

MAHON RECONSTRUCTED: WHY THE TAKINGS ISSUE IS STILL A MUDDLE

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Property law involves considerable interchange between individuals and governments. Local governments regulate real estate extensively. State and national regulations of such diverse matters as air quality and strip mining may affect property owners' use of their holdings. In the course of this regulation, a number of difficult constitutional issues arise. To give just a few examples, is an architect's building an "expression" protected by the first amendment?¹ Do sewer hookup moratoria illegally exclude the poor, and, if so, is such exclusion constitutionally significant?² Is it an "establishment of religion" when a local ordinance gives churches the right to veto the sale of liquor within a given distance of the church?³

By far the most intractable constitutional property issue is whether certain governmental actions "take" property without satisfying the constitutional requirements of due process and just compensation.⁴ A

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1. See, e.g., Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1, 21-50 (1977) (discussing the extent to which architecture can be regulated without infringing upon first amendment freedom of expression); Note, *Architectural Expression: Police Power and The First Amendment*, 16 URB. L. ANN. 273 (1979) (advocating greater recognition of first amendment rights of architects and their clients).

2. Cases discussing the exclusionary effects of municipal service moratoria include *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F. Supp. 1369, 1381-85 (D. Md. 1975) (sewer service moratoria orders not takings); *Associated Home Builders v. City of Livermore*, 18 Cal. 3d 582, 600-10, 557 P.2d 473, 483-89, 135 Cal. Rptr. 41, 51-57 (1976); *Golden v. Planning Bd.*, 30 N.Y.2d 359, 374-81, 285 N.E.2d 291, 299-303, 334 N.Y.S.2d 138, 149-53, *appeal dismissed*, 409 U.S. 1003 (1972).

3. This issue was recently settled against the ordinance in *Larkin v. Grendel's Den, Inc.*, 103 S. Ct. 505, 509-12 (1982).

4. U.S. CONST. amends. V, XIV, § 1. The fourteenth amendment does not mention taking property without just compensation, but limitations on takings are imposed upon the states

number of property theorists have addressed this vexing issue,⁵ but they have yet to agree on the proper disposition. Instead, commentators propose test after test to define "takings," while courts continue to reach ad hoc determinations rather than principled resolutions.⁶

This Article is not another effort to supply those missing theoretical principles. Rather, it explores possible reasons for the elusiveness of the meaning of "taking" in our law.

One case, *Pennsylvania Coal Co. v. Mahon*,⁷ seems to have generated most of the current confusion about takings.⁸ *Mahon* is a 1922 Holmes opinion with a Brandeis dissent and it originated what has come to be known as the diminution in value test to determine whether there has been a taking of property.⁹ Focusing on *Mahon*, this Article

through the requirements of due process. *Chicago, B. & Q. R.R. v. City of Chicago*, 166 U.S. 226, 235-41 (1897).

5. Some important works on the takings issue are B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974); Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983); Dunham, *Griggs v. Allegheny County in Perspective: 30 Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) [hereinafter cited as Michelman, *Fairness*]; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970). The continuing vitality of this problem is reflected in several recent articles of more than usual interest, including Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981) [hereinafter cited as Michelman, *Property*]; Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1002-08 (1982); Rodgers, *Bringing People Back: Toward a Comprehensive Theory of Taking in Natural Resources Law*, 10 ECOLOGY L.Q. 205 (1982).

6. The most recent decision reaffirming the case-by-case approach is *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 432 (1982), although the ad hoc approach is perhaps most clearly described in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978). In 1962, Allison Dunham pointed out the incoherence of the Court's takings decisions since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Dunham, *supra* note 5, at 63. More recent commentators have repeated the charge. See, e.g., B. ACKERMAN, *supra* note 5, at 236 n.9 (Court engages in "particularistic weighing-up of factors" when deciding takings cases); Oakes, "Property Rights" in *Constitutional Analysis Today*, 56 WASH. L. REV. 583, 602-03 (1981) (describing Court takings law as "ad hoc line drawing"); Stoebuck, *supra* note 5, at 1062-63 ("*Mahon* begins the era of extreme confusion about police power takings. . ."); Comment, *Regulation of Land Use: From Magna Carta to a Just Formulation*, 23 UCLA L. REV. 904, 904-05 (1976) ("takings" decisions have produced "bafflingly inconsistent results").

7. 260 U.S. 393 (1922).

8. For analyses of *Mahon* as a chief source of confusion in takings law, see B. ACKERMAN, *supra* note 5, at 163-66; Oakes, *supra* note 6, at 603-09; Stoebuck, *supra* note 5, at 1062-65; Comment, *supra* note 6, at 911-14.

9. See *infra* notes 24-27 and accompanying text. Holmes had argued earlier, while on the Massachusetts bench, that the distinction between allowable police regulation and taking was a matter of the degree to which property rights were curtailed. *Rideout v. Knox*, 148 Mass. 368,

analyzes various standard approaches to takings, and concludes by examining a fundamental tension in the American property tradition that may account for the confusion in takings analysis.

I. MAHON AND THE EMERGENCE OF THE DIMINUTION IN VALUE TEST

A. THE MAHON CASE

At issue in *Mahon* was the constitutionality of the Kohler Act (the Act),¹⁰ a 1921 Pennsylvania statute that was the state's latest effort to deal with a decades-old problem of soil subsidence in the anthracite mining region.¹¹ The statute prohibited the mining of anthracite coal deposits located beneath someone else's property in such a manner as to cause the sinking of various surface uses, including streets, railroad lines, churches, hospitals, schools, factories, stores, and, most important for *Mahon*, dwellings.¹²

At the time the Act was enacted,¹³ Pennsylvania common law recognized three separate "estates" in mining property: first, an estate in the surface, second, an estate in the minerals below, and finally, an estate in the support of the surface (the third estate).¹⁴ The third estate arose from miners' common law duty to support the surface under which they mined, a duty which could be released through agreement with the surface owner.¹⁵ Pennsylvania caselaw reified these support

372-73, 19 N.E. 390, 392 (1889). Ernst Freund made the same point, E. FREUND, THE POLICE POWER § 516 (1904), and cited Holmes to the effect that a "relatively small" interference with property rights did not require compensation. *Id.* at § 518.

10. 1921 Pa. Laws 1198.

11. See Cushing, *Near-Doomed Cities*, 19 TECH. WORLD 660, 663, 665 (1913) (expressing fear that city of Scranton would collapse from extensive mining). For earlier legislation addressing the surface support problem, see 1913 Pa. Laws 1439; 1911 Pa. Laws 26. See also Brief for Defendants in Error at 7-8, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (describing 1913 legislative response to soil subsidence caused by anthracite mining) Hereinafter cited as Brief for Defendants in Error. Like the Act, the 1913 statute forbade the undermining of roads and streets, although this provision was apparently never tested in court.

12. 1921 Pa. Laws 1198, § 1.

13. At least five other mining states had similar statutes predating the Act. 3 C. LINDLEY, A TREATISE ON THE AMERICAN LAW RELATING TO MINES AND MINERAL LANDS § 822 (1914). Lindley noted that these statutes may not have been "altogether free from constitutional objections." *Id.*

14. *Young v. Thompson*, 272 Pa. 360, 361, 116 A. 297, 297 (1922); *Charnetski v. Miners Mills Coal Mining Co.*, 270 Pa. 459, 463, 113 A. 683, 684 (1921); *Graff Furnace Co. v. Scranton Coal*, 244 Pa. 592, 596, 91 A. 508, 509 (1914). Cf. *Penman v. Jones*, 256 Pa. 416, 428, 100 A. 1043, 1046 (1917) (right to mine coal without liability for surface injury is a valuable and detachable property right).

15. *Penman*, 256 Pa. at 422, 100 A. at 1044.

rights (or their waiver) in the separate third estate.¹⁶ The Act in effect prohibited the severance of the third estate—the right of support—from the ownership of the surface, at least when surface structures might be threatened.¹⁷

In 1878, some thirty years prior to the Act, the Pennsylvania Coal Company (the Company) had sold the surface of a particular residential lot to Mrs. Mahon's father.¹⁸ In the deed the Company had retained the subsurface mineral rights, and the purchaser had waived all claims against the Company due to subsidence of the surface.¹⁹ Thus the Company had retained both mineral rights and support rights, or in Pennsylvania legal parlance, the second and third estates. By 1921, Mrs. Mahon and her husband were living on the lot, claiming title through the 1878 deed.²⁰ In September 1921, the Company notified the Mahons that it intended to mine beneath their property; the Mahons thereupon sued under the Act to enjoin the Company from mining in such a way as to cause subsidence of their residence.²¹ The Company's chief defense was that the Act unconstitutionally took the Company's property without compensation.²² The trial court held for the Com-

16. An eminent property scholar of the day, Wesley Newcomb Hohfeld, was highly critical of this reification of a property interest, and exercised his theory of "jural relations" to attack the leading Pennsylvania cases. See Hohfeld, *Faulty Analysis in Easement and License Cases*, 27 YALE L.J. 66, 72-82 (1917) (analyzing change in jural relations resulting when various interests in one property are alienated). For further discussion of Hohfeld's theory, see *infra* note 22. Although the third estate in support rights normally belonged either to the surface owner or to the owner of the subsurface mineral rights, it was sometimes transferred to third parties. *Charnetski v. Miners Mills Coal Mining Co.*, 270 Pa. 459, 463, 113 A. 683, 684 (1921); *Penman v. Jones*, 256 Pa. 416, 421-22, 100 A. 1043, 1044 (1917).

17. Brief on Behalf of the State of Pennsylvania, Amicus Curiae at 25, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) [hereinafter cited as *Penna. Brief*] (this reference can also be found in an edited version of the brief appearing in 260 U.S. at 408).

The actual purpose of the Act may have been to pressure coal companies to participate in a fund to indemnify injured surface owners. See *infra* note 75.

18. Record at 6, *Mahon*.

19. 260 U.S. at 412; see record at 7, *Mahon* (deed provided that Company not liable for "any injury or damages that may occur by reason of inining and removing said minerals").

20. Record at 9, *Mahon*.

21. 260 U.S. at 412. The Act was enforceable by penalties as well as by private injunctions. 1921 Pa. Laws 1198, §§ 7-8.

22. Brief for Plaintiff in Error at 7, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, (1922) [hereinafter cited as *Company Brief*] (this reference can also be found in an edited version of the brief appearing in 260 U.S. at 395). The Company also argued that the statute was an improper use of the police power. *Id.* at 9. Since *Mahon*, the Supreme Court (although not all the state courts) has tended to collapse the police power argument into the takings issue. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980) (taking occurs if regulation at issue does not substantially advance legitimate state interests); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980) (character of governmental action is one factor in determining whether taking has occurred). *But see Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) (treating separately

pany, but the Pennsylvania Supreme Court reversed and upheld the validity of the statute.²³

The United States Supreme Court reversed the state supreme court, ruling that the Act was not a legitimate exercise of the state's police power. Rather, the Court held, the statute effectuated a taking of property without compensation.²⁴ In some of the most quoted passages in property law, Justice Holmes set out the "diminution in value" test for regulatory takings of property.

Holmes first stated that exercise of the police power could diminish "to some extent values incident to property" without implicating the takings clause, because otherwise "[g]overnment could hardly go on."²⁵ Holmes then noted that the compensation provision of the takings

the taking and police power arguments). For an example of separate treatment of police power and takings issues at the state court level, see *Penn Cent. Transp. Co. v. City of New York*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977). See also Stoebe, *supra* note 5, at 1097-99 (analyzing the interrelationship among police power, eminent domain, and due process in two state cases).

The Court did not address the Company's third argument, that the Act impaired an obligation of contract. Holmes' neglect of the obligation of contract argument is somewhat puzzling. *Mahon* in some ways fits more logically under this rubric than under the takings clause; indeed, Frankfurter's 1923 review of Holmes' opinions listed *Mahon* with the obligation of contracts cases rather than with police power or eminent domain cases. Frankfurter, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions*, 36 HARV. L. REV. 909, 937 (1923). One can only speculate as to why Holmes chose to treat *Mahon* as a takings case. Perhaps the Hohfeldian analysis of property rights as aggregates of "jural relations," in vogue during the early 20th century, influenced him. Hohfeld's theory suggested that "contract" or "property" rights were interchangeable nomenclature for legal relationships. See generally Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-57 (1913) (diverse legal concepts can be reduced to a common set of jural relationships). See also Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325, 362 (1980) (property concepts could describe all legal relationships). For a description of the academic furor over Hohfeld's categories, see Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 989-93. Holmes was certainly aware that contract rights could be conceptualized as property rights. See, e.g., *Portuguese-American Bank v. Welles*, 242 U.S. 7, 11 (1916) (Holmes, J.) (assignment of a contractual right is like the sale of a horse in that both simply transfer rights). See also *Truax v. Corrigan*, 257 U.S. 312, 342 (1921) (Holmes, J., dissenting) (labelling an object does not provide "definiteness of contour"). Holmes may have preferred the property designation in overturning a state statute, if only to distance himself from the Court's contemporary "freedom of contract" decisions, with which he strongly disagreed. See, e.g., *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (most state statutes restricting contractual rights are within the police power); *Coppage v. Kansas*, 236 U.S. 1, 27 (1915) (Holmes, J., dissenting) (statute restricting employers' freedom to contract should be upheld). See also *Adkins v. Childrens Hosp.*, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting) (criticizing the expansion of "that innocuous generality"—liberty—"into the dogma, Liberty of Contract").

23. 274 Pa. 489, 500-01, 118 A. 491, 494, 497 (1922).

24. 260 U.S. at 414-15.

25. *Id.* at 413.

clause imposed certain limits on the exercise of the police power: "One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."²⁶ Holmes gave no other "facts for consideration" in this passage. In a later passage he restated the general rule: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."²⁷

Ever since Holmes' articulation of the diminution in value test for takings, courts have incanted his words in what Bruce Ackerman calls a "parody of stare decisis."²⁸ Courts apply the "test" but actually decide cases on the basis of undisclosed, ad hoc judgments of the kind and extent of diminution that constitutes takings. The absence of principled reasoning in these judgments suggests that the test itself is deeply flawed.

B. AMBIGUITY OF THE DIMINUTION TEST

Mahon's diminution in value test has been troubling in its ambiguity from the outset.²⁹ The test fails to answer the most obvious question: how much diminution in value is too much? Does a fifty percent drop in value constitute a taking?³⁰ A seventy-five percent drop?³¹ Or is anything less than a one hundred percent devaluation constitutionally permissible?³²

Even more troubling is the antecedent question of what property is relevant in a takings discussion: how much of *what*?³³ In *Mahon*, Holmes considered the relevant property to be the entire third estate

26. *Id.*

27. *Id.* at 415.

28. B. ACKERMAN, *supra* note 5, at 235 n.2. See also *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1464-65, 1479-80 (1978) (confused state of takings law caused by lack of standards in the diminution in value test).

29. See 36 HARV. L. REV. 753, 753 (1923) (Holmes' language gives no "yardsticks" for the degree of interference that constitutes a taking). See also *infra* text accompanying notes 33-35.

30. See, e.g., *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1382 (Fla.) (administrative decision allegedly reducing plaintiff's building plans by half not a taking), *cert. denied*, 454 U.S. 1083 (1981).

31. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (ordinance allegedly causing a drop in value from \$10,000 to \$2500 per acre upheld).

32. See, e.g., *Agins v. City of Tiburon*, 24 Cal. 3d 266, 274, 598 P.2d 25, 31, 157 Cal. Rptr. 372, 378 (1979) (zoning ordinance is a taking only when it deprives an owner of substantially all reasonable use of property), *aff'd*, 447 U.S. 255 (1980).

33. See Michelman, *Fairness*, *supra* note 5, at 1192, 1232-33 (diminution in value test fails to define particular property to be used as basis for calculating amount of devaluation).

retained by the Company in its deed, but lost to the Company by operation of the Act.³⁴ The resulting one hundred percent diminution—no leftover use at all—is the epitome of a taking under a diminution in value test.³⁵

In his dissenting opinion, Justice Brandeis suggested a different view of the relevant property. If the relevant property were the combined second and third estates, both of which the Company retained through the 1878 deed, then the Act impaired a much smaller percentage of the Company's property.³⁶ The Company could, after all, leave just enough coal "pillars" in place to support the surface.³⁷ The percentage of mineral property remaining in pillars, and thus lost for mining, may have been negligible, but the record was silent on this point.³⁸

As Brandeis commented, the issue of relevant property is "relative."³⁹ Indeed, in principle, nothing limits the relevant property to that described in the deed; the Court could have measured the diminution in value against *all* of the Company's property. This expansive reading of relevant property appeared recently in the New York Court of Appeals' disposition of *Penn Central Transportation Co. v. City of*

34. 260 U.S. at 414.

35. See *id.* at 414 (statute effectively abolishes the Company's valuable third estate in laud). *But see* United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (closing of gold mine not a taking). The seemingly anomalous *Central Eureka* case may be explainable as a war-time emergency measure. The reason for closing the mine was to "encourage" workers to go to more essential mines. *Id.* at 167. For discussion of uncompensated takings based on emergency justifications, see *infra* notes 107-08 and accompanying text.

36. See 260 U.S. at 419 (Brandeis, J., dissenting) (value of coal affected by statute *may* be negligible compared to value of Company's interest in property).

37. The standard method at the time of *Mahon* to support the surface was to leave pillars of coal in place. Cushing, *supra* note 11, at 663. Cushing estimated that this method required one-third of the total coal to remain as support pillars. *Id.* Others thought this method required leaving up to one-half of the coal. See C. YEARLY, ENTERPRISE AND ANTHRACITE 120-21 (1961).

38. 260 U.S. at 419. The record contained no information about this percentage. The dissenting justice in the Pennsylvania decision estimated that pillars would require one-fourth to one-third of the coal. 274 Pa. at 511, 118 A. at 498. The Mahons' brief supports the dissent's figures. Brief for the Defendants in Error at 7, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The Act did not specify the method by which the surface was to be supported, and if the Company could have found a method of support other than coal pillars, it could have removed all the coal. Alternative support methods would, however, presumably entail some additional expense. See *Mahon*, 274 Pa. at 518, 118 A. at 501 (cost of artificial support many times the value of the coal). *But see* Brief on Behalf of the City of Scranton, Amicus Curiae at 12, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (suggesting less expensive methods of support, including "flushing, coggling, and rock packing"); C. YEARLY, *supra* note 37, at 121-22; Cushing, *supra* note 11, at 788 (engineers devised plan to use water and mine refuse to create new support rock).

39. 260 U.S. at 419. In describing the issue of the relevant property as relative, Brandeis seems to have been mocking Holmes' often repeated view that legal issues were relative or matters of degree. See *infra* note 44 and accompanying text.

New York.⁴⁰ The court apparently calculated the diminution in value caused by New York City's landmark protection ordinance not only against the total value of the restricted Grand Central Terminal Building, but also against the value of the owner's other properties in the vicinity.⁴¹

When a court expands the relevant property to which the "taken" portion is compared, the diminution in value test emerges as a deep pocket rule, as holders of extensive property must suffer a greater diminution in value in order to establish a takings claim. Conversely, contracting the relevant property interest, as Holmes did, may turn every regulation into a taking.⁴² This approach may cause owners to make elaborate and socially useless splits of their property rights, so that any one property right affected by a regulation is completely taken, and the courts will have to reunite the bundle of property rights to determine whether there truly has been a taking. But the question recurs, what is the relevant bundle?⁴³ The diminution in value test certainly does not provide the answer.

The shortcomings of this approach must have been obvious to one of Holmes' intellect. In other contexts Holmes consistently characterized a property right as a matter of degree,⁴⁴ incapable of principled resolution. But given this propensity to legal relativism, why did Holmes in *Mahon* conclude that the Pennsylvania statute merited invalidation? Holmes was also well-known for his willingness to allow legislative experiment.⁴⁵ As he remarked in his famous dissent in *Loch-*

40. 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978).

41. *See id.* at 333-34, 366 N.E.2d at 1276-77, 397 N.Y.S.2d at 920 (whether regulation denied owner a reasonable return on property depends upon owner's other property holdings in area).

42. Michelman, *Fairness*, *supra* note 5, at 1193.

43. In *Penn Cent. Transp. Co. v. New York City*, the U.S. Supreme Court stated that the takings inquiry required examination of "the parcel as a whole" but did not say how to determine the appropriate bundle of property rights. 438 U.S. 104, 130-31 (1978).

If owners split their property rights to correspond perfectly with a particular regulation, courts may react by extending the veil-piercing jurisprudence used in corporate and tax law, in order to compare the regulated property interest with the balance of the property rights.

44. *See, e.g.*, O.W. HOLMES, JR., *THE COMMON LAW* 217 (1881) (difference between possession of a property interest and lack of possession is "one of degree only"). *See also* Epstein, *The Next Generation of Legal Scholarship?* (Book Review), 30 STAN. L. REV. 635, 654 n.53 (1978) (for more than 40 years Holmes maintained that the difference between takings and exercises of permissible police power was a matter of degree). For applications of Holmes' degree theory in other contexts, see Rogat, *Mr. Justice Holmes: A Dissenting Opinion* (pt. 2), 15 STAN. L. REV. 254, 274, 281, 300 (1963).

45. *See* Rogat, *supra* note 44, at 276 (Holmes was willing "to let dominant social forces have their way" as expressed in legislative measures). *See also* Rogat, *The Judge as Spectator*, 31 U.

ner v. New York,⁴⁶ "my agreement or disagreement [with an economic theory] has nothing to do with the right of a majority to embody their opinions in law."⁴⁷ In his view the only due process limitation on the majority's ability to impose its will through legislation was a showing that "a rational and fair man necessarily would admit that the statute . . . would infringe fundamental principles as they have been understood by the traditions of our people and our law."⁴⁸ Did the Act infringe such fundamental principles?⁴⁹ Was the *Mahon* taking a matter of principle after all?

C. DEMORALIZATION COST ANALYSIS OF THE DIMINUTION IN VALUE TEST

To clarify Holmes' decision in *Mahon*, Frank Michelman has offered a principle, based on a concept of "demoralization costs," derived from Jeremy Bentham.⁵⁰ Michelman concedes that a literal application of Holmes' diminution in value language is vacuous as a test of takings,⁵¹ but suggests that *Mahon* is really aimed at the high demoralization costs associated with the statute's restriction on an owner's bar-

CHI. L. REV. 213, 254 (1964) (Holmes disapproved of social legislation but believed that it was not his role to correct it).

46. 198 U.S. 45 (1905).

47. *Id.* at 75 (Holmes, J., dissenting).

48. *Id.* at 76.

49. Shortly after *Mahon*, Holmes remarked that a taking was an example of a violation of a specific constitutional prohibition, as distinguished from the "vague contours" of due process, upon which Holmes' colleagues justified invalidation of contemporary regulations of industrial safety and working conditions. *Adkins v. Children's Hosp.*, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting), *overruled*, 300 U.S. 379, 400 (1937). This remark suggests that takings should be subject to more rigorous review than general due process violations. Holmes' comment, however, does not help to define a taking, or to explain why a legislature's judgment should be overturned if takings are only a matter of degree.

Holmes' willingness to invalidate the Pennsylvania statute in *Mahon* evidently surprised his contemporaries. *See, e.g.*, Comment, *Constitutional Law: Police Power v. Eminent Domain*, 11 CALIF. L. REV. 188, 189 (1923) (Holmes' uncharacteristic invalidation "should offer some solace to those who fear the liberal tendency" to expand permissible police power). In a conversation with Justice Frankfurter, Brandeis explained Holmes' position by reference to his age and recent medical problems: "They caught him when he was weak, and played him to go whole hog." M. PARRISH, FELIX FRANKFURTER AND HIS TIMES 302 n.62 (1982). *Cf.* A. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 229 (1957) (Brandeis knew Holmes' criticism of an earlier case in which the Court upheld a prohibition statute, and may have predicted Holmes' views in *Mahon*).

50. *See* Michelman, *Fairness*, *supra* note 5, at 1212, 1214 (demoralization costs are the utilities lost when unpredictable redistributions occur). For Bentham's views on property, see J. BENTHAM, THE THEORY OF LEGISLATION 70-73 (Oceana Publications, Inc. ed. 1975).

51. Michelman, *Fairness*, *supra* note 5, at 1233.

gained-for property rights.⁵² Just as property owners are likely to feel unfairly treated by an uncompensated governmental action that physically encroaches on their property,⁵³ so are they demoralized by a regulation that takes, without compensation, rights for which they have specifically bargained.⁵⁴ Moreover, Michelman suggests, if other property owners agree that the government's cavalier treatment of bargained-for property rights is unfair, they too may be demoralized and discouraged from investing their resources in useful activities.⁵⁵ Widespread demoralization could, of course, entail a considerable social loss.

Under this analysis, the underlying takings problem arises because the perception of unfair treatment leads to inefficient results: when demoralization costs are considered, the total costs of the regulation may outweigh its benefits.⁵⁶ When governmental intervention in private affairs produces no net benefit but instead a net cost, the intrusion is unwarranted and amounts to a taking. According to Michelman, this efficiency loss, rather than some unfathomable notion that the statute went "too far" in diminishing the property's value,⁵⁷ was the Act's flaw.

Michelman's analysis thus requires a subtle consideration of hidden costs and benefits of the statute. If the logic is shifted to the benefit side, however, the case may not even require a determination and weighing of demoralization costs. Despite his reference to the statute's public purpose,⁵⁸ Holmes may have thought that the statute in fact had very little public benefit,⁵⁹ and that the Act was thus invalid even as an exercise of eminent domain, at least insofar as it benefited people like the Mahons.⁶⁰

Holmes quite clearly did not think the benefits of the statute were

52. *Id.* at 1229-30, 1234.

53. *Id.* at 1228.

54. *Id.* at 1234.

55. *See id.* at 1214 (demoralization affects sympathizers and observers who fear they are subject to similar treatment).

56. This analysis involves both fairness and efficiency concerns in that it is the owners' and sympathizers' sense of unfairness that leads to demoralization costs. *See id.* at 1225-26, 1231 (fairness and efficiency theories of compensation rely on many of the same factors).

57. 260 U.S. at 415 (Holmes, J.).

58. *Id.* at 416.

59. *See McGinley & Barrett, Pennsylvania Coal Company v. Mahon Revisited: Is the Federal Surface Mining Act a Valid Exercise of the Police Power or an Unconstitutional Taking?*, 16 TULSA L.J. 418, 430-31, 442 (1981) (fatal defect in Kohler Act was its lack of public purpose).

60. In spite of Holmes' assumption of public purpose, some of his other words suggest criticism of this eminent domain justification. *See, e.g.*, 260 U.S. at 413 ("[I]n ordinary private affairs the public interest does not warrant much of this kind of interference.").

very broad, as evidenced by his remark that “[t]his is the case of a single private house.”⁶¹ *Mahon* was indeed tactically awkward for Pennsylvania. Whereas the Act itself referred to subsidence under a variety of publicly used institutions, including schools, hospitals, streets, and utility lines,⁶² the Act came to the Supreme Court’s attention because private parties sued to save only their own residence. Why did Holmes emphasize this private aspect of the case when the statute seemed so clearly to address a peril that ranged far beyond the Mahons’ house? The next section discusses the various purported public purposes underlying the statute’s protection of surface uses, and considers why Holmes and the Court might have rejected all of these arguments.

II. TAKINGS AND PUBLIC BENEFITS IN *MAHON*

A. SAFETY JUSTIFICATION

Pennsylvania’s arguments in support of the Act’s legitimacy stressed its safety purposes. The preamble to the statute, as recited by the Pennsylvania Supreme Court, emphasized the danger to the lives and safety of large numbers of people caused by the loss of surface support in populous mining areas.⁶³ In its amicus brief to the Supreme Court the state stressed this safety rationale, though the brief also mentioned that the Act was intended to prevent “wholesale destruction of surface property.”⁶⁴

Justice Holmes dismissed out of hand any consideration of surface property destruction. If surface owners were so foolish as to build where they had bought only the surface, with no right of support, the state was not permitted to save them from their own improvidence.⁶⁵ If members of the public wanted support rights, they had to contract and pay for them, or, in the case of municipalities, acquire the rights through eminent domain proceedings.⁶⁶

Holmes was equally unimpressed with the safety justification. If safety was the Act’s only concern, it could have simply required coal

61. 260 U.S. at 413.

62. 1921 Pa. Laws 1198, § 1.

63. 274 Pa. at 496, 118 A. at 493. The version of the Act appearing in the session laws did not include the preamble. 1921 Pa. Laws 1198.

64. Penna. Brief, *supra* note 17, at 2 (this reference can also be found in an edited version of the brief appearing in 260 U.S. at 409).

65. 260 U.S. at 415.

66. This explanation clarifies the dicta questioning the validity of eminent domain: the eminent domain power might be available for property to be used by everyone, but not for other property. See *supra* note 60; *infra* note 103.

owners to give notice of imminent, dangerous mining to the surface owners.⁶⁷ Pennsylvania advanced an essentially paternalistic argument on this point: even with notice, affected homeowners might take undue risks and stay in their homes, since they were likely to be miners who had to live in the vicinity of the mine and other housing might be difficult to find.⁶⁸

Holmes no doubt thought the state would be foolish to protect individuals from the consequences of their choices.⁶⁹ In any event, he had another reason for discounting the safety justification for the statute. The statutory prohibitions against mining that damaged the surface applied only where the surface belonged to someone other than the mining company; the statute thus disclosed betrayed a lack of concern for general safety.⁷⁰

Holmes' dismissal of the state's safety rationale takes on another and quite different aspect when one considers the effect of the statute on the Company's future behavior. Suppose the Company continued to own considerable mineral property in fee simple, and still wanted to devote the surface to residential uses so that employees could live nearby.⁷¹ The Company could avoid having to support the surface by simply leasing the surface. The Act regulated only mining-related subsidence beneath property *owned* by another, and thus left *tenants* unprotected. Thus, while the Act did affect already completed land

67. 260 U.S. at 414. This argument also appeared in the state Supreme Court's dissenting opinion and in the Company's brief before the United States Supreme Court. See *Mahon*, 274 Pa. at 512, 118 A. at 499 (Kephart, J., dissenting) (legislature could have provided for public safety by requiring notice); Company Brief, *supra* note 22, at 23 (proper notice would provide sufficient protection for public safety). Earlier Pennsylvania cave-in legislation had required mining companies to give notice of mining plans to public officials, but this measure was apparently deemed insufficient to protect surface users' safety. 1913 Pa. Laws 1439.

68. Penna. Brief, *supra* note 17, at 36-37.

69. In what may have been a social Darwinist attitude, Holmes generally thought that attempts to protect the weak from the strong were ill-advised. See Rogat, *supra* note 44, at 255, 296 (Holmes thought it futile to "attempt to disturb locally dominant social forces"). For the influence on Holmes of contemporary scientific thinking, including social Darwinism, see J. Vetter, *The Evolution of Holmes, Holmes and Evolution* 28-34 (unpublished manuscript) (available at Southern California Law Review).

70. 260 U.S. at 414. In cases since *Mahon* it has become clear that, at least for purposes of the equal protection clause, a legislature need not address the whole of the regulatory problem in order to deal with an important segment. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949). Thus, perhaps the Act should not have been expected to regulate all undermining dangers in order to evince a legitimate concern for safety.

71. See Penna. Brief, *supra* note 17, at 37 (suggesting the need for residential surface uses for mine laborers) (this reference can also be found in the edited brief appearing in 260 U.S. at 411); Brief for Defendants in Error, *supra* note 11, at 6 (describing practice of selling surface rights so that employees could build homes near mines).

transactions, it did little to protect the safety of surface dwellers in future transactions. The Company could avoid the statute's prohibitions on any yet unsold land simply by restructuring its transactions from sales of the surface to leases.

B. CONCENTRATING OWNERSHIP TO INDUCE CARE

The possibility of restructured transactions does not entirely extinguish the Act's safety rationale, however, even with regard to future transactions. Increased safety might result simply from the concentration of ownership rights in a single owner. For example, if the Company did restructure its transactions to lease the surface, it might proceed more carefully with mining operations. It would weigh the loss of a stream of rental income against the gains from undermining the coal pillars. By contrast, since the Company had sold the surface rights, it lost all incentive to consider the costs of surface collapse in the future. Although here too the Company made a cost-benefit analysis, the calculation was made far in advance of actual undermining. The Company undoubtedly weighed the cost and probability of a future collapse when negotiating a sale price for the surface, and presumably could not demand as high a price from the purchaser who bought a surface right without support rights. On the other hand, those purchasers who wanted to erect surface structures were gambling that the Company would maintain support, at least for a time. This gamble would pay off only if the Company sold the surface some time prior to the actual undermining.

The Act, in effect, induced the Company to retain ownership of the surface, and, derivatively, to consider the costs and benefits of its mining activities on a case-by-case basis at the time of mining. This approach contrasts sharply with the Company's probabilistic blanket calculation made when selling surface rights to another, which was followed by blithely unconcerned mining activity at some later time. After passage of the Act, the Company would be likely to undermine its leased property only after a cost-benefit calculation revealed that mining profits outweighed any rental losses. The statute resembled an antidiscrimination statute, inducing the Company to evaluate each undermining decision individually rather than to operate on rule of thumb guesses made in advance.⁷² The net public benefit of the Act, then, was the decrease in surface disruption after mining companies

72. For a discussion of the efficiency costs and distributive benefits of antidiscrimination statutes, see R. POSNER, *THE ECONOMICS OF JUSTICE* 362-63, 378 (1981).

undertook case-by-case evaluations, less the cost savings associated with blanket reservations of rights.⁷³

The argument for concentrating ownership is less persuasive, however, when one considers the array of property rights available at the time of *Mahon*. The Company at that time already had to make a case-by-case calculation of the costs and benefits of acquiring support rights when it had not reserved or acquired the right of support. This was, apparently, a common occurrence in much of the anthracite region,⁷⁴ since many surface owners owned the support rights. The Act would have changed the Company's behavior, inducing case-by-case consideration only in those situations in which the Company had expressly retained a right *not* to make such an analysis—that is, only when the Company had already specifically retained or purchased the support rights, as was the case in *Mahon*. In these cases the Act required the Company either to mine in such a way as to support the surface, or to repurchase the surface so that it would undermine its own property, rather than someone else's.⁷⁵

73. Concentrating ownership rights is perhaps a rather convoluted route to achieving increased safety as a net public benefit of the statute. The argument seems less far-fetched, however, in view of the early 20th century practice of selling or leasing mining rights to high-risk scavenger companies when a mine had been reduced to pillars. These scavengers did not have to worry about suits from surface owners when the surface owners did not own support rights. The surface owners, however, could purchase the support rights from the original mining company or a third party; in such cases the owners were entitled to enforce claims against the scavengers for subsidence damage, if the scavengers could be found. See generally Brief on Behalf of the City of Scranton, Amicus Curiae at 3-4, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (after mining the support pillars, scavenger companies would dissolve, leaving damaged surface).

74. The coal operatives retained the right of support in less than one-fifth of the entire anthracite area. Brief on Behalf of the Scranton Gas & Water Co., Amicus Curiae at 47. At least some purchasers of surface rights insisted on a right of support of the surface. See *Penman v. Jones*, 256 Pa. 416, 420, 100 A. 1043, 1043 (1917) (defendant purchased land on condition that he would be assured surface support); Penna. Brief, *supra* note 17, at 27-28 (describing effect of the Act when surface owners retained support rights) (this reference can also be found in the edited brief in 260 U.S. at 408-09). Cf. *Cushing*, *supra* note 11, at 665 (one major hotel purchased all the coal beneath its surface in order to guarantee support).

75. Presumably the Company would not purchase the surface owner's right to support because the statute made such a right worthless when severed from the surface. The Fowler Act, 1921 Pa. Laws 1192, however, which was passed on the same day as the Kohler Act, casts doubt on this presumption. The Fowler Act established a voluntary fund for mine owners and operators into which they could contribute two percent of the market price of their coal, and from which claims of damages caused by subsidence would be paid. *Id.* at §§ 3, 8, 11. This act, perhaps inspired by contemporary worker's compensation legislation, apparently permitted continued liability-free undermining of surface property belonging to another, as long as the mining operator "bought" this right by contributing to the fund. For the development of worker's compensation legislation in the early 20th century, see Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

Both alternatives are unsatisfactory. To require that the Company support the surface reverses the original bargain, and seems improper and unfair. To require the alternative, that the Company repurchase the surface, would enable the surface owner to exact the entire value of the unlimited mining rights from the Company. The Act therefore transferred the value of mining without liability from the Company to the Mahons and others like them, with no ostensible benefit to anyone else. In Holmes' view, it was irrelevant that there might have been a great number of people like the Mahons.⁷⁶ Holmes seemed to believe that the transfer of benefits from one entity to another—or even a large number of entities—did not normally result in any net benefit so as to justify intervention in private rights.⁷⁷

C. OFFSETTING MONOPOLY

Although governmental intervention should not ordinarily simply redistribute private property, perhaps there is something special about the mining context, implying a broader public interest and justifying government action. The documents in *Mahon* suggest that the legislature may have drawn an analogy between the Act and statutes regulating monopolistic industries, a subject in some vogue in the then-recent past.⁷⁸ The attorneys for Pennsylvania⁷⁹ and the Pennsylvania Supreme Court opinion⁸⁰ suggested that the Company's enterprise was "clothed with a public interest."⁸¹ This phrase was popular in contemporary discussions of the appropriateness of public intervention to regulate natural monopolies,⁸² particularly railroads, with which the

76. See *Mahon*, 260 U.S. at 413 (damage to a house not a public nuisance even though similar damage inflicted on others as well).

77. See *id.* (in ordinary private affairs, public interest does not warrant much governmental interference).

78. See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 322 (1897) (public character of railroad calls for special legislative care to ensure that it conducts its business in the fair interests of the public); Adams, *Relation of the State to Industrial Action*, in *TWO ESSAYS* 67-83 (J. Dorfman ed. 1954) (describing special character of "natural monopolies" and reasons for their regulation).

79. Penna. Brief, *supra* note 17, at 20 (this reference also can be found in the edited brief appearing in 260 U.S. at 406-07).

80. See *Mahon*, 274 Pa. at 499, 118 A. at 494 (recognizing that changed circumstances have clothed mining with a public interest).

81. For a discussion of the doctrine concerning "property affected with a public interest," see generally Scheiber, *The Road to Munn*, in *V PERSPECTIVES IN AMERICAN HISTORY* 329 (1971).

82. Adams, *supra* note 78, at 103, 109-14 (explaining how laissez-faire policy fails to control "industries which, from their nature, are monopolies"). For contemporary views on monopoly as a justification for the police power, see E. FREUND, *supra* note 9, at § 377.

Pennsylvania anthracite coal industry had close historical links.⁸³ Also significant is the parties' discussion of *Block v. Hirsh*,⁸⁴ in which the Supreme Court (in another opinion written by Justice Holmes) upheld wartime rent controls in Washington, D.C.⁸⁵ *Block* can be characterized as a case about the regulation of a temporary wartime landlords' cartel or monopoly; the rent controls ensured that the landlords received no more than "reasonable" returns on their investments.⁸⁶ Modern discussions of monopoly regulation would probably raise the issue in the context of unconscionability doctrines, which protect weaker parties from those with superior bargaining power.⁸⁷

Holmes did not think it necessarily unreasonable for a legislature to attempt to redress monopoly bargaining power, or so he said in the context of statutes protecting labor organizations.⁸⁸ Arguably, controlling monopolies resulted in a net public benefit: first, it retained the efficiency of unitary management of natural monopolies, and second, any redistribution of wealth or transfer of rights was simply a matter of restoring extorted monopoly profits to the affected public.⁸⁹

The Pennsylvania legislature might have viewed the coal compa-

83. For analysis of the relationship between the Pennsylvania coal industry and the railroads, see T. COCHRAN, PENNSYLVANIA: A BICENTENNIAL HISTORY 107-08, 130-33; C. YEARLY, *supra* note 37, at 27-28; Hand, *Titles to Coal Lands in Pennsylvania and Incidental Monopolies Connected Therewith*, 16 YALE L.J. 167, 168-72 (1907).

84. 256 U.S. 135 (1921).

85. *Id.* at 158.

86. In its brief the Company treated monopoly regulation as a variant on eminent domain. It likened the rent control statute in *Block* to a condemnation of a leasehold interest in the landlords' property during the monopolistic conditions of a war emergency. Under this analysis just compensation was set at reasonable rental fees—the rents charged by landlords before the housing squeeze. See generally Company Brief, *supra* note 22, at 24-29 (emphasizing *Block*, which provided that such use of the police power is justified on a temporary basis only) (this reference can also be found in the edited brief appearing in 260 U.S. at 401-03). The Company distinguished the *Mahon* statute on the basis of its permanency and its absence of compensation. *Id.* at 27. For the intellectual history of the connection between eminent domain and monopoly regulation, see Scheiber, *supra* note 81, at 355-60.

87. For discussion and analysis of unconscionability doctrines, see U.C.C. § 2-302 (1978); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979); Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1983); Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967). See also E. FREUND, *supra* note 9, at § 378 (police power justifies regulation to restrain those with monopolistic or oppressive power).

88. See *Coppage v. Kansas*, 236 U.S. 1, 27 (1915) (Holmes, J., dissenting) (relative positions of employer and employee make bargaining transactions essentially coercive); *Adair v. United States*, 208 U.S. 161, 191 (1908) (Holmes, J., dissenting) (statute prohibiting the employer, the more powerful party, from exacting certain conditions should have been upheld).

89. *Adams*, *supra* note 78, at 104, 109-14. Cf. Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587, 1637-55 (1981) (discussing remedies for inequality of exchange, particularly in context of unconscionability).

mies as real estate monopolists, given their large interests in land and their power to attract employees who had to live on that land. Perhaps their superior bargaining power as employers allowed them to extract an unfair deal from their employees who bought lots. Perhaps the form of such unfair deals was to force all buyers to forego the usual right of support for their homes. To phrase the argument in terms of the regulatory doctrines of the era, the anthracite coal interests could be viewed as monopolists who extracted unreasonably high returns for the goods or services they provided. Under this view, the Company's return on the sale of unsupported surface rights might seem far too high. Requiring that support rights be joined to the surface rights would reduce that exorbitant return to one that would be fair and reasonable.

There are difficulties, however, with rationales based on monopoly or unequal bargaining power. First, the terms of the bargains between buyers and the Company are unknown, making it difficult to evaluate whether any disproportion in bargaining power resulted in the Company's receiving an unreasonably high rate of return. Second, it is uncertain whether the Company had a monopoly or even superior bargaining power over real estate. Perhaps it did have monopoly power at some time, but *Mahon* indicates otherwise. The Pennsylvania brief referred to instances in which support rights were retained by the surface owner, and presumably had to be purchased by the Company.⁹⁰ The Company, therefore, was not in total control, but instead had to bid for support rights; the Mahons or their predecessors could have bid against the Company rather than buying only the surface.

Third, and perhaps most poignant, even if the Company did have disproportionate bargaining power over the real estate, the Act would have done very little to alleviate this problem or to protect future surface residents from monopolistic depredations. The Act did not preclude the Company from causing subsidence under its own lands, nor did it prevent the Company from restructuring its future residential real estate deals as leases.⁹¹ With its surface rights transactions so structured, the Company might continue charging outrageously high prices in the form of rents. A municipality might respond with rent

90. Penna. Brief, *supra* note 17, at 19 (this reference can also be found in the edited brief appearing in 260 U.S. at 408-09). See also *Mahon*, 274 Pa. at 499, 118 A. at 494 (traditional Pennsylvania law required rights of support accompany surface rights unless specifically waived). Small entrepreneurs initially developed the anthracite mining industry; only later did the great railroads, which bought up mining rights after 1870, dominate the industry. See T. COCHRAN, *supra* note 83, at 131-32 (reviewing history of railroads' involvement with mining industry).

91. See *supra* text accompanying note 71.

control, but even rent control seems an ineffective route to halt exploitation. Because the surface residents were employees in the Company's mines,⁹² and were therefore particularly vulnerable, the Company could exercise its monopolistic powers in yet another and particularly striking form: low wages.⁹³

Once again, then, the primary beneficiaries of the Act were people like the Mahons: surface owners who, unlike some of their neighbors, had never bought support rights. Even under a theory of regulating monopolistic profit, the rest of the public seemed to receive no benefits.

D. RESTITUTION

Another possible justification for the statute could have been restitution: the transfer of rights brought about by the statute might have rectified a problem created by a previous implicit transfer of property rights. Changed circumstances in the mining industry might have altered the impact of the original deed, to the disadvantage of surface owners such as the Mahons. The release of liability for subsidence may have been clear in 1878 when Mrs. Mahon's father signed the deed, but the meaning attached to the disclaimer may have been entirely different by 1922 when the Company sought to mine under the Mahon property.

In the early days of anthracite mining, the ordinary practice was to leave supporting pillars unmined, in large part to keep the mines from caving in on the miners.⁹⁴ Thus, in the 1870's, the parties may well have expected subsidence only when accidental cave-ins occurred, rather than through a systematic practice of mining out the pillars.⁹⁵ It was only later, as the coal from the initial mining was depleted, that the companies began mining the supporting pillars (or sold the rights to others who would take the risk of collapse). As a result of this "second mining" the first major surface ruptures occurred shortly after the turn of the century.⁹⁶

92. See *supra* note 71 and accompanying text.

93. No doubt Holmes would have thought this Company strategy another example of the futility of attempting to protect the weak from the strong. See *supra* note 69.

94. Penna. Brief, *supra* note 17, at 5-6.

95. Brief for Defendants in Error, *supra* note 11, at 6.

96. See Brief for Defendants in Error, *supra* note 11, at 7-8 (in the 20 years preceding *Mahon*, cave-ins became more frequent and more severe, causing great loss of human life as well as property damage); Penna. Brief, *supra* note 17, at 6-7 (need for coal encouraged "second mining," which led to cave-ins). The Brief on Behalf of City of Scranton at 2-5 also included a sheaf of photographs of surface damage caused by cave-ins. The first photograph depicts an exposed coffin in a collapsed grave; others show the collapse of streets, houses, a public school, and a

In light of this background, perhaps the real issue in *Mahon* was to identify the proper party to bear the cost of a change in mining practice. Should it have been the coal operators who instituted the change? Or the surface owners who had waived support rights at a time when the waiver was not likely to matter? Pennsylvania's judicial recognition of a separate property interest in support rights seemed to put the costs on the surface owners. The surface owners' initial waiver of support rights was now characterized as the mine operators' property interest; the surface residents could expect no relief, even from an intentional undermining. Would the legislature be justified in redressing what was, in effect, a prior transfer by restoring the original understanding of the parties at the time of the deed?⁹⁷

A literal reading of the deed leads to only one conclusion: a waiver is a waiver. Holmes always stressed that contract law hinged on what the parties said and did rather than what they meant.⁹⁸ But "what they said" depends on interpretation by the relevant audience.⁹⁹ If the courts can recognize, for example, that "fifty percent protein" may mean "forty nine and one-half percent protein" in the context of an established business practice,¹⁰⁰ then the deed's literal language may not be an insuperable objection to a restitutionary argument.

It is more difficult, however, to challenge other arguments for the use of literalism as the rule of interpretation in property law. First, the classic argument for literalism in property law is that changes in meaning occur over time, and, during that time, third parties may have relied on the literal wording of the deed. Second, literalism allows redistribution of costs in both directions. New possibilities to mine out

factory. One photo shows the home of a Mr. and Mrs. Buckley, which had sunk into a deep pit. The Buckylys escaped by ladder from an attic window before the outbreak of fire. As the caption put it, "They saved their lives but lost THEIR ALL."

After these collapses at least some purchasers demanded surface support rights, which Pennsylvania law came to delineate as the third estate, or a transferable interest in the right of surface support. See *supra* notes 14-16 and accompanying text. See also *supra* note 74.

97. For other ambiguities in older Pennsylvania mining deeds and related turn of the century legal problems, see Madeira, *Leases of Minerals as Absolute Sales—The Pennsylvania Doctrine*, 64 U. PA. L. REV. 42 (1915).

98. O.W. HOLMES, JR., *supra* note 44, at 307, 309, 324-26.

99. *Cf. id.* at 330 (to determine whether a term is essential to a contract, court must examine "how the parties have dealt with it"). For the importance of an audience or "interpretive community" in establishing the meaning of language, see S. FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

100. *Hurst v. Lake & Co.*, 141 Or. 306, 310, 16 P.2d 627, 629 (1933). *Cf. Dadourian Export Corp. v. United States*, 291 F.2d 178, 183 (2d Cir. 1961) (misdescription of goods immaterial where purchaser was on notice to inspect).

pillars made support rights more valuable, but the increase in value went not only to the mine operators but also to those surface owners who had retained a right of support. Finally, recreating the original understanding of the parties is difficult under any circumstance. Some surface owners apparently did acquire or retain support rights, perhaps because the Company never expected to be hable for failure of support and therefore did not bother to extract a waiver in the earliest deeds to surface owners. The Company may have obtained waivers only as the dangers of collapse became more apparent. If so, however, the purchasers should also have been aware of these dangers and could have protected themselves by bargaining for support rights. If the buyers could have bought support rights along with the surface,¹⁰¹ then they presumably did not do so because the surface rights alone cost less.¹⁰²

The more one analyzes the arguments for a broad public interest in attaching support rights to the surface, the more the case seems to involve only a transfer of wealth from the Company to a limited class of beneficiaries. None of the possible public purposes withstands analysis; transfers of rights brought about by the statute resulted in no net social gain, perhaps not even in the case of transfers to municipalities.¹⁰³ The various beneficiaries of the Act represented no more than a collection of private interests. If these citizens wanted the support rights owned by the Company, they should have arranged a purchase at a price acceptable to the Company.

While Holmes recognized a need to permit de minimis gains and losses in the course of public regulation,¹⁰⁴ *Mahon* did not turn on such issues. Holmes did not view *Mahon* as concerning the rights of the

101. The Company's superior bargaining power, if it existed, may have affected the buyer's ability to acquire support rights. See *supra* text accompanying notes 89-93.

102. See *Mahon*, 260 U.S. at 416 (buyers who took risk of acquiring only surface rights must pay to get support rights); see also Cushing, *supra* note 11, at 666 (restating coal companies' position that purchasers knew of subsidence risk and could have protected themselves by buying support rights).

103. Under eminent domain a municipality could theoretically condemn the third estate for public use and purchase it at the fair market value. This protection of publicly used surface structures might have been justified by the transaction costs of arranging a bargain with the public, although of course municipalities could act as the public's bargaining agent. Holmes seemed to doubt whether other cave-ins justified the use of eminent domain. See *supra* note 60 and accompanying text.

104. See, e.g., *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911) (Holmes, J.) ("[P]ublic advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use."); *Rideout v. Knox*, 148 Mass. 368, 372-73, 19 N.E. 390, 392 (1889) (Holmes, J.) (to prevent greater evil, legislatures may impose small limitations on existing property rights).

public generally. Rather, it was a case in which the public had no right to be "in a particular place . . . except insofar as they have paid for it."¹⁰⁵ Invalidating the Act in *Mahon*, then, turned not on the question of "too much" taking, but on the fact that the statute transferred rights from one finite class of property owners to another.

III. TAKINGS AS REDISTRIBUTIONS

A. *MAHON* AS ANTIREDISTRIBUTIVE

The examples of *justified* regulation that Holmes gave in his opinion support an antiredistributive reading in *Mahon*.¹⁰⁶ These examples involved only transfers of property rights that were implicitly compensated, and that could have been easily justified by earlier takings theories. For example, a regulation requiring coal operators to leave barrier pillars of coal at the border of adjoining coal operations was permissible, since each operator received a benefit in flood and safety protection for the miners.¹⁰⁷ The same theory of implicit compensation justified another of Holmes' examples of permissible governmental action. An owner's property may be destroyed without compensation in order to halt an oncoming fire, but this rule implicitly compensates all owners by containing fire hazards.¹⁰⁸ A different, but still nonredistributive, theory supports the example of noxious fume suppression

105. M. PARRISH, *supra* note 49, at 302 n.62. See also 2 HOLMES-POLLOCK LETTERS 109 (M. Howe ed. 1941) (letter of Dec. 31, 1922) (public should not have property rights enlarged when public paid only for surface right).

106. See *Mahon*, 260 U.S. at 415 (legislation that arguably effects a taking is justified by its reciprocal advantages). Holmes' lifelong distaste for redistributive schemes, or for any scheme that would, as he put it, "prevent civilization from killing its weaker members," also supports an antiredistributive reading. E. WILSON, PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR 768 (1962) (quoting Holmes-Laski letter of May 24, 1919).

107. *Mahon*, 260 U.S. at 415. See *Mahon*, 274 Pa. at 513-14, 118 A. at 499 (Kephart, J., dissenting) (previous legislation upheld when mine owner received reciprocal benefit commensurate with burden imposed). See also *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 540 (1914) (upholding barrier pillar legislation as a proper exercise of police power).

108. *Mahon*, 260 U.S. at 415-16. See *Russell v. Mayor of New York*, 2 Denio 461, 464-65 (N.Y. 1845) (destruction of buildings to prevent spread of conflagration not a taking). Cf. *Bowditch v. Boston*, 101 U.S. 16, 18 (1879) (city not liable for buildings destroyed to prevent fire from spreading).

This firepath rule reciprocally benefits all property owners in somewhat the same way that mandatory fireproofing does. An owner who does not wish to accept the risk of sudden drastic loss may insure, presumably at rates lower than they would be without the firepath rule. See generally *Stone v. Mayor of New York*, 25 Wend. 157, 174-77 (N.Y. 1840) (describing some statutory variations on the firepath doctrine and characterizing statutory compensation as a form of insurance). For an early discussion of reciprocal benefits as implicit compensation for regulatory limits, see *Commonwealth v. Alger*, 61 Mass. (7 Cusl.) 53, 102 (1851); *Vanderbilt v. Adams*, 7 Cow. 349, 351-52 (N.Y. Sup. Ct. 1827). See also *Alger*, 61 Mass. (7 Cush.) at 95-97. (legislative

mentioned in Brandeis' *Mahon* dissent:¹⁰⁹ noxious fumes may be abated without compensation because the property owner never had a right to inflict noxious fumes on his neighbors, and consequently lost nothing by regulation.¹¹⁰

Regulation of all these situations required no compensation because the effects were nonredistributive. By contrast, the Act did redistribute property interests from one finite group of owners to another, without discernible net social gain. Under this analysis, it was the statute's redistributive aspect, unallayed by any net benefit that might have justified de minimis losses, that made it a taking. This conclusion, however, only moves the problem to a different level: what is wrong with redistribution? Why condemn a law because it transfers property from the Company to the Mahons?

establishment of clear rules in itself carries benefits in that citizens can then act with greater certainty).

109. *Mahon*, 260 U.S. at 417-18 (Brandeis, J., dissenting).

110. See Comment, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. CHI. L. REV. 854, 861-62 (1973) (review of 19th century cases validating regulations as not taking property when the regulations abated nuisances). See also Michelman, *Fairness*, *supra* note 5, at 1236 (likening nuisances to thefts of another's enjoyment of property). Cf. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 72-73 (1979) (perpetrator of a nuisance should not be permitted to set up a prescriptive right to the activity in the form of a "coming to the nuisance" defense).

One reason why legislation can abate nuisances without taking property is that property owners know that they may be enjoined from noxious uses, and must have built this risk into their purchase price. See, e.g., *Stuyvesant v. Mayor of New York*, 7 Cow. 587, 604 (N.Y. Sup. Ct. 1827) (upholding city's prohibition against using land as a cemetery, even though the letters of patent granting the land contained a covenant that the grantee could use the land as a cemetery); *Corporation of the Brick Presbyterian Church v. Mayor of New York*, 5 Cow. 538, 542 (N.Y. Sup. Ct. 1826) (upholding prohibition against using land as cemetery despite existence of covenant authorizing such use). The "coming to the nuisance" defense may establish a prescriptive right against neighbors' private abatement suits, but several cases suggest that an analogous prescriptive defense is unavailable against abatements under the police power for the benefit of the public. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 591-96 (1962) (growth of town around defendant's business justified safety regulation, even though defendant's operation was not a common law nuisance); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 409-10 (1915) (city ordinance did not effect a taking of defendant's property, which was outside city limits when the ordinance was passed). These results are justified if property owners should have expected that the public would need some time to overcome the transaction costs necessary to seek abatement of the nuisance. On the other hand, the public could authorize a public nuisance, using it as a kind of widely shared tax for a public benefit, but one that would not be borne disproportionately by individual private owners. See *Richards v. Washington Terminal Co.*, 233 U.S. 546, 553 (1914) (legislature may exempt public nuisances from liability but immunity for private nuisances would amount to a taking).

B. ARGUMENTS AGAINST REDISTRIBUTION

1. *Economic Analysis*

Economic theory concerning the proper occasion for public intervention provides one answer to the question of whether statutes with redistributive effects should be upheld. Some economists might argue that public intervention in private transactions is not justified where, as in *Mahon*, the numbers of parties are limited and there is no market failure. The parties have bargained with each other to the point that each controls the resources it values most highly. Under this theory, the state should not disrupt the stability of the parties' completed transaction.

This economic argument, however, is less dispositive than it appears. No efficiency reason demands transfer of the property, but no reason militates against transfer either, aside from the administrative costs of the redistribution itself. Efficiency reasoning is indifferent as to the owner of the property right, provided the right can be traded freely.¹¹¹

2. *Demoralization Costs and Logrolling Analysis*

A second and related argument against redistribution stems from Michelman's concept of demoralization costs.¹¹² Under this approach, the losers of rights are all the more demoralized if they think their involuntary transfers do not assure a net social benefit; the social costs of the regulation increase by the amount of such demoralization.¹¹³

This demoralization argument is also unpersuasive, but for political rather than economic reasons. The typical logrolling legislature will pass legislation benefiting some interests now and other interests later. As Michelman himself has pointed out, over the long run every interest in this political market will get a slice of the pie.¹¹⁴ How de-

111. See Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2-8 (1960) (free market transactions will result in maximum efficiency, if transaction costs are minimal). *But see* Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 14-24 (1982) (bargaining strategy may prevent efficient transaction even when administrative costs are low); Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 689-91 (1979) (wealth effect of transfer may affect allocation).

112. See *supra* note 50 and accompanying text.

113. Michelman, *Fairness*, *supra* note 5, at 1235.

114. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 156-57 (1977-78). Madison was the first American to present this argument of legislative fairness through coalition building. See THE FEDERALIST No. 10, at 77-84 (J. Madison) (C. Rossiter ed. 1961) (large size of constituency will

moralized will the Company be if Mahon gets the surface support rights from the Company today, but if, after the election next month, the legislature enacts a statute requiring employees (possibly including Mahon) to assume the risk of injury from working in the Company's mines? As Michelman notes, in the shifting coalitions of a Madisonian political market, in which every interest has an opportunity to join a winning alliance, the logrolling legislative process should assure reciprocal benefits over the long run.¹¹⁵

As a result reciprocal benefits need not be built into each item of legislation; it is enough that losses today are offset by gains on some other item of the agenda tomorrow. To be sure, the administrative costs of back-and-forth transfers may cause some social loss, but perhaps these slippages are the uncompensated costs without which, as Holmes said, "[g]overnment hardly could go on."¹¹⁶ These costs may represent the minimal uncompensated losses that must be tolerated for the sake of equalizing benefits.¹¹⁷

What, then, is objectionable about pure redistribution and transfer, if a logrolling legislature assures that every interest can in time become part of a majority and get its share of benefits? Of course, the logrolling process may not work because the agenda of issues may be too short for a variety of coalitions to form,¹¹⁸ or because some particular interest may be permanently frozen out of the chance to trade.¹¹⁹

prevent any one faction from pervading the legislature). Perhaps the original theory is attributable to David Hume. See Hume, *Idea of a Perfect Commonwealth*, in HUME'S MORAL AND POLITICAL PHILOSOPHY 373, 381-82 (H. Aiken ed. 1948) (describing how ideal government structure would adduce benefits, but no harms, from factions). Michelman characterizes the Madisonian argument as a "public choice" model, where all participants maximize individual subjective utilities, rather than a "public interest" model, where objective public good results. Michelman, *supra*, at 148-49. For an analysis putting Madison's argument in a public interest model, see H. PITKIN, *THE CONCEPT OF REPRESENTATION* 195-96 (1967).

115. Michelman, *supra* note 114, at 156-57, 172, 175-77.

116. *Mahon*, 260 U.S. at 413.

117. For a critique of the logrolling model, see J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 131-45 (1962). The authors argue that legislators are intensely interested in the gains from their narrow projects and are only mildly distressed by the widely shared costs incurred by the projects of others. This situation results in all agreeing to finance too many projects in order to secure individual gains. Thus, the authors say, the logrolling legislature arrives at inefficient total results, because total costs that are not intensely suffered individually cumulatively outweigh benefits.

118. Michelman, *supra* note 114, at 172-73. Coalition forming may be particularly difficult in the context of local governments. See Waggoner, *Log-Rolling and Judicial Review*, 52 U. COLO. L. REV. 33, 43 (1980) (the smaller the political community, the greater the likelihood that conditions necessary for successful logrolling will not develop).

119. See generally J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 80-88 (1980) (analyzing why the structure of the federal government failed to protect minority inter-

For purposes of the analysis, however, one may assume that the population of Pennsylvania in the 1920's was sufficiently large and diverse to allow a logrolling legislature to function properly. One may further assume that neither Mahon nor the Company was a "discrete and insular minority"¹²⁰ requiring protection beyond the normal course of coalition building. Why not allow uncompensated transfer among interests, when later implicit compensation can be expected in the average reciprocity of benefits secured to all in the logrolling process? If the theory is correct, legislative shifts of property rights among individuals and groups will balance out over time. Why should this long range reciprocity not justify short term redistributions? One answer, discussed below, is an argument from human nature.

3. *Argument from Human Nature*

Holmes may have thought that the redistribution issue could be framed in terms of our instinct to try always "by force or fraud" to get back what we feel is ours.¹²¹ But if we do have this reaction to the disruption of settled expectations, why ought we pay attention to it? Robert Nozick answers this question with a natural rights theory: property that is justly acquired initially, and justly transferred thereafter, ought not be disturbed against the will of the owner, despite whatever probabilities exist for ultimate compensation via logrolling.¹²²

Nozick's theory, however, does not completely vindicate the instinct against involuntary transfer to which Holmes alludes. Leaving aside the very serious difficulties in establishing the justice of *any* initial acquisition,¹²³ instances abound of arguably unjust acquisitions that have occurred in the distant past. Consider, for example, the federal government's controversial acquisition of Indian tribal land. The rectification of these or other past injustices might well entail wholesale involuntary transfers of present property interests, transfers that would

ests). The Court referred to this problem in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

120. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

121. O.W. HOLMES, JR., *supra* note 44, at 213. In this observation, Holmes likened our instincts with those of the dog and the seal. *Id.*

122. See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 150-51 (1974) (theory of justice in holding focuses on the original acquisition of property, subsequent transfer of property, and rectification of injustice in holdings).

123. See *id.* at 174-78 (criticizing Locke's labor-based theory of original acquisition). See also Drury, *Robert Nozick and the Right to Property*, in *THEORIES OF PROPERTY* 360, 367-69 (1979) (discussing difficulty in asserting acquisition just when opportunities of others are thereby diminished).

surely arouse contrary Holmesian instincts.¹²⁴ Although the doctrine of prescription may seem to justify claims based on transactions that were initially unjust,¹²⁵ this doctrine merely repeats the maxim that settled expectations are not to be disturbed, without saying *why* they should not be disturbed.

Nozick's rights argument is thus not entirely successful as a rationale against transfer. For injustices long past, the argument would either permit disruptive transfer to rectify the earlier injustice, or reject transfer on a prescriptive basis that does little more than reassert that it is wrong to disrupt settled expectations. In either case, this natural rights theory fails to explain whether or why we should be governed by the Holmesian instinct against disruptive redistributions. Some disruptive redistributions might be unjust, but others might be just.

4. *Wealth Promotion Analysis*

Some of Holmes' remarks suggest another line of reasoning why transfer is undesirable: transfer might disrupt what Holmes called the "stream of products."¹²⁶ This reasoning reflects Madison's views, as set forth in his famous statement that the "first object of government" is the protection of "[t]he diversity in the faculties of men, from which the rights of property originate."¹²⁷ Bentham's theories add a gloss to the argument: a country will accumulate wealth if it protects the ability to acquire, but that ability flourishes only where the laws assure some continuity in property expectations.¹²⁸ Acquisition of wealth requires planning, investment of time and effort, and secure knowledge of return on the investment. Continuous property transfers, though they may all eventually even out, will not encourage wealth production.¹²⁹

124. See Nozick, *supra* note 122, at 152 (no developed theory addresses the present consequences of rectifying past unjust property acquisitions). For an elaboration on this problem, see Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 436-37 (1982).

125. 1 J. MILL, PRINCIPLES OF POLITICAL ECONOMY 214-15 (rev. ed. 1899).

126. Letter from Holmes to Harold Laski (May 8, 1917), in HOLMES-LASKI LETTERS 84 (M. Howe ed. 1953). Holmes and Laski continued their dialogue on the stream of products in letters from Laski to Holmes (May 15, 1917) and Holmes to Laski (May 17, 1917). *Id.* at 85-87. For a more complete development of this theory, see O.W. Holmes, Jr., *Economic Elements*, in COLLECTED LEGAL PAPERS 279 (1920); O.W. Holmes, Jr. *Law and the Court*, in *id.* at 291, 292-94.

127. THE FEDERALIST No. 10, at 78 (J. Madison) (C. Rossiter ed. 1961).

128. J. BENTHAM, *supra* note 50, at 70-73. See also M. MEYERS, THE MIND OF THE FOUNDER 503 (1973) (protection of property and other rights encourage industry by "securing the enjoyment of its fruits") (quoting Madison's 1821 comment on his Constitutional Convention speech of Aug. 7, 1787).

129. See J. BENTHAM, *supra* note 50, at 89-90 (forced exchanges permissible only to avoid great losses; forced transfers never permissible).

In John Locke's language, "industrious and rational" persons cannot get a foothold if legislatures transfer their property rights, and force them to pool their labors with the "quarrelsom[e] and contentious."¹³⁰ Hence pure transfers should be restrained in the political market, not because they may go uncompensated over the long run, but because they cause too much turmoil for wealth producing enterprise.

The Madison/Bentham argument against the uncertainty caused by transfers is very familiar in American political thinking. One hears it in the comments of "Rusticus" during the constitutional period (prohibition of retroactive laws would "restore lost confidence; and give a scope to the exertions of the industrious")¹³¹ and in the remarks of Lincoln ("Let not him who is houseless pull down the house of another, but let him work diligently and build one for himself, thus by example assuring that his own shall be safe from violence when built.")¹³² Stephen Field's comments on goldmining practices (unless trespass were restrained "the proprietor would never be secure in his possessions, and without security there would be little development, for the incentive to improvement would be wanting")¹³³ reflect this reasoning, as do modern arguments of law-and-economics that a private property system may induce decisionmakers to internalize externalities and thereby encourage efficient productivity.¹³⁴ The theory that stable property expectations are necessary for productivity pervades legal doctrine.

IV. THE FUNDAMENTAL TENSION: WEALTH VERSUS VIRTUE

Despite the familiarity of the stability argument, a deeper question remains: why encourage wealth? Is encouraging the production of wealth the primary purpose of our system of private property? A careful look at the American property tradition reveals that other views of the purpose of private property have coexisted with the wealth maximizing view since at least the framing of the Constitution.

130. J. LOCKE, *SECOND TREATISE OF GOVERNMENT* § 34 (P. Laslett ed. 1963).

131. Rusticus, *On ex post facto laws*, reprinted in Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539, 541 (1947).

132. Address before the Workingmen's Association of New York, (Mar. 21, 1864), quoted in Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 276 n.65 (1914).

133. *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279, 379 (1859).

134. For examples of how economics-based legal theories use this argument, see Agnello & Donnelley, *Property Rights and Efficiency in the Oyster Industry*, 18 J.L. & ECON. 521, 522-23 (1975); Baker, *Starting Points in Economic Analysis of Law*, 8 HOFSTRA L. REV. 939, 962 (1980).

A. WEALTH, VIRTUE, AND THE AMERICAN PROPERTY TRADITION

Aristotle related property acquisition and spending to the virtue of generosity.¹³⁵ On this account, one needs a certain amount of wealth in order to be magnanimous, but it does not necessarily follow that more is better. The ethical ends of generosity and inagnamity constrain wealth accumulation; pure acquisitiveness has no claim for protection unless it also promotes those virtues.¹³⁶ Some theorists of the Middle Ages went far beyond Aristotle, arguing that true virtue required the renunciation of material possessions.¹³⁷ In general, the premodern philosophic theorists saw wealth acquisition at best as subordinate to the promotion of the virtue of generosity, and at worst as a highly suspicious and dangerous passion.¹³⁸

Madison rejected this theory, as had Hobbes and Locke before him.¹³⁹ According to Madison, human virtues are notoriously unstable and reliance upon them may easily lead to outrage, despoilation, and

135. ARISTOTLE, *NICOMACHEAN ETHICS* 19 (D. Chase trans. 1911). Aristotle also discusses the use of wealth for "magnificence," or "fitting expense on a large scale." *Id.* at 80-83.

136. *Id.*

137. This position was particularly associated with the Franciscans. N. CANTOR, *MEDIEVAL HISTORY: THE LIFE AND DEATH OF A CIVILIZATION 455-58* (2d ed. 1969). Because it challenged the worldly possessions of the Church it often raised considerable controversy. *See, e.g.*, G. LEFF, *WILLIAM OF OCKHAM: THE METAMORPHOSIS OF SCHOLASTIC DISCOURSE 618-19* (1975) (describing controversy over Franciscan teaching of absolute poverty and its ultimate condemnation by the Pope). *Cf.* R. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM 31-37* (1926) (theorists of the medieval period could not justify economic activity unrelated to a moral end). For an argument that the condemnation of avarice was associated with changes in medieval European economic conditions, see Little, *Pride Goes before Avarice: Social Change and the Vices in Latin Christendom*, 76 *AM. HIST. REV.* 16 (1971).

138. *Cf.* R. TAWNEY, *supra* note 137, at 39-42 (medieval economic theory grounded in a moral authority which took precedence over considerations of economic expediency). For a description of how artists of the Middle Ages luridly portrayed the vice of avarice, see Little, *supra* note 137, at 37-38.

139. Madison was part of an 18th century intellectual movement that rejected the idea of basing politics on human virtue, and consequently turned to the "passions," primarily avarice, as the basis of politics. For a history of this movement and its 16th and 17th century precursors, see A. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS 9-31* (1977). Madison himself was ambivalent about the importance of the virtues to politics. *See* G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 612-13* (1969) (Madison believed governments could not be sustained on principles of fear, honor, and virtue). Madison's collaborator on *The Federalist*, Alexander Hamilton, viewed the passion for fame as superior to the passion for wealth, at least among statesmen. *See* G. STOURZH, *ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 95-106* (1970) (human love of glory was of primary significance in Hamilton's outlook); *see also* *THE FEDERALIST* No. 72, at 437 (A. Hamilton) (C. Rossiter ed. 1961) ("[L]ove of fame . . . [is] the ruling passion of the noblest minds."). Hamilton's view of fame may be distantly related to the earlier conception of virtue. *See infra* notes 148-54 and accompanying text.

bloodshed.¹⁴⁰ Madison felt it safer to rely not on virtues, but on self-interest.¹⁴¹ Among self-interested motives, avarice, though perhaps the homeliest, is also the most constant and reliable.¹⁴² By splitting society into a multiplicity of property interests, avarice distracts persons from the perhaps more majestic, but certainly more predatory, endeavors of our forebears.¹⁴³ Businesspersons slit each other's throats only symbolically; they fight no duels and make no great point of honor. Yet their successes encourage others to make money instead of strife, and may produce a surplus that strengthens the nation against outsiders.¹⁴⁴ Thus, protecting acquisitive interests increases both productivity and national strength.

On this reasoning, the protection of settled expectations promotes acquisition which in turn brings internal peace as well as strength vis-à-vis outsiders. Thus, in the classic triad of life, liberty, and property, the element of property ultimately serves life by reducing strife at home and presenting the image of strength abroad.

This chain of consequences—protecting expectations promotes wealth which preserves peace—has historically suffered certain credibility problems. Even when they have agreed with the ultimate goals, American courts and legislatures have sometimes broken the chain. In promoting wealth acquisition, courts and legislatures have occasionally disturbed expectations instead of assuring them, and according to the legal historians, have altered property rules to promote dynamic enter-

140. See THE FEDERALIST No. 10, at 81 (J. Madison) (C. Rossiter ed. 1961) (neither religious nor moral motives are reliable as checks upon oppression).

141. See *id.* at 321-22 (greatest security against concentration of power is personal motives to resist encroachments of others).

142. Improperly channelled self-interest may be destructive. Cf. *id.* at 79 ("most common and durable source of factions [is] . . . unequal distribution of property"). For the 18th century reevaluation of avarice as a constant and even a civilizing passion, see A. HIRSCHMAN, *supra* note 139, at 41-42, 54-66.

143. See Diamond, *The Federalist*, in L. STRAUSS & J. CROUSEY, HISTORY OF POLITICAL PHILOSOPHY 631, 647-50 (1972) (Madison advocated commercial development as a means to fragment the major warring factions—rich and poor—into many different types of propertied interests). For acquisitiveness as a desirable passion in 18th century thought, see A. HIRSCHMAN, *supra* note 139, at 63-66. Hamilton, however, thought that commerce, resulting from the love of wealth, would create conflicts with foreign powers and eventually lead to war. G. STOURZH, *supra* note 139, at 150. For an interesting recent comment on private property as a dissipator of group conflict, see Demsetz, *Professor Michelman's Unnecessary and Futile Search for the Philosopher's Touchstone*, 24 NOMOS 41, 46 (1982).

144. See *supra* note 143. For Hamilton's view on the relationship between commerce and external strength, see G. STOURZH, *supra* note 139, at 148-53, 198-99; J. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 529-31 (1975). For a modern version of the relationship between individual wealth-maximization and external strength, see R. POSNER, *supra* note 72, at 205.

prises at the expense of their more passive counterparts.¹⁴⁵ Alternatively, legislatures sometimes required those perceived as the "haves" to give up expected gains in order to mollify the "have-nots" in turbulent times, on the theory that inequalities of wealth can cause social unrest.¹⁴⁶

Familiar as the wealth maximizing argument for protecting expectations may be, American governing institutions have frequently acted as if protecting acquisition does not really deliver wealth and its supposed derivatives of peace and strength. More importantly, one strand in American political thinking has consistently rejected the argument's underlying assumptions that the *res publica* has no meaning aside from the sum of individual satisfactions, and no functions aside from smoothing over the transaction costs encountered by self-interested humans.¹⁴⁷

J.G.A. Pocock has brilliantly illustrated the manner in which thinkers from the sixteenth through the eighteenth centuries revived and transformed the Aristotelian idea that human excellence is linked with participation in the polity and that the polity in turn depends on the character or "virtue" of its members.¹⁴⁸ In the early years of the republic, this view coexisted with the antithetical Lockean conception of government based on and serving the desires of only discrete indi-

145. See Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 724 (1938) (courts have "subsidized" dominant business interests through takings jurisprudence). See generally M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1760-1860*, at 31-108 (1977) (historical and economic analysis of change in conception of property from 18th century to post-Civil War); Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: the United States, 1789-1910*, 33 J. ECON. HIST. 232, 234-48 (1973) (tracing the historical development of government expropriation and concluding that eminent domain acted as a subsidy for corporate enterprise). But see generally Freyer, *Reassessing the Impact of Eminent Domain in Early American Economic Development*, 1981 WIS. L. REV. 1263, 1267-86 (examining local level eminent domain cases between 1820-1860 and concluding that government expropriation benefited the public more than corporate interests).

146. See, e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445-46 (1934) (upholding legislative extension of mortgage redemption period, which reduced mortgagees', predominantly corporations', investment security in favor of individual homeowners' interests).

147. See J. POCOCK, *supra* note 144, at 435-36 (views of Locke and conclusions following from his arguments—"the individual under government inhabited an exchange-based society in which virtue was private, consisting in relationships which were guaranteed by the government but not in participation in government as a self-creating act of citizenship"). For a discussion of Hobbes as the originator of this view, see F. COLEMAN, *HOBBS AND AMERICA: EXPLORING THE CONSTITUTIONAL FOUNDATIONS* 59-62 (1977).

148. For an exposition of the development of this civic virtue school of thought, see J. POCOCK, *supra* note 144, at 423-505. See also Pocock, *The Mobility of Property and the Rise of Eighteenth-Century Sociology*, in *THEORIES OF PROPERTY* 140, 144-46 (1979) ("Property and power are the prerequisites of authority and virtue.").

viduals.¹⁴⁹ For those who looked to civic virtue as the safeguard of the republic (and vice versa), property functioned to foster the independence and civic participation of a morally committed citizenry.¹⁵⁰ The protection of property was necessarily subordinate to that function, even at the cost of substantial redistribution.

Thus could Jefferson argue for wide distribution of agricultural property as conducive to civic character, and maintain that extreme inequalities in property would corrupt the republic.¹⁵¹ Thus could the Antifederalists argue that riches and power were neither the exclusive nor the most important goals for American government. To the Antifederalists, the important issues related to the nature of the regime and the qualities that it produced in the people.¹⁵² In one of the most influential Antifederalist writings, Richard Henry Lee wrote:

If there are advantages in the equal division of our lands, and the strong and manly habits of our people, we ought to establish governments calculated to give duration to them, and not governments which never can work naturally, till that equality of property, and those free and manly habits shall be destroyed. . . .¹⁵³

This eighteenth and early nineteenth century "propertarianism" sought to foster civic virtue through property—property that would encourage sturdy independence and liberty.¹⁵⁴ Beyond that point of citizen independence, however, the widely espoused civic property

149. See J. POCOCK, *supra* note 144, at 435-36 (views of Locke and conclusions following from his arguments—"the individual under government inhabited an exchange-based society in which virtue was private, consisting in relationships which were guaranteed by the government but not in participation in government as a self-creating act of citizenship"), 526-47 (discussion of Federalist-Republican controversy). See also Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. L. & ECON. 467, 481-82, 485-87 (1976) (republican government, committed to people's welfare, required suppression of individual desires in deference to common good).

150. See *infra* notes 151-53 and accompanying text.

151. See Katz, *supra* note 149, at 470-74, 480-81 (describing Jefferson's view that rights in land were critical to country's development as reflected by his introduction of legislation creating a wider distribution of property rights). For the intellectual history of the connection between landed property and civic virtue, see J. POCOCK, *supra* note 144, at 446-50.

152. See 1 THE COMPLETE ANTI-FEDERALIST 20-23 (H. Storing ed. 1981) (republican government depends on civic virtue and devotion to fellow citizens). See also Speech by M. Smith (June 21, 1788) reprinted in 6 THE COMPLETE ANTI-FEDERALIST 157-59 (H. Storing ed. 1981) (representative government, composed primarily of "yeomanry," is best security of liberty).

153. Letter from the Federal Farmer (Oct. 13, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 251 (H. Storing ed. 1981). The Federal Farmer is generally presumed to be Richard Henry Lee. 2 THE COMPLETE ANTI-FEDERALIST 215 (H. Storing ed. 1981).

154. M. CUNLIFFE, THE RIGHT TO PROPERTY: A THEME IN AMERICAN HISTORY 11, 21 (1973). The term "propertarianism" is Cunliffe's. *Id.* See also Corwin, *supra* note 132, at 255-56, 276 (framers of Constitution viewed protection of property rights as function of social compact).

doctrine had a strong egalitarian element, and might tolerate or even encourage redistribution.¹⁵⁵

Alexis de Tocqueville was perhaps the most insightful witness of the defects in using property as a vehicle for civic virtue. He recognized how property might not cultivate independence but its opposite; the regard for independent property could become a passion for individual acquisitiveness, which undermined solidarity and the courage following from it, and thereby rendered individuals not independent but rather collectively susceptible to tyranny.¹⁵⁶ Moreover, insofar as the egalitarian side of the civic property doctrine contemplated redistribution, the doctrine ignored the counterproductive tactics that property owners would employ to avoid redistribution.¹⁵⁷ The civic property tradition is significant, however, in that its argument for protection of property focused not on accumulating wealth, but rather on maintaining the liberty of a self-governing nation. The implication of this view is that property is to be protected only up to the bounds of some conception of civil and social responsibility.¹⁵⁸

155. See Katz, *supra* note 149, at 480-81, 483-84 (although landholding and farming produced virtue upon which republicanism depended, equality of property was the "soul of a republic").

156. 2 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 144-46, 148-50 (F. Bradley ed. 1945). See also *id.* at 163-65 (taste for material gratification leads wealthy members of society to engrossment in commerce rather than political leadership), 168-71 (pursuit of manufacturers divides classes), 239-41 (where wealth is only mark of social distinction citizens become more uniform in opinions and dominating passion is for wealth). Tocqueville thought that contemporary Americans had so far resisted these dangers. *Id.* at 150-51. J.G.A. Pocock describes Tocqueville's critique as "basically Aristotelian." J. POCOCK, *supra* note 144, at 537-38. For Tocqueville's comments on acquisitiveness in contemporary France, see A. HIRSCHMAN, *supra* note 139, at 122-25.

157. One example of an evasive tactic is the premature demolition of buildings potentially subject to historic landmark regulations. These regulations burden the individual owners with the costs of maintaining their structures as historic landmarks, while conferring aesthetic and cultural benefits upon society. See *Guests at Biltmore Surprised as Wreckers Tear Out Decor*, N.Y. Times, Aug. 16, 1981, at 1, col. 1 (describing the destruction of hotel interior just as landmark commission began to consider landmark designation). See generally Hershman, *Critical Legal Issues in Historic Preservation*, 12 URB. LAW. 19, 28 (1980) (landmark laws may discourage investment and development of distinguished architecture); Comment, *Allocating the Cost of Historic Preservation: Compensation for the Isolated Landmark Owner*, 74 Nw. U.L. REV. 646, 648 (1979) (historic landmark regulations impose inordinate costs on the building owners and may create inefficient use of valuable space).

158. See, e.g., *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 283, 291-92 (1827) (Johnson, J.) (government has duty not only to protect and enforce rights but also "to impose limits to the avarice and tyranny of individuals").

B. THE CONTINUING TENSION IN THE AMERICAN PROPERTY TRADITION

Neither of these traditions has vanished. The Lockean/Madisonian/Benthamite argument for acquisition, with its concomitant denial of a polity founded on any civic qualities beyond individual satisfactions, has found an exuberant revival in neoclassical economics. On the other hand, the civic conception of property as a means of developing character and promoting republican participation also persists, most notably in the writing of Charles Reich¹⁵⁹ and Richard Flathman,¹⁶⁰ and to some degree in the writings of Frank Michelman¹⁶¹ and Margaret Jane Radin.¹⁶² The constant (and, according to economists, hopeless) efforts to restrain landlords¹⁶³ and fast talking merchants¹⁶⁴ are outgrowths of the tradition that subordinated property protection to civic virtue, requiring the "haves" to treat the "have-nots" more generously—just as the medieval prohibitions on regraters, forestallers, and engrossers attempted to suppress the exploitation of commercial advantage by some to the detriment of others.¹⁶⁵

In takings doctrine, the tradition of property's civic responsibility is embodied in a test that balances public benefits against private losses from a particular measure.¹⁶⁶ This test baffles legal commentators who

159. See Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964) (property rights maintain independence, dignity, and pluralism in society by creating area in which majority must yield to owner).

160. See R. FLATHMAN, *THE PRACTICE OF RIGHTS* 199-224, 227-30 (1976) (discussing the problems of justifying private property rights in light of their adverse affects on political liberties such as freedom of speech, press, and association).

161. See Michelman, *Property*, *supra* note 5, at 1109, 1112-14 (characterizing property rights as political rights affecting individual participation in the sovereignty).

162. See Radin, *supra* note 5, at 978, 1006 (discussing possible special protection for property of groups).

163. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077-83 (D.C. Cir. 1970) (making tenant's obligation to pay rent dependent on landlord's compliance with implied warranty of habitability), *cert. denied*, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 622-29, 517 P.2d 1168, 1171-76, 111 Cal. Rptr. 704, 707-12 (1974) (recognizing an implied warranty of habitability in residential leases).

164. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449-50 (D.C. Cir. 1965) (courts may refuse to enforce unconscionable contracts).

165. For explanations of the early common law prohibitions against forestalling, regrating, and engrossing, see Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 CALIF. L. REV. 1, 64-65 (1981); Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 367-71 (1954).

166. See R. ELLICKSON & A. TARLOCK, *LAND USE CONTROLS* 136 (1981) (courts often find cost-benefit analysis relevant in takings litigation).

take a neoclassical economic approach.¹⁶⁷ From a Benthamite point of view, this test might be relevant to the utility of the proposed measure, but would have no bearing at all on the issue of compensation: if the public needs property, it may acquire it, but must still pay for it.¹⁶⁸ The premise of this takings test, however, is quite the reverse; that is, that citizens may be required to sacrifice and bear private losses in the face of a substantially greater public need.

Thus, the arguments about disturbing established expectations take two very different directions: one would protect the acquisitive faculties which bring wealth and strength; the other would protect the citizen independence and participation which enhance the community, but would thereafter raise no principled objections to redistribution.

C. WHY THE TAKINGS PROBLEM REMAINS

This tension between the two arguments helps explain why the takings problem is so intractable. Our traditional discourse envisions property as serving quite divergent purposes. Although these purposes frequently overlap, the two views of property ultimately suggest different characters and limits for public protection of property ownership; the disagreements over purposes are manifested in disagreements about the circumstances under which the public may regulate property without compensation.¹⁶⁹

The proacquisitive position is that individuals should be able to act on numerous fixed property expectations, and thus any involuntary and uncompensated disruption of those expectations is a wrongful taking. This view clearly has a rhetorical advantage. One of our prominent political metaphors includes a prepolitical right to property: humans supposedly bring property into the social contract, and consent to government in order to protect individual property, not diminish it.¹⁷⁰ This metaphor rejects redistribution of property and effectively precludes all but acquisitive abilities as appropriate objects of protec-

167. See, e.g., *id.* (“[T]he balancing approach underprotects landowners from unfair but efficient regulations, and overprotects them from fair but inefficient regulations.”).

168. J. BENTHAM, *supra* note 50, at 90; see also *Mahon*, 260 U.S. at 416 (“[I]t is not plain that a man’s misfortunes or necessities will justify his shifting the damages to his neighbor’s shoulders.”).

169. For somewhat different formulations, see Michelman, *Property*, *supra* note 5, at 1109; Oakes, *supra* note 6, at 587.

170. J. LOCKE, *supra* note 130, at §§ 25-51, 87. See also R. NOZICK, *supra* note 122, at 12-25 (describing protective associations, including government, that are formed to protect against abuses in a Lockean state of nature).

tion. The vocabulary of Locke, Madison, and Bentham, and not that of Aristotle, dominates the takings discourse, blurring the notion of a pre-political property right with the political goals of strength and internal peace.¹⁷¹

The concept of a prepolitical property right is problematic, primarily because it fails to address the question of what it means to "own" anything in the absence of the community's protection.¹⁷² For this and other reasons, courts have seldom recognized such a prepolitical right. Justice Chase, at a time when the Supreme Court still discussed seriously application of natural law in civil matters, denied that property existed prior to the social contract.¹⁷³ Aside from such an open reference to political theory, in takings litigation courts always veer noticeably away from the directions in which this antiredistributive theory should drive. Powerful as the theory is in many areas of American social thought, it has historically been rather frail in takings jurisprudence.¹⁷⁴ *Mahon* is, after all, an exceptional case.¹⁷⁵ The usual practice in takings jurisprudence is to allow political communities wide latitude in defining citizens' obligations, similar to the practice in the jurisprudence of obligation of contract.¹⁷⁶ The rhetoric of protecting expectations of gain does appear in takings jurisprudence,¹⁷⁷ but so does the rhetoric of civic duty.¹⁷⁸

171. See *supra* notes 139-45 and accompanying text.

172. See, e.g., R. NOZICK, *supra* note 122, at 9 (Locke does not provide a satisfactory explanation of the basis of the law of nature).

173. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 394 (1798).

174. Scheiber, *supra* note 81, at 360-76 (stressing the narrowness of 19th century views of takings). See also F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 105-23 (1973) (describing the first hundred years of takings jurisprudence as conservative); M. HORWITZ, *supra* note 145, at 63-66 (until end of 18th century, economic development was so meager that takings issue did not play a significant role in American law).

175. In the land use area, which is a major source of takings litigation, the Supreme Court has not found a noninvasive land use regulation to be a taking of property since *Mahon*. Comment, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis*, 57 WASH. L. REV. 715, 724 (1982). The Court in large part ignored *Mahon* in the years immediately following the decision. Note, *Reexamining The Supreme Court's View of the Taking Clause*, 58 TEX. L. REV. 1447, 1454-55 (1980).

176. For a discussion of the obligations of citizens in the context of contract law, see Comment, *A Process-Oriented Approach to the Contract Clause*, 89 YALE L.J. 1623, 1630 & n.38 (1980).

177. E.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 431, 436 (1982); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

178. See, e.g., *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1382 (Fla. 1981) ("The owner of private property is not entitled to the highest and best use of his property if that use will create a public harm."), *cert. denied*, 454 U.S. 1083; *Just v. Marinette County*, 56 Wis. 2d 7, 15-16, 201 N.W.2d 761, 767 (1972) (one factor considered was whether the damage "ought to be borne by the individual as a member of society for the good of the public safety, health, or general welfare"). See also *supra* note 166 and accompanying text.

In *Mahon*, it seems that Holmes was attempting to avoid these traditional rhetorics and their very different political connotations by using the relativistic and scientific terminology of a seemingly measurable "degree." Instead of avoiding the problem, however, Holmes' opinion only illustrated its resilience by adopting a standard that could not be applied without returning to one of the traditional rhetorics.¹⁷⁹

Takings jurisprudence uses two quite divergent vocabularies, each reflecting one of the two divergent concepts of property. The takings dilemma is thus not simply a confusion over legal terms, to be solved by adopting scientific policy.¹⁸⁰ Like the dilemma over state action,¹⁸¹ the takings dilemma is a legal manifestation of a much deeper cultural and political argument about the civic nature of what Holmes would have called the "human animal."

This impasse is particularly unfortunate because both views of property have considerable commonsensible appeal. The argument for protecting acquisitiveness rests on the intuitive propositions that human beings act to further their own material well-being, that it is fruitless to attempt to suppress this characteristic entirely, and that the ability of individuals to act in their own best interest may have substantial social benefits. The civic argument rests on the equally intuitive propositions that any community—including one that protects private property—must rely on some moral qualities of public spiritedness and mutual forbearance in its individual members to bond the community together, and that a democracy may be particularly dependent on these qualities because it relies not on force, but on voluntary compliance with the norms of the community.

Our inability to reconcile these positions in any principled way suggests the inadequacy of our existing political vocabulary.¹⁸² It is

179. See *supra* note 6.

180. Cf. B. ACKERMAN, *supra* note 5, at 23-40 (proposing that scientific policymaking be used in takings jurisprudence). *But cf.* Epstein, *supra* note 44, at 640, 656 (criticizing Ackerman's policymaking approach as more commonsense than scientific).

181. For a good sampling of divergent approaches to the state action question, see generally *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

182. For a description of later medieval difficulties in coping intellectually with temporal political life due to a similar failure of vocabulary, see J. POCOCK, *supra* note 144, at 8-9, 49-55. On the other hand, medieval thinkers had far fewer difficulties in reconciling the "acquisitive" and "civic" views of property outlined in this Article. Aquinas does so in a particularly striking passage of the *Sunma Theologiae* (II-II, Question 66, Third Article), where he remarks that individually owned property is necessary because it induces people to work more conscientiously and in a more orderly fashion, and because a division of property is conducive to peace; but that the use of property should be not for the individual owner but for the commonality (most particularly, the rich should aid the needy). Perhaps Aquinas could so blithely combine the "acquisitive" and

time, as Richard Rorty's "Pragmatist" would say, to change the subject and generate a more promising vocabulary by examining the issue in another manner.¹⁸³ Perhaps Holmes had precisely that in mind when he wrote his *Mahon* opinion.¹⁸⁴ But his indeterminate language of "degree" left it open to later courts to return to the traditional positions, often settling takings questions on the basis of uncertain standards of civic responsibility,¹⁸⁵ rather than on the basis of predictable rules that would protect wealth acquisition from unexpected redistribution. Indeed, although the *Mahon* opinion is thoroughly antiredistributive on close analysis, courts have construed its ambiguous wording to create quite extensive disruptions of property expectations.¹⁸⁶

D. TOWARD A NEW APPROACH TO TAKINGS

It is significant that Holmes' effort failed to generate a more satisfactory way of talking about takings; his "scientific" approach was ignored at the outset,¹⁸⁷ and has never generated fruitful elaboration.¹⁸⁸ But while Holmes' language of "degree" may not have avoided the traditional dispute between the proacquisitive and civic arguments, perhaps *Mahon's* larger lesson is that it is necessary to move on to some other way of talking about property and takings.

With all due respect for Holmes, and with apologies for departing from this Article's initial promise not to try to solve the takings issue, the author submits that there are more promising approaches to takings

"civic" positions because he distinguished the ideally good from the expediently possible, and thus could retain the explanatory power of economics without conceding that acquisitiveness should be encouraged (even though it might be tolerated if channeled in proper directions). See Parel, *Aquinas' Theory of Property*, in THEORIES OF PROPERTY 88, 107 (1979) (the ideal is that people should strive for "felicity," not property, but are subject to the imperfections of human nature; therefore, the best regime is not equivalent to the ideal).

183. R. RORTY, CONSEQUENCES OF PRAGMATISM xiv (1982).

184. For a description of the influence of early 20th century pragmatist thinkers on Holmes, see Vetter, *supra* note 69, at 31-34.

185. See *supra* note 178. The somewhat unsatisfying character of judicial discussions such as these may be related to a more general 20th century skepticism about the possibility of rational knowledge of values. See Moore, *Moral Reality*, 1982 Wis. L. Rev. 1061, 1070-71 (moral skepticism leads to a tendency to prefer utilitarian theories).

186. See, e.g., Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136-37 (1978) (*Mahon* construed to allow city to prevent building in the airspace above a historical landmark); Loeterman v. Town of Brookline, 524 F. Supp. 1325, 1329 (D. Mass. 1981) (town's bylaw prohibiting owners of condominium units from recovering possession of units from tenants is not a taking under *Penn Central*).

187. See Note, *supra* note 175, at 1454-58 (reviewing post-*Mahon* developments in takings law); see also *supra* note 175.

188. See *supra* note 6.

issues. First, takings jurisprudence could turn to ordinary language as a guide for what constitutes a taking of property.¹⁸⁹ While ordinary language might not yield a principled reconciliation of the various concepts incorporated in our ideas of property, ordinary understandings do take into account the different elements we want, including the wish to protect industriousness as well as the wish to foster civic responsibility. A takings jurisprudence based on ordinary understanding can protect the expectations that most people have about their property (since, by definition, most people are aware of or share the ordinary understanding), including expectations about the risk of regulation. Ordinary understanding can simultaneously accommodate the need for civic responsibility in dealing with property, since that need is also part of ordinary understanding.

Second, takings jurisprudence should not assume that all governments are identical in takings questions and should therefore look more closely at the governmental entity doing the taking. Citizens may be protected against federal legislative takings by the Madisonian safeguards accompanying a large and diverse legislature;¹⁹⁰ there may be other types of protections against takings available at the local level.¹⁹¹ A sensible jurisprudence should not assume that what constitutes a taking of property at the federal level is necessarily a taking at the local level, or vice versa.

Third, in order to deepen our jurisprudence about property and takings, we need to reassess our own traditions with respect to property. This Article attempts to do so in a modest way, but there have certainly been more intensive efforts by other authors,¹⁹² and one hopes that still other attempts will follow. A reassessment of past practices can help delineate the contents of ordinary understanding by revealing both the continuities and the changes in assumptions about the rights and duties entailed in property ownership. Moreover, a deeper historical understanding can also help liberate us from outmoded past practices by put-

189. Robert Ellickson develops the use of ordinary language and contemporary community standards in defining property rights in his comments on nuisance law and possible nuisance based property regulations. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 728-33 (1973).

190. See *supra* notes 114-15 and accompanying text.

191. For this author's use of Albert Hirschman's concepts of "exit" and "voice" in analyzing local land regulation, see Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 882-912 (1983).

192. The author thinks highly of the pathbreaking intellectual historical work of J.G.A. Pocock and his dissection of the 17th and 18th century backdrop to modern political thought. See J. POCKOCK, *supra* note 144.

ting some distance between the past and the present.¹⁹³ Ordinary practice is part of a tradition and cannot be entirely reinvented.¹⁹⁴ But if some of our views about property are dysfunctional remnants, historical inquiry will help to identify them, and it will also highlight those traditional property concepts that are still valid for us.

Such a task moves us beyond the scope of *Mahon v. Pennsylvania Coal Co.* But that case, as perhaps the most famous and most perplexing of takings cases, may also become the most valuable if it ultimately jogs us into a more productive vocabulary for talking about property and takings, beginning with ordinary understanding as it occurs within a tradition.

193. For a description of the distancing effects of historical study on tradition, see Wieseltier, *Culture and Collective Memory* (Book Review), N.Y. Times, Jan. 15, 1984, at 9, col. 2.

194. S. SHILS, TRADITION 34 (1981).

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