

# Tribute to Carol Rose

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## INTRODUCTION

It is a great honor to be asked to pay tribute to Carol Rose, whose work has been critically important to my own scholarship and to that of so many of my peers. Carol has been an inspiration to several generations of scholars, not only because of the many keen insights she has contributed to several different fields of law, but also, perhaps especially, because of her style of thinking, writing, and working with other scholars. Carol's modesty, her incredible ability to cut right to the heart of the matter in the most down-to-earth, but always amazingly well-turned phrase, and her generosity to other scholars are models of what a more engaged, more honest, and more gracious scholarly community could be.

Carol likes to organize things in lists—her articles include a dozen propositions on property and takings, seven arguments on property, and so on.<sup>1</sup> I am going to offer, then, a list of the top three reasons that Carol's contributions to the “vastly overwritten” takings literature, to use her phrase,<sup>2</sup> are genuine advances of a very special sort. In the hope of spurring Carol to develop her contributions into a more comprehensive theory about how to ensure that government acts efficiently and fairly when regulating property, I am then going to propose the outline for what I hope will be her book on takings.

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1. See, e.g., Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996) [hereinafter Rose, *Keystone Right*]; Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265 (1996) [hereinafter Rose, *A Dozen Propositions*].

2. Rose, *A Dozen Propositions*, *supra* note 1, at 265.

## I. EVER-EVOLVING BOUNDARIES BETWEEN PRIVATE AND PUBLIC RIGHTS

The first major contribution that Carol has made to our understanding of the Takings Clause is a deep and nuanced appreciation for the relationship between the ever-evolving nature of property rights and the appropriate reach of a compensation requirement. As Michael Heller and the others on the panel on property theory have shown, Carol has long recognized that property rights are fluid—they generally are mud, not crystals, to use one of her most influential metaphors.<sup>3</sup> Although property rights must be reasonably secure in order to promote productivity and trade, property rights cannot be too fixed.<sup>4</sup> Indeed, Carol would have us confront the fluidity of property head on, by changing our rhetoric about property from a focus on land to a focus on water:

If water were our chief symbol for property, we might think of property rights—and perhaps other rights—in a quite different way. We might think of rights literally and figuratively as more fluid and less fenced-in; we might think of property as entailing less of the awesome Blackstonian power of exclusion and more of the qualities of flexibility, reasonableness and moderation, attentiveness to others, and cooperative solutions to common problems.<sup>5</sup>

The fluidity of property rights has several causes, and Carol's insights about those causes have significant implications for our thinking about takings. The most important reason property rights are, and must be, fluid, is that property regimes—property rights and limits on those rights—are a means of managing conflicts over scarce resources."<sup>6</sup> As Demsetz and others have demonstrated, we define property rights only when a resource becomes sufficiently scarce that the benefits of defining individual rights to the resource are less than the costs of doing so.<sup>7</sup> Carol pointed out that the same logic governs the way in which we *limit* private property rights by defining public rights. She explained that when we denominate something as private property, one of the determinants of the value of that property is its owner's ability to draw upon public resources to put the private property to more intensive use. Private property owners often use their land to "access . . . adjacent common resources, effectively 'piggybacking' the use of a common resource like air or water onto their

3. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578 (1988) [hereinafter Rose, *Crystals and Mud*].

4. Rose, *A Dozen Propositions*, *supra* note 1, at 267-68, 270.

5. Rose, *Keystone Right*, *supra* note 1, at 351; *see also* Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOL. L.Q. 351, 361 (1998) [hereinafter Rose, *Idea of the Public Trust*].

6. Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 585 (1990) [hereinafter Rose, *An Evolutionary Approach*]; *see also* Rose, *Crystals and Mud*, *supra* note 3, at 578.

7. Rose, *Crystals and Mud*, *supra* note 3, at 578.

individual land ownership.”<sup>8</sup> Carol uses the example of a landowner polluting the air or water, but it could be instead the rancher using adjacent public lands to graze his cattle, or the owner of an urban apartment building using the nearby public playground to provide the building’s occupants necessary recreational opportunities.

Just as in the Demsetzian story, if those public resources—clean air and water, public lands, or public parks, become sufficiently scarce or congested, competition for the resource will generate increasing conflicts. As those conflict costs rise, the benefits of defining the public’s right to resources held in common, by specifying limits upon private property owners’ rights to draw upon common resources, begin to outweigh the costs of defining and enforcing the public’s rights.<sup>9</sup> The resource held in common can become scarce for a variety of reasons: the resource may be an exhaustible resource; changes in the demographics of the population or in technology may be placing increasing demands on the resource; changes in technologies may have increased our ability to understand the value of the resource (as when we learn the consequences of not preserving wetlands that serve as buffers and drains in hurricanes, for example); or the use of the resource may involve increasing marginal costs—the ninth seawall may impose different costs on a common resource than the first, for example.<sup>10</sup>

Carol points out that the relationship between scarcity and the evolving definition of property rights is not just a function of the need to manage the use of resources held in common. The development of nuisance law, regulating the relationships between neighbors, also is driven by scarcity. Behaviors such as keeping pigs in one’s yard that are not a problem when an area is sparsely settled become so when more people compete for clean air and water, and nuisance law responds to that competition. Carol explained:

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. And, finally, legislatures take over and regulate ex ante, and in much greater detail, the areas where landowners can and cannot locate . . . 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.<sup>11</sup>

Scarcity and congestion therefore require that the boundaries between

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8. Rose, *A Dozen Propositions*, *supra* note 1, at 272.

9. *Id.* at 282-84.

10. Carol M. Rose, *The Story of Lucas*, in ENVIRONMENTAL LAW STORIES 237, 275 (Richard J. Lazarus & Oliver A. Houck eds., 2005) [hereinafter Rose, *The Story of Lucas*].

11. Rose, *A Dozen Propositions*, *supra* note 1, at 274.

private property rights and the limits on those rights necessary to protect the public's interest in resources held in common, as well as the boundaries between the rights of one private property owner and those of his or her neighbors, be in a relative constant state of transition.

Although the transitions often are relatively slow evolutions, even slow changes may cause disruptions in the expectations of private property owners. Accordingly, takings problems commonly arise during transitions, when one's understanding of the content of his or her property rights vis-à-vis the neighbors' rights, or vis-à-vis the public's rights, is in flux. Carol explains, using the example of air pollution:

When these polluting activities become more intense, they may become exponentially more disruptive and costly. But by that time, polluters have a transitional gains trap of their own: they have become used to polluting, they have made capital expenditures on that basis, and they think they are entitled to continue to pollute, just in the same way they always have. And their neighbors may well think, "If X can pollute, then I should be able to too." They all think that if they are required to stop, they must be compensated . . . . People come to think that they have entrenched rights to continue the Rule of Capture and that they can continue to take things "for free" from the commons, even when those common resources have become scarce and fragile.<sup>12</sup>

Carol accordingly shows us the difficult dynamics that produce hard takings cases: increasing scarcity and congestion demand that property rights and limits on those rights evolve, but at the same time, people develop expectation interests in being able to act as they always have. Just as Oliver Wendell Holmes said, in reference to the seemingly odd doctrine of adverse possession: "A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it."<sup>13</sup> Private property owners come to think of the public's lack of enforcement of its rights as converting the right into the private property owner's.<sup>14</sup>

To address the conflicts, Carol urges closer attention to the "continuities and the changes in assumptions about the rights and duties entailed in property ownership."<sup>15</sup> As she explained, "property on the one hand, and the regulation of property on the other, are aligned in a set of overlapping evolutionary relationships."<sup>16</sup> By recognizing that what at first blush may

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12. Rose, *Keystone Right*, *supra* note 1, at 344-45.

13. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476-77 (1897).

14. See Rose, *An Evolutionary Approach*, *supra* note 6, at 587.

15. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 598 (1984).

16. Rose, *An Evolutionary Approach*, *supra* note 6, at 577.

look like a private property right may instead be just a temporary gap in the definition of public rights resulting from the lack of demand for the specification, Carol helps us understand better why there often will be no need for compensation in what she calls “transition management.”<sup>17</sup> Indeed, she points out that compensating landowners for closing the gap in the definition of public rights risks “inviting a wasteful free-for-all in common resources—the very opposite of the aim of a property regime.”<sup>18</sup>

Carol helps us to see the importance of not requiring compensation in such transitions in part by an insightful comparison to what she calls “housekeeping” transitions. She notes that courts and legislators often must adopt “background housekeeping rules” to keep the property regime “simple, manageable and legible to outsiders and newcomers.”<sup>19</sup> Those background rules sometimes result in an individual losing what had previously been defined as her property rights. The original owner of land may lose it because of rules of adverse possession, for example.<sup>20</sup> The holder of a covenant may lose the right to enforce it through a legislature’s imposition of recording acts or statutes of limitation, or through the courts’ imposition of a doctrine of changed circumstances.<sup>21</sup> The holder of property rights may find herself with only liability rule, rather than property rule, protection of those rights.<sup>22</sup>

Carol notes that these “housekeeping” divestments” suggest that property rights are not absolute, but rather may be limited by rules designed to ensure that the property regime works efficiently, even though those rules may result in the forfeiture of individual rights. So, too, then a property regime may require, for efficiency’s sake, that the boundaries between public and private rights constantly evolve in response to scarcities, rather than being fixed in time.

Carol’s first major contribution to our understanding of how to define takings, then, is her very significant insights into why the boundary between public rights and private rights is, and should be fluid, and cannot be dammed up, so to speak, by a compensation requirement that uses a fixed date as the baseline from which to measure private property rights.

## II. LOCAL MAJORITIES VERSUS STATE AND FEDERAL MINORITIES

Carol’s second most significant contribution to takings theory stems from her early work about what she first called “a troublesome suspicion

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17. Rose, *The Story of Lucas*, *supra* note 10, at 275.

18. Rose, *A Dozen Propositions*, *supra* note 1, at 294.

19. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 12 [hereinafter Rose, *Property and Expropriation*].

20. *Id.* at 8-9.

21. *Id.* at 11.

22. *Id.* at 9-10.

of local legislative bodies.”<sup>23</sup> In an article about judicial review of piecemeal zoning changes, not about takings claims, she noted James Madison’s fear of faction, and his belief that the “antidote” to faction is a constituency of sufficient size and variety to guarantee that every dog will have its day.<sup>24</sup> With a sufficiently large and diverse constituency, all legislative action will require compromise and coalitions, and the pattern of shifting alliances and log-rolling that ensue will ensure that all interests will obtain some benefit through the legislative process.

Carol acknowledged that local governments lack that particular protection. They typically have a small number of items on their agenda and a limited diversity of interests, so log-rolling is constrained, as is the deliberation and reflection thought to occur when the “clash of multiple interests” slows down the legislative process.<sup>25</sup> Thus, local legislative bodies “cannot (or cannot always) be trusted to act with the ‘legislative due process’ envisioned by The Federalist No. 10 in a larger legislature.”<sup>26</sup>

But, Carol argued, the fact that local governments do not have the features Madison identified as a check on factions does not mean that we should treat them like second class legislatures, or as no different from administrative agencies, as some courts and many commentators were urging (and have continued to urge).<sup>27</sup> Instead, she noted, we should recognize that local governments have other checks on unfair domination by one faction—checks that she calls “alternative bases of legitimacy.”<sup>28</sup> She identified two, drawing upon Albert Hirschmann’s *Exit, Voice, and Loyalty*: first, the ability of dissatisfied minorities within a local government to voice their displeasure loudly; and second, their ability to exit, or move to a friendlier jurisdiction if their complaints are not taken seriously. Drawing upon the arguments of the Anti-Federalists, as well as history and tradition, Carol showed that those two features of local government have long been considered potent disciplines. She argued:

The legitimacy of local decisionmaking . . . may derive from interested parties’ opportunities for a combination of Hirschman’s elements: voice in the ability to participate in decisions, and in having decisionmakers who know the issues directly and who try to secure the parties’ acceptance of a final decision and their continued

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23. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 853 (1983) [hereinafter Rose, *Planning and Dealing*]; see also Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism*, 84 NW. U. L. REV. 74 (1989) [hereinafter Rose, *The Ancient Constitution*].

24. Rose, *Planning and Dealing*, *supra* note 23, at 854.

25. *Id.*

26. *Id.* at 856.

27. See, e.g., *Snyder v. Bd. of County Comm’rs*, 595 So. 2d 65 (Fla. Dist. Ct. App. 1991), *quashed by* 627 So. 2d 469 (Fla. 1993).

28. Rose, *Planning and Dealing*, *supra* note 23, at 882.

integration in the community; and exit in the parties' ultimate opportunity to withdraw and go elsewhere.<sup>29</sup>

Carol was addressing the problem of piecemeal changes, not the broader problems of takings.<sup>30</sup> Her solution to the problem of piecemeal changes was to suggest that courts should examine whether local governments were acting like good mediators—providing due consideration of the interests of all affected by the change and ensuring fairness by preventing surprise.<sup>31</sup> That solution has not been reflected in subsequent work on takings, although I will argue in a moment that Carol might think it should. But Carol's insights into the different bases for legitimacy between state and federal governments, on the one hand, and local governments, on the other, has had a significant impact on the scholarship about takings.

I drew heavily on Carol's work, for example, in arguing that the possibility of exit often was a significant constraint upon local governments' ability to drive unduly hard bargains in negotiating with developers over exactions or impact fees as a condition to approval of development proposals.<sup>32</sup> Where competition among municipalities was sufficient to give developers credible threats of exit, I argued, courts should defer to the disciplinary force of competition rather than impose rules like those the Supreme Court adopted in *Nollan* and *Dolan*.<sup>33</sup>

Others drew the opposite conclusion from Carol's insights about the differences between local and state and federal governments, arguing that the fact that land cannot be moved out of a local government's jurisdiction counsels for *greater* judicial protection of landowners' Fifth Amendment rights against local governments than against state and federal governments.<sup>34</sup> Indeed, Bill Fischel built his theory of takings, in

29. *Id.* at 887.

30. Indeed, Carol specifically "[left] to one side" the takings clauses of federal and state constitutions in her discussions of the role of exit and voice in disciplining local governments. Rose, *The Ancient Constitution*, *supra* note 23, at 96.

31. Rose, *Planning and Dealing*, *supra* note 23, at 893-910.

32. Vicki Been, *Exit as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991).

33. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

34. See, e.g., WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995) (arguing that courts should scrutinize local governments more closely under the Takings Clause because property owners have greater voice in state and federal governments and because local governments are most able to externalize the costs of their decisions onto people living outside the jurisdiction); NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 116 (2001) (arguing that more active judicial review of local governments is required to control majoritarian bias); see also William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 CHI.-KENT L. REV. 865 (1991); Vicki Been, *The Perils of Paradoxes—Comment on William A. Fischel, "Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?"*, 67 CHI.-KENT L. REV. 913, 920 (1991) (debating the point); cf. Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831 (1992) (arguing that exit alone will not be sufficient to constrain

substantial part, upon the notion that state and federal governments offer landowners more viable options of exit and voice than local governments, and therefore require less judicial scrutiny in takings cases than local governments do.<sup>35</sup>

Fischel's arguments led Carol to revisit the work she started in *Planning and Dealing* and to specifically address the importance of that work for takings jurisprudence. Carol noted: "Some distinction among levels of government is a much-needed corrective in the discussion of takings jurisprudence; indeed, it is quite amazing that takings cases have so blithely disregarded differences among levels of government and types of governmental agencies."<sup>36</sup> She disagreed, however, with Fischel's assessment of the advantages and dangers of local governments. With her characteristic carefulness and generosity, she acknowledged the validity of Fischel's concern for situations in which local majorities disregard the interests of the owners of undeveloped land that cannot be moved from the jurisdiction, and noted that at such points, "takings jurisprudence might most appropriately intervene."<sup>37</sup> But she persuasively critiqued his argument that state and federal legislatures are more "amenable to the exit/voice modes of civic influence than are local governments."<sup>38</sup> First, she showed that land is just as hard to move out of the reach of a state or federal government as out of the local government, and that the national government (and to a lesser extent, the state government), unlike a local government, prevents exit not just of land, but also of other assets that might give one influence over the government.<sup>39</sup> As to voice, she contested Fischel's assumption that the ability to form coalitions and engage in log-rolling—opportunities more often available at the state or federal level than at the local level—is equivalent to the opportunity for speaking on one's own behalf, as one has more opportunities to do at a local level.<sup>40</sup>

Carol went on to suggest, in general terms, how differences between local and state or federal governments should play out in takings jurisprudence. She emphasized that scholars confronting takings cases should be attuned to the different kinds of failures that would plague local versus state and federal governments.<sup>41</sup> The constraints of exit and voice,

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local government exactions policies, but not taking a position on the level of judicial protection required).

35. FISCHEL, *supra* note 34, at 131-35.

36. Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121 (1998) (reviewing FISCHEL, *supra* note 34) [hereinafter Rose, *Takings, Federalism, Norms*].

37. *Id.* at 1133.

38. *Id.*

39. *Id.* at 1134.

40. *Id.* at 1135-36.

41. I assume that she also intends for judges to pay attention to the differences between local and other governments, as discussed *infra* notes 48-50 & 66-67 and accompanying text.



while usually a more powerful check on local governments than state or federal governments, will sometimes fail at the local level, “with the result that at the local level, stable minority interests may be treated unfairly.”<sup>42</sup> Takings cases involving local governments therefore will (or should) “especially engage the instances in which certain owners are ‘singled out’ for undue burdens.”<sup>43</sup> The need for coalition politics generally will constrain state and federal governments, but also may fail, with the result of both “minoritarian” rent seeking, and the disadvantages of higher levels of government (“the distance of representatives from ordinary constituents and their problems, the corresponding influence of wealth and organization on elections and legislation, the overly confident belief in uniform national solutions, [and] the bureaucratic rigidity and resistance to local circumstances that so irk citizens about their federal government”<sup>44</sup>). She suggests that takings cases involving those governments therefore should focus on “state and federal legislation ‘as applied’—the instances where general legislation or regulations are patently inappropriate for special circumstances” and on “the owners whose special plights are ignored in the breezy generality of national legislation.”<sup>45</sup>

Although it was not very expansive about her own views (as befits a gracious review of another’s work), Carol’s review of Fischel’s book was an important advance in our thinking about takings. Most obviously, it influenced Fischel, who later wrote *The Homevoter Hypothesis*, in part to respond to Carol’s description of *Regulatory Takings* as within the tradition of “localism bashing.”<sup>46</sup> While the “tough love” approach to local governments that he outlines in *The Homevoter Hypothesis* includes a compensation requirement, the role of that requirement is more nuanced and more realistic about the costs and benefits of judicial review than advocated in his earlier work.<sup>47</sup>

Others have drawn upon Carol’s understanding that exit and voice may serve to constrain a local government’s decision-making in ways that are important to takings jurisprudence as well.<sup>48</sup> Indeed, Mark Rosen recently offered an extensive argument in support of “tailoring” constitutional

42. Rose, *Takings, Federalism, Norms*, *supra* note 36, at 1138.

43. *Id.* at 1151.

44. *Id.* at 1138-39.

45. *Id.* at 1150-51.

46. WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS* 288 (2001).

47. *Id.*; see also *id.* at 272-75, 283-85.

48. For other discussions that have relied upon Carol’s insights, see, for example, Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 486-89 (2000); Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. REV. 242, 276 (2000). Carol’s insights also have informed scholarship outside the takings context. See, e.g., Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 406 (2002).

protections according to the level of government at issue. His arguments, in part, draw upon the bases for the legitimacy of local governments that Carol emphasized: “[T]he systemic differences in exit costs across different levels of government are a *prima facie* basis for tailoring constitutional principles to different levels of government. Generally speaking, there is less need for judicially enforced constitutional protections at lower levels of government, where exit costs are lower.”<sup>49</sup>

Again, Rosen did not work out the details of how the different bases for legitimacy of local governments should shape takings jurisprudence.<sup>50</sup> Much work remains to be done on that issue, but Carol has made a very significant contribution to takings theory by focusing our attention on the differences, and the potential for a takings jurisprudence that is correctly attuned to those differences.

### III. CRYSTALLINE RULES AND MUDDY STANDARDS

Carol has given us, then, both an admonition to consider the different strengths and weaknesses of local, state and federal governments when we consider whether a regulation effects a taking, and the understanding that both private property rights and the limits on those rights necessary to protect property held in common by the public are constantly evolving not (or not just) for troublesome reasons, but because of quite legitimate cost/benefit calculations of the value of finer-grained definitions of the respective rights. Those insights led to the third major contribution Carol has made to takings jurisprudence: the explication of when and why takings doctrine may be abstract and hard-edged, when it must instead be contextual and flexible, and why we should expect oscillation between crystals and mud. Many takings mavens have debated whether takings doctrine should be composed of flexible standards or rigid rules over the years,<sup>51</sup> but we owe a special debt for Carol’s early, clear, thorough, and

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49. Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1610-11 (2005).

50. Stewart Sterk has suggested that federal courts in fact reach different results when both the property taken and the offending regulation are the product of state, rather than federal, law. But his claim is that the courts are driven by federalist concerns, rather than by the level of government that made the challenged decision, and the different bases for legitimacy of the various levels of government. Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203 (2004).

51. See, e.g., Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1629 (1988) (“balancing—or better, the judicial practice of situated judgment or practical reason” is necessary in takings jurisprudence because of the inherent difficulty of reconciling private property and democracy); see also Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 617 (2004); Marc Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002); Margaret Jane Radin, *The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings*, in REINTERPRETING PROPERTY 120, 133-35 (1993); Barton H. Thompson, Jr., *The Allure of Consequential Fit*, 51 ALA. L. REV. 1261, 1270 (2000). But see, e.g., Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988).

sophisticated examination of the issues.

In her 1988 article, *Crystals and Mud*, she explained that on the one hand, what she calls crystalline doctrines—the “per se” rules of *Loretto*<sup>52</sup> or *Lucas*<sup>53</sup>—are desirable to help people shape their behavior and invest with confidence. They help promote trade, by making clear who owns what rights, and therefore who one has to negotiate with to acquire those rights. They also constrain the discretion of government regulators and by so doing, reduce the opportunity for rent-seeking from interest groups anxious to secure advantage from the regulators’ exercise of discretion.<sup>54</sup> On the other hand, crystalline takings rules will sometimes produce gross injustices—subjecting property owners to majoritarian oppression or one-size-fits-all generalities, or allowing huge “land grabs” of the resources held in common by the public—because the imagination of those specifying ex ante rules will simply fail to anticipate the almost unlimited variety of conflicts that will arise, and the context-specific differences that might require variations in the rules.

One approach, then, would be to try to specify when crystalline rules are least likely to produce unanticipated injustices. That, of course, is what Justice Scalia tried to do in inventing a per se rule for total diminutions in value in *Lucas*. He argued that the category of 100% wipeouts would be small, and that the scope of justifications that might excuse a 100% wipeout would be extremely narrow and knowable ex ante.<sup>55</sup> But, of course, buried in qualifications and the footnotes were all the reasons that a crystalline rule might work grave injustices. The scope of the rule depended upon (among other things) the baseline against which “limitations inherent in title” are to be measured, as well as upon the definition of the boundaries of the property.<sup>56</sup>

Justice Scalia’s attempt to tidy things up has not fared well in the ensuing decade. First *Palazzolo*,<sup>57</sup> then *Tahoe*,<sup>58</sup> reasserted the role of ad hoc balancing tests and other muddy standards in takings jurisprudence. But Carol advised that see-sawing between “per se” rules and “ad hoc” standards in takings doctrine should be expected: “the history of property law tells us that we seem to be stuck with both.”<sup>59</sup> She explained that the very fact that crystalline rules are attractive because they “yield fixed

52. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

53. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

54. “[T]he muddier the rules, the greater the likelihood that interest groups will bid for whatever ‘asset’ is the object of the decision-maker’s discretionary choice, frittering away resources in the bidding process.” Rose, *Crystals and Mud*, *supra* note 3, at 591.

55. *Lucas*, 505 U.S. at 1018.

56. *Id.* at 1016 n. 7.

57. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *see also id.* at 636 (O’Connor, J., concurring).

58. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002).

59. Rose, *Crystals and Mud*, *supra* note 3, at 593.

consequences” makes them prone to “overuse[] . . . in contexts that make them unpredictable and counterproductive.”<sup>60</sup> Carol argued that it is the “booby trap aspect of what seems to be clear, simple rules—that scenario of disproportionate loss by some party—that seems to drive us to muddy up crystal rules with the exceptions and the post hoc discretionary judgments.”<sup>61</sup>

Her examples of forfeitures in contract law drive home the point that the law abhors dramatic and disproportionate loss,<sup>62</sup> and that hard-edged rules that appear to sanction such losses may undermine rather than foster the certainty, facilitation of trade, and avoidance of the “frittering away” of resources in rent-seeking that hard-edged rules are designed to promote.<sup>63</sup> Similarly, hard and fast takings rules, if they result in disproportionate losses for private property owners, will make owners too timid about investing in and using property. Hard and fast takings rules that result in disproportionate losses to common resources, on the other hand, will make the public too timid about allowing the commons to be used.<sup>64</sup> Carol’s warning about forfeitures, thus, is directly applicable to takings as well:

Simple boundaries and simple remedies, it turns out, may yield radically unexpected results, and may destroy the confidence we need for trade, rather than fostering it. It is forfeiture, the prospect of dramatic or disproportionate loss, that brings that home; and forfeiture—and the detailed ways in which it might have been avoided—can only be known to us *ex post*.<sup>65</sup>

But Carol’s insights about the crystal to mud and back again cycle also tell us more about when we might profitably use crystalline rules: she notes that rules seem to be most helpful and most needed when the parties are in one-time relationships, with no repeat play or ongoing relationship, because it is then that “temptations to dupe each other, or simply to play commercial hardball, might be strongest.”<sup>66</sup> Muddy standards, on the other hand, seem to “mimic a pattern of post hoc readjustments that people would make if they were in an ongoing relationship with each other.”<sup>67</sup> Interestingly, that understanding of when rules are most needed tracks Carol’s insights about the different bases for legitimacy that apply to local

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60. *Id.* at 599.

61. *Id.* at 597.

62. *Id.* at 598.

63. *Id.* at 591.

64. *Id.* at 600; *see also* Rose, *Keystone Right*, *supra* note 1, at 365 (“[T]he in-your-face rhetoric of property rights can undermine actual institutions of property, suggesting that anything goes, and that the property owner need not care in the least for his fellows. That is not what makes property work to make a society richer. And it is not what makes democracy work to make a society freer.”).

65. Rose, *Crystals and Mud*, *supra* note 3, at 601.

66. *Id.*

67. *Id.* at 602.

and state and federal governments: where interest groups need each other for coalition politics, they are unlikely to play hardball, except in situations in which they can identify a “discrete and insular minority” they will never again need at the bargaining table. Similarly, when members of a community can use voice, and the threat of exit, to constrain overreaching by a local government and the members of the community to which the government most responds, they take advantage of the protections of an ongoing relationship.

Rather than simple rules for a complex world, as takings scholars such as Richard Epstein have advocated,<sup>68</sup> Carol teaches us that simple rules will often produce unexpected results that are so harsh that they will lead to inefficiencies in the property regime. The complexities of the world demand fluid standards. Carol’s insights reveal that those standards can and should seek to mimic and reflect the ways in which ongoing relationships moderate the complexities of evolving situations.

#### IV. COMMON SENSE TAKINGS: MAKING BETTER USE OF CAROL’S INSIGHTS

These three very significant contributions Carol has made to the field of takings law unfortunately have not always received as much attention as they deserve. The courts, for example, have failed to use many of Carol’s insights. To be sure, Carol’s writings have made some inroads in the courts. Justice Kennedy’s concurrence in *Lucas*, for example, recognizes that the common law of nuisance has not or does not evolve quickly enough to justify the faith Justice Scalia puts in it to limit private property rights.<sup>69</sup> That concurrence surely owes a debt to Carol’s work. Similarly, Justice O’Connor’s affection for rules rather than standards, expressed in her concurrence in *Palazzolo*<sup>70</sup> and trumpeted by the majority in *Tahoe*,<sup>71</sup> owes much to *Crystals and Mud* and to Carol’s *Dozen Propositions*.

Nevertheless, I would have hoped to see more evidence that judges were reading, and heeding, Carol’s lessons. One can imagine any number of reasons that the evidence of Carol’s influence on the courts falls short of what we academics would want. For my purposes, though, the most useful, even if perhaps not the most accurate, theory is that Carol has not yet pulled her takings work together in a counterpart to Richard Epstein’s *Takings*,<sup>72</sup> or Bill Fischel’s *Regulatory Takings*.<sup>73</sup> I believe Carol’s book

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68. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

69. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

70. *Palazzolo v. Rhode Island*, 533 U.S. 606, 632 (2001) (O’Connor, J., concurring).

71. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326-27 (2002).

72. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

on the subject, which obviously would need to have a three-word title, might appropriately be called Carol Rose's *Common Sense Takings*.

To generate further discussion about Carol's contributions to the theory and doctrine of takings, I have sketched an outline of the central themes I believe Carol's book would adopt. I am not trying to write her book, of course—I could not come close to Carol's incredible way with words, for starters. But I am hoping to prod her to draw out the implications of her insights for the takings debates that undoubtedly will continue to swirl around the Supreme Court in the years to come. So, with apologies to Carol for what undoubtedly are many errors, I suggest here how the three major contributions Carol has made to the literature on takings might be pulled together into a more comprehensive theory of takings.

*A. Takings doctrine should primarily be composed of muddy ex-post standards rather than ex-ante crystalline rules.*

The many variables necessary to identify when compensation should be paid—the scope of private property rights, the boundary between those rights and the public's rights, the stage of the overlapping evolution of those sets of rights, and the level of government imposing the limit, to name a few—are too complex and contextual to make hard-edged rules workable in all but the exceptional circumstance such as physical appropriations through eminent domain. Thus Carol has argued: "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."<sup>74</sup> Indeed, nuisance law serves as a useful guide to how courts should address takings problems, because "takings" doctrine is a "meta-version" of nineteenth-century courts' nuisance jurisprudence: "Like nuisance adjudications, takings adjudications are post hoc judicial determinations and are based generally on ordinary practice and reasonable expectations about which regulatory efforts are fair and normal and which are not."<sup>75</sup>

*B. Takings doctrine should be concerned about fostering a better regulatory scheme.*

Carol views takings law as "regulating the regulators."<sup>76</sup> Because land resources are increasingly scarce, she argues that

we do not need just any regulatory regime, we need a good one. We

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73. FISCHEL, *supra* note 34.

74. Rose, *A Dozen Propositions*, *supra* note 1, at 287.

75. Rose, *An Evolutionary Approach*, *supra* note 6, at 590.

76. *Id.*

need a regulatory regime that helps us to internalize externalities—a regulatory regime that induces us to think carefully about the way we use land without distorting our decision-making process or diverting us from activities that are worthwhile and valuable.<sup>77</sup>

Carol's concern about regulating the regulators comes, in part, from her insights about the reasons a democratic society protects property. In several works, she evaluates the arguments typically given about the political importance of property. While she finds difficulties with each of the arguments, she nevertheless notes that "[e]ven free speech might be hard put to rival the sheer number and persistence of property's claims for political pre-eminence in democratic governments."<sup>78</sup> Property plays an important role in society, Carol believes, and resources are simply too precious to have an "anything goes" approach to the regulation of property.<sup>79</sup>

*C. Takings doctrine therefore would start with an inquiry about the nature of the regulators at issue, the different dangers posed by federal, state, and local governments, and the efficacy of existing constraints upon those regulators.*

As illustrated by her review of Fischel's work, Carol is wary of supplanting, or even supplementing, the mechanisms that now constrain local, state and federal governments with more intensive judicial review of legislation or regulation.<sup>80</sup> She has far less faith in judges to get it right than Fischel expressed in *Regulatory Takings* (and than others have advocated).<sup>81</sup> Carol instead would first ask whether judicial scrutiny, beyond rational basis review, was necessary at all, given inherent constraints. By focusing on the dangers that various levels of government pose, she would narrow the class of cases that might require compensation, and direct the courts' attention to those.

*D. At the state and federal level, attention to the dangers of over-regulation would lead to a focus on whether the regulator is sufficiently attuned to the need for local exceptions.*

In her discussions of the dangers of regulation by state and federal governments, Carol worries about decision-making that is overly abstracted from the actual patterns of land use. She cautions against planners that try to think too far out in the future and imagine potential externalities, with the effect that regulations control, at considerable cost,

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77. *Id.* at 589.

78. Rose, *Property and Expropriation*, *supra* note 19, at 4.

79. Rose, *An Evolutionary Approach*, *supra* note 6, at 594.

80. Rose, *Takings, Federalism, Norms*, *supra* note 36.

81. See FISCHEL, *supra* note 34.

problems that are not really problems.<sup>82</sup> That concern motivates her suggestion that courts have a role to play in preventing state and federal governments from imposing one-size-fits-all solutions on problems that have local peculiarities. Some might argue that her concern is best addressed by a somewhat more intensive scrutiny of the fit between the means and the ends of the regulation, through a due process analysis. Others might suggest that her concern calls for a least restrictive means test, again (after *Lingle*<sup>83</sup>), through a due process challenge. But Carol seems to envision that the concern would be addressed through as-applied takings claims—claims that although the government's interest is a legitimate one, it is not necessary (or at least something more than rational) to achieve that interest at the extraordinary cost the regulation imposes because of the peculiar circumstances of this landowner.

Perhaps given her appreciation for local mediative processes like variance procedures, Carol has in mind something like the standard for variances—that the regulation as applied leaves the landowner unable to earn a reasonable return on the land because of the unique circumstances of the land, the local ecosystem, or other local variations in the general problem that motivated the statute.<sup>84</sup> Where the landowner could not show some unusual feature of her situation that made the general legislation unfair to apply, but was complaining instead about new limits on the value of her private property arising from a generally applicable adjustment of rights necessary to accommodate increasing scarcity or congestion of a public resource such as wetlands, Carol would not require compensation, as explained below. Where the landowner could not show exceptional circumstances, but nor could the government justify the general change as an evolutionary development of the boundaries between private property and public rights, Carol would trust the coalition politics that serve to legitimate state and federal governments to ensure that the landowner will, over time, gain some benefit to offset her loss.

*E. At the local level, the danger of majoritarian oppression would require a focus on whether the private property owner had an opportunity to be heard, received due consideration of his or her interests, and was protected from surprise.*

The court would focus its scrutiny, in those cases involving local government, on the process that marked the government's decision-

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82. Rose, *An Evolutionary Approach*, *supra* note 6, at 588.

83. *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074 (2005).

84. Variances were intended, of course, to allow local governments the discretion necessary to avoid takings claims. But perhaps because of the suspicion of such processes that Carol takes on in *Planning and Dealing*, *supra* note 23, little attention has been paid to incorporating into takings jurisprudence the standards that have been developed to govern the discretion local governments exercise in reviewing variance applications.



making, rather than solely on the substance of the regulation. In *Planning and Dealing*, Carol urged that courts reviewing piecemeal changes focus on a mediation model, which would examine whether the changes were “ill-considered or unfair.”<sup>85</sup> Evaluating whether the change was duly considered requires attention to whether “interested parties had enough opportunity to participate.”<sup>86</sup> Adapting her analysis to the takings context, she would have the court examine first whether the decision-maker gave the party claiming unfairness an opportunity to be heard, or considered the potential for unfairness through devices like a takings impact review or cost-benefit analysis.<sup>87</sup> Then, she would consider whether the procedures used were sufficient to foster mediation of the various interests—were hearings, impact reviews, and other processes and procedures used “to publicize issues, to draw in interested parties, to examine alternative solutions, and to satisfy the public that the issues have been fully explored?”<sup>88</sup>

Such an approach “would require that norms and tradeoffs be disclosed and explained case-by-case.”<sup>89</sup> That could be demonstrated through thoughtful (not boilerplate) findings, but Carol was especially keen on the use of impact analysis as “an ultimate explanation of norms and tradeoffs in an impact statement.”<sup>90</sup> Carol was writing about environmental impact statements, not takings impact statements (indeed she is skeptical about state statutes requiring takings impact analyses).<sup>91</sup> But her arguments have considerable force in suggesting that a court should be wary about finding a taking where the local government has explained the costs that it is imposing upon property owners, and explained why it has chosen to impose those costs. Explanation, Carol wrote, “reinforces and encourages an exploration of issues and potential accommodations; the very fact that decisionmakers have to explain outcomes may encourage them to think of alternatives and mitigations.”<sup>92</sup>

Finally, the mediative approach would look for evidence that the affected parties were treated fairly. The touchstone of fairness that is most appropriate, in Carol’s view, is “predictability, or protection from surprise.”<sup>93</sup> That protection comes in part from good planning—“continuous and careful reevaluation of resources and goals” which “encourages communities to think ahead and to publicize their intentions,

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85. Rose, *Planning and Dealing*, *supra* note 23, at 893.

86. *Id.* at 894.

87. *Id.* at 895-96.

88. *Id.* at 897.

89. *Id.* at 899.

90. *Id.*

91. See Rose, *A Dozen Propositions*, *supra* note 1, at 288.

92. Rose, *Planning and Dealing*, *supra* note 23, at 899-900.

93. *Id.* at 903-04.

and in fact to weigh how they expect to develop.”<sup>94</sup> But it also depends upon the property owner’s ability to avoid the regulatory scheme through exit.<sup>95</sup> In short, courts would look to whether property owners had “an opportunity to get out of harm’s way if they did not wish to bear the risks.”<sup>96</sup>

Carol illustrates her points by noting the propensity of the political process, and regulatory regimes, to favor “‘insiders’ at the expense of ‘outsiders,’” with the ugly result of exclusionary zoning or NIMBYism.<sup>97</sup> She would accordingly have judges pay particular attention to, for example, instances of individual down-zonings that appeared on the heels of majority opposition to a proposed disfavored use. In those situations especially, neither voice nor exit may be sufficiently robust to ensure due consideration or fairness.

*F. Takings doctrine would be attentive to the nature of the resource at issue, the content of the specific rights alleged to accrue to the holder of the resource, and the reason for the transition in the definition of the boundary between those private rights and the public rights that generated the conflict.*

Carol would hold that “compensation [is] not due when regulation effectively prevent[s] private owners from doing something to which they were not entitled.”<sup>98</sup> The fact that the property owner has been allowed to put her property to some use in the past does not mean that she is entitled to continue.<sup>99</sup> Nor is a property owner necessarily entitled to a use just because others, seemingly similarly situated, have been allowed to put their property to that particular use.<sup>100</sup> Instead, Carol would determine whether the regulation that seemingly changes the boundaries between private property and public rights was in fact a natural evolution brought about by increasing scarcity and congestion. Generally, the Fifth Amendment would not require compensation for regulations that seek to protect public or “diffuse” resources because increasing scarcity demands that property rights be defined to avoid conflicts. Carol points out that there might be good reasons for the *legislature* to award compensation for such transitions in certain circumstances, but she generally would not allow judges to require the legislature do so.<sup>101</sup>

The question Carol poses will not be an easy one to answer, of course.

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94. *Id.* at 907-08.

95. *Id.* at 903.

96. *Id.* at 910.

97. Rose, *An Evolutionary Approach*, *supra* note 6, at 588.

98. Rose, *A Dozen Propositions*, *supra* note 1, at 275.

99. *Id.* at 282-84.

100. Rose, *The Story of Lucas*, *supra* note 10, at 275.

101. Rose, *A Dozen Propositions*, *supra* note 1, at 284-87.

Carol has acknowledged: “The difficulty lies in the old question of definition: just what properties count as ‘impressed with a public trust’ for purposes of takings defenses and why?”<sup>102</sup> Further, Carol recognizes that “fairness considerations comparable to estoppel may sometimes weigh in favor of compensating owners who are required to cease their intrusions onto public resources.”<sup>103</sup>

*G. Private nuisance law cannot serve as the only baseline from which limitations on private property rights are measured.*

Nuisance law is a useful starting point for the analysis of whether the evolution of property law and the regulatory regime now justifies the regulation of the externality. But the notion advanced in *Lucas* that the common law of nuisance is the primary limitation on a property owner’s expectations is clearly wrong, under Carol’s account. First, as noted above, nuisance law will only develop to regulate a conflict when the benefits of promulgating and enforcing the law outweigh the costs of doing so. Thus it is folly for the Court to freeze the applicable law of nuisance at any particular time, such as the date on which the property owner acquired the property. Nuisance law is by its very nature dynamic.<sup>104</sup> Second, looking only to the common law of nuisance and ignoring legislative definitions of nuisance ignores the fact that legislatures step in to codify and fill gaps in nuisance law when the benefits of notice and certainty are sufficient to justify the costs of legislative attention to the definition of nuisance. It also ignores the traditional role legislatures have paid in protecting against “common” or “public” nuisance.<sup>105</sup> Third, the common law of nuisance essentially atrophied for many conflicts, because the courts found the issues too daunting and insoluble through litigation. As Carol notes, “[C]ourts 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.”<sup>106</sup>

*H. Average reciprocity of advantage and other “rough substitutes” for compensation would be a defense to takings claims.*

Carol’s work on takings evidences considerable concern about the ways in which regulation of property sometimes imposes costs on individuals that are well justified, without compensation, because those costs are

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102. Rose, *Idea of the Public Trust*, *supra* note 5, at 357.

103. Rose, *A Dozen Propositions*, *supra* note 1, at 285.

104. Rose, *The Story of Lucas*, *supra* note 10, at 276.

105. Rose, *A Dozen Propositions*, *supra* note 1, at 275.

106. *Id.* at 277-78; see also Rose, *Property Rights*, *supra* note 6, at 588.

“offset by some reciprocal benefits.”<sup>107</sup> Similarly, she has argued that schemes that grandfather pre-existing uses for limited times provide the kind of rough substitute for compensation that should answer calls for compensation under the takings clause.<sup>108</sup> Carol’s willingness to count those adjustments as compensation stems in part from her recognition that in their mediative roles, local governments often find that “an appropriate solution is not always a single answer complying with fixed standards, but rather a mix of accommodations.”<sup>109</sup>

### CONCLUSION

I am sure I have made many errors in trying to articulate the comprehensive theory that flows from Carol’s insights about takings. But I hope to have suggested enough of an outline to provoke Carol to undertake a book on takings that will correct all my mistakes, fill in the gaps, and provide guiding principles for all those earnestly seeking to make sense of the Fifth Amendment’s compensation requirement. Carol’s contributions to our thinking about when compensation should be paid to owners whose property values are affected by regulatory changes are already enormous, so it may not be fair to ask for more. But given the scarcity of real advances in the field, perhaps Carol will forgive us for calling for a readjustment of the boundaries between her right to put her time and talents to other uses and our thirst for her always extraordinarily cogent analysis.

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107. Rose, *Planning and Dealing*, *supra* note 23, at 902.

108. Rose, *The Story of Lucas*, *supra* note 10, at 276-77.

109. Rose, *Planning and Dealing*, *supra* note 23, at 891.