Washington and Lee Law Review

Volume 53 | Issue 1 Article 8

Winter 1-1-1996

A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation

Carol M. Rose

A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation

Carol M. Rose*

Introduction

Property rights are a hot political topic. In the last few years, the issue of regulatory "takings" of property has ceased to be merely a vastly overwritten subject in the legal academic literature. A "property rights" movement — taking aim in particular at environmental legislation — seems to have been energized by several new takings cases from the Supreme Court[1]

---

* Gordon Bradford Tweedy Professor of Law and Organization, Yale Law School. This Paper was delivered October 4, 1995 as the John Randolph Tucker Lecture to the faculty, students, and guests of the Washington and Lee University School of Law, whose comments and questions were most insightful and useful. For helpful comments on earlier drafts, I especially would like to thank Bruce Ackerman, Fred Bosselman, Peter Byrne, Daniel Esty, Louise Halper, and Laura Underkuffler. Chris Kubiac provided valuable research assistance. Errors, of course, are my own.

1. The Supreme Court held almost no regulations to be takings prior to the 1980s. This trend began to change quite sharply in the 1980s, particularly after 1987. The major cases finding actual or potential takings of property have been, in chronological order: Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438-39 (1982) (holding physical invasion of property to be taking); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321-22 (1987) (holding damages to be appropriate remedy if taking occurs); Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-42 (1987) (holding requirement of public access as condition for building permit to be taking); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027-31 (1992) (holding that regulation denying all economically beneficial uses of land constitutes taking unless state can show that background principles of nuisance and property law prohibited proposed use); Dolan v. City of Tigard, 114 S. Ct. 2309, 2321-22 (1994) (holding requirement of public easement as condition for building permit to be taking). *But see* Yee v. City of Escondido, 503 U.S. 519, 526-31 (1992) (holding rent control not to be physical taking of property); Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 491-502 (1987) (holding state mining law limiting rights to undermine surface not to be taking). On the emergence of the property rights movement, see, e.g., Christopher Georges, *Wider Property-Owner*

and, to a lesser extent, from a newly activist Court of Federal Claims.[2] "Takings" bills are debated fiercely in Congress and in statehouses all over the United States, as state and federal legislators entertain measures that confront a pattern of regulation that is said to threaten private property.[3]

Although the congressional bills deal only with federal matters, and the state measures deal with state and local regulation, most of these measures follow one of three basic strategies. First, they may require regulatory bodies or state officers to undertake assessment processes in an attempt to determine whether their actions potentially "take" the property of private parties. Second, they may attempt to redefine and expand what counts as a "taking" of property. And third, they may implicitly or explicitly narrow the defenses that regulatory bodies may raise when facing takings charges. Taken together, these measures may considerably enlarge the range of public acts that count as "takings" and, conversely, considerably contract the scope of regulatory authority.

In this article, I will address some of the issues that these acts and proposals raise, concentrating on the congressional bills because, if adopted, these federal enactments may well serve as models for subsequent state legislation.[4] But more generally, I want to clarify some of the property concepts that underlie takings jurisprudence. Because many of the proponents

---

Compensation May Prove a Costly Clause in the "Contract with America," WALL ST. J., Dec. 30, 1994, at A8; H. Jane Lehman, *Owners Aren't Giving Ground in Property Battles* (1st in 3 part series, "Whose Land Is It?," on the private property rights movement), CHI. TRIB., Feb. 9, 1992, § 16 (Real Estate), at 1B, 1B-2B.

2. *See, e.g.*, Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 160 (1990) (finding application of wetlands regulation to be taking), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994).

3. As of the fall of 1994, all state legislatures had considered, and 10 had enacted, some version of takings legislation. Robert H. Freilich & RoxAnne Doyle, *Taking Legislation: Misguided and Dangerous*, LAND USE L. & ZONING DIG., Oct. 1994, at 3, 3 & n.1. The newly elected Congress also has taken up takings legislation; the House passed the Private Property Protection Act of 1995, H.R. 925, 104th Cong., 1st Sess. (1995) [hereinafter House Property Protection Act], on March 3, 1995, and the Senate is currently considering the Omnibus Property Rights Act of 1995, S. 605, 104th Cong., 1st Sess. (1995) [hereinafter Senate Property Rights Act]. By 1995, more states had passed similar legislation, including Florida, H.R. 863, 1995 Leg., Reg. Sess. (1995) (enacted May 18, 1995), Texas, S. 14, 74th Leg., Reg. Sess. (1995) (enacted June 12, 1995), and Virginia, S. 1017, 1994-95 Leg., Reg. Sess. (1995) (enacted March 25, 1995), among others.

4. Takings assessment laws, the most common type among the state enactments, followed this pattern. The general model for states was Executive Order 12,630, 3 C.F.R. 554 (1988), *reprinted in* 5 U.S.C. § 601 (1994), issued late in the Reagan administration, which required federal agencies to assess the takings implications of proposed regulations. *See* Freilich & Doyle, *supra* note 3, at 3.

of takings legislation call on what they regard as the historic principles of a more property-conscious past,[5] I will concentrate on the common-law and historical legal principles relating to takings and property regulation.

Briefly, my position is that historic Anglo-American legal principles did indeed recognize the importance of private property rights, which are essential in a functioning free enterprise economy. But those principles also recognized what were called "public rights," particularly in resources that are not easily turned into private property — historically, air, water resources, and fish and wildlife stocks — because the management of such diffuse resources is also essential in a functioning economic order of free enterprise. Indeed, the essence of traditional takings law is an effort to balance private rights and public rights as they co-evolve over time. This balance is drawn principally by judicial actions, but the judiciary historically has recognized that legislatures have an important role to play, particularly in defining and protecting public rights. What is most at risk in the new takings measures is the tradition of public rights because, in their authors' anxiety to protect private rights, the measures may lose sight of the complementary character of public and private rights in any functioning property regime.

With that introduction, let me begin my Dozen Propositions — twelve observations on private property, public rights, and the new takings legislation.

Proposition 1.

Private property rights are essential in a free-enterprise regime.

Property's importance for capitalism has been recognized at least since John Locke's famous discussion in his Second Treatise of Government,[6] a discussion on which both William Blackstone[7] and Jeremy

---

5. *See Regulatory Takings and Property Rights: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) [hereinafter *Regulatory Takings*] (statement of James W. Ely, Jr.) (arguing that American law and practice historically was solicitous of private property); *id.* (Statement of Roger J. Marzulla) (arguing that framers wished to protect property, which was under assault from environmental laws); *see also* Roger Pilon, *Property Rights, Takings, and a Free Society*, 6 HARV. J.L. PUB. POL'Y 165, 168-70 (1983) (arguing that modern restrictions on property subvert historically correct principles of private property). More recently, Pilon testified in favor of the takings legislation pending in the House of Representatives. *Regulatory Takings*, *supra* (statement of Roger Pilon).

6. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 290, 292-96, 299-301, 350-51 (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

7. 2 WILLIAM BLACKSTONE, COMMENTARIES *2-*4.

Bentham[8] later elaborated. An owner must have reasonably secure expectations of continued ownership if he or she is going to expend efforts to improve resources. Similarly, reasonably secure definitions of property are essential to trade because trading partners must know who owns what in order for their trades to mean anything.

These elementary building blocks of capitalism — encouragement to labor and trade — are important reasons for the security of property, and they are very widely recognized in the common law of property. Incentives to labor, for example, arise in a classic nugget of property case law, *Pierson v. Post*,[9] where the dissenting Judge Livingston engaged the majority in a lively debate about the way that property rights affect incentives to undertake useful labor.[10] The underlying idea that Livingston expressed is one of the most important arguments for property: People are much more likely to plan carefully and work hard when they know that the fruits of their labors will be secure to them in the form of property rights.

Proposition 2.

Although private property rights need to be reasonably secure, their content can change with changing conditions.

Property rights in traditional law have never had fixed characteristics that apply under all conditions and for all time.[11] Indeed, it would be undesirable and probably impossible for property rights to have such fixed definitions. This point is recognized even by such libertarian writers as Richard Epstein[12] and has been acknowledged by such a property-conscious judge as Justice Scalia.[13]

A chief reason why property rights change is that they are costly to establish and maintain. At the most elementary level, it takes time, effort,

---

8. JEREMY BENTHAM, THE THEORY OF LEGISLATION (Principles of the Civil Code) pt. 1, chs. 7-9 (C.K. Ogden ed., 1987) (1789).

9. Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

10. *Id.* at 180-82 (Livingston, J., dissenting).

11. WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 178-79 (1995).

12. Richard A. Epstein, *On the Optimal Mix of Private and Common Property*, *in* PROPERTY RIGHTS 17, 40 (Ellen F. Paul et al. eds., 1994).

13. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992) (opinion of Scalia, J.) (stating that owners expect property restrictions from newly enacted legislation); *see also id.* at 1016-17 n.7 (speculating that defining relevant property for takings cases depends on how owners' expectations "*have been shaped* by the State's law of property") (emphasis added).

and resources to put a fence around a yard. More complex systems of property rights, like copyright, require more effort and expense to establish and enforce. Because property regimes are not costless, people often do not define property rights at all until the need becomes clear; generally speaking, people do so only when resources become scarce, raising the prospect of damaging conflicts over resource use. An important way to prevent those conflicts is to define property rights.

There is nothing particularly new about the observation that property rights only arise with scarcity. Both Locke and Blackstone gave plausible (though no doubt mythical) narrative versions of the origins of property rights.[14] In these narratives, people did not bother to assert any but the most rudimentary property rights when natural foodstuffs were plentiful; they only created property rights when the relevant resources became more scarce and when people became more concerned about preserving their investments in those resources. As Blackstone put it, human beings arrived at the point at which the "earth would not produce her fruits in sufficient quantities, without the assistance of tillage; but who would be at the pains of tilling it, if another might . . . seize upon and enjoy the product of his industry, art, and labour?"[15] Scarcity and the need to encourage resource management, then, gave rise to the effort to create property regimes.

Whether or not Locke's and Blackstone's accounts were historically accurate, the pattern they described is typical in the development of common-law property rights. For example, in the American West, grassland rights were only very loosely defined in the early years of European settlement, when the supply of grass seemed limitless. But private property in grasslands became much more sharply defined as more settlers arrived with more grazing animals, which of course brought the possibilities for strife among settlers and overuse in the grazing areas and raised the need for more careful management.[16] In fact, the United States finally closed off the grasslands to further free use and instead instituted a grazing permit system — a kind of leasing arrangement that was supposed to eliminate both settler strife and overuse of the grassland areas.[17] But in recent years, new conflicts have

---

14. BLACKSTONE, *supra* note 7, at *2-*8; LOCKE, *supra* note 6, §§ 27-33, 36-38.

15. BLACKSTONE, *supra* note 7, at *7.

16. *See* Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163, 169-71 (1975); George C. Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 3, 28-35 (1982).

17. *See* PHILLIP O. FOSS, POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN 3-4, 34-35 (1960) (arguing inevitability of overgrazing on "free" land);

pitted established grazing interests against environmentalists and recreational users who complain that the grazing permit system takes insufficient account of the impact that stock foraging has on the environment. Although change is strongly resisted by grazing interests, these complaints suggest that existing definitions of rights do not fully account for the full array of interests in the grasslands, and if we are to avoid further conflict, we may need another redefinition of grassland rights in the West.[18]

Grassland rights illustrate the general pattern of change in property, a pattern that responds to the benefits and costs of establishing, defining, and protecting property rights. Unrestricted open access is not a problem when resources are plentiful, but where congestion increases, open-access resources may deteriorate — a situation often called "the tragedy of the commons."[19] People very often respond to this congestion and strife by dividing open-access resources into individual private property holdings, as some of the ranchers did on the western lands.

Proposition 3.

Some resources are candidates for public rights and management.

Private property is an important response to scarcity, congestion, and strife, but it is not always the only response or the best one. Some scarce resources require larger-scale management, even public management — a fact that has been recognized in the common law of property. The use of waterways, for example, has been considered a public property right since the time of the Romans and, to a lesser degree, so have fisheries.[20]

---

id. at 58-65, 69, 71-72 (describing Taylor Grazing Act and noting its somewhat stabilizing effect on grazing lands); *see also* Coggins & Lindeberg-Johnson, *supra* note 16, at 40-41 (describing Taylor Grazing Act and noting its favoritism to ranchers).

18. *See* FOSS, *supra* note 17, at 138 (describing early, though somewhat ineffective, complaints of wildlife interests); George C. Coggins, *The Law of Public Rangeland V: Prescriptions for Reform*, 14 ENVTL. L. 497, 526-34, 538-41 (1984) (proposing variety of reforms, including range rehabilitation to benefit nonranching rangeland uses); Coggins & Lindeberg-Johnson, *supra* note 16, at 94-100 (describing growing conflicts between ranchers and other interests). For some of the current controversies, see, e.g., Timothy Egan, *In Battle over Public Lands, Ranchers Push Public Aside*, N.Y. TIMES, July 21, 1995, at A1 (describing ranchers' counterattack on Interior Secretary's efforts to reduce overgrazing).

19. This name comes from Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). An earlier development of the idea is found in H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954).

20. Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 713-14, 747-49 (1986).

The reason for these common or public rights relates to the costs of establishing property rights: It is more difficult to define individual property rights in some resources than others. Land is a resource in which it is relatively easy to define individual property rights. Land is fixed in location and can be visibly marked, and trespassers can be identified relatively easily — though certainly not without cost, as our modern security systems attest. On the other hand, flowing water is considerably more difficult to reduce to individual property because it moves around and cannot be so easily designated as belonging to one person or another. Underground waters are more difficult still because their movements are hidden and because it is difficult to ascertain who else might be tapping into a given aquifer or what kinds of activities might be polluting it. Stocks of wild animals and fish are as difficult as groundwater or surface waters; even though individual animals or fish can be taken by individual people, the maintenance of the stock as a whole can be quite difficult because the animals migrate out of individual owners' boundaries and because poaching may not be easy to police or even to observe. Perhaps the most difficult resource to capture in private property is air, which can easily be turned into a medium for pollution and noise affecting many people.

The difficulty of defining and enforcing private property rights in water, wildlife, and air did not and does not now mean that these resources are not valuable but simply that they are not necessarily best treated as *individual* or *private* property rights. In traditional American law, these diffuse resources were often treated as limited common rights. For example, all the owners of land along flowing rivers had limited use rights in the river, particularly for stock watering and, to a certain extent, for waterpower; indeed, the uses of these "limited commons" were the subjects of the riparian system of water rights that developed in the early and mid-nineteenth century.[21]

Sometimes diffusely enjoyed resources were designated as "public rights." This designation reflected the fact that although a resource could not easily be privatized, it was nevertheless valuable to many people and subject to a kind of easement for public use, including passive uses such as simple enjoyment of clean air and quiet surroundings.[22] Not surprisingly, the

---

21. *See generally* Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261 (1990).

22. *See* Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217, 221-27 (1984) (arguing that 19th century American law was replete with "public rights," characterized as property rights); Molly Selvin, *The Public Trust Doctrine in American Law and Economic Policy, 1789-1920*, 1980 WIS. L. REV. 1403, 1428-34 (same). Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28

subjects of public rights often were associated with water, air, and wildlife. The assignment of public rights in these resources meant that they were generally available to the public at large but subject to conditions akin to "reasonable use" in riparian law. The chief condition was that no particular person could encroach on the rights of others by appropriating an undue amount to himself or herself — in the forms of pollution, noise, overuse, damage to fish habitat, blocking roads or navigation lanes, and so forth.[23]

Proposition 4.

Private land ownership often entails the use of public resources.

Private ownership, particularly land ownership, has a close connection with common and public resource uses. When people define individual property rights in land, they often use their land as the means of access to adjacent common resources, effectively "piggybacking" the use of a common resource like air or water onto their individual land ownership. This practice is not a problem so long as the common resources are relatively uncongested. As with individual property rights, there is no particular need to assert and formalize public rights in common resources, as long as the resources remain plentiful. Thus, it does not matter if one landowner disposes of small quantities of wastes in a fast-flowing stream, as long as the water can aerate and biodegrade the wastes. Similarly, no one cares much if a single landowner burns wood or coal if the amounts of smoke are small and quickly dispersed.

But where population becomes dense, these unrestricted private uses of the "commons" can become a problem. That is why London had restrictions on burning coal as long ago as the thirteenth *century*.[24] That is why early

---

IND. L. REV. 329 (1995), contests the idea that public rights can be characterized as property — meaning individual property. *Id.* at 341-42. She correctly emphasizes the important role of public rights in traditional common law. *Id.* at 345-47 (discussing public nuisance).

23. *See* Rose, *supra* note 20, at 745. For the general duty of riparian owners to avoid "any works which render the water unwholesome or offensive," see JOSEPH K. ANGELL, TREATISE ON THE LAW OF WATERCOURSES §§ 136-40, at 231-41 (7th ed. 1877). For the long-standing prohibition on the fouling of public waters, see *id.* § 555, at 722-23. *See also* People v. Gold Run Ditch & Mining Co., 4 P. 1152, 1156, 1158-59 (Cal. 1884) (dumping of debris washing into navigable stream is public nuisance, in spite of long usage); Gerrish v. Brown, 51 Me. 256, 262 (1863) (using river to dump debris deemed to be public nuisance); Rogers v. Kennebec & P. R.R., 35 Me. 319, 324 (1853) (railroad company held liable for damages for causeway that obstructed navigation). *But cf.* Commonwealth v. Ruggles, 10 Mass. 391, 393 (1813) (private fishing nets obstructing passage of fish held not within statute that prohibited permanent structures disrupting fish passage).

24. FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 156 (2d ed. 1990).

nineteenth-century American states restricted access to shellfish in their waters.[25] That is why late nineteenth-century and early twentieth-century American law increasingly recognized rights of action for nuisance against landowners who caused undue smoke, fumes, noise, water pollution, and even loss of light and air — private nuisance in the case of nearby and specially affected owners and public nuisance in the case of the larger public or numerous members of it.[26]

These legal developments exemplify the general pattern: Increasing congestion in common resources is a major reason for the evolution of legal definitions of property rights because greater congestion alters the costs and benefits of establishing property rights. Specifically, greater congestion makes it worth the cost and effort to define property rights more explicitly. American property law, like the law of most of the world, has always responded to increasing conditions of congestion so as to avoid strife and waste and has done so by redefining both private and public rights.

---

25. *See* Corfield v. Coryell, 6 F. Cas. 546, 550-53 (C.C.E.D. Pa. 1823) (No. 3,230) (upholding New Jersey's restriction of oyster gathering to state citizens).

26. For the subjects of private nuisance, see, e.g., Hurlbut v. McKone, 10 A. 164, 165-67 (Conn. 1887) (steam planing-mill producing excessive noise, shavings and sawdust, smoke and cinders, and vibrations held to be nuisance); Miley v. A'Hearn, 18 S.W. 529, 529-30 (Ky. 1892) (privy within 10 feet of plaintiff's well and 13 feet of daughter's bedroom residence deemed nuisance); Hayden v. Tucker, 37 Mo. 214, 215-16, 224-25 (1866) (breeding of mares with jacks [jackasses] and stallions within sight and hearing of dwelling and within view of public street held to be nuisance). Note that the presence of the street made the last case eligible for treatment as a public nuisance as well. *Hayden*, 37 Mo. at 216. For cases on public nuisances, see, e.g., State v. Luce, 32 A. 1076, 1076-77 (Del. Ct. Gen. Sess. 1885) (defining public nuisance in jury instructions as one affecting people of neighborhood or those traveling on public road; defining citizens of neighborhood as "so many of them as contradistinguishes them from a few"). Though it was often repeated that a use could not be abated as a nuisance unless the damage was real and serious, it did not have to be actually dangerous to be enjoinable. *See, e.g.*, Ashbrook v. Commonwealth, 64 Ky. (1 Bush) 139, 144 (1867) (noting that offensive odors need not actually cause disease to be "common nuisance"; "if it is detrimental to the comfort of those dwelling around it, and to the passers-by, it is a [common] nuisance, and may be abated"); Campbell v. Seaman, 63 N.Y. 568, 583 (1876) (treating disruption of enjoyment of ornamental shrubs and plants as nuisance). By the end of the century, the courts in New York were ready to recognize that a structure disrupting light and air from the street interfered with a property right. *See* Newman v. Metropolitan Elevated Ry., 23 N.E. 901, 902 (N.Y. 1890). Perhaps because private uses are likely to have spillover effects on common resources, courts regularly have held use rights subject to greater public responsibility. *See* Laura Underkuffler-Freund, *Takings and the Nature of Property*, 9 CAN. J.L. & JURISPRUDENCE (forthcoming 1996) (manuscript at 41-42, on file with the *Washington and Lee Law Review*) (distinguishing between "apparent" judicial model of absolute property and "operative" model requiring community responsibility in property use rights).

I mentioned that landowners may "piggyback" uses of common resources onto their individual property, and pigs themselves are a case in point. Pigsties are noisy and smelly, but they used to be a part of the American urban landscape. Private landowners kept pigs on their property or let them roam the streets, even in big cities like New York.[27] As those cities grew, however, pigs and pigsties became increasingly frequent targets of nuisance suits.[28] These suits now are virtually nonexistent in urban areas. Why? Because private landowners' nuisance actions have been superseded by general public legislation about animals.

Pigsties, in a way, are representative of the ways in which public and private rights change in response to congestion: At first, when clean air is not in short supply, landowners enjoy a regime of "anything goes" or open access; they can keep pigs and other intrusive uses on their land, with all the attendant noise and odors that fill the air, if they want. Those noises and odors do not really matter, so long as there is little competition for the air. But as more people move in, nuisance law emerges to hold these owners to account to their neighbors and to the public — at least on an ex post, case-by-case basis.[29] And, finally, legislatures take over and regulate ex ante, and in much greater detail, the areas where landowners can and cannot locate their pigsties, their brick kilns, and other such problematic uses. The legislatures do this in order to systematize public rights ex ante, making their enforcement more uniform and predictable for private landowners.

Proposition 5.

Public rights have co-evolved with private rights.

Traditional Anglo-American law generally recognized a duty of legislatures to compensate owners when private rights were appropriated for the public benefit. At all levels of government, compensation was and continues to be the norm, for example, when land is taken for roadways. On the other hand, compensation was contingent on several defenses. For example, unless land was taken outright, compensation was generally not due when legislation imposed moderate but more or less equal burdens on

27. Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 901-02, 921-24.

28. 2 H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES § 586, at 792-93 (3d ed. 1893) [hereinafter WOOD ON NUISANCE] (discussing pigsties as nuisances).

29. It is notable that in the 1893 edition of WOOD ON NUISANCE, the author did not consider pigsties in the city as nuisances per se but only when ill-kept and, consequently, smelly or noisy. *Id.* Thus, pigsties could only be enjoined on a case-by-case basis.

large numbers of landowners.[30] Nor was compensation due when regulation was implicitly recompensed by reciprocal benefits going to the affected landowners.[31]

Most important, compensation was not due when regulation effectively prevented private owners from doing something to which they were not entitled. Thus traditional American law did not necessarily regard land ownership as a license for a landowner's unrestricted "piggybacked" use of adjacent diffuse resources such as water, air, or wildlife, particularly in situations in which one landowner's use could have serious effects on many other owners and persons. Such an act was considered an encroachment on the rights of others, and its restraint was not necessarily a compensable event.

Immediately neighboring landowners or other easily identifiable people might protect themselves through private trespass or nuisance law, each bringing an action in his or her own behalf.[32] In some ways, however, the matters of more pressing concern were actions that affected the diffuse and less recognizable general public, whose collective interests might be great even though their individual interests were too minor for any of them to bring an action. These diffuse interests were the particular domain of public rights, and legislatures were widely considered their guardians. Massachusetts, for example, first as a colony and then as a state, prohibited as a "common nuisance" any unauthorized obstructions to fish passage in its rivers.[33] This law attempted to protect the then-prolific runs of anadromous

---

30. This occurred either through taxes or through legislative authorizations of public nuisance, which can be likened to an in-kind tax. *See infra* text accompanying notes 42-47.

31. *See, e.g.*, Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 540-47 (1914) (upholding barrier pillar law that required coal companies to maintain coal walls between mines in order to prevent flooding). This case was discussed as an instance of reciprocal benefits in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). *See also* Welch v. Swasey, 214 U.S. 91, 107 (1909) (noting that state court justified building height limits as protecting adjacent buildings from fire).

32. For a useful discussion of the differences between nuisance and trespass, see generally Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13 (1985).

33. The statute is discussed in Commonwealth v. Ruggles, 10 Mass. 391, 393 (1813). Massachusetts' public protection of fisheries was very extensive and extended to non-navigable waters. Some other states, such as New York, limited the protection of fish to navigable waters. *See* People v. Platt, 17 Johns. 195, 213-14 (N.Y. 1819) (denying applicability of requirement that dam add fish ladder where dam crossed non-navigable stream and where original grant had not preserved fishery). American definitions of "navigable" are quite broad, however, and have included such uses as the floating of logs and canoes in turbulent

shad and Atlantic salmon, widely used for foodstuffs; the legislature effectively treated these fish as public property over which it was entitled to dispose in the public's behalf. When the state did permit the major dams that drove the new textile mills in the 1820s, 1830s, and 1840s, it required the builders to install rudimentary fish ladders in an unfortunately unsuccessful effort to preserve public and private fishing rights.[34] By the turn of the century, as recreational wildlife uses became more important, many states recognized recreational fishing and hunting as part of the "public trust" uses of navigable waterways and forbade private owners from interfering with such public uses.[35]

Such legislative protections of general public rights were not occasions for compensation. Rather, the public was regarded as a kind of beneficial owner of diffuse resource rights, even though the legislature might assert public rights in different ways under differing conditions of congestion. And unless a private use was officially authorized as a net public benefit, a private owner's appropriation of diffuse but congested resources was considered an act of unjust encroachment, which could be abated as a public nuisance.[36]

Proposition 6.

Courts traditionally have protected evolving public rights.

Recent Supreme Court "takings" cases have shown considerable attention to the importance of historic property categories, including the traditional background concept of public nuisance, which is discussed in the 1992 case *Lucas v. South Carolina Coastal Council.*[37] As the *Lucas* Court remarked, the mere invocation of "public nuisance" is not an excuse for public appropriation of private property.[38] Indeed, it never was, but earlier courts

---

or shallow waters. *See* Rose, *supra* note 20, at 764 and sources cited therein.

34. *See* THEODORE STEINBERG, NATURE INCORPORATED: INDUSTRIALIZATION AND THE WATERS OF NEW ENGLAND 174-75 (1991) (discussing one such ladder in Massachusetts). The need for fish passage was recognized only belatedly, and the fishways were not very successful. *Id.* at 175.

35. *See, e.g.*, State *ex rel.* Thompson v. Parker, 200 S.W. 1014, 1017 (Ark. 1917) (stating that hunting and fishing on navigable waters is public right); Ainsworth v. Munoskong Hunting & Fishing Club, 116 N.W. 992, 993 (Mich. 1908) (discussing right to hunt fowl on navigable waters); Diana Shooting Club v. Husting, 145 N.W. 815, 820 (Wis. 1914) (explaining that navigable waters are public waters that should be open for all to hunt and fish).

36. For examples, see Halper, *supra* note 22, at 348-50.

37. 505 U.S. 1003 (1992).

38. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1026 (1992).

stressed their willingness to accept reasonable legislative definitions of nuisance,[39] which is another way of saying that they would accept reasonable legislative protections of public rights.

At least two points, however, have been insufficiently recognized in recent takings cases. First, historic American law took into account the need for changes in the protection of public rights as resources became more congested.[40] Second, legislatures were recognized as playing a central role in making those changes.[41]

Nuisance law was a primary protector of public rights, and nuisance law itself was at its most active stage of development in the late nineteenth century when urbanization and new technology set the stage for numerous conflicts over land uses. A part of the nuisance story was a very significant byplay between legislatures and courts.

Throughout the nineteenth century, legislatures were widely recognized as competent to define public nuisances so as to prevent private encroachments on public rights, but they also could *authorize* encroachments on public resources by private parties.[42] And at a time of great commercial and industrial innovation, when active land uses were often regarded as beneficial to the community, uses that had been considered public nuisances indeed often *were* authorized.[43] These authorized nuisances included legislative permission for municipalities to pollute water,[44] for manufacturing plants to raise the

---

39. *See* Jan G. Laitos, *Legal Institutions and Pollution: Some Intersections Between Law and History*, 15 NAT. RESOURCES J. 423, 434-36 (1975) (noting late 19th century legislative practice of declaring smoke a nuisance) (citing and quoting Northwestern Laundry v. City of Des Moines, 239 U.S. 486, 491-92 (1916), which says that state, by itself or through its municipalities, may declare dense smoke to be nuisance and that harsh effects on business are not grounds to object unless enactment is "merely arbitrary").

40. *See* Joseph L. Sax, *Rights that "Inhere in the Title Itself": The Impact of the* Lucas *Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 945 (1993) (noting *Lucas* Court's attempt to "cut off" arguments that property law changes as circumstances change).

41. *See* Halper, *supra* note 22, at 344-51; John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 17-20 (1993) (criticizing *Lucas* Court's failure to recognize traditional legislative role).

42. Halper, *supra* note 22, at 346.

43. *Id.* at 347-51; *See, e.g.*, People v. New York Gaslight Co., 64 Barb. 55, 69-70 (N.Y. App. Div. 1872) (declaring gasworks' unwholesome smells not a nuisance where authorized by statute, so long as works not negligently built or operated); Pittsburgh, C. & St. L. Ry. v. Brown, 67 Ind. 45, 48 (1879) (declaring that when necessary for common good, legislature may require act that would be nuisance on common -law principles, such as locomotive whistle at railway crossing). For the limitations on legislative authorizations of public nuisance, see *infra* text accompanying notes 48-52.

44. *See* 2 WOOD ON NUISANCE, *supra* note 28, § 752, at 1042-45 & n.3 (noting that

dams that disrupted and depleted fish stocks,[45] and most notoriously, for railway firms to pollute air and create noise and vibrations.[46]

As problematic as some of these authorized public nuisances may now seem, the standard theory was one that still seems sound: Any encroachment on public rights had to be justified by an even greater benefit to the public's well-being. In that sense, the burden of the authorized public nuisance could be seen as an in-kind tax — the citizens "paid" this tax not in money but in the form of widespread, but relatively minor, property damage, which was acceptable because the benefits constituted a net public improvement for which the costs were widely shared.[47]

We can now see damage from these authorized public nuisances that may not have been so obvious at the time,[48] but even by the end of the nineteenth century, courts and legal scholarship noticed many problems. They particularly noticed problems in cases where the legislature authorized private parties, like railroad firms, to make public improvements, but where the costs seemed to fall especially heavily on certain other private persons. Perhaps it was predictable that in the fastest growing and most congested of cities, New York, the courts engaged themselves especially vigorously in the rising

---

legislature may authorize municipal sewerage, citing City of North Vernon v. Voegler, 103 Ind. 314 (1885)).

45. STEINBERG, *supra* note 34, at 174-75 (noting that Massachusetts chartered dam at Lawrence and required fish ladders that ultimately proved ineffective).

46. *See* Richards v. Washington Terminal Co., 233 U.S. 546, 553-54 (1914) and authorities cited therein. *See also* WOOD ON NUISANCE, *supra* note 28, § 53, at 1046-74; H.G. WOOD, A TREATISE ON THE LAW OF RAILROADS § 212, at 719-20 (2d ed. 1894) (noting that legislature could exempt railroad firms from liability for noise, soot, etc. that would otherwise be nuisances, so long as they operated with due care, but could not relieve them of obligation to compensate owners if they took private property).

47. Note, however, that the legislature could not authorize a *private* nuisance; for the classic statement of this point, see *Richards*, 233 U.S. at 553, 557. *See also* Baltimore & P. R.R. v. Fifth Baptist Church, 108 U.S. 317, 331-32 (1883) (declaring that legislative authorization cannot justify private nuisance); 2 WOOD ON NUISANCE, *supra* note 28, § 758-59, at 1060-65 (declaring that authorization of public nuisance could not include taking of private property). The distinction follows the distinction between a tax and a taking; the authorization of a public nuisance — with harms that are diffuse but widespread — is comparable to a tax, while the authorization of a private nuisance harms a single individual and, on classic takings theory, should be disallowed unless compensated.

48. *See, e.g.*, STEINBERG, *supra* note 34, at 194-95, 202-03 (describing authorities' ultimately false optimism about ability to restock rivers with fish losses due to industry). Nineteenth-century public officials may have shared what seems to be a widespread tendency to overestimate the benefits and underestimate the risks of new technology. *See generally* James E. Krier & Clayton P. Gillette, *The Un-Easy Case for Technological Optimism*, 84 MICH. L. REV. 405 (1985).

level of conflicts between private property owners and legislatively authorized franchisees.[49] The result was a judicial brake on the legislative authorizations that effectively "spent" public resources such as clean air, clean water, wildlife, and quiet surroundings.

How was that brake applied? Basically, it was applied through the deployment of private rights to protect larger public ones. According to courts and commentators, the legislature could authorize public nuisances but not private ones — it could authorize widespread nuisances but not those that especially harmed particular individuals.[50] Similarly, the courts ruled that a legislative authorization could not justify negligent acts,[51] and in general, they carefully distinguished the legislature's authorization from the specific (and damaging) choices of authorized private franchisees.[52]

The construction of New York's elevated trains was an especially important subject in this increasingly active nuisance law, and New York's courts used it in such a way as to permit public improvements while insuring that a fuller range of property rights would be taken into account. In major innovations on nuisance law, the New York Court of Appeals both recognized a right of light and air for the enjoyment of property — a development that undoubtedly smoothed the way for later city building height restrictions and zoning ordinances — and invented a nuisance damage remedy that now seems strikingly modern.[53]

Through an evolving nuisance law, then, the later nineteenth-century courts effectively enlisted private rights to restrain legislative giveaways of the public rights in air, water, wildlife, and peace and quiet. Judicially created nuisance law required that the legislative "expenditures" of public rights

---

49. *See* Louise A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeals, 1850-1915*, 54 ALB. L. REV. 301, 334-37 (1990).

50. *See supra* note 47 and authorities cited therein (discussing distinction between authorizing private nuisance and public nuisance).

51. Halper, *supra* note 49, at 310. For a lucid explanation of the negligence principle in public nuisance generally, see Halper, *supra* note 22, at 346-47.

52. *See* Halper, *supra* note 49, at 336-37; *see also* 2 WOOD ON NUISANCE, *supra* note 28, § 753, at 1047-48 & nn.2, 1-2, § 757, 1057-59 (discussing judges' narrow readings of legislature's authorization).

53. Story v. New York Elevated R.R., 90 N.Y. 122, 156-62 (1882). For recognition of a different aesthetic harm in an earlier private nuisance case, see Campbell v. Seaman, 63 N.Y. 568, 583 (1876) (declaring damage to enjoyment of ornamental plants actionable in nuisance). For an excellent discussion of *Story* and its subsequent history, see Halper, *supra* note 49, at 341-57. Halper makes a strong argument that this case anticipated by almost ninety years the famous Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970). Halper, *supra* note 49, at 349.

at least take into account the costs to private property and at least weigh the expected benefits of public giveaways against the costs of private damage that results. Parenthetically, this history is a useful reminder to those of us who favor the explicit recognition of public rights. It is a reminder that private rights are important, too, and can place a restraining hand on a legislature's careless squandering of public rights.[54]

In addition to a sharpened nuisance law, however, American judges of the later nineteenth-century found a more direct restraint on legislative giveaways in a newly minted "public trust" doctrine. Although the public trust doctrine had been in play for several centuries, it took new life from the 1892 Supreme Court opinion *Illinois Central Railroad v. Illinois*.[55] In state after state, courts adopted *Illinois Central*'s position that public resources — notably navigable waterways and adjacent lands — were "inalienable" public resources and could not be transferred to private parties even by legislatures, except in furtherance of public trust purposes such as navigation and recreation.[56]

Finally, late nineteenth-century courts were instrumental in legitimizing the state legislatures' efforts to *protect* public rights (as opposed to legislative authorizations of private encroachments).[57] Though the measures are no longer viable on Commerce Clause grounds, courts up to the U.S. Supreme Court recognized state efforts to preserve stocks of wildlife.[58] Although the courts never questioned federal efforts to curb water pollution,[59] they recognized local measures to restrain and relocate sources of foul odors and

---

54. *See* Carol M. Rose, *A Tale of Two Rivers*, 91 MICH. L. REV. 1623, 1629 (1993) (book review) (noting that private and public property rights made 19th-century industrialists consider environmental costs).

55. 146 U.S. 387 (1892).

56. Illinois Central R.R. v. Illinois, 146 U.S. 387, 452-54 (1892); *see* Rose, *supra* note 20, at 735-39 (discussing *Illinois Central* and subsequent state cases). Interestingly enough, New York, which had a long tradition of plenary legislative authority over public trust property, also joined other states in adopting the idea that the public trust was inalienable, even by legislative act. *See* Rose, *supra* note 20, at 738-39 & n.133.

57. Humbach, *supra* note 41, at 11-13, 17-18.

58. Geer v. Connecticut 161 U.S. 519, 522-35 (1896), *overruled on Commerce Clause grounds in* Hughes v. Oklahoma, 441 U.S. 322 (1979). For the development of fish and game commissions in the late 19th century, see JAMES A. TOBER, WHO OWNS THE WILDLIFE?: THE POLITICAL ECONOMY OF CONSERVATION IN NINETEENTH-CENTURY AMERICA 179-229 (1981). For a discussion of Congress' passage in 1900 of the Lacey Act, ch. 553, 31 Stat. 187 (1900) (partially repealed 1909) (codified at 16 U.S.C. § 701 (1988)), also aimed at preserving wildlife, see TOBER, *supra*, at 227-29.

59. *See, e.g.*, Rivers and Harbors Act of 1899, ch. 425, § 14, 30 Stat. 1121, 1152 (1899) (codified at 33 U.S.C. § 407 (1988)).

smoke,[60] and in general, they approved an expanding scope of legislative protections of public rights.

Indeed, the earlier dynamism of court-made nuisance law appears to have gone into a period of relative quiescence after the turn of the century. It was at this time that courts ceded to legislatures — especially local legislatures, through zoning — the increasingly complex task of defining the ways that land uses might be restricted as being unusually burdensome to the neighbors or to the public at large.[61]

For this reason, it is particularly misleading to look simply to common-law judicial definitions of nuisance as the basis for modern property rights. For almost a century now, legislators — with judicial acquiescence — have taken over the task of refining and specifying the range of acceptable land-owner practices, once defined only by judicially administered trespass and nuisance law on a case-by-case basis.[62] By comparison, judicially defined nuisance law now tends to be relatively crude and does not always reflect the greater congestion of modern life, the greater information that we now have about the effects of human activities on resources, or the more complex and nuanced remedies that legislatures can devise to moderate those effects.[63]

We are much more aware today of the impact of human uses on common environmental resources, but modern environmental laws are the successors to traditional legislative protections of public rights — the London prohibitions on coal burning, the early American restrictions on obstructions to navigable waterways, the late nineteenth-century public assertion of responsibility for protecting fish and wildlife stocks, and the whole panoply

---

60. Many major cities passed air pollution and refuse ordinances in the 1880s and later. *See* Laitos, *supra* note 39, at 433-34. Perhaps best known, although for its constitutional implications for the Privileges and Immunities Clause rather than for public nuisance, are the Slaughter-House Cases, 83 U.S. 36 (1872). These cases in fact concerned a land-use issue, and in them the Court upheld New Orleans's ordinance locating slaughterhouses, which were notorious for their foul air, at a distance from population centers. *Id.* at 80-82.

61. FISCHEL, *supra* note 11, at 179; Halper, *supra* note 49, at 318.

62. *See* Laitos, *supra* note 39, at 433, 436 (noting shift away from judicial to legislative remedies by 1880s and describing judicial acquiescence in legislative nuisance definitions). The most famous instance of judicial acquiescence in legislative definitions is Euclid v. Ambler Realty Co, 272 U.S. 365, 390-95 (1926) (upholding zoning ordinance). *See also* Welch v. Swasey, 214 U.S. 91, 107-08 (1909) (upholding building height limits); Bove v. Donner-Hanna Coke Corp., 258 N.Y.S. 229, 235-36 (App. Div. 1932) (citing local zoning permission as indicator that plant was not a nuisance).

63. *See* William W. Fisher, III, *The Trouble With* Lucas, 45 STAN. L. REV. 1393, 1405-07 (1993) (describing nuisance benchmark for takings cases as "retrogressive"); *see also* Halper, *supra* note 49, at 302 (suggesting that modern nuisance law forgot about advances of earlier law).

of public efforts to protect health, safety, and welfare from private overuse of common air and water resources that are "piggybacked" onto private property.

It would have been wasteful — a potential tragedy of the commons — to allow individual private landowners to appropriate resources that were effectively shared by many others. Such a regime would have led predictably to a wasteful scramble by many individuals to capture as much as they could of resources that none could capture completely. The tradition of public rights allowed no such thing, as this brief overview has shown. Indeed, the courts intervened even when legislatures seemed too willing to give up those public rights to private individuals. But those same courts traditionally were willing to allow the legislatures considerable latitude when they *protected* public rights against private encroachment.

Proposition 7.

Prior private usage gives no permanent claim against public rights.

Although property rights clearly have changed over time, there is a pattern to their change. The general pattern of the common law was to leave property usages alone and not to bother enforcing rights to the letter, so long as no conflicts arose. This pattern was efficient: Why raise a fuss when no rights or resources are endangered? And it was also a way to encourage neighborly resolutions. Indeed, many aspects of traditional American law encouraged property owners to be generous in allowing members of the public to use their land, for example, for hunting. The other side of the coin was that with certain narrow exceptions, the public using the land acquired no permanent rights over against the owner and could not continue indefinitely if the owner changed his mind. The opposite rule, as one court observed, would be "perverting neighborhood forbearance and good nature"[64] and, as others added, would only encourage "churlish" behavior.[65]

But the same pattern applied to public rights. *Private* uses of *public* rights were condoned as long as no damage was threatened, but the other side of this coin was that the private owner acquired no permanent rights in the public resource. The 1915 case *Hadacheck v. Sebastian*[66] showed how

64. Pearsall v. Post, 20 Wend. 111, 135 (N.Y. Sup. Ct. 1838). As discussed in this case, the chief exceptions permitted public prescription of roadways and, to a more limited extent, public squares. *Id.* at 126-27. *See* Rose, *supra* note 20, at 750-53.

65. JOSEPH K. ANGELL & THOMAS DURFEE, A TREATISE ON THE LAW OF HIGHWAYS § 151, at 164 (2d ed. 1868); *cf.* Gore v. Blanchard, 118 A. 888, 891 (Vt. 1922).

66. 239 U.S. 394 (1915).

this idea worked in the particular situation of private parties engaging in uses that trenched on public rights. The case involved a private brickyard owner whose facilities emitted smoke and fumes over the surrounding area, which was initially relatively isolated.[67] As Los Angeles grew up around the brickyard, however, the city passed an ordinance forbidding the operation of brick kilns within the city limits, and the owner was prosecuted for violating it.[68] The Supreme Court upheld the ordinance and the conviction.[69]

The case confirmed a commonplace from nineteenth-century property law: A private owner could commit what would otherwise be a public nuisance so long as the surrounding areas were lightly populated and relatively undisturbed, but public authorities could bar the use when the area became more heavily populated and when the public was actually inconvenienced by such private encroachments on public rights.[70] Just as a private owner should not suffer expropriation for the neighborly act of allowing the public to use his land when it caused him no inconvenience, neither should the public's rights be expropriated simply because a private party used common resources at a time when those resources were not scarce or congested and when it would have been "churlish" for public officials to try to prevent the private use.[71]

Hadacheck exemplifies the way that takings cases have incorporated the basic principles of a traditional American doctrine of public rights: The

---

67. Hadacheck v. Sebastian, 239 U.S. 394, 405-06 (1915).

68. *Id.* at 404-05.

69. *Id.* at 412-14.

70. For earlier cases in this line, see, e.g., Wier's Appeal, 74 Pa. 230, 241-43 (1873); People v. Detroit White Lead Works, 46 N.W. 735, 737 (Mich. 1890); Ashbrook v. Commonwealth, 64 Ky. (1 Bush) 139, 142-44 (1867). *Cf.* Spur Indus. v. Del E. Webb Dev. Co., 494 P.2d 700, 708 (Ariz. 1972) (in banc) (declaring that developer must indemnify cattle feedlot owner for cost of moving pre-existing feedlot from previously rural area). For an article discussing this issue, see John D. Ingram, *Coming to the Nuisance: Nor Shall Private Property Be Taken Without . . .*, 5 N. ILL. U. L. REV. 181, 187-88 (1985).

71. It was stated commonly that private parties could not acquire a prescriptive right against the public to perpetrate a public nuisance. *See, e.g.*, 1 WOOD ON NUISANCE, *supra* note 28, § 19, at 40-43, § 76, at 105-106 (declaring that there is no defense of prescriptive right or "coming to the nuisance" for public nuisance). For rulings to this effect, see, e.g., People v. Gold Run Ditch & Mining Co., 4 P. 1152, 1158-59 (Cal. 1884) (involving long-standing mining waste); *Ashbrook*, 64 Ky. (1 Bush) at 140 (involving 30 year-old livestock pens); New Castle City v. Raney, 6 Pa. C. 87, 89, 93-94 (1888) (involving ice floes from old millpond) (citing Rhodes v. Dunbar, 57 Pa. 274, 274-75 (1868) (involving noise and debris from old planing mill)). One well-known brickyard case denied the "coming to the nuisance" defense in a private nuisance case where the time of prescription had not yet run. Campbell v. Seaman, 63 N.Y. 568, 584 (1876).

fact that private owners "piggybacked" a use of public resources onto their private land uses did not give the owner any permanent rights to use those diffuse public resources. More specifically, past private usage of public resources was not necessarily an impediment to legislation that would protect public resources in the future. Thus, pigsties, brick kilns, slaughterhouses, and many other private landowners' uses were restricted as their damage to clean air and other public resources became more acute.

Proposition 8.

The province of takings law is to balance transitional compromises.

As a practical matter, when legislatures begin the transition to protecting public rights, there may be good reasons to take a cautious approach and to avoid pressing public rights to the hilt, particularly in the case of pre-existing uses. For one thing, the public authorities may be quite late in determining that particular private land uses cause damage to other persons and to public resources, or they may have suggested that these uses could continue. In the meantime, owners may have innocently sunk capital into their land uses in the expectation of being permitted to continue to consume public resources like air, water, wildlife stocks, or even peace and quiet.[72] Halting such uses may result in the deadweight loss of expenditures that the owner has already made — deadweight in the sense that the expenditures become useless either to the owner or to anyone else.[73]

---

72. Innocence is sometimes a tricky question. As with insurance, the prospect of compensation may make the original user overinvest even when he or she knows that the use will become incompatible with an eventual public use. This is the moral hazard problem, recently much discussed in the literature of regulatory takings. For a review, see generally William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269 (1988).

73. For a nuisance analogy, see the well-known *Spur Industries* case, in which a retirement community was permitted to enjoin the operation of a large but remote feedlot — but only upon paying for the feedlot's removal costs. *Spur Indus.*, 494 P.2d at 706-08. As Donald Wittman points out, failure to require compensation to the nuisance-like activity could encourage the developer to cause inefficient losses to the feedlot when the developer might have avoided these costs by choosing a different location. *See* Donald Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance"*, 9 J. LEGAL STUD. 557, 566 (1980). Both Wittman, *id.* at 565-66, and Ingram, *supra* note 70, at 186-88, point out that foreseeability has been an important factor in "coming to the nuisance" cases. Foreseeability might well have been a sub silentio factor in *Hadacheck* as well because brick kilns were commonly on the outskirts of cities; owners might have been thought to take their chances that cities would expand in their direction. *See* Campbell v. Seaman, 63 N.Y. 568, 581, 584 (1876) (explaining that brick kilns normally locate near towns but that

Indeed, disappointed or angered owners may take matters into their own hands and act in ways inconsistent with the ultimate legislative goal. It is possible, for example, that the stringent legal protections of historic buildings may have precipitated an outburst of arson attacks on historic properties.[74] Less dramatic, but still extremely important, is the political resistance that those landowners may mount against reform unless they are mollified.[75] Thus, utilitarian considerations, along with fairness considerations comparable to estoppel,[76] may sometimes weigh in favor of compensating owners who are required to cease their intrusions onto public resources. Unless they are placated, these owners may destroy the very public resources that the public is attempting to safeguard. At the same time, the preservation of the public resources themselves, for all users present and future, speaks for limiting any *further* private inroads.

Takings cases traditionally have deployed several techniques to manage these competing considerations — to avoid unfairness, undue burdens, and unforeseeable losses to individual property owners while at the same time preserving the ability of legislatures to protect public rights as the need evolves over time. Like all compromises, these are messy and fraught with intellectual and even practical imperfections, but as in most other areas of life, the adjustment of property relations has a considerable element of "muddling through."[77]

For example, takings and due process considerations typically have required that pre-existing uses be "grandfathered" into new legislation aimed at protecting public rights.[78] Zoning ordinances are one example. They

---

they cannot prevent neighbors from moving in and making reasonable use of own property).

74. For the arson problem in historic buildings, see Jonathan Walters, *Arson: A Heritage in Flames*, HIST. PRESERVATION, Mar./Apr. 1981, at 11, 11 (describing fire in building that occurred immediately after notification of possible designation as historic structure).

75. *See* GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 19-26 (1989) (describing resistance to efficient changes in property regimes).

76. For a reform of takings doctrine based on estoppel, see J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 138-40 (1995).

77. *See generally* Charles E. Lindblom, *The Science of "Muddling Through"*, 19 PUB. ADMIN. REV. 79 (1959) (arguing that human capacities allow only successive limited comparisons of alternatives rather than comprehensive rational approach).

78. Aside from securing owners' expectations, one fairness reason for this "grandfathering" is that the early private uses may well not have damaged public resources, such as air, water, or wildlife, as much as the later uses of the same sort. In economic terms, the marginal costs of early uses may still be low — unlike latecomers' added uses, which

typically exempt pre-existing nonconforming uses, at least for some substantial period of time.[79] Similarly, in state property jurisprudence, there is much attention to what are called the "vested rights" of private property owners to continue land development projects, even when the projects are inconsistent with recent legislative change.[80] The much-used phrase in federal takings jurisprudence, "investment-backed expectations," aims to identify and, if necessary, to indemnify the property owners who may suffer particularly pointed losses, even from legislation that is otherwise a reasonable effort to protect public rights.[81]

These judicial techniques are compromises, or rather, they are all the same compromise. The compromise aims at protecting settled expectations, avoiding the demoralizing of private owners who can establish their settled expectations, and preventing the deadweight loss of pre-existing capital investments taken in good faith. Those are the aims with respect to regulated individuals.

But the other aims of the compromise are public: to stave off private evasions that might destroy resources important to the public; to permit legislatures, over time, to adjust the protections necessary for the preservation of public rights and resources; and to obviate the need to compensate owners beyond a point at which those owners should reasonably be expected

---

have increasing marginal costs. For the marginal cost/average cost disjunction in urban growth, see generally George S. Tolley, *The Welfare Economics of City Bigness*, 1 J. URB. ECON. 324 (1974). *But see* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030-31 (1992) (suggesting that devices like grandfathering may disallow *prospective* regulation); Humbach, *supra* note 41, at 15-16 (criticizing *Lucas* Court for failure to notice equitable differences between existing and prospective uses, as well as differences in their cumulative damage to environmental resources). For a description of early judicial concerns about continuing pre-existing uses in zoning, see Fred P. Bosselman, *The Commodification of "Nature's Metropolis": The Historical Context of Illinois' Unique Zoning Standards*, 12 N. ILL. U. L. REV. 527, 576-77 (1992).

79. The constitutionality of imposing time limits on pre-existing nonconforming uses is discussed in Harbison v. City of Buffalo, 152 N.E.2d 42, 44-46 (N.Y. 1958). One problem with pre-existing nonconforming uses is the question of repair or alteration and whether such changes are sufficiently substantial as to be equivalent to new construction. *See* Town of Belleville v. Parrillo's, Inc., 416 A.2d 388, 391-93 (N.J. 1980) (holding restaurant's transformation to discotheque to be impermissible alteration of nonconforming use).

80. *See, e.g.*, Clackamas County v. Holmes, 508 P.2d 190, 192-93 (Or. 1973) (discussing substantiality of landowner's investment needed to acquire "vested right[s]" to proceed with project despite change in land-use regulation).

81. *See Lucas*, 505 U.S. at 1019-20 n.8 (citing phrase in *Penn Central*); Penn Cen. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (discussing interruption of "investment-backed expectations" as factor in takings jurisprudence).

to adjust their own expectations about what they can and cannot do on their properties.

The pattern of compromise in takings cases historically has entailed inquiries that are often detailed and fact-laden. In effect, takings cases are rather like nuisance cases, but applied to governmental actions. Just as courts in nuisance cases ask whether a private owner's use is comparable to other normal land use practices, so do courts in takings cases ask whether governmental actions accord with other ordinary regulatory practices — practices that owners can normally anticipate.[82] As with nuisance, takings cases are ex post and case-by-case — messy though this approach sometimes seems — because the circumstances of individual owners and their properties vary enormously, as do the conditions giving rise to regulation.[83]

Perhaps most important, takings jurisprudence is like nuisance law in that it can adjust to increasing congestion and new occasions for the assertions of public rights. This flexibility is evident to some degree even in recent Supreme Court cases, which have sometimes seemed particularly inattentive to the subject of public rights and the legislative role in their protection. In *Nollan v. California Coastal Commission*,[84] for example, a case that found a state coastal commission's action unconstitutional as a taking of property, Justice Scalia nevertheless recognized that the public may have a legitimate interest in protecting a view[85] — a public resource only relatively recently recognized as such.

Proposition 9.

Recent legislative redefinitions of takings upset the balance implicit in takings jurisprudence.

Recent proposals for takings legislation purport to clean up the messiness of takings jurisprudence and clarify property rights, but in fact, many of these proposals do neither. Instead, many only complexify takings questions and disrupt traditional understandings of the relationship of private and public rights.

---

82. Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence — An Evolutionary Approach*, 57 TENN. L. REV. 577, 590 (1990).

83. The need for case-by-case assessment reveals a problem in some of the "takings assessment" legislation that requires ex ante generalized takings consideration rather than consideration of effects on individual owners. *See infra* text accompanying notes 90-93.

84. 483 U.S. 825 (1987).

85. Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 (1987).

One approach is to require an advance assessment of the takings implications of proposed regulations. State takings legislation, so far, has largely followed this model. However, several of the state assessment statutes and proposals appear largely to track Supreme Court verbiage about takings, suggesting that this legislation in large part simply asks the relevant assessors to second-guess the courts — the very courts whose determinations change steadily in order to adjust public and private rights.[86] Nevertheless, if kept to a simple checklist, such ex ante assessments might help to remind regulators of important private property interests at stake without unduly hampering the regulatory process.[87]

Considerably more complex and more problematic is the federal government's Executive Order 12,630,[88] which was an early example of the assessment approach. Unfortunately, it poses questions that are almost impossible to answer in advance. This Order requires federal agencies, in their "takings" assessments, to identify particular properties affected, their present uses, the economic impact on each, any offsetting benefits, and the duration of the adverse effects[89] — and all this concerns only the consideration of economic impact, which by no means exhausts the Order's list.[90]

A moment's reflection suggests how much these questions will resist an ex ante investigation, and what special difficulties they present for regulations with broad but mild impacts — the very regulations that are often thought fairer than those that single out particular owners. In such assessment requirements, the detailed factual inquiries of takings jurisprudence simply are shifted without being avoided, and indeed, they are shifted to a time frame in which they are less likely to yield reliable answers.[91] At best, such overblown procedural requirements are simply wasteful and redundant, and at worst they are a kind of harassment of regulators.

---

86. For a very explicit example, see Arizona's recently passed H.R. 2229, 42d Leg., 1st Reg. Sess. (1995), which amends the Arizona Code to require counties and county agencies to comply with specifically named U.S. Supreme Court opinions. *Id.* §§ 2-3.

87. *See* John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327, 343-44 & nn.65-70 (1994) (describing Washington state assessment "checklist" with cautious approval).

88. Exec. Order No. 12,630, *supra* note 4.

89. *Id.* § 5(b).

90. For a summary of the Order's requirements, see Robin E. Folsom, *Executive Order 12,630: A President's Manipulation of the Fifth Amendment's Just Compensation Clause to Achieve Control over Executive Agency Regulatory Decisionmaking*, 20 B.C. ENVTL. AFF. L. REV. 639, 658-69 (1993).

91. *See also Recent Legislation*, 108 HARV. L. REV. 519, 521 (1994) (discussing state review statute that requires agencies to undertake fact-specific review before facts are known).

Another approach attempts to define legislatively what is and what is not a regulatory taking, particularly by stating a threshold percentage of "diminution in value" — 10%, 30%, etc. — beyond which an owner must be compensated. Recent congressional proposals in particular have chosen this route.[92] As a matter of policy, of course, it certainly seems to be within a legislature's competence to determine that some particular regulatory program is simply not worth a given level of loss to landowners. But if a legislature wishes to impose such constraints on its own acts, it might better consider them along with the other pros and cons of particular programs, rather than dressing percentages up in the sanctimonious garb of constitutional rights that sweep across all regulations — and that indirectly and retroactively amend any legislation affecting property rights.[93]

Whatever else might be said of percentage limits, they ultimately fail to clarify one of the central issues of takings jurisprudence. To posit a 10% or 20% or 30% diminution in value as a taking still does not answer the question that has always dogged the diminution in value test for regulatory takings — "percent of what?"[94] That is, what is the underlying property to which the loss in value is compared?[95] Even where such percentage requirements are

---

92. *See, e.g.*, House Property Protection Act, *supra* note 3, § 3(a); Senate Property Rights Act, *supra* note 3, § 204(a)(2)(D). "Diminution in value" has been a ground for takings claims since Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922), though its meaning is notoriously ambiguous, as was noted in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), where the Court discussed the difficulty of deciding when a regulation has gone "too far." *Lucas*, 505 U.S. at 1015.

93. *See* Martinez, *supra* note 87, at 339. The House bill, despite other problems, places constraints on its own acts only with regard to specific programs. *See* House Property Protection Act, *supra* note 3, § 9(5) (defining application of law to several statutory sections, including wetlands and endangered species protections, as well as to several statutes relating to water allocations). Mississippi's new takings statutes also apply to specific regulatory programs, i.e., timber and agriculture. *See* H.R. 1541, 1995 Leg., Reg. Sess. (1995) (enacted March 16, 1995); *see also* Freilich & Doyle, *supra* note 3, at 3 n.8 (summarizing Mississippi takings legislation).

94. This problem often arises with *Mahon*'s "diminution of value" test. *Mahon*, 260 U.S. at 419 (Brandeis, J., dissenting). For further explanation, see the classic discussion in Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1190-93 (1967) (describing difficulty of arriving at "denominator" of property to which to compare loss).

95. The scope of underlying property rights was raised in *Lucas*, where the Court suggested that if a new regulation removed all value from a property, compensation is due unless the regulation concerns a limitation that "inhere[s] in the title itself" in the form of "background principles of the State's law of property and nuisance." *Lucas*, 505 U.S. at 1028-29. These phrases undoubtedly will produce much new litigation about the scope of property rights and will not be clarified in the new takings legislation; indeed, similar phrases are sometimes included in those proposals. *See, e.g.*, Senate Property Rights Act, *supra* note 3, § 204(a)(2)(C).

passed, one can predict that they will generate more litigation about almost exactly the same question. Thus, on closer analysis, the percentage limits, like the assessment legislation, generally only complicate, without solving, the fact-specific inquiries that are so much a part of most takings jurisprudence.

Aside from these various "clarifying" efforts, a number of the new legislative proposals implicitly or explicitly narrow the substantive scope of public rights. One of the sharpest attacks on public rights is quite subtle. This attack is contained in what seems to be a minor adjustment to the "percent diminution" clauses in the major congressional bills, where it is stated that the percentage applies to the value of the entire property, *or to any affected part or portion.*[96] This "portioning" approach has quite a history. Among other things, it was mentioned by Justice Scalia in *Lucas*,[97] urged by Richard Epstein in a subsequent commentary on *Lucas*,[98] rejected by Justice Souter in *Concrete Pipe and Products v. Construction Laborers Pension Trust*,[99] incorporated nonetheless into an opinion of the U.S. Court of Appeals for the Federal Circuit,[100] and apparently, finally borrowed by congressmen or their staff for inclusion in the takings bills.

But this seemingly innocuous phrase masks a quite radical position and would very much alter existing takings jurisprudence. Once property can be divided into "relevant" portions, any diminution can be manipulated to become a 30%, 50%, or even 100% diminution.[101] The phrase could effectively mean that virtually *any* regulation with *any* adverse impact on an owner's parcel could become an occasion for compensation, without

---

96. House Property Protection Act, *supra* note 3, § 3(a); Senate Property Rights Act, *supra* note 3, § 204(a)(2)(B)-(D).

97. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016-17 n.7 (1992).

98. Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1374-77 (1993). It is notable, however, that in the accompanying footnote, Epstein cites as examples of partial takings the destruction of real property covenants. *Id.* at 1374 n.25. These are easily assimilable to traditional bars to taking of title of specific real property interests or to takings of what Frank Michelman described as specific contract-based expectations, whose taking is particularly "demoralizing." *See* Michelman, *supra* note 94, at 1214-15.

99. Concrete Pipe and Prods. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2290 (1993).

100. Florida Rock Indus. v. United States, 18 F.3d 1560, 1568-72 (Fed. Cir. 1994). *But see id.* at 1576-79 (Nies, J., dissenting) (arguing that partial takings analysis is inconsistent with current law).

101. In fact, once the taking applies to a "portion," any discussion of percentage diminution becomes meaningless.

regard to the owner's expectations and whether they were reasonable,[102] and without regard to the public rights that might be at stake.

Equally serious are measures and proposals that limit or obfuscate the defenses against takings charges. Occasionally, these limitations are quite explicit; for example, one Montana bill would explicitly eliminate the takings defense that a regulation protects public trust property.[103] More frequently, however, these limitations operate more indirectly, particularly by silently omitting traditional defenses. Executive Order 12,630 exemplifies one way of curtailing defenses by omission. It states that only "real and substantial" threats to health and safety — as opposed to the traditional unmodified trio of health, safety, *and welfare* — can justify regulation and preserve it from takings charges.[104] Several state proposals, as well as House Bill 925, take this indirect limiting tactic, omitting welfare justifications for regulatory actions.[105] House Bill 925 includes another defense, but it is a quite truncated one: The bill adds that a regulation can overcome a

---

102. Justice Scalia's mention of this approach went on to speculate that a more moderate position is the genuine rule — that the relevant property is defined by the ways in which a state's property law has shaped owners' reasonable expectations about the "particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016-17 n.7 (1992).

103. Montana H.R. 597, 54th Leg., Reg. Sess. § 3(8) (1995).

104. Exec. Order No. 12,630, *supra* note 4, § 3(c); *see* Folsom, *supra* note 90, at 687-94 (citing various divergences between the Order — with its guidelines — and takings law); *see also* Martinez, *supra* note 87, at 337 (describing certain state legislation as departing from Supreme Court takings jurisprudence).

105. House Property Protection Act, *supra* note 3, § 5(a)(1). For the states, see, e.g., WYO. STAT. § 9-5-302(a)(iii)(B)(V) (1995) (representing assessment-type statute exempting actions to protect public health and safety but omitting actions to protect welfare); Delaware S. 56, 137th Gen. Ass. §§ 1701(a), 1702 (1993) [hereinafter S. 56] (deeming 50% loss in value to be taking requiring compensation unless regulatory program intended to "prevent uses noxious in fact or demonstrably harmful to the health and safety of the public," but omitting welfare). The language of this Delaware bill is very similar to the proposal of the American Legislative Exchange Council (ALEC), which calls for compensation in the case of *any* reduction in fair market value of real property. PRIVATE PROPERTY PROTECTION ACT § 3(A) (Am. Legislative Exch. Council) [hereinafter MODEL ACT]. The Delaware Bill provides only the seemingly narrow exceptions for regulation of a "public nuisance in fact" or a "demonstrable harm to the health and safety of the public." S. 56, *supra*, § 1702. Though the meaning of "public nuisance in fact" is not clear in ALEC's model act, the passage could be somewhat generously interpreted because a clause in the "Legislative Findings and Declarations" section refers to a "public nuisance affecting the public health, safety, *morals or general welfare*." MODEL ACT, *supra*, § 2(B) (emphasis added). The Delaware bill did not include this opening section and, hence, appears to omit welfare as a justification. S. 56, *supra*, § 1702.

takings charge if it prevents an identifiable "damage to specific property" of other owners — if it effectively wards off a private nuisance.[106]

These shields for regulatory action may be laudable as far as they go, but they by no means exhaust the defenses traditionally available to American legislatures. Consider what these very crabbed and untraditional limitations would mean in practice. A land use causing odors that are disgusting (but not provably illness-producing) could not be regulated without compensating the offending owner; health and safety is not provably imperilled and protection of "mere" welfare would not be a justification. Similarly, land uses that cause water runoff and that inflict siltation, turbidity, and fishkills on other waterfront users could not be regulated without compensation; the damage "merely" affects welfare and that damage might not be sufficiently specific to particular properties. If this kind of takings legislation were to apply to the Clean Air Act,[107] the acid rain provisions would become suspect. Acid rain causes damage to wildlife and vegetation — again, "mere" welfare — rather than to health and safety, and of course, that damage is hard to identify with "specific" properties. The "polluter pay" principle here gives way to the "pollutees pay" principle.

As a matter of fact, "mere" welfare damages — odors, noise, and pollution damage to structures or to natural resources — are very likely to be damage to other people's *property*, whether that property is specifically identifiable or not. That fact suggests how little concern the takings legislation really has for property, despite the verbiage of property rights.

Traditional jurisprudence allowed much greater leeway to legislatures, allowing them to protect not only health and safety but also comfort, convenience, and welfare in general, whether specifically identifiable to particular properties or not. Indeed, economic logic suggests the reasons for this traditionally expansive view. If a land use causes identifiable damage to a specific property, the landowner can sue in her own behalf under private nuisance law. If a land use causes substantial health or safety

106. House Property Protection Act, *supra* note 3, § 5(a).

107. 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993). House Bill 925, by its own terms, does not apply to the Clean Air Act. House Property Protection Act, *supra* note 3, § 9(5). Senate Bill 605 apparently does because its terms are much more general. The bill states defenses somewhat differently, providing for a nuisance defense. Senate Property Rights Act, *supra* note 3, § 204(d). Thus, limitations on production of acid rain precursors would be compensable unless acid rain could be classified as a traditional nuisance. This approach is highly problematic given the short time since the discovery of acid rain effects.

hazards, the public may well be so outraged that single individuals will sue in the public's behalf or insist that public officials do so. But if a land use causes more diffuse and less identifiable damage to welfare — the thousand small cuts into clean water, fresh air, plentiful fish and wildlife and quiet surroundings — then members of the general public have only attenuated incentives to sue in their own behalf.[108] Each person and property owner shares the problem with many others, and all may await the action of someone else. Hence, the general public, faced with diffuse and hard-to-define damage, is most in need of the legislative protection of public rights. Following this logic, legislative protection of wide and diffuse public rights traditionally has been considered a part of the police power, rather than takings of private property.

Indeed, there is a relation between standing doctrines and the police power: Private individuals may not be appropriate advocates for a broad public interest because their personal interests are slight; hence, they do not have standing. But the quid pro quo is not that broad public damage goes undefended. The quid pro quo is that the public's agents — its legislative and regulatory agencies — are entitled to protect against damage to the public. That is the traditional position of public rights.

Contrary to these historical patterns, the new proposals on takings go far beyond the constitutional protections of private ownership, even as those protections are set out in the takings jurisprudence of our recently more conservative Supreme Court. That is why this kind of legislation could seriously disrupt the balancing effort of takings jurisprudence — the balance between the protections of private rights and public rights.

Proposition 10.

Proposed legislative redefinitions of takings impair public rights and dissipate resources.

Some of the proposed takings redefinitions, if enacted, will effectively transfer public rights to private owners. They will do so by expanding the definition of a taking, by narrowing the legislature's defenses against takings charges, and by adding duplicative procedures whose costs can delay and impede legitimate legislative action. More important, they will do so

108. Even when individuals overcome the problem of attenuated interest in diffuse damage, problems of standing may impede their legal effectiveness. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-67 (1992) (holding that environmental group and its members have no standing to require Secretary of Interior to adopt regulations applying environmental review to federal actions outside United States).

without any semblance of the older justifications for legislative authorizations of encroachments on public rights — that the public good, on balance, was served by the authorization.[109]

Quite the contrary, these transfers suggest a net social impoverishment. Like private rights, public rights have an economic justification: They maintain unified control over large-scale, common-pool resources. By cutting back on that unified control and allowing unrestricted open access to individuals, though we may chant the name of property rights, we are in effect inviting a wasteful free-for-all in common resources — the very opposite of the aim of a property regime.

Modern scholarship suggests some special reasons for concern about legislative transfers of public rights to private interests: These transfers are not likely to be reversed easily. Whatever the problems with judicial takings remedies, they can at least adjust as a pattern of cases emerges. But the situation could well be different for takings legislation. First, the academic literature of "public choice" argues that in legislatures, interest groups that are concentrated and intense have a bargaining advantage over large, diffuse interests.[110] If true, this pattern suggests that land and resource developers of all kinds — timber companies, miners, real estate developers, and agricultural interests — are likely to receive special favor in legislatures, particularly when the interests arrayed against them are large and diffuse.[111] What this means, of course, is that public rights are always in a somewhat precarious situation in legislatures, which may be the reason why so many courts still seem to find the public trust doctrine attractive.[112] Second, the academic literature from cognitive psychology argues that once a special favor is granted and turns into a new status quo, the beneficiaries will be especially unlikely to give it up. This phenomenon is known as the "endow-

---

109. Even with these justifications, earlier courts used private nuisance law and the public trust doctrine to police legislative giveaways of public rights. *See supra* text accompanying notes 55-56.

110. *See, e.g.*, Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 723-24 (1985) (noting that "discrete and insular minorities" have advantage over diffuse interests in pluralist politics). For the classic statements, see generally JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962) and MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (2d ed. 1971).

111. *See* Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 293, 297 (1992) (noting that landowners generally wield more influence in legislatures than ordinary taxpayers).

112. *See supra* text accompanying notes 55-56; *see also* Rose, *supra* note 20, at 713-16, 729-30 and authorities cited therein.

ment effect": People are more attached to things that they *have* than to prospective things they *might*, but do not now, have.[113]

Endowment effects, added to the ordinary legislative patterns of public choice, suggest that it would be especially difficult to reverse the transfers of public rights implicit in the new takings proposals. To a certain degree, we can already discern this pattern in the enormous difficulty that Congress has encountered in modifying agricultural supports and water subsidies, environmentally damaging though these may be.[114]

The modern legislative transfers would mean, of course, that the public would have to pay for resources that it has traditionally owned — and has owned for very good reason. This would be a poor idea in any time, but it is particularly disturbing that these proposals have arisen at a time when the national deficit is at an all time high. The alternative, of course, is that the public would *not* repurchase its rights. But that does not really alter the picture. Such transfers still effectively drain resources away from future generations of American citizens. This dilemma is again reminiscent of the deficit problem, insofar as the current generation of children will be impoverished by our present "expenditures" of public rights — by their giveaway to private persons who have no particular incentive to maintain public values.

Most important, however, is a quite different factor. A pattern of such transfers encourages disrespect for public rights and encourages private property owners to adopt an attitude of extortion and "in-your-face" about matters of known concern to the public. Property as a whole depends greatly on a civilized respect for the rights of others, including rights of the public. Citizens should expect that their legislators will avoid measures that can disrupt respect for public rights and that could instead reward persons who had no reason to expect that they could indefinitely appropriate public resources for themselves.

Proposition 11.

Legislatures nevertheless can play an important role in bringing private property concepts into the preservation of public rights.

There is no question that many of our environmental and land use laws could use improvement, both from the perspective of cost effectiveness and

---

113. *See generally* Jack L. Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, 79 AM. ECON. REV. 1277 (1989).

114. Ronald Smothers, *Bright Prospects on Georgia Farm*, N.Y. TIMES, Sept. 23, 1995, at A6 (describing Congress' difficulty in phasing out agricultural support system).

from the perspective of fairness to individual owners. There is a relationship between these points; legislatures that can treat other people's property as a "free good" may not have much incentive to weigh costs and benefits accurately.[115] There are many examples: Local governments can act cavalierly in allowing — or prohibiting — land uses that primarily damage outsiders.[116] Federal laws, with their distance from specific local conditions, may be so optimistic about the efficacy of general legislation as to call for impracticable or unenforceable levels of performance, which leaves citizens confused and frustrated about their rights and duties.[117] Environmentalists should learn a lesson from the property rights backlash that has whipped up the recent takings proposals; the cavalier treatment of private rights is very likely to have serious repercussions that ultimately can damage public rights as well.

Specific legislation to deal with these concerns can make regulation both fairer to individual citizens and more productive to the larger community. Indeed, in focusing on takings jurisprudence — which is so dominated by the judiciary — we often overlook the fact that legislatures police each other in ways that can allay takings claims from the outset. For example, a number of states require that local regulation undergo a variety of planning steps, in part to improve regulatory quality, in part to give citizens an early opportunity to raise fairness concerns about land use regulation, and in part to prevent municipalities from imposing external costs on one anothers' citizens.[118]

Just as important, legislatures often have created limited property rights in order to preserve environmental resources. Since the late nineteenth

---

115. Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 21-22 (1985) (arguing that if government never has to compensate, it has no incentive to care for private property, leading to overregulation).

116. For example, municipal patterns of "exclusionary zoning" often are described as efforts to foist responsibility for low-income residents on others; a good example is the famous Mt. Laurel litigation, beginning with Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713, 731-34 (N.J.) (requiring city to zone for "fair share" of region's low-income housing), *cert. denied*, 423 U.S. 808 (1975). *See also* FISCHEL, *supra* note 11, at 340 (describing Mount Laurel litigation as addressing problem of "local parochialism").

117. *See* Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. (forthcoming 1996) (manuscript at 28, on file with the *Washington and Lee Law Review*) (book review).

118. See, for example, the "housing element" requirement in California, CAL. GOV'T CODE §§ 65580-65589 (West 1983 & Supp. 1995), which requires localities, *inter alia*, to plan for housing for all economic groups of the community and to meet their respective shares of regional housing needs.

century, for example, legislatures have passed measures to charge for the right to hunt and fish through licensing requirements. These measures give hunters a limited property right while helping to limit demand on the underlying resources.[119] The 1990 amendments to the Clean Air Act opened up another and extremely valuable experiment in quasi-property rights by effectively privatizing a large portion of the United States' sulphur dioxide emissions.[120] The tradeable emission rights established under that program, however, are bounded; they limit emissions to relatively small amounts that, when added up, yield a total amount that is not considered dangerous to the public health and welfare.

Because they are bounded and finite, permits and emission rights of this sort are quite in keeping with traditional ideas of private property. Legislative approaches like these differ markedly from the proposed legislative takings redefinitions. Some of the latter would effectively hand over unrestricted rights and permit open encroachment on public resources simply on the basis of ownership of land. Under such measures, land ownership becomes the basis for "piggybacked" rights to use or damage common resources with impunity. That pattern effectively recreates a tragedy of the commons in the diffuse land-adjacent resources of air, water, and wildlife stocks.

Limited tradeable emission rights, by contrast, have the virtues of traditional private property rights. Rather than giving carte blanche to an entire resource, they are closely bounded in scope. Once allocated, they can be traded and hence allow a range of private choices; and they encourage thrift, planning for the future, and attentiveness to the rights of others.

Legislative definitions of this sort — limited private rights in diffuse public resources — could be immensely valuable both for the preservation of public resources and for the security of private ownership. Anyone genuinely interested in securing property rights might well consider how these limited, legislatively created property rights can be deployed to preserve the environmental resources — water, air, and wildlife — that so often set off takings disputes.

---

119. TOBER, *supra* note 58, at 209.

120. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 401, 104 Stat. 2399, 2584 (1990) (codified at 42 U.S.C. § 7651-7651o (Supp. V 1993)). Strictly speaking, tradeable emission rights are not property rights in air in the sense that the holder can exclude others from some portion of the air; they are, rather, limited rights to pollute the air — to use the air as storage for wastes.

Proposition 12.

Public rights are as essential to a free enterprise system as are private rights.

In a free enterprise system, public rights measure in importance beside private rights. Both kinds of rights are important because the goal of a free enterprise system, all other things being equal, is not to maximize the value of privately held resources. It is to maximize the value of *the sum of private and public resources.*

Much of the literature of the takings debate points out the dangers to private owners from uncompensated public appropriations. These dangers are real. Public appropriations can unfairly single out particular private owners to pay for public benefits, and writ large, they mean that we could impoverish ourselves as a nation by discouraging enterprise and undermining commerce. For this reason, we have constitutionalized judicial oversight of public regulation through the Takings Clause.

Handouts of public rights to private owners, however, are unfair to the public. They too can impoverish us as a nation because they decimate resources that are diffuse and difficult to turn into private property but that are still immensely valuable to the public as a whole — now and (it is to be hoped) in the future. Citizens are entitled to expect that their legislatures will safeguard public rights along with private ones and in so doing, uphold the respect for rights — including public rights — that is a necessary part of the moral infrastructure of any property regime and, indeed, of republican government itself.

NOTES