisions at an

293. See Mandelker, supra note 288, § 2.05. But in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899-900 (1992), the U.S. Supreme Court allowed full compensation for plaintiff’s land due to new state restrictions regarding development of barrier islands. For a full discussion, see supra notes 154-66 and accompanying text.

294. See Cullingworth, supra note 253, at 12-14.

295. This development right should be freely assignable, since it would be treated as a ripe economic entitlement.

296. Opposition to such vesting legislation may often reflect concerns that local land use ordinances and institutions are inadequate to control the types of development current in the jurisdiction. My proposal assumes that such local powers are adequate. If they are not, their substantial improvement could be part of a legislative compromise that could include prospective vesting rules.
appropriate stage of the process. Mandating a vesting permit provides a clear focus for public debate about the appropriateness of the proposed development. Moreover, the significance of the vesting permit should encourage collaboration among regulatory bodies, furthering the important goal of having only a single development permit.297

In short, such a statute would provide an appropriate adjustment for both owners and regulators to the reality that land use regulation in a crowded and polluted nation must be pervasive and rigorous but also fair, efficient, and sophisticated. Such statutes are a common feature of comprehensive European land use laws.298

Several states have adopted statutes that move toward vesting development rights upon the issuance of a central permit.299 Many are quite incomplete. Some apply only to platting of subdivisions. Some apply only to requirements for individual permits and do not address changes in requirements for other approvals. Recently enacted laws in Colorado and North Carolina provide better models.300 Both laws

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298. See supra part IV (discussing English, French, and German land use laws).

A vested property right shall be deemed established with respect to any property upon the approval, or conditional approval, of a site-specific development plan, following notice and public hearing, by the local government in which the property is situated. Such vested property right shall attach to and run with the applicable property and shall confer upon the owner the right to undertake and complete the development and use of said property under the terms and conditions of the site specific development plan. . . . Site specific development plan may be in the form of, but is not limited to . . . a planned unit development plan, a subdivision plat, a specially planned area, a planned building group, a general submission plan, a preliminary or general development plan, a conditional or special use plan, a development agreement, or any other land use approval designation as may be utilized by a local government.

A property right which has been vested . . . shall remain vested for a period of three years. . . . Notwithstanding [the vesting provisions], local governments are hereby authorized to enter into development agreements with landowners providing that property rights shall be vested for a period exceeding three years where warranted . . . .
vest development rights upon the approval of a "site-specific development plan," but allow the locality to indicate which permit so functions. The vesting permit allows the developer to complete her project according to the terms and conditions of the approved plan. The developer must still obtain all necessary permits, but only according to the rules in force at the time of vesting.301

An addendum to an article about constitutional requirements is not a propitious place for a discussion of the details of such a statutory scheme. The Colorado statute has been criticized on several points, and some of these merit attention.302 Professor Hagman thought that such statutes should protect only actual reliance,303 while I am inclined to believe that they should protect an owner's entire expectation for development, including the increased value in the land. But this addendum will have served its purpose if it points toward the type of discussion we should have about compensation statutes; they should acknowledge the propriety of public control over development decisions, but establish ex ante rules that foster regulation that proceeds fairly and efficiently.


301. Both the Colorado and North Carolina statutes provide that regulations passed after the vesting point may be enforced if the landowner is compensated for: "[A]ll costs, expenses, and liabilities incurred by the landowner, including, but not limited to, all fees paid in consideration of financing, and all architectural, planning, marketing, legal, and other consultants' fees incurred after approval. . . . [C]ompensation shall not include any diminution in the value of the property." Colo. Rev. Stat. Ann. § 24-68-105(c). North Carolina's statute differs insignificantly. N.C. Gen. Stat. § 153A-344.1(e)(1)(c). Neither statute explicitly provides an equitable remedy.

302. Michael M. Schultz, Vested Property Rights in Colorado, the Legislature Rushes in Where . . ., 66 Denv. L. Rev. 31 (1988). Schultz argues that Colorado's safety exception is too narrow. Id. at 58-60. He also notes that unless neighbors act early in the process these concerns will not be addressed. See id. at 58. Unfortunately, neighbors are frequently unconcerned until there is visible evidence of development. Id. His further complaint that the statute encourages "warehousing" of approved development rights seems misplaced; vested rights last only three years. See id. at 60. Moreover, a market for permitted development projects may emerge that could foster efficiencies in obtaining permits and construction.