“The Foundation of Our ‘Regulatory Takings’ Jurisprudence”: The Myth and Meaning of Justice Holmes’s Opinion in *Pennsylvania Coal Co. v. Mahon*

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Mr. Justice Holmes's opinion, for the Supreme Court, in *Pennsylvania Coal v. Mahon*, [is] both the most important and most mysterious writing in takings law.¹

Nine cases and four findings of constitutional infirmity over the last decade would not amount to a trend in, say, First Amendment jurisprudence. But it does in Takings Clause jurisprudence. Before 1986, the Supreme Court's two-hundred-year history arguably reveals no more than four occasions on which the Court found laws to be regulatory takings, triggering the obligation to pay just compensation under the Federal Constitution's Takings Clause² although they involved no physical appropriation or destruction of property.³ Yet the Rehnquist Court has found four regulatory takings in its first ten years.⁴ The Court also heard three other regulatory taking cases,⁵ and has agreed to hear two more.⁶

Genealogists of this regulatory takings jurisprudence have found their Adam in *Pennsylvania Coal Co. v. Mahon*,⁷ a 1922 Supreme Court decision with a majority opinion by Justice Oliver Wendell Holmes. The *Mahon* Court concluded that a Pennsylvania statute prohibiting mining of coal so as to cause surface subsidence was unconstitutional.⁸ "The general rule at least," Holmes wrote, "is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁹ The Holmes opinion, Chief Justice Rehnquist concludes, was "the foundation of our

1. BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 156 (1977).

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

3. The number here depends upon several definitional issues regarding the term "regulatory takings." Six cases are widely recognized candidates: *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Armstrong v. United States*, 364 U.S. 40 (1960); *Louisville Joint Stock Bank v. Radford*, 295 U.S. 555 (1935); and the subject of this Article, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). However, if takings turning on physical invasions are not regulatory takings, then *Loretto* and *Kaiser Aetna* drop out. If "regulatory taking" implies invocation of the Fifth Amendment either directly or by incorporation in the Fourteenth Amendment, then, as I argue below, *Mahon* drops out. See *infra* text accompanying notes 249-63. If, on the other hand, "regulatory takings" cases include Fourteenth Amendment Due Process Clause cases that strike down regulatory measures because they are unaccompanied by just compensation, then many other cases from the first quarter of this century should be added to the list. See *infra* text accompanying notes 268-83.

4. See *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987).

5. See *Concrete Pipe & Prod. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

6. See *Suitum v. Tahoe Reg'l Planning Agency*, 80 F.3d 359 (9th Cir. 1996), cert. granted, 65 U.S.L.W. 3281 (U.S. Oct. 15, 1996) (No. 96-243); *Youpee v. Babbitt*, 67 F.3d 194 (9th Cir. 1995), cert. granted, 116 S. Ct. 1874 (June 3, 1996) (No. 95-1595).

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

8. See *id.* at 414.

9. *Id.* at 415.

'regulatory takings' jurisprudence."¹⁰ Holmes, echoes Justice Scalia, invented the idea of the regulatory taking because he recognized that "if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits."¹¹ A bevy of scholars has come to the same conclusion.¹²

The Holmes opinion in *Mahon* is lauded, not just as the common ancestor of all regulatory takings decisions, but also as the progenitor of particular features of current regulatory takings doctrine. The Supreme Court¹³ and Congress¹⁴ have both embraced a tradition of looking to *Mahon* for a diminution in value test; scholarly recognition has preceded and accompanied

10. *Keystone*, 480 U.S. at 508 (Rehnquist, C.J., dissenting).

11. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992). Justice Stevens has also pointed to Justice Holmes's opinion in *Mahon* as "chart[ing] a significant new course" and "kindl[ing]" the "so-called 'regulatory takings' doctrine." *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2327 (1994) (Stevens, J., dissenting).

12. See, e.g., DAVID L. CALLIES ET AL., *CASES AND MATERIALS ON LAND USE* 245 (2d ed. 1994) ("In [*Pennsylvania Coal Co. v. Mahon*], the regulatory taking doctrine was born."); STEVEN J. EAGLE, *REGULATORY TAKINGS* § 1-1, at 2 (1996) ("[T]he Supreme Court . . . never had found governmental activities short of a physical invasion to constitute a taking. This changed abruptly with Justice Holmes's famous declaration in *Pennsylvania Coal Co. v. Mahon*."); DANIEL R. MANDELKER, *LAND USE LAW* § 2.11, at 29 (3d ed. 1993) ("*Pennsylvania Coal Co. v. Mahon*, a landmark decision, was the first Supreme Court case to hold a land use regulation unconstitutional under the taking clause."); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1086 (1993) ("[I]n *Pennsylvania Coal v. Mahon* . . . the Court for the first time struck down a regulation as an uncompensated taking."); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) ("In 1922 . . . the Supreme Court's decision in *Pennsylvania Coal v. Mahon* established a new takings regime").

13. See *Lucas*, 505 U.S. at 1014 (citing *Mahon* as basis for per se rule that regulation will effect taking when diminution in value is complete); *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) (citing *Mahon* as "the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking'"); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) ("[G]overnmental action in the form of regulation can be so onerous as to constitute a taking which constitutionally requires compensation."); *United States v. Central Eureka Co.*, 357 U.S. 155, 168 (1958) ("[W]e have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking."). The Court has also adverted to a "diminution in value" interpretation of *Mahon* in presenting its rationale for its ripeness doctrine in takings cases. See *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.") (citing *Mahon*).

14. The regulatory takings bills introduced in Congress after the 1994 elections adopt a diminution in value test for determining whether compensation is due. As one bill stated:

A private property owner that, as a consequence of a final qualified agency action of an agency head, is deprived of 33 percent or more of the fair market value, or the economically viable use, of the affected portion of the property as determined by a qualified appraisal expert, is entitled to receive compensation in accordance with the standards set forth in section 204 of this Act. S. 605, 104th Cong. § 508(a) (1995); see also H.R. 925, 104th Cong. § 2 (1995) ("The Federal Government shall compensate an owner of property whose use of that property has been limited by an agency action . . . that diminishes the fair market value of that property by 33 1/3 percent or more . . ."). Committee reports and floor statements associated with these bills often acknowledge the pioneering role of *Mahon*. See, e.g., H.R. REP. NO. 104-46, at 4 (1995) ("In *Pennsylvania Coal Co. v. Mahon* the Supreme Court recognized that regulation of property could be considered a taking if it 'goes too far.'") (citation omitted); 141 CONG. REC. S4503 (daily ed. Mar. 23, 1995) (statement of Sen. Hatch) (citing *Mahon* as holding that regulation will be taking if it "goes too far").

that embrace.¹⁵ At other times, the Court has cited *Mahon* for a balancing test, a view of the case also apparently endorsed by the two most recent Supreme Court nominees.¹⁶ Academic acknowledgment of a balancing test in *Mahon* runs a close second to acknowledgment of a diminution in value test.¹⁷

But if *Mahon* is celebrated for its originality and fecundity, it is also blamed for the muddled state of regulatory takings doctrine. The decision in *Mahon*, charges Justice Scalia, "offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment,"¹⁸ a point echoed by supporters of recent takings legislation¹⁹ and by Justices Ginsburg and Breyer in their nomination hearings.²⁰ Scholars have been even less charitable. *Mahon*, Carol Rose finds,

15. See, e.g., Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 562 n.9, 565-66 (1984); Rubinfeld, *supra* note 12, at 1086-87; Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 41 & nn.33-35 (1964); Treanor, *supra* note 12, at 799.

16. Justice Breyer discussed *Mahon* extensively at the hearings on his nomination. See *Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 103d Cong. 110-11, 115, 208-09, 281 (1994) (testimony of Judge Breyer) [hereinafter *Breyer Nomination*]. One passage from his testimony links *Mahon* most clearly to a balancing test:

[T]he Constitution recognizes, and Holmes . . . recognized . . . that it is perfectly necessary for the Government to say to a coal mine operator . . . you must leave columns of coal in the mine so it does not collapse. That is called regulation.

Balancing what is at the heart of the matter in the case of property and the need for society to function through regulation is different in that area than in some other area, but that is because different things are involved

Id. at 208. At her hearings, Justice Ginsburg also presented a balancing approach, referring obliquely to *Mahon*:

There is a clear recognition that at some point a regulation can become a taking. . . . On the one hand, the regulations are made for the benefit of the community; and on the other hand, there is the expectation, the reliance interest of the private person. Those two considerations will have to be balanced in future cases.

Nomination of Ruth Bader Ginsburg to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 103d Cong. 249 (1993) (testimony of Judge Ginsburg) [hereinafter *Ginsburg Nomination*].

17. See, e.g., FRED BOSSELMAN ET AL., *THE TAKING ISSUE* 238 (1973) ("[L]and use regulations must be tested by balancing the value of the regulation against the loss in value to each affected property owner. This balancing test was established as the law by the famous case of *Pennsylvania Coal Co. v. Mahon*."); MANDELKER, *supra* note 12, at 29 ("Justice Holmes provided very little additional guidance on when a regulation is a taking because it goes 'too far,' but some commentators believe he adopted a balancing test to decide this question."); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1190 n.53 (1967) (tentatively suggesting that one of Holmes's references in *Mahon* to diminution in value might actually indicate adherence to "some kind of a 'balancing' test"); Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335, 339 (1988) ("Since the 1922 case of *Pennsylvania Coal Co. v. Mahon*, it has been clear that the just compensation clause was designed to promote balanced fairness and justice to property owners and the public.").

18. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

19. See, e.g., 141 CONG. REC. S4503 (daily ed. Mar. 23, 1995) (statement of Sen. Hatch) ("Just how do courts determine when regulation amounts to a taking? Holmes's answer [in *Mahon*], 'if regulation goes too far it will be recognized as a taking,' is nothing more than an ipse dixit.") (citation omitted).

20. See *Ginsburg Nomination*, *supra* note 16, at 249 ("There is a clear recognition that at some point a regulation can become a taking. When that point is reached is something to be settled in the future. . . . This is a still evolving area and I can't say any more about it than what is reflected in the most recent precedents . . ."). Similarly, Judge Breyer noted:

"seems to have generated most of the current confusion about takings."²¹ Bruce Ackerman's conclusion best sums up the conventional praise and criticism of Justice Holmes's opinion in *Mahon*: It is "both the most important and most mysterious writing in takings law."²²

My goal in this Article is to unveil the mystery.²³ The *Mahon* opinion, I will argue, is best understood as a terse expression of Justice Holmes's theory of the constitutional protection of property, and of his views about the textual basis for that protection, both of which he had developed over decades. Much of that theory and those views was unique to Holmes; other Supreme Court Justices agreed with him at most in part. There was, however, broader agreement on the Court about several features of the *Mahon* opinion. In the modern campaign to force *Mahon* into the role of a seminal regulatory takings case, most of its original meaning—to Holmes and to the other members of the

When does a reasonable regulation become a taking of property for which you must pay compensation? You know what Justice Holmes said. You are going to be disappointed, but what he said was this. He said, "[Y]ou don't have to compensate, when you regulate. But, Government, you cannot go too far." What is too far? Indeed, ever since that time, the courts have been trying to work out what is too far, and I don't think anyone has gotten a perfect measure of that.

Breyer Nomination, *supra* note 16, at 111.

21. Rose, *supra* note 15, at 562; see also James E. Krier, *Takings from Freund to Fischel*, 84 GEO. L.J. 1895, 1895 (1996) (reviewing WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995)) ("[T]he regulatory takings problem has become the jurisprude's version of Fermat's last theorem, with Justice Holmes playing provocateur.").

22. ACKERMAN, *supra* note 1, at 156.

23. My work is, of course, preceded and supported by that of others. Although I will have occasion as the Article proceeds to cite much of the previous scholarly inquiry into *Mahon*, an overview of the work focused specifically on *Mahon*, or providing particularly novel perspectives on the case, seems appropriate. Carol Rose discusses *Mahon* in her article, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, *supra* note 15. The avowed purpose of her discussion, however, is not to reconstruct a single Holmesian theory of constitutional property, but to examine "various standard approaches to takings" that all might be seen to be exemplified in *Mahon*, as a prelude to her conclusion that takings law remains confused because of a "fundamental tension in the American property tradition." *Id.* at 563. Lawrence Friedman analyzes *Mahon* as the response of the Court, upholding the sanctity of contract and creditors' rights, to a certain kind of legislative populism, and criticizes Holmes for fragmenting "the ruin of an entire community" into a "series of petty losses." Lawrence M. Friedman, *A Search for Seizure: Pennsylvania Coal v. Mahon in Context*, 4 LAW & HIST. REV. 1, 22 (1986). William Fischel argues that the outcome in *Mahon* had little impact on the behavior of the coal mine owners, who decided voluntarily to repair or compensate damage caused by subsidence and to take steps to minimize subsidence because of the mutual economic dependence of mine owners and surface dwellers in the community. See WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 13–47 (1995). Fischel's investigation supports Robert Ellickson's contention that social norms often make legal rules irrelevant. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). Fischel's discovery that mine owners repaired or compensated for damage also throws a bit of cold water on Friedman's argument that *Mahon* ignored a tragedy occurring in coal country. Joseph DiMento has published an excellent piece of historical research on the drafting of the *Mahon* opinions, making full use of the Holmes and Brandeis Papers collections at the Harvard Law School, as well as published sources. See Joseph F. DiMento, *Mining the Archives of Pennsylvania Coal: Heaps of Constitutional Mischief*, 11 J. LEGAL HIST. 396 (1990). Bruce Ackerman discusses *Mahon* as a product of "Ordinary Observing" rather than "Scientific Policymaking" in his attempt to make sense of the confusion in takings law by developing accounts of those two paradigms. See ACKERMAN, *supra* note 1, at 156–67. Finally, E.F. Roberts provides a somewhat rambling meditation on *Mahon*, the conclusion of which is that Holmes would likely have supported forcing governments to pay damages for temporary takings. See E.F. Roberts, *Mining with Mr. Justice Holmes*, 39 VAND. L. REV. 287 (1986).

Mahon Court—has been obscured. The opinion has come simultaneously to mean more, and less, than it did as written and handed down.

I unveil *Mahon* in two Parts, addressing four tasks. First and most importantly, Part I constructs an account of Justice Holmes's constitutional property jurisprudence, using the relevant portions of his enormous judicial output and his substantial nonjudicial work, and shows how *Mahon* fits into that jurisprudence. The remaining three tasks are my goals in Part II, which tracks the shifting meanings of *Mahon*. First, I distinguish those portions of *Mahon* that were idiosyncratically Holmesian from those shared by enough of the other Justices to become part of the contemporary constitutional property jurisprudence. Next, I demonstrate how the latter-day use of *Mahon* has obscured its original meanings and has rendered inexplicable much of the analysis and language in Justice Holmes's opinion. Lastly, I suggest a number of issues to be considered before deciding whether and how the rediscovered *Mahon* should affect the further development of the regulatory takings doctrine.

I. THE JURISPRUDENCE OF THE HOLMES OPINION IN *MAHON*

All that can be expected from modern improvements is that legislation should easily and quickly, *yet not too quickly*, modify itself in accordance with the will of the *de facto* supreme power in the community²⁴

The jurisprudence of *Mahon* requires extended discussion, but a succinct summary of its facts will suffice. The law at issue in *Mahon* was the Kohler Act,²⁵ a 1921 Pennsylvania statute that prohibited underground mining of anthracite coal that caused the surface above to collapse. The prohibition applied only to surfaces that were not owned by the miner and that supported specified uses including streets, hospitals, schools, factories, and houses.²⁶ When the Pennsylvania Coal Company notified Mr. and Mrs. Mahon of its intention to mine underneath their house, the Mahons sued under the Kohler Act to enjoin the company from mining in such a way as to cause their house to sink.²⁷ The company's defense was that the Act was unconstitutional. The company noted that when it had originally sold the surface rights to the Mahons' lot, it had not only retained the mineral rights, but had also specifically obtained a waiver of all claims against the company due to

24. 1 OLIVER WENDELL HOLMES, JR., *Summary of Events: Great Britain*, in THE COLLECTED WORKS OF JUSTICE HOLMES 323, 325 (Sheldon M. Novick ed., 1995) (emphasis added) [hereinafter COLLECTED WORKS]. Holmes makes this observation in a short article about a gas-stokers' strike in London, written during his tenure as editor of the *American Law Review*.

25. Act of May 27, 1921 (Kohler Act), 1921 Pa. Laws 445.

26. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412–13 (1922).

27. See *id.* at 412–13.

subsidence to the surface. By effectively nullifying the waiver, argued the company, the Kohler Act deprived it of property without due process of law, took its property without just compensation, and impaired the obligation of a contract.²⁸ The company won in the Pennsylvania trial court, but lost on the Mahons' appeal to the Pennsylvania Supreme Court, and persuaded the United States Supreme Court to hear the case on writ of error. Of the eight Supreme Court Justices who heard the case,²⁹ seven agreed with the company that the Act was unconstitutional; Justice Louis D. Brandeis was the sole dissenter.³⁰ Chief Justice William Howard Taft assigned the opinion of the Court to Justice Holmes. Holmes had rejected broad protection for property and contract rights in a number of prominent cases,³¹ and Taft may have wanted to reward Holmes for his vote and to make sure that Holmes remained on board.

Holmes produced a short opinion of about 1500 words, covering less than five pages in the United States Reports.³² Yet within those limits, Holmes outlines and demonstrates a distinctive, coherent approach to the constitutional protection of property. That approach is best discussed in three stages. First, Holmes defines the "property" protected by the Constitution and suggests criteria for a successful theory of constitutional property protection. In doing so, Holmes establishes his position in relation to both of the main American traditions of constitutional property jurisprudence: the vested rights tradition and the substantive rights/police power tradition. Second, Holmes attempts to develop and apply a theory for deciding constitutional property cases that remains true to his definition of constitutionally protected property. Under that theory, judges must determine how drastically a challenged law has departed from basic principles, or as Holmes once referred to them, "structural habits," embedded in preexisting positive law. The body of Holmes's opinion is best read as an application of that theory to the issue of whether the Kohler Act is

28. See Brief for the Plaintiffs in Error, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 394-404 (1922) (No. 549).

29. Justice William Rufus Day resigned on November 13, 1922, the day before *Mahon* was argued, and Justice Pierce Butler, Justice Day's replacement, was not sworn in until January 2, 1923, 22 days after *Mahon* was decided. See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 986 (Kermit L. Hall et al. eds., 1992).

30. See *Mahon*, 260 U.S. at 416 (Brandeis, J., dissenting).

31. Most importantly for Taft, Holmes had dissented the previous Term from the first majority opinion Taft had written upon joining the Court as Chief Justice. See *Truax v. Corrigan*, 257 U.S. 312, 342 (1921) (Holmes, J., dissenting) (invalidating Arizona statute legalizing picketing by striking employees as deprivation of employer's property without due process). Holmes had also written the majority opinion in *Block v. Hirsh*, 256 U.S. 135, 153 (1921), upholding a wartime rent control scheme, and dissented in the famous due process cases of *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (Holmes, J., dissenting); *Adair v. United States*, 208 U.S. 161, 190 (1908) (Holmes, J., dissenting); and *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

32. Holmes's brevity in opinion writing, conventionally linked to his relative lack of concern about the facts in a particular case, and his lack of patience in performing the analyses that he thought were necessary in theory, has been regularly noted by commentators. See, e.g., RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 251-54 (1990); Yosai Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 247-48 (1964). The laconic character of the *Mahon* opinion, which has frustrated a generation of takings scholars, is typical of the Holmesian style.

constitutional as applied both to private homes and to publicly owned property. Third, Holmes suggests the limits of his own theory—limits at which he only hints in *Mahon*, but more fully develops in other opinions and writings. Legal theories and doctrines, Holmes contends, are irreducibly historical and collective: They are developed over time and by more than one judge. Holmes demonstrably did not view *Mahon* as the application of a settled, comprehensive calculus of constitutional property, but as one more step in developing a series of guiding precedents. In this Part of the Article, I discuss each of these three facets of Holmes's approach in turn.

A. *A Noncategorical Historical Framework for Constitutional Property Rights: Framing the Question Presented*

After a page of facts and procedural history, Justice Holmes turns to framing the question presented by *Mahon*. In two sentences, Holmes states, in a highly compressed form, the two basic elements of his approach to constitutional property rights: "As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far."³³ The first element of Holmes's approach is that the rights of property and contract that the Constitution protects are defined by historically contingent standing positive law.³⁴ This element is suggested by the first sentence, in which Holmes states that the statute raises a constitutional question because it has "destroy[ed] previously existing" rights. The issue of "deprivation" or "taking" of property, or "impairment" of contract, is thus framed as an issue of legal change, a framework Holmes reminds the reader of twice later in the opinion, when he argues that government could not exist if it had to "pay[] for every . . . change in the general law,"³⁵ but that in some cases, the "constitutional way" is to "pay[] for the change."³⁶ A corollary of this positivist approach is that if

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

34. By "standing positive law" or "existing positive law" I mean the law actually enforced in a particular jurisdiction at a particular time, including judge-made, administrative, statutory, and plebiscitary law. Of course, it is a matter of jurisprudential dispute whether it is meaningful to speak in such terms. If, for example, one thought that the application of coercive force by the state was not really governed by rules, or that no valid theory could support a distinction between state and private coercion, the term "standing positive law" would not be meaningful. As we will see, Holmes was aware of and participated in such jurisprudential debates. I will argue that he thought it meaningful to speak of standing positive law. See *infra* text accompanying notes 83–96. Until the late nineteenth century, one could have used the term "municipal law" rather than "standing positive law." See 1 WILLIAM BLACKSTONE, COMMENTARIES *44 (defining municipal law as "a rule of civil conduct prescribed by the supreme power of a state"); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *447 (following Blackstone); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 1–2 (New York, John S. Voorhies 1857) (following Blackstone and Kent). That use of "municipal law," however, has survived only in the field of international law. See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 577 (2d ed. 1995).

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

36. *Id.* at 416.

positive law remains the same, no constitutional property or contract issue will arise.³⁷ For example, the enactment of a statute that codifies an ancient common law rule will not raise a constitutional property issue. As Justice Holmes explained in *Jackman v. Rosenbaum Co.*:³⁸

[I]f, from what we may call time immemorial, it has been the understanding that the burden exists, the land owner does not have the right to that part of his land except as so qualified and the statute that embodies that understanding does not need to invoke the police power.³⁹

The second element in Holmes's approach is that there is no categorical difference between the legal changes that the Constitution forbids (or for which it requires compensation) and those changes that it allows without compensation. The Constitution allows some destruction of the kind of property rights it protects; it provides only partial protection, against those legal changes that go "too far." The Constitution's tolerance of small uncompensated takings can be, and has been, described as a separate government power—the "police power"—but that does not mean that exercises of the police power have some distinctive quality that justifies or explains the tolerance. Holmes explicitly acknowledges the justificatory use of the term, and criticizes it as "cover[ing] and . . . apologiz[ing] for the general power of the

37. Although I believe this statement correctly describes Holmes's view, it is also likely to be misleading. As I will discuss in the next Section, for Holmes the most important question of constitutional property law was whether a particular rule of positive law was supported by principles and practices reflected in the entire body of positive law. Ordinarily, this question would be raised when the particular rule under examination was a recently adopted alteration of previously existing law. Conceivably, however, over time the entire body of positive law might change so much that a particular rule of law, though itself unchanged, would no longer be supported by accepted principles and practices. If that were the case, the particular rule might be open to constitutional attack though it had never changed. Holmes made clear, however, that he believed such cases would be rare. Upholding an ordinance prohibiting burial of the dead within city and county limits, Holmes wrote:

Since, as before the making of constitutions, regulation of burial and prohibition of it in certain spots, especially in crowded cities, have been familiar to the Western World. . . . The plaintiff must wait until there is a change of practice or at least an established consensus of civilized opinion before it can expect this court to overthrow the rules that the lawmakers and the court of his own State uphold.

Laurel Hill Cemetery v. San Francisco, 216 U.S. 358, 366 (1910). For further discussion of Holmes's notion of "survivals," see *infra* text accompanying notes 192–95.

38. 260 U.S. 22 (1922) (upholding Pennsylvania statute that Court found to reflect longstanding Pennsylvania common law rule granting adjoining property owners reciprocal easements to allow either owner to build party wall).

39. *Id.* at 31. In *Otis Co. v. Ludlow Manufacturing Co.*, 201 U.S. 140 (1906), Justice Holmes made clear that he believed longstanding statutory law could also become an incident of ownership that needed no police power justification. Responding to a due process challenge to a mill act, he commented:

[T]he liability of streams to this kind of appropriation and use has become so familiar a conception in New England, where water power plays as large a part as mines in Utah, that it would not be very extravagant to say that it enters as an incident into the nature of property in streams as there understood.

Id. at 152.

legislature to make a part of the community uncomfortable by a change."⁴⁰
As Holmes sums up in a dissent written six years after *Mahon*:

The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. Property must not be taken without compensation, but with the help of a phrase, (the police power) some property may be taken or destroyed for public use without paying for it, if you do not take too much.⁴¹

40. *Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting). It is significant that this frank statement appears in a dissent. Justice Holmes's view that there was no qualitative distinction between exercises of the police power and takings was a source of friction between him and other Justices on numerous occasions, including the drafting of *Mahon* itself. Eleven years before *Mahon*, in the case of *Noble State Bank v. Haskell*, 219 U.S. 104 (1911), Holmes issued an opinion for a unanimous Court containing a typical statement suggesting that there was no clear line between "private use" and "public use." He soon issued a clarifying statement in the form of a rare opinion on denial of petition for rehearing, explaining that "[t]he analysis of the police power" in his *Noble State Bank* opinion, "whether correct or not, was intended to indicate an interpretation of what has taken place in the past not to give a new or wider scope to the power" *Noble State Bank*, 219 U.S. at 580 (denying petition for rehearing). One can only imagine that this extraordinary retreat—"whether correct or not"—was motivated at the very least by Holmes's perception that other members of the Court did not agree with him.

Holmes reported in a letter to Harold Laski that comments from other members of the Court led him to delete a reference to "the petty larceny of the police power" in another opinion handed down some two months before *Mahon*: "[M]y brethren, as usual and as I expected, corrected my taste when I spoke of relying upon the petty larceny of the police power, dele 'the petty larceny of.' It is done—our effort is to please." Letter from Oliver Wendell Holmes to Harold Laski (Oct. 22, 1922), in 1 HOLMES-LASKI LETTERS 338, 338 (Mark DeWolfe Howe ed., 1963). Howe suggests that Holmes is referring to *Knights v. Jackson*, 260 U.S. 12 (1922). See 1 HOLMES-LASKI LETTERS, *supra*, at 338 n.3.

In a draft of *Mahon* itself, Holmes expressed the same sentiment in almost exactly the same terms. The police power, said Holmes, is "'little more than a conciliatory phrase to reconcile the doctrine with the seemingly absolute protecting provisions of the Constitution.'" *DiMento*, *supra* note 23, at 406 (quoting draft of *Pennsylvania Coal v. Mahon*, possibly marked "Dec 1/22"). Holmes deleted this phrase before publication, apparently responding to objections from other Justices. Holmes reports the objections in a letter to Frederick Pollock:

At our conference yesterday two cases of mine were hung up for further consideration, Brandeis wanting to write against one—that I don't care about—and everybody seeming to have misgivings about another on the police power which I believe to be a compact statement of the real facts of the law and as such sure to rouse opposition for want of the customary soft phrases. But as I couldn't get at what the trouble was, or rather troubles were, for different men had different difficulties, I told them I would put my head under my wing and go to sleep until somebody wrote something.

Letter from Oliver Wendell Holmes to Frederick Pollock (Nov. 26, 1922), in 2 HOLMES-POLLOCK LETTERS 106, 106 (Mark DeWolfe Howe ed., 1941) (citations omitted). According to Howe, the first case Holmes refers to is *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922), and the second is *Mahon*. See 2 HOLMES-POLLOCK LETTERS, *supra*, at 106 nn.1–2.

41. *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 209–10 (1928) (Holmes, J., dissenting). The *Springer* dissent may have been the last occasion on which Holmes expressed his views on the police power. The first was over 50 years earlier, in an 1871 book review of Thomas M. Cooley's *Treatise on Constitutional Limitations*: "Another interesting topic on which we find an instructive chapter is the police power. We suppose this phrase was invented to cover certain acts of the legislature which are seen to be unconstitutional, but which are believed to be necessary . . ." HOLMES, *Cooley's Treatise on Constitutional Limitations*, in 1 COLLECTED WORKS, *supra* note 24, at 268, 269. Holmes expressed the same views on a number of occasions before his appointment to the Supreme Court. See, e.g., *Bent v. Emery*, 53 N.E. 910, 911 (Mass. 1899); *United States Reports, Supreme Court*, in 3 COLLECTED WORKS, *supra* note 24, at 35, 35.

Holmes's two basic framing choices are expressed in two sentences. But to understand fully the significance of the two choices, one must understand the alternatives Holmes was rejecting, the legal traditions against which he was reacting, and his reasons for those rejections and reactions. Thus, in the remainder of this Section, I first describe historical and ahistorical models of constitutional property rights both in their pure, abstract form and as they have actually appeared in dominant American constitutional traditions: the historical model in the vested rights tradition and the ahistorical model in the substantive rights/police power tradition. I then explain how Holmes's approach, which rejects the ahistoricism of the substantive rights/police power tradition and the categorical approach of the vested rights tradition, fits in with his broader views about law, morality, and human psychology.

1. *The Alternatives Holmes Rejected*

Two formal models of property rights have dominated American constitutional law. Under a historical model, property is defined in terms of the advantages—the rights, powers, and immunities—afforded owners under existing positive law. The relevant question in a constitutional challenge to a statute is whether—or how much—the statute alters those advantages or some privileged subset of them. Under an ahistorical model, a “property right” is a segment of an unchanging ideal boundary between a property owner and the surrounding community, rather than a segment of the boundary that the government actually enforced at an identified time in history. The relevant question in a constitutional challenge is whether the challenged statute sufficiently comports with the ideal boundary; the state of positive law immediately before the passage of the statute is, in theory, irrelevant to the constitutional issue.⁴²

42. Of course, neither model is complete as a theory of constitutional property. For one thing, without additional assumptions, neither does a good job of distinguishing between allowed and prohibited changes in positive law. For the attempts of courts and scholars before Holmes to deal with change within a historical model, see *infra* text accompanying notes 51–61; for typical solutions to the problem of change within an ahistorical model, see *infra* text accompanying notes 71–74. Furthermore, both models are compatible with a variety of views about the nature of law and of constitutional adjudication, methods of constitutional decisionmaking, and the value of legislative activism. Thus, although an ahistorical model is often linked to the natural law view that there is a moral order independent of human will, whence the ideal boundary derives, see *infra* text accompanying notes 98–99, it is possible to imagine an ideal boundary that is the product of human judgment and compromise. Second, both models are compatible with either close attention to specific precedent or with relative disregard of it. For a discussion of the use of precedent to inform an ahistorical model, see *infra* text accompanying notes 284–89. Third, both historical and ahistorical models can be used either by those who favor expansive legislative powers, or by those who favor tighter limits on the legislature. Justice Brandeis's dissent in *Mahon* is a classic example of the deferential use of an ahistorical model. See *Mahon*, 260 U.S. at 422 (Brandeis, J., dissenting) (distinguishing between statutes that “confer benefits upon property owners” and those that “protect the public from detriment and danger”). The majority opinion in *Lochner v. New York*, 198 U.S. 45 (1905), striking down a law limiting the working hours of bakers, may be the best known use of an ahistorical model to place significant limits on legislative power. See *id.* at 53 (noting that “property and liberty” protected by Fourteenth Amendment “are held on such reasonable conditions as may be imposed by the

When Justice Holmes joined the Supreme Court in 1902, he could look back over the previous century of Supreme Court decisions and find strong traditions of both historical and ahistorical approaches to protecting property and contract. The leading historical approach was the vested rights tradition, which dominated thinking on the limits of legislative power for the first three-quarters of the nineteenth century. The most prominent ahistorical approach was the substantive rights/police power tradition, which coexisted with the doctrine of vested rights during the middle of the nineteenth century and came to eclipse it by that century's end. Jurists working within each of these traditions advanced not only a conceptual framework for understanding constitutional property rights, but interpretations of specific constitutional texts.

The doctrine of vested rights, a general theory about the limits of legislative power, turned centrally on the rights afforded individuals under standing positive law.⁴³ Under the vested rights doctrine, a legislature exceeded the scope of its power when it enacted a law that took away rights that had "vested" in individuals under preexisting positive law. Such a law was described as "retroactive" because it was thought to be an attempt to reach into the past to alter or ignore an event that had already occurred—namely, the transmutation of some privilege that an individual had enjoyed under existing positive law into an immunity from subsequent legislative interference. The Court came to understand two constitutional provisions as protecting particular categories of vested rights, and thus as embodying a historical approach to the limitation of legislative power. In *Calder v. Bull*,⁴⁴ the Court rejected the argument that the Ex Post Facto Clause⁴⁵ prohibited all laws impairing vested rights, but it affirmed in dicta that the Clause prohibited abrogation of a criminal's vested right to a punishment no greater than the law provided at the time the crime was committed.⁴⁶ More importantly, in *Ogden v. Saunders*,⁴⁷

governing power of the State in the exercise of [its police] powers").

43. The classic progressive account of the vested rights doctrine can be found in Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914). Among more recent accounts, I have found those of James Kainen to be particularly helpful. See James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87 (1993) [hereinafter Kainen, *Historical Framework*]; James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State*, 31 BUFF. L. REV. 381 (1982) [hereinafter Kainen, *Nineteenth Century*].

44. 3 U.S. (3 Dall.) 386 (1798) (holding that Connecticut law setting aside probate court decree and granting new trial did not violate Ex Post Facto Clause of Federal Constitution).

45. U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . ex post facto Law.").

46. See *Calder*, 3 U.S. (3 Dall.) at 390–91 (Chase, J.); *id.* at 396 (Paterson, J.); *id.* at 399–400 (Iredell, J.).

47. 25 U.S. (12 Wheat.) 213 (1827). *Ogden* involved a challenge to an 1801 New York statute under which insolvent debtors could obtain discharges of their debts. The statute applied only to debts contracted after its passage. A creditor whose claim under an 1806 debt contract was destroyed by the discharge statute argued that it impaired the obligation of his contract with the debtor, and thus violated the Contract Clause, U.S. CONST. art. I, § 10. The *Ogden* Court upheld the statute. Because the debt was incurred after passage of the statute, the creditor was on notice that the debtor's obligation was from the outset qualified by the insolvency statute.

a bare majority of the Court adopted a vested rights model for the Contract Clause,⁴⁸ explicitly rejecting the position, advocated by Chief Justice Marshall in dissent, that the Clause protected a substantive right to contract independent of state law.⁴⁹

The Court explicitly acknowledged that the Ex Post Facto and Contract Clauses implemented only selected parts of the vested rights doctrine's general limitation on legislative power.⁵⁰ The Court's refusal to enforce the whole of the vested rights doctrine as federal constitutional law, however, was partially offset by its broad interpretation of the Contract Clause. Under the Court's landmark holding in *Fletcher v. Peck*,⁵¹ the "contracts" protected by the Contract Clause included not only contracts between private parties, but also contracts between a private party and the state.⁵² Moreover, they included not only executory contracts, but also executed grants.⁵³ Thus in *Mahon*, for example, the deed under which the Mahons claimed title to their house, and the deeds under which governments claimed title to streets and schools, were all "contracts" within the meaning of the Contract Clause; the Pennsylvania Coal Company quite naturally claimed, among other things, that the obligation of those contracts was impaired by the Kohler Act.

48. U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.").

49. See *Ogden*, 25 U.S. (12 Wheat.) at 354–57 (Marshall, C.J., dissenting).

50. The doctrine of vested rights was understood to protect not just property rights or contract rights in a narrow sense, but all rights "'to do certain actions or possess certain things,' which [a citizen] has already begun to exercise, or to the exercise of which no obstacle exists in the present laws of the land." *Merrill v. Sherburne*, 1 N.H. 199, 214 (1819) (paraphrasing *Calder*, 3 U.S. (3 Dall.) at 394 (Chase, J.)). Thus all legislation, civil and criminal, fell within its scope. The Supreme Court came to adopt the position that, at least when it was acting under federal question jurisdiction, it was confined to the enforcement of the Federal Constitution, which embodied only selected portions of the vested rights doctrine. See *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 539–40 (1837) (finding that law divesting vested rights must "impair the obligation" of contract to be unconstitutional); *Watson v. Mercer*, 33 U.S. (8 Pet.) 88, 110 (1834) (refusing to declare act void merely because it "d[is]vests antecedent vested rights of property"); *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 413 (1829) (holding that statute which "divest[ed] rights which were vested by law" would not violate Federal Constitution "provided its effect be not to impair the obligation of a contract"); Kainen, *Nineteenth Century*, *supra* note 43, at 425–34 (discussing Supreme Court enforcement of vested rights doctrine).

51. 10 U.S. (6 Cranch) 87 (1810) (invalidating Georgia legislature's attempt to annul titles to land that had been transferred from state's original corrupt grantees to bona fide purchasers).

52. See *id.* at 137–38.

53. See *id.* at 136–37. As Stephen Siegel has noted, acceptance of a broad construction of the Contract Clause in *Fletcher v. Peck* was undoubtedly tied to the absence of any other federal constitutional protection of property against legislative incursion by the states. See Stephen Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 29 n.134 (1986). The Court decided that the Fifth Amendment Takings Clause (and, in dicta that took root, the rest of the Bill of Rights) applied only to action by the federal government. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). The Contract Clause thus became the symbolic bulwark of the protection of private property against the states, and the most frequently invoked federal constitutional provision during the nineteenth century. See BENJAMIN F. WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION* at xiii (1938) ("During the nineteenth century no constitutional clause was so frequently the basis of decisions by the Supreme Court of the United States as that forbidding the states to pass laws impairing the obligation of contracts.").

Although the broad interpretation of "contract" survived, by the last quarter of the nineteenth century the vested rights model began to decline, due to its failure to find an uncontroversial yet effective definition of vesting. In the case of contracts for debt, the vesting event seemed obvious. The act of entering into the contract seemed to transform the expectations of the parties into something qualitatively different; formerly diffuse expectations crystallized. Gradually, however, jurists ceased to believe that uncontroversial criteria could classify laws as prospective or retrospective.⁵⁴ If one asked the only truly uncontroversial form of the question, "Does this law create a new obligation in respect to a transaction already past?," every statute turned out to be retrospective, thus rendering the retrospective/prospective distinction useless. As Bryant Smith, writing in the 1920s, put it, "[t]here is no such thing as a law that does not extinguish rights, powers, privileges, or immunities acquired under previously existing laws. That is what laws are for."⁵⁵ The uncontroversial form of the vested rights doctrine turned out, quite unhelpfully, to mandate complete legal stasis. Only by covertly or unconsciously making additional assumptions or judgments could one salvage a category of prospective laws.

The enactment of the Fourteenth Amendment coincided with the rise of a new approach. The Amendment, which created a Due Process Clause applicable to the states, raised the issue of whether the Federal Constitution would now protect not just those vested rights falling within the scope of the Ex Post Facto and Contract Clauses, but all vested rights. A number of state courts—most prominently the New York Court of Appeals in *Wynehamer v. People*⁵⁶—had interpreted the due process clauses in their state constitutions to provide the general protection for vested rights that was lacking in the pre-Reconstruction Federal Constitution. The Supreme Court, however, declined to interpret the Fourteenth Amendment Due Process Clause as embodying a historical vested rights model. Rather, in *Mugler v. Kansas*,⁵⁷ the Court interpreted the Due Process Clause as embodying an ahistorical approach to constitutional property rights. *Mugler*, like *Wynehamer*, involved a challenge to a state Prohibition statute that banned virtually all manufacture and sale of

54. James Kainen provides an illuminating account of this loss of faith. See Kainen, *Nineteenth Century*, *supra* note 43, at 461–80.

55. Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 233 (1927); see also Bryant Smith, *Retroactive Laws and Vested Rights II*, 6 TEX. L. REV. 409 (1928).

56. 13 N.Y. 378 (1856). In *Wynehamer*, the New York Court of Appeals struck down a New York Prohibition law as violative of a brewer's vested rights under preexisting law, protected under the Due Process Clause of the New York Constitution. Edward Corwin and others have enshrined *Wynehamer* as the first substantive due process case. See, e.g., EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT* 101–02 (1948) (describing *Wynehamer* as "compris[ing] a new starting point in the history of due process of law"). As I explain in the text, however, the "substance" in *Wynehamer*—the vested rights doctrine—was quite different than the "substance" that the Supreme Court found in the Fourteenth Amendment Due Process Clause. See Kainen, *Historical Framework*, *supra* note 43, at 125 (noting this difference).

57. 123 U.S. 623 (1887).

intoxicating liquors.⁵⁸ Mugler argued that the statute violated the Fourteenth Amendment Due Process Clause, both on a vested rights theory,⁵⁹ and on the theory that the statute violated liberty and property rights as defined by the Constitution, independent of standing positive law.⁶⁰ The Court rejected Mugler's challenge and upheld the statute, employing a purely ahistorical analysis:

The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that *all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community*.⁶¹

In other words, claimed the *Mugler* Court, the Fourteenth Amendment implicitly defines the property rights it protects as excluding any right to injure the community; that definition is quite independent of the rights recognized by the positive law of any particular jurisdiction at any particular time. When reviewing a statute under the Due Process Clause, the only issue is whether the statute can reasonably be described as preventing injury to the community. If so, then it is within the state's police power, which is the power to protect the safety, health, and morals of the community.⁶² Because Mugler's

58. The Court had consolidated two cases for argument. Kansas had twice convicted Mugler of brewing and selling beer in contravention of the Prohibition statute, and was pursuing the other defendants, Ziebold and Hagelin, under a provision empowering the state to close breweries and distilleries as public nuisances. For expository ease, I will let Mugler speak for all three defendants.

59. See *id.* at 634 (summarizing Mugler's argument) ("[T]he Kansas legislature has attempted to destroy property rights already vested, and created under laws enacted by the same authority.").

60. See *id.* at 630-31.

61. *Id.* at 665 (emphasis added).

62. Contemporary treatise writers supporting such an approach included Thomas Cooley, Ernst Freund, and Christopher Tiedeman. As Cooley observed:

The police of a State . . . embraces its system of internal regulation, by which it is sought . . . to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated . . . to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.

THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 572 (Boston, Little, Brown & Co. 1868); see also ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 511, at 546-47 (1904) ("[I]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful, or as Justice Bradley put it, because 'the property itself is the cause of the public detriment.'") (quoting *Davidson v. New Orleans*, 96 U.S. 97, 107 (1877)); CHRISTOPHER G. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES 4 (1900) ("[T]he police power of the government, as understood in the constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as civil-law maxim, *sic utere tuo ut alienum non laedas*."). The Latin expression means "use your own property in such a manner as not to injure that of another." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 807 (2d ed. 1995).

constitutional property rights were subject to exercises of the police power, his challenge to a statute within that power failed.⁶³ The ahistorical character of the approach adopted in *Mugler* is underlined by the Court's terse dismissal of *Mugler*'s vested rights argument:

It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged.⁶⁴

Under the *Mugler* Court's approach, a statute's alteration of rights under previously existing law is irrelevant: No change in law violates constitutionally protected property rights so long as it aims at protecting the public side of an ideal boundary between owner and community.

Once the basic notion of an ideal boundary was in place, it became necessary to explain why, if the ideal boundary was unchanging, many changes in positive law were permissible. The *Mugler* Court alluded to the most common attempt to resolve this paradox: "The supervision of the public health and the public morals is . . . 'to be dealt with as the special exigencies of the moment may require . . .'"⁶⁵ In other words, changes in factual circumstances may cause certain conduct to produce new injurious consequences, and cause other previously injurious conduct to become benign.⁶⁶ Other explanations of the paradox appealed to increases in knowledge and changing enforcement costs. Even if conditions do not change, over time we may gain new knowledge of the injurious effects of particular actions, and that new knowledge may justify the legislature's prohibition of

63. The *Mugler* Court disposed of *Mugler*'s Fourteenth Amendment "liberty" claim by using the same conceptual framework. See *Mugler*, 123 U.S. at 660 ("[W]hile power does not exist with the whole people to control rights that are purely and exclusively private, government may require 'each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another.'" (quoting *Munn v. Illinois*, 94 U.S. 113, 124 (1876))). The Court also rejected *Mugler*'s claim that the manufacture of liquor for the personal use of the maker cannot be injurious to others, and affirmed the preeminence of the legislature in making such factual determinations. See *id.* at 660–62.

64. *Id.* at 669.

65. *Id.* (quoting *Stone v. Mississippi*, 101 U.S. 814, 819 (1880)); see also *Munn*, 94 U.S. at 134 ("[T]he great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.").

66. As Brandeis noted in dissent in *Mahon*:

The restriction here in question is merely the prohibition of a noxious use. . . . Whenever the use prohibited ceases to be noxious—as it may because of further change in local or social conditions—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

Mahon, 260 U.S. at 417 (Brandeis, J., dissenting). Justice Sutherland's opinion in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379–97 (1926), the landmark case upholding local zoning, masterfully develops this argument. Sutherland contends that zoning is reasonable "under the complex conditions of our day" even though it would not have been in simpler times: "[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." *Id.* at 387

those actions.⁶⁷ And if the state's limited resources justify the legislature's passing a law that does not track the ideal boundary perfectly but is more practical to enforce, then changing enforcement costs may result in legal changes.⁶⁸

Mugler was decided in 1887; *Mahon* reached the Supreme Court in 1922. In the intervening thirty-five years, *Mugler*'s ahistorical approach to the Due Process Clause had become the dominant, established tradition. The "property" and "liberty" protected by the Due Process Clause were not reducible to rights under standing positive law, and due process inquiry was not triggered by an alteration of positive law rights. Rather, property and liberty were defined independently of standing law, in terms of an ideal boundary between owner and community that defined the limits of the police power. The Court echoed and cited *Mugler* in the most famous of substantive due process cases, *Lochner v. New York*:⁶⁹ "Both property and liberty," stated the *Lochner* Court, "are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of [its police] powers."⁷⁰

Over the same period, the ahistorical model reshaped the Court's previously settled Contract Clause inquiry. The Court's first step was to adopt a rule of strict construction, reading narrowly contracts such as corporate charters to avoid shackling the police power.⁷¹ Ultimately, in the 1880 case of *Stone v. Mississippi*,⁷² it established what became known as the reserved powers doctrine,⁷³ under which no legitimate exercise of the police power could ever violate the Contract Clause, on the theory that the state never had the authority to contract away that power.⁷⁴ Once there was a police power

67. The success of the "Brandeis brief" in cases such as *Muller v. Oregon*, 208 U.S. 412 (1908), is good evidence of the Court's acceptance of this form of argument. In *Muller*, the Court ostensibly upheld maximum-hour legislation for women in large part because of "abundant testimony of the medical fraternity" about the injurious effects of long hours on women's bodies, and through women on the children they bore, and consequently on "the strength and vigor of the race." *Id.* at 421. Of course, in *Muller*, the "new knowledge" was used to reinforce stereotypes rather than challenge them, which might lead one to wonder whether the Court was really convinced by the "new discoveries" of medical experts. For further discussion of *Muller* and the possible reasons underlying the Court's decision in that case, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-4, at 573, 573 n.20 (2d ed. 1988).

68. See, e.g., *Euclid*, 272 U.S. at 388 (concluding that legislature may constitutionally forbid even some innocuous uses in course of "includ[ing] . . . a reasonable margin to insure effective enforcement").

69. 198 U.S. 45 (1905).

70. *Id.* at 53 (citing *Mugler v. Kansas*, 123 U.S. 623 (1887)).

71. See, e.g., *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878) (upholding ordinance prohibiting transportation of animal offal through village of Hyde Park, Illinois, even though prohibition would cripple corporation chartered by state to make fertilizer from offal).

72. 101 U.S. 814 (1880) (upholding Mississippi law banning state-chartered lottery).

73. See *id.* at 817-19. For the Supreme Court's use of the term "reserved-powers doctrine," see, e.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23-24 (1977).

74. See *Stone*, 101 U.S. at 819 ("No legislature can bargain away the public health or the public morals."). In *Manigault v. Springs*, 199 U.S. 473 (1905), the Court adopted the same approach to contracts between two private parties, by upholding a state law that authorized one landowner to flood land owned by another, in spite of a preexisting contract in which he had promised to refrain from doing so. Justice Brown concluded that "parties by entering into contracts may not estop the legislature from enacting laws intended for the public good." *Id.* at 480.

escape hatch, the central issue in most Contract Clause cases became whether the legislation challenged was sufficiently aimed at protecting the health, safety, and welfare of the public, the same issue that was determinative in most Due Process Clause cases.⁷⁵ This fusing of the two inquiries, as we shall see, was commonplace by the time *Mahon* was decided, and is reflected in Justice Holmes's parallel references to the Due Process and Contract Clauses.⁷⁶

2. *Holmes's Reasons for Embracing a Noncategorical Historical Approach*

Long before he became a Justice of the United States Supreme Court, Holmes gave notice of his rejection of both the substantive rights/police power and vested rights traditions. In *Danforth v. Groton Water Co.*,⁷⁷ for example, Holmes, writing as Chief Justice of the Massachusetts Supreme Judicial Court, criticized the United States Supreme Court's use of an ahistorical substantive rights model to uphold a law repealing a statute of limitations for debts on which the limitations period had already run.

Such a repeal requires the property of one person to be given to another when there was no previous enforceable legal obligation to give it. Whether the freedom of the defendant from liability is due to a technicality or to his having had no dealings with the other party, he is equally free, and it would seem logical to say that if the Constitution protects him in one case it protects him in all.⁷⁸

The property recognized by the Constitution, Holmes insisted, is defined by historically existing rules directing the exercise of state coercion, not by an ideal boundary of "justice." When a debt action is barred under an existing statute of limitations, a statute that revives the action imposes a new legal burden on the debtor, and thus takes his property. Whether the original debt was "just" or not, and whether it is "just" for a debtor to invoke the statute of limitations, are not matters addressed by the constitutional provisions protecting property.

75. The Court still interpreted the Contract Clause to protect particular contractual obligations once made, rather than a right to create contractual obligations. The significance of that limitation, however, was greatly diminished by the discovery of substantive "liberty of contract" under the Due Process Clause. See, e.g., *Adair v. United States*, 208 U.S. 161 (1908) (invalidating federal criminal law prohibiting discharge of employees of interstate carrier for belonging to labor organization as violating liberty to contract); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating law restricting hours of labor as violating liberty to contract); *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897) (invalidating insurance regulation as violating "the liberty to contract" under Due Process Clause).

76. See *infra* text accompanying notes 245–48.

77. 59 N.E. 1033 (Mass. 1901).

78. *Id.* at 1033.

But if Holmes seemed to embrace the historical orientation of the vested rights tradition, he denied that there was any categorical difference between “vested rights,” immune from legislative alteration, and “unvested rights,” subject to legislative whim. For example, in *Rideout v. Knox*,⁷⁹ an 1889 Massachusetts Supreme Judicial Court decision, Holmes considered the constitutionality of a statute granting a cause of action against landowners who erected or maintained fences, not to benefit themselves, but to cause grief to their neighbors—so-called “spite fences.”⁸⁰ When Holmes addressed the application of the statute to already existing fences, he did not ask whether a landowner’s rights regarding such fences had “vested,” thus rendering the application “retroactive” in the vested rights sense. Rather, Holmes adopted a noncategorical approach, asking whether such an application, under the circumstances, placed too great a burden on the landowner. Holmes concluded that the burden was not as great as it seemed, and that the statute was therefore constitutional even as to its application to already existing fences.⁸¹

The identification of constitutionally protected property with rights under standing positive law, and the rejection of a categorical distinction between vested and unvested rights, led straight to Holmes’s formulation of the question presented in *Mahon*. The challenged statute raised a constitutional issue because it “destroy[ed] previously existing rights of property and contract”; the issue was “whether the police power [could] be stretched so far.”⁸² Why should we see the taking or deprivation of constitutionally protected property as a matter of degrees of change in historically contingent assignments of legal rights? Holmes’s answer to this question starts with a conception of law as jurisdictionally regularized coercion, and is further reinforced by moral skepticism, a rejection of deductive ordering of law, and a particular understanding of human psychology.

a. *Law as Jurisdictionally Regularized Coercion*

Holmes, influenced by positivists like Comte and Mill,⁸³ viewed law as a set of rules observed to govern the application of coercion. Under this theory

79. 19 N.E. 390 (Mass. 1889).

80. The law declared a private nuisance every fence exceeding six feet in height and “maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property.” *Id.* at 391 n.*.

81. As Holmes interpreted the statute, an owner would not make himself liable for the cost of taking down the fence merely by letting it stand. “If the owner of the fence gave leave to the party complaining to take it down, it would show conclusively that the fence was no longer maintained by him for malevolent motives, and therefore would defeat an action for subsequent annoyance.” *Id.* at 393.

82. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

83. On the connection between positivist influences on Holmes and his interpretation of the Due Process and Takings Clauses, see Patrick J. Kelley, *Holmes’s Early Constitutional Law Theory and Its Application in Takings Cases on the Massachusetts Supreme Judicial Court*, 18 S. ILL. U. L.J. 357, 362–63, 383–84 (1994). I discuss Professor Kelley’s interpretation of Holmes’s constitutional property jurisprudence below. See *infra* note 145.

of law, legal concepts such as property and contract could be reduced to groups of rules about the application of force that benefitted people identified as owners or as contracting parties. If that was all property and contract were as a legal and constitutional matter, then a change in rules that eliminated some of those previously enjoyed benefits "took" property or "impaired the obligation" of a contract. As Holmes put it in *Mahon*, such a change in rules would "destroy previously existing rights of property and contract."⁸⁴

More precisely, I think, Holmes implicitly accepted a definition of law as coercion that was regularized—in other words, that was applied in a way that could be described by rules—over a jurisdiction. First, law was for Holmes fundamentally a matter of coercion, of violence and threats of violence by human beings against other human beings.⁸⁵ Holmes argued that a universal classification of law "should be based on *duties* and not on *rights*,"⁸⁶ because "[d]uties precede rights logically and chronologically."⁸⁷ One can only have a right if a duty, a threat of sanction, is imposed on others. The effect of all law is thus to limit freedom that people otherwise would have had: "[T]he direct operation of the law is to limit freedom of action or choice on the part of a greater or less number of persons in certain specified ways."⁸⁸ Holmes specifically used this framework to analyze legal concepts such as possession, property, and contract. All of them, according to Holmes, are reducible to a set of legal duties. To have "property" in the legal sense is not to have the ability to use it, but to have others placed under duties with regard to that use:

[T]he law does not enable me to use or abuse this book which lies before me. That is a physical power which I have without aid of the law. What the law does is simply to prevent other men to a greater or less extent from interfering with my use or abuse.⁸⁹

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

85. See Letter from Oliver Wendell Holmes to Harold J. Laski (Sept. 7, 1916), in 1 HOLMES-LASKI LETTERS, *supra* note 40, at 14 ("[A]ll law means I will kill you if necessary to make you conform to my requirements."). As Holmes once wrote:

As long as law means force—(and when it means anything else I don't care who makes it and will do as I damn choose—) force means an army and this army will belong to the territorial club. Therefore the territorial club will have the last word—subject to the knowledge that if it does too much there will be a war in which it may go under in its present form.

Letter from Oliver Wendell Holmes to Morris R. Cohen (Nov. 23, 1919), in LEONORA COHEN ROSENFELD, PORTRAIT OF A PHILOSOPHER: MORRIS R. COHEN IN LIFE AND LETTERS 324 (1962).

86. 1 HOLMES, *Codes and the Arrangement of the Law*, in COLLECTED WORKS, *supra* note 24, at 212, 214.

87. *Id.*

88. 3 HOLMES, *Possession*, in COLLECTED WORKS, *supra* note 24, at 37, 47.

89. *Id.* According to Holmes, the law not only defines what property is; it also defines the circumstances under which a property right (that is, the power to remove or enforce certain duties on others) will be recognized in a particular person:

Every right is a consequence attached by the law to a group of facts which the law defines. . . . When we say that a man owns a thing, we affirm directly that he has the benefit of the consequences attached to a certain group of facts, and, by implication, that these facts are true of him.

Id. at 44–45.

Second, law was not just coercion, but regularized coercion. Holmes explicitly acknowledged the regularity implicit in his concept of duty when he formulated his prediction theory of law:

[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right. . . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.⁹⁰

Since predictions depend on observed regularities, to define duty—the most basic legal concept—in terms of prediction is to make regularity fundamental to law.

Finally, the regularity implicit in Holmes's understanding of property and contract is regularity over a jurisdiction. Justice Holmes recognized that one might make "prophecies of what the courts will do" on a judge-by-judge basis, but in practice his predictive model did not focus on the behavior of individual judges.⁹¹ Rather, it typically assumed that the predictions would be made for an entire jurisdiction. Thus, wrote Holmes, his famous "bad man" wants to know "what the Massachusetts or English courts are likely to do in fact."⁹² The predictions that a lawyer needs to learn can be found in "[t]he reports of a given jurisdiction in the course of a generation," which "take up pretty much the whole body of the law, and restate it from the present point of view."⁹³ Holmes's analysis of constitutional property and contract rights also assumes that the rules which comprise "property" and "contract" apply across a jurisdiction. The "previously existing rights of property and contract"⁹⁴ that, when destroyed, raise a constitutional issue, were not the quirks of individual judges, even if those quirks were highly predictable. Rather, they were advantages that we would expect every judge in a jurisdiction to recognize.

Holmes never explained how to reconcile his predictive theory, which seems as though it might atomize law into the behavior of individual public

90. *Id.* at 391, 393.

91. Holmes's recognition of the "inarticulate and unconscious judgment[s]" that underlie judicial decisionmaking, *see id.* at 397, led legal realists such as Jerome Frank to claim him as a grandfather. *See, e.g.,* JEROME FRANK, *LAW AND THE MODERN MIND* 124–25, 253–60 (1930). Holmes's reaction to *Law and the Modern Mind*, however, is telling:

Frank's book . . . has ideas but . . . seems to show some confusion about the emotional reaction of judges as if it were all to be set against the rules. Whereas the greater part of such reactions are in aid of them. . . . Frank's prejudice against the rules seems to forget how great a body of conduct is determined by them and how many cases they keep out of Court.

Letter from Oliver W. Holmes to Felix Frankfurter (Oct. 17, 1930), in *HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934*, at 258–59 (Robert M. Mennel & Christine L. Compston eds., 1996).

92. 3 *HOLMES, The Path of the Law*, in *COLLECTED WORKS*, *supra* note 24, at 391, 393.

93. *Id.* at 392.

94. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

officials, with his practical treatment of law as uniform over a jurisdiction.⁹⁵ One might speculate, however, that he would ground a reconciliation in empirical observation.⁹⁶ In fact, he would assert, judges apply precedent and statutes in a reasonably uniform manner, so that it is possible in a very large number of circumstances to speak of jurisdictional regularities. Those are the conditions—themselves historically contingent—under which it is possible to speak meaningfully of property and contract rights under standing positive law, and under which it is possible to determine whether a particular legislative enactment changes standing positive law. So long as they obtain, it is possible to organize a constitutional property and contract jurisprudence around the notion of degrees of change from existing law.

95. Holmes's only expression of his reasoning is quite brief and incomplete. In an early essay, published nine years before *The Common Law*, he wrote:

Any motive for [judges'] action, be it constitution, statute, custom, or precedent, which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration as one of the sources of law, in a treatise on jurisprudence. Singular motives, like the blandishments of the emperor's wife, are not a ground of prediction, and are therefore not considered.

[Oliver W. Holmes], *The Law Magazine and Review*, 6 AM. L. REV. 723, 724 (1872) (reviewing essay by Frederick Pollock on John Austin's definition of law). This explanation suffers from several omissions. First, the traditional sources of law and the urgings of an influential person about a single case hardly exhaust the universe of potential motives for judicial conduct; they represent only the two poles. A lawyer attempting to predict the behavior of judges committed to classical substantive due process might do well to read "Mr. Herbert Spencer's Social Statics," see *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), or the works of influential treatise writers such as Thomas Cooley, Christopher Tiedeman, and John Dillon. Such texts could have at least as much predictive value as arguably obsolete precedent. Second, we might be able to develop very reliable predictions for the conduct of an individual judge, framed as a description of the judge's motives. These motives would not be "singular" in the sense that they appeared in only a single case, but they would apply only to a single judge. Are they properly part of jurisprudence, or not? Third, when Holmes makes an assertion about what is "worthy of consideration . . . in a treatise on jurisprudence," is this an assertion about the practicalities of publication (that the legal community would not accept a treatise that listed individual judges and made predictions about them), or is it an assertion about the nature of law? See *The Law Magazine and Review*, *supra*, at 724. By avoiding these questions, Holmes manages to reconcile his radical pronouncements of theory with a much more conservative practice.

96. The treatment of law as regularized across a jurisdiction could also be grounded in a pragmatic goal or theoretical commitment. One might decide that jurisdictional predictions were most helpful to lawyers, who must often counsel clients without knowing which particular judge will hear the client's case. Thomas Grey has most convincingly argued that Holmes's prediction theory was part of a practical jurisprudence, concerned with aiding lawyers in their professional practices. See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 826–29 (1989). Or one could decide, as a matter of legal theory, that only coercion that was regularized across a jurisdiction could and should count as law. This view, which assumes that law has at least a minimum moral content, is decidedly un-Holmesian. For such a view, see LON L. FULLER, *THE MORALITY OF LAW* 106 (rev. ed. 1969) (defining law as "the enterprise of subjecting human conduct to the governance of rules"). For Fuller's criticisms of Holmes and the concept of law as coercion, see *id.* at 106–18. Fuller also discusses Holmes and positivism in his earlier lectures published as LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 92–95, 117–18 (1940). For another criticism of Holmes as failing to recognize that the very idea of law depends on regularity, see Rogat, *supra* note 32, at 225 ("[Holmes] never seems to have perceived, and certainly never acknowledged, the extent to which general commitments to fairness, generality and neutrality are built into the idea of legality and constitute part of its meaning.").

b. *Moral Skepticism*

Justice Holmes's adoption of a historical approach to constitutional property jurisprudence was also influenced by his moral skepticism. Ahistorical approaches to constitutional property rely on the notion of an ideal boundary between owner and others against which positive law can be measured.⁹⁷ The ideal boundary might be a matter of human choice, but it is more usually identified with a moral order that is independent of human will and posited law. On this view, the Constitution should be read as declaratory of moral rights and duties that exist independently of any text.⁹⁸ Terms such as "property" and "contract" are ultimately linked, not to a historically contingent set of rules for applying state coercion, but to justice itself. Thus, during the heyday of vested rights, departures from a historical approach were often defended by appeals to justice. Consider, for example, Thomas M. Cooley's defense of a "healing statute," or curative act, which would render enforceable a deed that was invalid when made:

There is some apparent force . . . in the objection that such a statute deprives a party of vested rights. But the objection is more specious than sound. . . . The right which the healing act takes away in such case is *the right in the party to avoid his contract*,—a naked legal right, which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect.⁹⁹

Under this view, the Constitution was ultimately designed to protect moral rights, rather than positive legal rights; if a new law clearly enforced justice, it could not be unconstitutional.

97. See *supra* text accompanying notes 65–68.

98. Akhil Amar nicely depicts the declaratory theory:

To a nineteenth-century believer in natural rights, the Bill [of Rights] was not simply an enactment of We the People as the Sovereign Legislature bringing new legal rights into existence, but a declaratory judgment by We the People as the Sovereign High Court that certain natural or fundamental rights already existed.

Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1206 (1992). For another description of constitutional provisions as declaratory, see Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 3–4 (1954–55). The declaratory theory need not lead to the position that all natural rights should be enforced by judicial review, however. Arguably, the official position of the Supreme Court in the second quarter of the nineteenth century was that the Ex Post Facto and Contract Clauses were declaratory of a natural limit on legislative power—the legislature cannot deprive individuals of vested rights—but that those Clauses also defined the portions of that natural limit that were enforceable by the federal judiciary. See *supra* text accompanying notes 43–50.

99. COOLEY, *supra* note 62, at 378. Alternatively, one might argue that the "justice" to which Cooley is appealing is embedded in the existing legal regime itself. The principle that people should be held to their promises, or at least the promises that they make for consideration, is more central to contract law than the rule that contracts of a certain kind must be signed and acknowledged. An appeal to principles immanent in positive law will turn out to be central to Holmesian constitutional property jurisprudence. See *infra* note 134 and text accompanying notes 102–11.

For Holmes, the problem with this view was that it relied on something that did not exist. Holmes kept no secret of the fact that he was a thoroughgoing moral skeptic. He consistently expressed his lack of belief in the existence of a prepolitical moral order. "The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."¹⁰⁰ A constitutional directive to judges to test legislative enactments by engaging in moral reasoning was for Holmes no better than a directive to follow the commands of ghosts—if you don't believe in ghosts, it's hard to comply with the directive.¹⁰¹

c. *The Rejection of Large-Scale Deductive Ordering*

A third reason Justice Holmes opted for a historical model of constitutional property was his criticism of the view that the individual legal rules comprising positive law could be deduced from a single postulate or a small group of postulates. The position that law is or should be so organized is sometimes called "formalism" or "legal formalism," although no consensus has formed on just how these terms should be used.¹⁰² Holmes's views on the organization of bodies of law are complex.¹⁰³ For now, it is important only to recognize that Holmes rejected an extreme form of organization by means of deductive logic: He did not believe that specific rules governing a wide variety of legal disputes could be derived from a single, general principle. Holmes's 1880 review of Christopher Columbus Langdell's contracts casebook, for example, criticized Langdell for his "effort to reduce the concrete details of an existing system to the merely logical consequence of simple postulates," an effort "always in danger of . . . leading to a misapprehension of the nature of the problem and the data."¹⁰⁴ Similarly, *The Path of the Law* criticized "the notion that a given system . . . can be worked out like mathematics from some general axioms of conduct."¹⁰⁵ In his Supreme Court opinions, Holmes

100. 3 HOLMES, *Natural Law*, in COLLECTED WORKS, *supra* note 24, at 445–46.

101. The "ghost" example, brought to my attention by Henk Brands, is from JOHN HART ELY, *DEMOCRACY AND DISTRUST* 29 (1980).

102. For the use of "formalism" as synonymous with "deductive ordering," see, e.g., Grey, *supra* note 96, at 822 ("Conceptualism is the project of structuring law into a system of classification made up of relatively abstract principles and categories; formalism is the project of making law certain by making legal reasoning deductive."). The many uses of "formalism" are catalogued in Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 509–10 (1988).

103. See *infra* text accompanying notes 123–34.

104. 3 HOLMES, *Review of Langdell's Law of Contracts and Anson's English Law of Contracts*, in COLLECTED WORKS, *supra* note 24, at 102, 103. The Langdell review also provided the first public airing of the aphorism that, after its appearance one year later, in Holmes's book *The Common Law*, became the most famous antiformalist slogan: "The life of the law has not been logic: it has been experience." The sentence is identical in both appearances. Compare *id.*, with 3 HOLMES, *The Common Law*, in COLLECTED WORKS, *supra* note 24, at 109, 115.

105. 3 HOLMES, *The Path of the Law*, in COLLECTED WORKS, *supra* note 24, at 391, 396.

applied these criticisms to constitutional interpretation, warning that “there should not be extracted from the very general language of the Fourteenth Amendment, a system of delusive exactness and merely logical form.”¹⁰⁶ In *Mahon* itself, there is at least one sentence that can be read as an echo of these criticisms: “[T]his is a question of degree—and therefore cannot be disposed of by general propositions.”¹⁰⁷

The rejection of large-scale deductive ordering of law is important because Holmes seemed to conclude that an ahistorical approach to constitutional property depended on such ordering. Recall that *Mugler* bases its ahistorical constitutional property jurisprudence on the notion that all property owners are subject to a general duty not to injure others: “[A]ll property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.”¹⁰⁸ If such a jurisprudence is to succeed, that general imperative—“do not injure the community”—must have some bite in specific cases, even though some discretion will be left to the legislature. In his analysis of tort liability, however, Holmes concludes that this very imperative—“*sic utere tuo ut alienum non laedas*”—“teaches nothing but a benevolent yearning”; it is an “empty general proposition” from which only “hollow” deductions can be made.¹⁰⁹ Particular rules of tort liability were actually grounded on multiple specific policy judgments. Holmes considered, among others, the rule that a man incurred no liability by “build[ing] a house upon his land in such a position as to spoil the view from a far more valuable house hard by.”¹¹⁰ This privilege, Holmes argued, could not be deduced from a general principle that one was free to use one’s land in any way that did not injure the community. Instead, it rested upon more particular judgments, namely,

106. *Martin v. District of Columbia*, 205 U.S. 135, 139 (1907).

107. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

108. *Mugler v. Kansas*, 123 U.S. 623, 665 (1887).

109. 3 HOLMES, *Privilege, Malice, and Intent*, in COLLECTED WORKS, *supra* note 24, at 371, 373; see GARNER, *supra* note 62, at 807 (translating “*sic utere tuo ut alienum non laedas*” as “use your own property in such a manner as not to injure that of another”). The rejection of “*sic utere*” and similar principles as “hollow” is undoubtedly connected to a rejection of objective morality. As Frederick Schauer comments with regard to criticism of Blackstone:

Blackstone’s view that certain abstract terms definitionally incorporate a wide range of specific results is tied intimately to his perception of a hard and suprahuman reality behind these general terms. If the word “property,” for example, actually describes some underlying and noncontingent reality, then it follows easily that certain specific embodiments are necessarily part of that reality, just as pelicans are part of the underlying reality that is the universe of birds.

Schauer, *supra* note 102, at 513.

110. 3 HOLMES, *Privilege, Malice, and Intent*, in COLLECTED WORKS, *supra* note 24, at 371, 373. For a similar argument concerning the law of contract conditions, see 3 HOLMES, *The Common Law*, in COLLECTED WORKS, *supra* note 30, at 109, 287; William P. La Piana, *Victorian from Beacon Hill: Oliver Wendell Holmes’s Early Legal Scholarship*, 90 COLUM. L. REV. 809, 828–29 (1990) (discussing Holmes’s argument).

upon the fact that a line must be drawn between the conflicting interests of adjoining owners, which necessarily will restrict the freedom of each; upon the unavoidable philistinism which prefers use to beauty when considering the most profitable way of administering the land in the jurisdiction taken as one whole; [and] upon the fact that the defendant does not go outside his own boundary.¹¹¹

If these particular considerations could not be reduced to a single general principle, and Holmes concluded that they could not be, then a constitutional property jurisprudence that depended on such a reduction was impossible. Holmes decided that the ahistorical model of classical substantive due process was so dependent, and therefore vacuous.

d. *The Psychological Basis of Property and the Limits of Law as a Human Institution*

A last major factor behind Holmes's adoption of a historical approach to constitutional property was his view that the institution of property was grounded in a human psychology that lawmakers had to accommodate. Holmes did not believe in a teleological human nature. For him, there was no cosmological order that gave a reason for living or goals in life. Rather, he concluded, "beliefs and wishes have a transcendental basis" only "in the sense that their foundation is arbitrary. You can not help entertaining and feeling them, and there is an end of it."¹¹² Thus, in Holmes's ethics and epistemology, "*Can't Helps*"¹¹³ substitute for ultimate truths.

On the other hand, Holmes did have a particular view of human psychology, which had direct ties to his conceptions of both knowledge and property:

[P]roperty, friendship, and truth have a common root in time. One can not be wrenched from the rocky crevices into which one has grown for many years without feeling that one is attacked in one's life. What we most love and revere generally is determined by early associations.¹¹⁴

111. 3 HOLMES, *Privilege, Malice, and Intent*, in COLLECTED WORKS, *supra* note 24, at 371, 373. Holmes also mentioned, in a separate paragraph, the consideration that the owner's liability should not turn on his subjective motive in building the house, because ownership rights would become too uncertain. See *id.* This consideration plays an important role in Holmes's opinion in *Rideout v. Knox*, 19 N.E. 390 (Mass. 1889), which I discuss below, see *infra* text accompanying notes 142–47.

112. 3 HOLMES, *Natural Law*, in COLLECTED WORKS, *supra* note 24, at 445, 446–47.

113. *Id.* at 446.

114. *Id.* Holmes applied this associational psychology to friendship in a touching eulogy to Walbridge Abner Field, the Chief Justice of the Supreme Judicial Court of Massachusetts: "Long association makes friendship, as it makes property and belief, a part of our being. When it is wrenched from us, roots are torn and broken that bleed like veins." 3 HOLMES, *Answer to Resolutions of the Bar*, in COLLECTED WORKS, *supra* note 24, at 494–95.

Thus the institution of property is due, at least in part, to a fundamental element of human psychology—the desire to continue enjoying something that one has enjoyed for a long time and to which one has become firmly attached. This characteristic is also a reason to take a historical approach to constitutional property jurisprudence. Property law, Holmes suggested, protects expectations formed by personal history.

This reason for adopting a historical approach to constitutional property, however, is in tension with Holmes's analytical theory of law, which equates property with rights under existing positive law, regardless of the content of that law. The psychological perspective is a prelegal one, which, according to Holmes, has implications for the content of the positive law itself. Thus, Holmes most often invoked human psychology to justify a particular doctrine of property law, that of acquiring ownership by prescription:

A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.¹¹⁵

True to his moral skepticism, however, Holmes was not suggesting that the law should protect “the deepest instincts of man” because those instincts were morally worthy of nurture. Rather, as he explained elsewhere, recognition of prescription as a method of acquiring ownership is merely instrumental to the survival of the legal system itself:

115. 3 HOLMES, *The Path of the Law*, in COLLECTED WORKS, *supra* note 24, at 391, 405. Holmes made the same point in an opinion he wrote as Chief Justice of the Massachusetts Supreme Judicial Court five years later:

Prescription and limitation are based on one of the deepest principles of human nature, the working of association with what one actually enjoys for a long time, whatever one's defects of title may be, and of dissociation from that of which one is deprived, whatever may be one's rights. The mind like any other organism gradually shapes itself to what surrounds it, and resents disturbance in the form which its life has assumed.

Dunbar v. Boston & Providence R.R., 63 N.E. 916, 916 (Mass. 1902); see Letter from Oliver Wendell Holmes to William James (Apr. 1, 1907), in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 416, 417–18 (Max Lerner ed., 1943) (“The true explanation of title by prescription seems to me to be that man, like a tree in a cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life.”). This view also influenced Holmes's perspective in a U.S. Supreme Court case deciding that a member of a Philippine tribe had a right under United States law to register his private ownership of a tract of land that had been seized by the Philippine and United States governments. Holmes noted that the organic statute adopted by Congress to govern the Philippines provided that “no law shall be enacted in said islands which shall deprive any person of . . . property without due process of law” (quoting Organic Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691) and found it hard to believe that Congress

meant by “property” only that which had become such by ceremonies of which presumably a large part of the inhabitants never had heard, and that it proposed to treat as public land what they, by native custom and by long association, one of the profoundest factors in human thought, regarded as their own.

Cariño v. Insular Gov't, 212 U.S. 449, 459 (1909).

Law, being a practical thing, must found itself on actual forces. It is quite enough, therefore, for the law, that man, by an instinct which he shares with the domestic dog, and of which the seal gives a most striking example, will not allow himself to be dispossessed, either by force or fraud, of what he holds, without trying to get it back again. Philosophy may find a hundred reasons to justify the instinct, but it is totally immaterial if it should condemn it and bid us surrender without a murmur. As long as the instinct remains, it will be more comfortable for the law to satisfy it in an orderly manner, than to leave people to themselves. If it should do otherwise, it would become a matter for pedagogues, wholly devoid of reality.¹¹⁶

Here, Holmes formulated yet another reason why the enforcement of a moral order cannot be the essence of law. Not only is law analytically reducible to regularized coercion, shaped by human will, and not only is there no objective moral order, but even if there were an objective moral order, it could not be embodied in enforceable law because it would be impossible to maintain obedience. Legislators and judges, Holmes argued, cannot stand in opposition to a widespread human desire; the only thing they can and should do is attempt to bring some order to the satisfaction of the desire.

Holmes's view of the proper reaction of judges to widespread human desires may lead, not only to his view that standing positive law defines the property protected by the Constitution, but also to his view that the constitutional protection afforded property is protection against drastic changes in principles embedded in that positive law.¹¹⁷ Because the issue of protecting constitutional property rights arises when positive law is *changed*, it is important to examine Holmes's instructions to judges faced, not with a constant human desire, but with a dramatic shift in expressed popular will. In 1871, Holmes considered the question whether the North Carolina Constitution could be amended without following the amendment procedures set out in the Constitution itself. True to his view that judges cannot stand in opposition to the desires of dominant social forces, Holmes concluded that "if the will of the majority is unmistakable . . . the courts must yield."¹¹⁸ According to Holmes,

116. 3 HOLMES, *Possession*, in COLLECTED WORKS, *supra* note 24, at 37, 59; *see also* 3 HOLMES, *Montesquieu*, in COLLECTED WORKS, *supra* note 24, at 425, 429 ("What proximate test of excellence can be found except correspondence to the actual equilibrium of force in the community—that is, conformity to the wishes of the dominant power?"). Holmes considered violence the basis, not just of law, but of all social organization. As he observed in *The Common Law*, "the *ultima ratio*, not only *regum*, but of private persons, is force . . . at the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference." 3 HOLMES, *The Common Law*, in COLLECTED WORKS, *supra* note 24, at 109, 137. Holmes was alluding to Louis XIV's practice of stamping "*Ultima Ratio Regum*"—"The Last Argument of Kings"—onto the barrels of cannons forged during his reign. *See* KEVIN GUINAGH, *DICTIONARY OF FOREIGN PHRASES AND ABBREVIATIONS* 199 (3d ed. 1983).

117. For a description of this protection, *see infra* text accompanying notes 142–47.

118. 1 HOLMES, *Cooley's A Treatise on the Constitutional Limitations*, in COLLECTED WORKS, *supra* note 24, at 268. Here, I am heavily indebted to H.L. Pohlman's analysis of this discussion and Holmes's constitutionalism more generally. *See* H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES: FREE SPEECH*

however, "[t]he courts may properly abide by [the old constitution]," which is "an admitted expression of the sovereign will," "until they see that the new manifestation is not only unmistakable, but irresistible."¹¹⁹ The key premise—that the old constitution was the "admitted expression of the sovereign will"—enables Holmes to promote continuity under the guise of deference to the will of the community.

Holmes's constitutional property jurisprudence may be grounded on similar logic. Continuity, a value resting on a universal feature of human psychology, is the principal value underlying the constitutional protection of property. To promote that value, while remaining deferential to the will of dominant social forces, courts should presume that certain basic principles embedded in standing positive law reflect the settled will of those dominant forces. Although gradual legal change is inevitable, sudden changes that drastically undermine basic principles, unaccompanied by compensation to disadvantaged parties, should be struck down as inconsistent with the settled will of the community, so long as those changes are not perceived as "irresistible."

B. *Measuring Degrees of Legal Change from "Structural Habits" in Positive Law*

Under Holmes's formulation of the question presented in *Mahon*, the issue in constitutional property cases is one of degrees of change from preexisting positive law; a government unconstitutionally "takes" or "deprives" someone of property when it alters legal rights and obligations too drastically. This noncategorical historical approach excludes a large number of theories for deciding constitutional property cases, but it does not itself constitute a complete theory of decision because it leaves open crucial questions: How do we measure degrees of change in preexisting law? When we say that a law "goes too far,"¹²⁰ what sort of distance do we have in mind?

The *Mahon* opinion also has something to say about those questions. In the three-and-a-half pages of legal discussion following the question presented, Holmes offers a tentative theory for measuring degrees of legal change and demonstrates the application of that theory. Holmes thought that the positive law of a jurisdiction could be described, not just as an accidental aggregation of specific, unrelated rules, but as a body of law that exhibited an internal structure, organized around a variety of principles or paradigm cases. Those "structural habits"¹²¹ provided a basis for assessing how much change in positive law a particular piece of legislation caused. A court could locate

AND THE LIVING CONSTITUTION 225–39 (1991). Patrick Kelley also addresses Holmes's discussion of the North Carolina Constitution. See Kelley, *supra* note 83, at 368–69.

119. *Id.*

120. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

121. *Interstate Consol. St. Ry. v. Massachusetts*, 207 U.S. 79, 87 (1907).

relevant principles and ask whether a particular legislative alteration of preexisting law ran directly counter to one or more of them or was only mildly in tension with them. In *Mahon*, Justice Holmes applies this theory to the Kohler Act. His opinion examines the relationship of the Kohler Act restrictions on mining to selected doctrines and principles in existing law, including the doctrine of public nuisance, the principle of placing a high value on the physical safety of individuals, and the tradition of more closely protecting legal rights that have been recognized as separate, transferable "estates." Holmes concludes that the Kohler Act constitutes too drastic a departure from these "structural habits" to be tolerated without compensation.¹²²

In the first two of the following Subsections, I present the account of positive law organization on which Holmes's method of measuring legal change depends, and sketch the basic features of that method. In the third Subsection, I describe Holmes's development and application of that method in *Mahon*; in the fourth, I consider the role of diminution in value.

1. *Analogy and the Organization of Bodies of Law*

For Holmes, positive law was an organized body, rather than a set of unrelated rules. As I have already suggested, however, Holmes rejected the model of deductive ordering, under which all rules are deduced from a small number of basic postulates and axioms.¹²³ Yet the alternative was not chaos; it was another kind of organization. Holmes's alternative model differed from that of deductive ordering in two ways. First, the number of principles that organized law was not necessarily small: There might be scores, if not hundreds, of such principles. Second, these principles did not serve as axioms from which specific legal rules could be deduced. Rather, they were more like paradigm cases, the reach of which was determined gradually through analogical reasoning. Reasoning by analogy, unlike deductive reasoning, was always part discovery and part artifice. The point of equipoise between two opposed paradigm cases could never be precisely calculated, and judges needed to exercise judgment in drawing the lines that determined the sphere of influence for each paradigm case.

A passage in what is probably Holmes's most famous opinion, his dissent in *Lochner*,¹²⁴ suggests the distinction between deductive and analogical ordering. The irresistible deduction does not exist; as Holmes put it, "[g]eneral propositions do not decide concrete cases."¹²⁵ But in rejecting the possibility of absolute logical compulsion, Holmes did not reject the possibility of logical

122. See *infra* text accompanying notes 148–95.

123. See *supra* text accompanying notes 102–11.

124. *Lochner v. New York*, 198 U.S. 45 (1905).

125. *Id.* at 76 (Holmes, J., dissenting).

influence. Thus, in the *Lochner* dissent, he immediately qualifies his aphorism: "General propositions do not decide concrete cases. . . . *But I think that the proposition just stated, if it is accepted, will carry us far toward the end.*"¹²⁶ The challenge, then, was to develop a model of reasoning under which one could describe propositions, not as "decid[ing] concrete cases" of their own logical force, but as "carry[ing] us far towards the end."¹²⁷ To meet this challenge, Holmes drew heavily from an older, common law model of reasoning by analogy.¹²⁸ This distinguished him from later skeptics, who questioned the power of legal reasoning of any kind.¹²⁹ Viewed from a later skeptical perspective in which deduction and analogy were indistinguishable, Holmes's legal thought was contradictory and inexplicable, and seemed to vacillate from prophetic utterances daring to suggest that general propositions did not decide concrete cases, to atavistic pronouncements about fundamental principles in the law.¹³⁰ If we accept Holmes's distinction, however, the lines

126. *Id.* (Holmes, J., dissenting) (emphasis added). The "proposition just stated" was Holmes's own assertion that "a constitution is not intended to embody a particular economic theory." *Id.* at 75 (Holmes, J., dissenting). Thus Holmes was not criticizing the *Lochner* majority's use of a general proposition, but explaining the limits of his own.

127. As Karl Llewellyn would later put it, the challenge was to develop a model that would explain why it was *not* the case "that if the outcome of an appeal is not foredoomed in logic it *therefore* is the product of uncontrolled will which is as good as wayward." KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 4 (1960). Benjamin Cardozo viewed himself as engaged in the same project:

A definition of law which in effect denies the possibility of law since it denies the possibility of rules of general operation, must contain within itself the seeds of fallacy and error. . . . Law and obedience to law are facts confirmed every day to us all in our experience of life.

BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 126-27 (1921) (footnote omitted).

128. On reasoning in common law theory, see, e.g., GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 30-38 (1986). Postema describes a blend of "particularist" and "principled" conceptions of reason in common law theory that bears a striking resemblance to Holmes's view of the reasoning process generating legal structure. According to that blended conception, "[p]articularist' reason or intuition is inadequate and incomplete without guidance from general principles," but both kinds of reason are "practical reason exercised within an already constituted, though open-ended, framework." *Id.* at 35-36. The only "'natural law' involved is not external to the tradition, but implicit in it, not socially transcendent, but immanent." *Id.* at 36.

129. For examples of scholarship from the legal realist and critical legal studies schools that more broadly challenge legal reasoning, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 838-49 (1935); Jerome Frank, *Are Judges Human? Part Two: As Through a Glass Darkly*, 80 U. PA. L. REV. 233, 241-42 (1931); David Kairys, *Legal Reasoning*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 11, 11-17 (David Kairys ed., 1982); Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW*, *supra*, at 40, 47 ("There is never a 'correct legal solution' that is other than the correct ethical and political solution to that legal problem."); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

130. The failure to distinguish between deductive and analogical reasoning may account, at least in part, for the judgment of some scholars that, for all his protestations to the contrary, Holmes believed in deductive ordering of law. Grant Gilmore came to the starkest conclusion in his general assessment of Holmes: "Holmes's accomplishment was to make Langdellianism intellectually respectable." GRANT GILMORE, *THE AGES OF AMERICAN LAW* 56 (1977). For other scholarly suggestions that Holmes was to some degree a formalist, see GRANT GILMORE, *THE DEATH OF CONTRACT* 14-53 (1974); Robert W. Gordon, *Holmes' Common Law as Social and Legal Science*, 10 HOFSTRA L. REV. 719, 726-30 (1982); Saul Touster, *Holmes a Hundred Years Ago: The Common Law and Legal Theory*, 10 HOFSTRA L. REV. 673, 691 (1982); G. Edward White, *The Integrity of Holmes' Jurisprudence*, 10 HOFSTRA L. REV. 633, 638-39 (1982).

of his theory of legal organization begin to come into focus.

Holmes relied frequently on two models of legal organization, one bipolar, the other multipolar. The bipolar model stems from an image of law that Holmes first described in 1873, at the age of thirty-two, and returned to often over the remaining sixty-two years of his life:

The growth of law is very apt to take place in this way: Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other. The distinction between the groups, however, is philosophical, and it is better to have a line drawn somewhere in the penumbra between darkness and light, than to remain in uncertainty.¹³¹

The components of this image suggest a model of legal organization. Law is organized around certain principles that we understand in the context of their application in paradigm cases and in the opposition of those paradigm cases to other paradigms. As we get further away from a particular paradigm case, application of the principle becomes less certain. Holmes's description of cases clustered around poles suggests the metaphor of gravity: As we gain distance from one paradigm case, its gravitational pull decreases and we start feeling the attraction of another paradigm case. If there are very few other decided cases located around the paradigms, our task of deciding a case that falls somewhere in the middle will be very difficult. As other cases are decided, plotting a location for each new case becomes easier. But there will always be an element of judgment involved at the edges.¹³²

Although Holmes often used a bipolar model to explain legal reasoning and organization, he also used a more complex, multipolar model, under which each principle or paradigm case stood in relation to and was limited by many others, and under which the resolution of a particular legal conflict potentially drew on many principles. For example, Holmes offered a multipolar model

131. 1 HOLMES, *The Theory of Torts*, in COLLECTED WORKS, *supra* note 24, at 326, 327 This passage reappears almost word for word in *The Common Law*. See 3 HOLMES, *The Common Law*, in COLLECTED WORKS, *supra* note 24, at 109, 179–80. For a list of citations to passages in which Holmes pursues this theme, see Jerome Frank, *A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism*, 9 RUTGERS L. REV. 425, 437 n.66 (1954).

132. Holmes often used this bipolar model, not only to explain legal reasoning and organization in general, but also to explain constitutional property doctrine. See *infra* text accompanying notes 217–27

when he sought to explain the restricted scope of ostensibly absolute constitutional rights: Such rights, Holmes argued, are "limited by the neighborhood of principles of policy which are other than those on which the particular right is founded."¹³³ Here, the image is of principles spread out on a two-dimensional plane.

Holmes calls these principles "structural habits," a term the connotations of which are worth teasing out. The principles are "structural" because they act to organize legal doctrine. Like habits, the principles are not innate or natural, but are contingently acquired or developed over time; they are features of a particular legal culture or tradition.¹³⁴ On the other hand, like habits, they may become so settled and involuntary in application that they seem natural and are difficult to discard. Thus the distinction between physical trespasses and nontrespassory annoyances is an important organizing feature of tort and property law. Countless cases, statutes, and social practices have established and reinforced it, so someone raised in Anglo-American legal culture will automatically view a physical trespass as, all other things being equal, a more serious matter. And it has become so much a part of the way we see things that we cannot quite imagine its elimination.

With this dimension added, Holmes's view of law can be seen as an attempted synthesis or reconciliation of the two principal contending schools of nineteenth-century jurisprudence: positivism and historicism.¹³⁵ Holmes begins with the positivist notion that law consists of rules posited by human will, rather than divined by natural reason.¹³⁶ But he adds the historicist insight that human will and human understanding operate only within a tradition. When people make law, they do so within a tradition and do not discard all of the legal categories and distinctions that shape that tradition, though they may seek to alter some of them. When people understand law, they do so in terms of paradigm cases opposed to other paradigm cases, and an array of such paradigms defines part of a legal tradition. Because laws are so made and understood, they can cohere as a body even though they are contingent acts of will.

133. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908). As discussed above, Holmes also drew on a multipolar model when seeking to explain the lack of tort liability for building a house that destroys a neighbor's view; the privilege is not derived from a single, general principle, but is related to a number of more particular judgments of policy. See *supra* text accompanying notes 110–11.

134. Thus, Holmes distinguished between objective and positive morality: "I utterly disbelieve all postulates of human rights in general. Those established in a given society stand on a different ground." Letter from Oliver Wendell Holmes to Harold Laski (Oct. 23, 1926), in 2 *HOLMES-LASKI LETTERS*, *supra* note 40, at 115. Law, Holmes contended, embodied the judgments of positive morality: "The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race." 3 *HOLMES, The Path of the Law*, in *COLLECTED WORKS*, *supra* note 24, at 391, 392.

135. For an interpretation of Holmes as attempting to blend positivism and historicism, see Grey, *supra* note 96, at 805–13.

136. See *supra* text accompanying notes 83–96.

2. *Measuring Legal Change from Structural Habits*

If positive law can be described as a body built around a number of principles or structural habits, then it may be possible to assess degrees of legal change from those principles in a way that would be impossible were positive law a collection of unrelated rules. To determine how drastic an alteration a particular piece of legislation works on previously existing law, one could assess its relationship to the principles underlying the relevant portion of that law. In a number of constitutional property cases before *Mahon* Holmes explicitly reasons by analogy, drawing principles from existing law and using them to defend the challenged legislation. Perhaps the best example of these is *Interstate Consolidated Street Railway v. Massachusetts*.¹³⁷ In *Interstate Consolidated Street Railway*, Holmes finds it centrally important that the challenged law, which required street railways to carry pupils to and from school at half fare, can be described as promoting education, for it can then be compared to the practice of financing schools through general taxation. The latter practice, Holmes notes, "is an appropriation of property to a use in which the taxpayer may have no private interest, and, it may be, against his will."¹³⁸ Yet although "[i]t has been condemned by some theorists on that ground . . . no one denies its constitutionality. People are accustomed to it

137. 207 U.S. 79 (1907). Two other examples are worth mentioning. The first is *Hudson County Water Co.*, 209 U.S. 349, which upheld a New Jersey law limiting piping of water from New Jersey lakes and streams to out of state destinations. Holmes found it crucial that the purpose of the law at issue was to "maintain . . . rivers that are wholly within" the state. *Id.* at 356. He looked for decisions concerning analogous purposes, and found two sets of cases that support the state's power. One set of cases "recognize[s] that the State as quasi-sovereign and representative of the interests of the public has standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned." *Id.* at 355 (citing *Kansas v. Colorado*, 185 U.S. 125, 141, 142 (1902); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907); *Kansas v. Colorado*, 206 U.S. 46, 99 (1907)). The other set affirms that "the State may make laws for the preservation of game" on the "principle[s] of public interest and the police power, and not merely as the inheritor of a royal prerogative." *Hudson County Water Co.*, 209 U.S. at 356 (citing *Geer v. Connecticut*, 161 U.S. 519, 534 (1896)). Holmes concluded that the statute at issue in *Hudson County Water Co.* fell close enough to these two existing paradigms to pass the constitutional test. The principle in *Hudson County Water Co.* was not one of Holmes's great successes. For the story of its decline, see Sheldon M. Novick, *Introduction*, 1 COLLECTED WORKS, *supra* note 24, at 8, 56–57.

The second example of such reasoning by analogy is *Noble State Bank v. Haskell*, 219 U.S. 104 (1911) (upholding state statute requiring banks to contribute to depositors' guaranty fund). Holmes concluded that "analogy and principle" support the power of the legislature to enact such a statute, cited several other statutes previously approved by the Court that regulated banks for the purpose of protecting depositors, and noted that the practice of requiring other banks to contribute to depositors' guaranty funds was itself common and longstanding. *See id.* at 111–12. Finally, Holmes noted and responded to the classic "obsta principiis" or "slippery slope" argument: "It is asked whether the State could require all corporations or all grocers to help guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise." *Id.* at 112. It is futile to ask where the line will be drawn, Holmes argued, because there is no general theory, transcending legal traditions, which would tell us where to draw the line. Grocers might be treated differently from banks; the Court would decide the grocers' case when it arose, by locating principles in the legal tradition, and drawing analogies from them.

138. *Interstate Consol. St. Ry.*, 207 U.S. at 87.

and accept it without doubt."¹³⁹ Here Holmes returns to his basic framework. The "property" protected by the Constitution is not a theorist's ideal, but the actual, established practice of a particular legal tradition; the tradition in question includes the practice of financing the education of children by taxing everyone, even those who have no children to be educated. The half-fare requirement must be evaluated in terms of how different it is from established practice. Holmes concludes that it "is not different in fundamental principle"¹⁴⁰—it does not amount to so drastic a change as to require compensation. At the end of the opinion, Holmes reemphasizes that inquiry always starts from within a particular legal tradition and takes as given the distinctions drawn in that tradition:

It does not follow that it would be equally in accord with the conceptions at the base of our constitutional law to confer equal favors upon doctors, or workingmen, or people who could afford to buy 1000-mile tickets. Structural habits count for as much as logic in drawing the line.¹⁴¹

In assessing departures from such structural habits, Holmes considered the purposes and reasons that underlay both the challenged law and existing positive law rules. Recall Justice Holmes's opinion in *Rideout v. Knox*, the 1889 "spite fence" legislation case.¹⁴² Once Holmes established that the spite fence statute changed the common law, and thus "limit[ed] . . . previously existing rights of property,"¹⁴³ the issue became whether the statute was a "small limitation[]" that "may be imposed for the sake of preventing a manifest evil," or a "larger one[]," which "could not be [imposed] except by the

139. *Id.*

140. *Id.*

141. *Id.* Holmes's reference to "people who could afford to buy 1000-mile tickets" is an allusion to *Lake Shore & M.S. Ry. v. Smith*, 173 U.S. 684 (1899) (invalidating state law requiring railroads to sell 1000-mile tickets at rate lower than that otherwise determined reasonable). For another expression of the same point, see Holmes's dissent in *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358, 366 (1910) (upholding ordinance prohibiting cemeteries within city and county limits) ("[T]he extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic.").

142. See *supra* text accompanying notes 79–81.

143. *Rideout v. Knox*, 19 N.E. 390, 391 (Mass. 1889); see *id.* (stating that at common law, "[t]he limit up to which a man may impair his neighbor's enjoyment of his estate by the mode of using his own is fixed by external standards only."). In *The Common Law*, published eight years earlier, Holmes had already fully developed his view that the law *should* be governed by external standards, and had shown his eagerness to demonstrate that the common law had in fact progressed from internal to external standards. See 3 HOLMES, *The Common Law*, in COLLECTED WORKS, *supra* note 24, at 109, 134 (asserting that law, "by the very necessity of its nature, is continually transmuting . . . moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated."); see also Sheldon M. Novick, *Introduction*, 1 COLLECTED WORKS, *supra* note 24, at 8, 11 (describing Holmes's arguments about external standards in *The Common Law*). Thus, Holmes's conclusion that the common law used an external standard, made against the background of evidence in *Rideout* that he recognizes is conflicting, see *Rideout*, 19 N.E. at 392, may not be an entirely disinterested one.

exercise of the right of eminent domain."¹⁴⁴ For Holmes, the first step in analyzing that issue was to consider the reason underlying the common law rule of no liability for spite fences; Holmes concluded that "the right to use one's property for the sole purpose of injuring others" was "not a right for the sake of which property is recognized by the law, but is only a more or less necessary incident of rights which are established for very different ends."¹⁴⁵

This "quasi accidental character of the . . . right to put up a fence for malevolent purposes"¹⁴⁶ remained central to Holmes's conclusion that the spite fence statute was constitutional. The statute did not drastically change preexisting law because it destroyed only an incidental feature, not a core principle. The *Rideout* opinion also discusses the impact of the statute on the owner; but that discussion is colored by Holmes's conception of law as an organized body, in which particular legal rules must be seen as related to underlying policies and principles. The expectations of an owner must be seen as being shaped, not by each legal rule as a separate, opaque command, but by a web of rules and reasons; if an owner understands that, in our legal culture, purely malicious behavior is not highly valued, then she, and we, will be less likely to see a spite fence statute as a significant curtailment of property rights.¹⁴⁷

144. *Rideout*, 19 N.E. at 392 (citation omitted).

145. *Id.* at 390–91. Holmes's view was likely that the common law excluded consideration of motive to impart greater certainty to ownership rights. *See id.* at 392 (expressing concern that statute broadly prohibiting construction with malicious intent would make property rights subject to jury findings on motive). Patrick Kelley recognizes that identification of the purposes underlying rules of existing law is central to Holmes's inquiry in *Rideout* and other takings opinions Holmes wrote on the Massachusetts Supreme Judicial Court. *See Kelley, supra* note 83, at 385–87. However, Kelley places consequentialism at the center of Justice Holmes's theory of constitutional property protection. He argues that under Holmes's theory a change in law will not amount to a taking "when an objective evaluation of the taking's consequences for all concerned would lead to the conclusion that it would not be reasonable (and the constitution makers therefore couldn't have intended) to preclude this kind of restraint on property owners." *Id.* at 384; *see id.* at 381 (describing Holmes as "balanc[ing] the public need against the harm to the landowner"). By contrast, under my reading, Holmes's constitutional property jurisprudence was focused on protecting settled expectations by assessing degrees of change from existing law. As Richard Posner and Thomas Grey have put it, Holmes was a "tame utilitarian" but a "militant skeptic." *See RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE* 241 (1990); Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19, 26–33 (1995). That skepticism, I believe, led Holmes away from consequentialism in his constitutional property jurisprudence.

146. *Rideout*, 19 N.E. at 393.

147. My view of the role of such "structural habits" in Holmes's constitutional property jurisprudence is clarified by contrast with Bruce Ackerman's interpretation of Holmes's position in *Mahon*. Holmes, Ackerman argues, approached constitutional property problems from what Ackerman calls an Ordinary Observer perspective. *See ACKERMAN, supra* note 1, at 164, 267 n.108; *id.* at 10–12 (arguing that Ordinary Observer is "ordinary" because he believes that ordinary layman's language is sufficient for legal analysis, and an "observer" because he believes that legal rules are sound to extent that they vindicate expectations generated by dominant social institutions). According to Ackerman, Holmes's crucial decision was to treat the right to subjacent support—a technical legal construct—as an ordinary layman's thing. Once that right had been invested with the status of a "thing," then it followed that, when the right was redistributed, as a constitutional matter a thing was taken. *See id.* at 163–64.

I agree with Ackerman that Holmes was an "Observer," but I question his conclusion that Holmes was an "Ordinary Observer." Holmes not only embraced, but shaped and promoted the "Scientific" view that the property protected by the Constitution is a "bundle of rights" defined by standing positive law. *See ACKERMAN, supra* note 1, at 10–11, 27–28 (defining Scientific view of legal language as technical construct

3. *The Assessment of Legal Change in Mahon*

That brings us to *Mahon* itself. The legal discussion in *Mahon* is divided into two main parts. The first half concerns the constitutionality of the Kohler Act as applied to the Mahons in their capacity as private owners of surface rights. The second half, which Justice Holmes added after some prompting by Chief Justice Taft,¹⁴⁸ is supposed to concern "the general validity of the Act."¹⁴⁹ It contains some analysis of the Act's application to publicly owned surface rights and some additional discussion of legal principles that are equally applicable to publicly and privately owned rights. The *Mahon* Court concludes that the Kohler Act is unconstitutional in all of its applications.¹⁵⁰

Holmes's discussion is terse in both halves of the opinion, but somewhat more detailed in the first. He starts by announcing that "[t]his is the case of a single private house"¹⁵¹—a bit of rhetorical exaggeration, since Holmes knows that the Court is considering the Kohler Act as it affects all private houses, not the Mahons' alone. His general point, however, is that although "[s]ome existing rights may be modified"¹⁵² in the case of private houses,

independent of ordinary language, and identifying "bundle of rights" model as Scientific approach to property); *supra* text accompanying notes 33–41. Holmes did not ask the Ordinary Observer's question whether a challenged statute fit into the static ordinary language category of "taking." Rather, he asked a question that recognized that legislation always changed the status quo: Does this redistribution of rights represent a change drastic enough to require compensation? To answer that latter question, Holmes looked to the principles and distinctions of a legal tradition, rather than ordinary layman's language.

Ackerman recognizes that a "Scientific Observer" approach is possible, and identifies, as Scientific Observers, the members of the *Lochner*-era substantive due process school. See ACKERMAN, *supra* note 1, at 18, 199 n.26. Holmes certainly would not agree with those *Lochner*-era Scientific Observers that "historical analysis [of the common law tradition] would yield a body of principles sufficiently abstract and self-consistent to constitute a Comprehensive View." *Id.* at 199 n.26; see also *id.* at 11–12. But Holmes's view that the principles immanent in positive law do not coalesce into a single "Comprehensive View" need not disqualify him from "Scientific Observer" status. Alternatively, Holmes's view challenges the distinction between "Ordinary" and "Scientific" approaches, because it recognizes that legal language is neither wholly independent of nor wholly congruous with ordinary language. On Holmes's view, both languages should broadly reflect practices and expectations generated by dominant social institutions; legal language may recognize subtle distinctions that ordinary language does not, and may reflect changes in social institutions (such as patterns of ownership) more quickly than ordinary language.

148. Joseph DiMento's excavations in the Holmes Papers have brought to light the fact that Holmes's original draft of *Mahon* contained only the first half, addressing the Kohler Act only as it applied to the Mahons. Holmes added the second half after Chief Justice Taft sent Holmes a letter expressing his view that the Kohler Act was unconstitutional with respect to streets and schools, as well as private houses, and that the *Mahon* opinion should say so. See Letter from William H. Taft to Oliver W. Holmes (Dec. 2, 1922), in DiMento, *supra* note 23, at 407.

149. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922). The split between the first and second half of the opinion were crucial to Justice Stevens's effort to distinguish *Mahon* in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). Justice Stevens characterized the second half of the *Mahon* opinion as "advisory," *id.* at 484, a point disputed by the four dissenters. See *id.* at 507–08 (Rehnquist, C.J., dissenting). I discuss *Keystone* below. See *infra* text accompanying notes 397–405.

150. See *Mahon*, 260 U.S. at 414.

151. *Id.* at 413.

152. *Id.* Here Holmes cites his opinion in *Rideout v. Knox*, the 1889 spite fence case. Holmes had noted there that although such fences were "not directly injurious to the public at large, there is a public interest to restrain this kind of aggressive annoyance of one neighbor by another, and to mark a definite limit beyond which it is not lawful to go." *Rideout v. Knox*, 19 N.E. 390, 392 (Mass. 1889).

"usually in ordinary private affairs the public interest does not warrant much of this kind of interference."¹⁵³ This last statement is confusing; taken out of context, it could easily be the expression of an ahistorical approach to constitutional property law.¹⁵⁴ If "ordinary private affairs" and "public interest" are defined independently of any particular positive law tradition, then Holmes's statement sounds like the affirmation of an ideal boundary—an independent, stable line between private and public matters. Immediately after this statement, however, Holmes turns to a discussion of the Kohler Act's relationship to three relevant doctrines or principles found in the Anglo-American legal tradition: the doctrine of public nuisance; the value of protecting physical safety; and the treatment of interests that have the status of separate estates in land. Thus, the context suggests that Holmes is discussing "the public interest" and "ordinary private affairs" not as ideal ahistorical categories, but as defined within a particular legal tradition—not as matters of "logic," but as "structural habits."¹⁵⁵

Holmes's survey of the relevant portions of the Anglo-American legal tradition begins with the law of public nuisance. At common law, Holmes notes, an activity qualifies as a public nuisance only if it causes a type of injury that will, by definition, affect an entire community, rather than individual landowners.¹⁵⁶ For example, a brewery might be declared a public nuisance—as it was in *Mugler v. Kansas*¹⁵⁷—because it produced and made available to the community intoxicating liquors. The injury caused by the availability of intoxicating liquors affects the community as a whole, not particular landowners; it is "common or public" injury.¹⁵⁸ By contrast, subsidence under a particular house causes injury only to a particular landowner. Even if the subsidence occurs under more than one house—even if "similar damage is inflicted on others in different places"¹⁵⁹—it still does not amount to a public nuisance, because the only rights at issue are the rights of particular landowners in the use and enjoyment of their land. The common law consequence is that the sovereign is not justified in intervening on behalf of the public. Thus the Kohler Act represents a significant departure from the existing law of public nuisance.

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

154. For my description of ahistorical approaches, see *supra* Subsection I.A.1.

155. *Interstate Consol. St. Ry. v. Massachusetts*, 207 U.S. 79, 87 (1907).

156. Holmes cites an 1867 Massachusetts Supreme Judicial Court opinion, *Wesson v. Washburn Iron Co.*, 95 Mass. (13 Allen) 95 (1867), for this definition of public nuisance. For the acceptance of such a definition by the *Mahon*-era Pennsylvania Supreme Court, see *Phillips v. Donaldson*, 112 A. 236, 238 (Pa. 1920); for its acceptance by the American Law Institute, see RESTATEMENT (SECOND) OF TORTS § 821B(1) & cmt. g (1979).

157. 123 U.S. 623, 662 (1887); see *supra* text accompanying notes 57–68.

158. *Mahon*, 260 U.S. at 413 (citing *Wesson*, 95 Mass. (13 Allen) at 103). The brewery might also be actionable as a private nuisance if it unreasonably interfered with the use and enjoyment of a particular piece of land—if, for example, the fumes from the brewing operation caused the occupants of a neighboring house to become sick.

159. *Id.*

Immediately after Holmes concludes that the damage caused by subsidence is not common or public, he adds the following sentence: "The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal."¹⁶⁰ This comment is best read as a supplement to the public nuisance discussion. Assume that, contrary to Holmes's conclusion, we can identify some injury that subsidence causes to the public as a whole. For example, we could argue that the public has an interest in protecting "stable land surface," a kind of natural resource. Indeed, the interest in preserving the state's natural resources is the same interest that Holmes recognizes as "fundamental" in *Hudson County Water Co.*, the case upholding a limit on the export of water from New Jersey rivers.¹⁶¹ Why is this not a worthy purpose? Holmes's response is that with respect to such a purpose, the Kohler Act is fatally underinclusive. Subsidence causes a loss of "stable land surface," whether or not the owner of the surface estate also owns the mineral rights and the right to support; but the Kohler Act's prohibition on mining that causes subsidence only applies when ownership is split. The Act allows so much loss of stable land surface that, absent some particular reason for the Act's limited scope, we cannot easily understand it as meant to preserve stable land surface at all.

Holmes next considers the relationship of the Kohler Act to the goal of protecting the physical safety of the people living on top of the mines. Holmes implicitly acknowledges that protecting individuals from physical harm is a tradition in American law that justifies regulation even when the cost to the regulated party is high.¹⁶² He concludes, however, that the requirement that the Pennsylvania Coal Company provide notice before mining amply furthers the recognized interest in protecting the Mahons' lives. Here, the company gave such notice; "[i]ndeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house."¹⁶³ Thus the Mahons could vacate their house if they believed the mining would compromise their physical safety.¹⁶⁴

160. *Id.* at 413-14.

161. See *supra* text accompanying notes 133, 137.

162. Three years earlier, in *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919), Holmes had acknowledged this tradition in an opinion upholding an ordinance banning the storage of petroleum within 300 feet of any dwelling, even though compliance with the ordinance by the oil company in question required removal of existing tanks that were "necessary for the business" and the company knew "of no available place in the city where the tanks could be put and oil stored without violating the ordinance." *Id.* at 499. Justice Brandeis, dissenting in *Mahon*, pointed to *Pierce Oil Corp.* as a case demonstrating that "[r]estriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put." *Mahon*, 260 U.S. at 418 (Brandeis, J., dissenting). There was no finding in *Pierce Oil Corp.*, however, that the petroleum storage ban rendered useless either the tanks or the land on which they sat.

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

164. I discuss below Justice Holmes's lack of deference to legislatures in these two passages, and Justice Brandeis's advocacy of greater deference in dissent. See *infra* text accompanying notes 290-95.

Holmes's third observation about the Kohler Act as applied to the Mahons is that the Act "purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate."¹⁶⁵ William Fischel concludes that Holmes's reference to this factor was "only a matter of rhetorical emphasis";¹⁶⁶ Bruce Ackerman finds in this reference the key to the entire decision.¹⁶⁷ The truth, I think, is somewhere in between. Holmes was obviously aware of the myriad ways in which the common law of property¹⁶⁸ and the vested rights tradition¹⁶⁹ gave greater protection and powers to holders of interests that were recognized as estates in land. Once an interest was recognized as an estate in land, holders of that interest would come to expect more stability in the legal treatment of that interest. Thus a legal change that destroyed an estate in land would be perceived as more extreme than a change that destroyed a less distinct interest. For Holmes, this was not by itself conclusive, but was a factor that weighed in favor of finding a constitutional violation.

Two other lines of precedent equally applicable to the Mahons emerge in the *Mahon* opinion's second half.¹⁷⁰ First, Holmes reemphasizes the principle of protecting "personal safety," and introduces the principle of "average reciprocity of advantage," in the course of distinguishing *Mahon* from

165. *Mahon*, 260 U.S. at 414. As William Fischel has noted, the Pennsylvania Supreme Court recognized the right to support as a separate estate only five years before *Mahon*, in *Penman v. Jones*, 100 A. 1043 (Pa. 1917). See FISCHEL, *supra* note 23, at 17–18, 32–33. Ironically, the chief advocate of such recognition was Phillip Mattes, the Scranton City Solicitor, author of the Kohler Act and an amicus brief in support of the Mahons. See Amicus Brief for the City of Scranton, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 411 (1922) (No. 549); FISCHEL, *supra* note 23. Mattes had invented the notion of treating support rights as a separate estate in land to enable Scranton to acquire those rights cheaply from a willing seller. The Pennsylvania Supreme Court swallowed the theory, but it came back to haunt the court a short five years later in *Mahon*. See *id.* at 33. As Fischel notes, the court's decision was roundly criticized by none other than Wesley Newcomb Hohfeld, in one of the very few examples of his own application of "Hohfeldian analysis" before his untimely death. See *id.*; Wesley Newcomb Hohfeld, *Faulty Analysis in Easement and License Cases*, in WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 160 (Walter Wheeler Cook ed., 1923).

166. FISCHEL, *supra* note 23, at 18.

167. See ACKERMAN, *supra* note 1, at 156–65; *supra* note 147 (discussing Ackerman's interpretation of Holmes).

168. For example, for several hundred years, estates in land have been alienable inter vivos and devisable, unlike some future interests in some jurisdictions. Compare 1 AMERICAN LAW OF PROPERTY § 2.1, at 77 (A. James Casner ed., 1952) (noting that freehold estates were alienable and devisable after 1540), with LEWIS M. SIMES & ALLAN F. SMITH, *THE LAW OF FUTURE INTERESTS* §§ 1857, 1859, at 167, 171–73 (2d ed. 1956) (noting that executory interests and contingent remainders were once inalienable in many states and are still inalienable in some states), and *id.* § 1903, at 204–05 (noting that some courts have held possibilities of reverter not to be devisable). Similarly, co-owners of possessory estates generally have the power to partition, whereas co-owners of future interests do not. See *id.* § 1764, at 88.

169. See *supra* Subsection I.A.2.

170. The opinion's drafting history explains this seeming misplacement. In addition to suggesting that Holmes append a discussion of the constitutionality of the Kohler Act as applied to publicly owned surfaces, see *supra* note 148, Chief Justice Taft advised Holmes to address *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914), on which he predicted (correctly) Justice Brandeis's dissent would rely. See Letter from William H. Taft to Oliver W. Holmes (Dec. 2, 1922), in DiMento, *supra* note 23, at 407–08. Rather than rewriting his initial draft, Holmes placed all additional discussion in a new second half of the opinion, whether or not it specifically related to the Kohler Act's application to public lands.

Plymouth Coal Co. v. Pennsylvania.¹⁷¹ In *Plymouth Coal*, the Court upheld a Pennsylvania statute requiring each mine owner to leave coal in place at the edge of its property, to protect miners from being drowned if a neighboring mine was abandoned and allowed to fill with water. Holmes concedes that the statute upheld in *Plymouth Coal* made it impossible to mine certain coal, an effect that "has very nearly the same effect for constitutional purposes as appropriating or destroying it."¹⁷² The *Plymouth Coal* statute was different for two reasons. First, it "was a requirement for the safety of employees invited into the mine."¹⁷³ Thus Holmes returns to the goal of protecting personal safety: The *Plymouth Coal* statute was adequately related to that goal, while the Kohler Act was not.¹⁷⁴ Second, because the regulation not only burdened, but also benefitted each mine owner, the *Plymouth Coal* statute "secured an average reciprocity of advantage that has been recognized as a justification of various laws."¹⁷⁵

Holmes's development of this idea—"average reciprocity of advantage"—provides a particularly clear example of his analogical method. In *Noble State Bank v. Haskell*,¹⁷⁶ Holmes starts with a practice that is recognized as constitutional under settled law, the "every day" case of taxation.¹⁷⁷ He then attempts to frame a principle explaining why taxation is constitutional and suggests that there are other cases that might be justified under that principle. Taxation, he indicates, is probably not the only practice justified on the principle that "the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."¹⁷⁸ Holmes then elaborates on this principle in *Jackman v. Rosenbaum Co.*,¹⁷⁹ noting that the police power "has been held warranted in some cases by what we may call the average reciprocity of advantage, although the advantages may not be equal in the particular case."¹⁸⁰ The scheme established by the statute in *Plymouth Coal*, Holmes suggests, is similar enough to these other recognized practices to pass constitutional muster. It is not too much of a stretch to call the scheme a "scheme of mutual protection,"¹⁸¹ though it, like many of the other practices,

171. 232 U.S. 531 (1914).

172. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

173. *Id.* at 415.

174. Holmes does not really explain the difference between *Mahon* and *Plymouth Coal* with regard to the goal of protecting personal safety. Is there some reason why requiring mine owners to give notice of intent to abandon a mine would not have provided the same degree of protection as notice would have in *Mahon*? Does it matter that the statute in *Plymouth Coal* was supposed to protect business invitees rather than owners?

175. *Mahon*, 260 U.S. at 415.

176. 219 U.S. 104 (1911).

177. *See id.* at 111.

178. *Id.*

179. 260 U.S. 22 (1922).

180. *Id.* at 30.

181. *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911).

may imperfectly distribute benefits and burdens. By contrast, the Kohler Act is much less like a scheme of mutual protection; it seems to effect a redistribution from one defined group to another.¹⁸² The holding in *Plymouth Coal* cannot save it.

The other discussion in the second half of the *Mahon* opinion not specifically directed toward public lands is that of the wartime rent control cases.¹⁸³ The laws at issue in those cases, Holmes contends, are distinguishable from the Kohler Act because they were "intended to meet a temporary emergency and provid[ed] for compensation determined to be reasonable by an impartial board."¹⁸⁴ Holmes's discussion of the "temporary emergency" justification in his opinion in one of those cases, *Block v. Hirsh*,¹⁸⁵ provides another good example of his effort to find principles in preexisting law. He notes that the rent controls will undoubtedly deprive apartment owners of the ability to profit fully from "the sudden influx of people to Washington caused by the needs of Government and the war and thus of a right usually incident to fortunately situated property."¹⁸⁶ However, the policy of restricting profits from a national misfortune "has been embodied in taxation and is accepted."¹⁸⁷ In other words, the principle of restricting "war profits" is well established in existing law; whether or not it is logical, it is a "structural habit," and that is all Holmes needs to know. The wartime rent control cases are close enough to the existing tradition not to constitute a radical change and thus pass constitutional muster.¹⁸⁸ The Kohler Act, on the other hand, has nothing to do with restricting profits from war or other dire emergencies so it cannot gain protection from that tradition.

Holmes's review of the Kohler Act as it applies to public lands—the announced topic of the second half of the opinion—is less satisfying. Holmes himself was not content with this portion of the opinion, and a letter that he wrote to Frederick Pollock expressing this dissatisfaction may contain the clearest statement of what he intended to convey:

Brandeis's dissent speaks as if what I call average reciprocity of advantage were made the general ground by me. Not so. I use that

182. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (concluding that Kohler Act "giv[es] to private persons and communities] greater rights than they bought"). Carol Rose emphasizes this point in her reading of *Mahon*. See Rose, *supra* note 15, at 581 (noting that *Mahon* "turned . . . on the fact that the statute transferred rights from one finite class of property owners to another").

183. See *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Block v. Hirsh*, 256 U.S. 135 (1921)

184. *Mahon*, 260 U.S. at 416.

185. 256 U.S. 135 (1921).

186. *Id.* at 157.

187. *Id.*

188. In a later case, Holmes showed that he was serious about the importance of the "war profits" and "temporary emergency" rationale; he maintained that the rent control law upheld in *Block v. Hirsh* became unconstitutional once the emergency ceased. See *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548–49 (1924); *infra* note 226 (discussing *Chastleton*).

only to explain a particular case. My ground is that the public only got on to this land by paying for it and that if they saw fit to pay only for a surface right they can't enlarge it because they need it now any more than they could have taken the right of being there in the first place. Perhaps it would have been well if I had emphasized more the distinction between the rights of the public in places where their right to be there is unqualified and their right where they only get any *locus standi* by a transaction that renounced what they now claim.¹⁸⁹

Holmes's only discussion of related precedent is a discussion of the doctrine of public necessity, under which certain emergencies will justify public authorities in destroying private property without compensation. The classic case of public necessity, exemplified by the Supreme Court opinion Holmes cites,¹⁹⁰ is the destruction of privately owned buildings to provide a firebreak. Holmes argues that these exceptional cases should be read narrowly and then speculates, interestingly, that the whole doctrine may "stand as much upon tradition as upon principle."¹⁹¹ Under my reading of Holmes, this is an odd comment for him to make. Here, Holmes seems to discard tradition in favor of "principle" of unknown origin. There is an answer to this, but it is one that introduces further complexities to Holmes's thought, and to his constitutional project.

Holmes believed that some legal doctrines could be identified as "survivals"¹⁹²—rules that continue to exist by inertia even though the law in general has discarded their original justifications. His comment in *Mahon* about the doctrine of public necessity suggests that he believed that doctrine to be such a survival. Although the public necessity doctrine persisted, other legal doctrines pointed to the acceptance of a principle at odds with allowing "public necessity" to justify uncompensated destruction of property. In *The Common Law*, Holmes had argued that Anglo-American tort law was best understood as embodying the principle that a person should generally be liable for those harms that a prudent man would have known would result from his actions.¹⁹³ That tort liability, argued Holmes, was independent of the

189. Letter from Oliver Wendell Holmes to Frederick Pollock (Dec. 31, 1922), in 2 HOLMES-POLLOCK LETTERS, *supra* note 40, at 108, 109. The fact that the Kohler Act reverses the outcome of a specific bargain is important in Frank Michelman's treatment of *Mahon*. Michelman notes that an owner's "psychological commitment to his explicit, formally carved out, appurtenant rights in another's land is much more sharply focused and intense, and much nearer the surface of his consciousness, than any reliance he places on his general claim to be safeguarded against nuisances." Michelman, *supra* note 17, at 1231. Such a factor may well have been important to Holmes, who certainly believed that property had a psychological basis, see *supra* text accompanying notes 112–22, and was aware that crystallized expectations were given special protection by some positive-law traditions, such as the vested rights doctrine. See *supra* text accompanying notes 50–62.

190. *Bowditch v. Boston*, 101 U.S. 16 (1879).

191. *Mahon*, 260 U.S. at 416.

192. See, e.g., 3 HOLMES, *Law in Science and Science in Law*, in COLLECTED WORKS, *supra* note 24, at 406, 412.

193. See 3 HOLMES, *The Common Law*, in COLLECTED WORKS, *supra* note 24, at 142, 146–47.

blameworthiness of the action in question. For example, we would not blame a man for stealing a horse when his life depended on it. Yet the law would hold the man liable; “although [the horse thief] does wisely to ransom his life as best he may, there is no reason why he should be allowed to intentionally and permanently transfer his misfortunes to the shoulders of his neighbors.”¹⁹⁴ Private necessity does not exempt a person from liability; Holmes thought it was an anomaly that public necessity did. Echoing his pronouncement in *The Common Law*, Holmes asserts in *Mahon* that “[i]n general it is not plain that a man’s misfortunes or necessities will justify his shifting the damages to his neighbor’s shoulders.”¹⁹⁵

It is not within the scope of this Article to trace further the connections between Holmes’s theory of torts and his constitutional property jurisprudence, but it is important to note the complications that recognition of “survivals” introduce into Holmes’s method of deciding constitutional property cases. If we are to recognize such a category, then we must not only identify “structural habits” in positive law, but also evaluate which ones might be “survivals” that no longer fit in with other legal principles. The more weight we give to that “fit,” however, and the more abstract the contravening principles on which we rely, the more it seems we are relying on a model of law—as a consistent body ordered by highly abstract principles—that Holmes seems at other times to reject. Even with those complications, however, the *Mahon* opinion is best understood as exemplifying Holmes’s jurisdictional project: assessing the degree to which the challenged legislation departs from principles embedded in standing positive law.

4. *The Place of Diminution in Value*

Until now, I have not focused on the role of economic value, and of diminution in that value, in Holmes’s constitutional property jurisprudence. Diminution in value cannot be ignored, however, for Holmes obviously thought it had an important role.¹⁹⁶ He never explicitly stated the reason he considered diminution in value important, but the most likely explanation is a positivist reduction of right to remedy. Never a sentimentalist, Holmes recognized that the “just compensation” guaranteed by the Constitution was in practice far less than the “full and just equivalent”¹⁹⁷ about which the Court

194. *Id.* at 190.

195. *Mahon*, 260 U.S. at 416. David Rosenberg traces the connection between Holmes’s general theory of torts, the doctrine of private necessity, and the just compensation requirement for takings, in DAVID ROSENBERG, *THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY* 112–13, 120–21 (1995).

196. It also cannot be ignored because of its prominence in modern takings analysis. See *infra* text accompanying notes 372–96.

197. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). For recent opinions quoting this language from *Monongahela Navigation Co.*, see *PruneYard Shopping Center v. Robins*, 447

occasionally rhapsodized. Rather, he noted, the community "runs highways and railroads through old family places in spite of the owner's protest, paying in this instance, to be sure, the market value . . . but still sacrificing his will and his welfare to that of the rest."¹⁹⁸ Because the remedy for a taking is the limited one of payment of market value, rather than return of the property itself, the ownership interest protected by the just compensation principle is not the interest in physical possession, but the interest in market value. Thus, the police power is precisely the "power of the State to limit what otherwise would be *rights having a pecuniary value*,"¹⁹⁹ and the effect of a legal change on pecuniary value becomes particularly important to constitutional property analysis.

Viewed from the perspective of his broader constitutional property jurisprudence, Holmes's comments in *Mahon* and elsewhere suggest two different roles for diminution in value. First, Holmes sometimes appears to treat the amount of loss in value as a second factor in his takings equation, in addition to the degree of change from principles in existing law. On this view, the general question posed by all constitutional property cases becomes, "How much are settled expectations disturbed by this change in law?" The magnitude of that disturbance is, roughly speaking, the product of multiplying the degree of legal change by the amount of economic loss caused by the change.

This way of framing the inquiry recognizes that the Constitution is designed to protect people, and that the way people react to legal change depends both on how unexpected the change is and how much impact the change has on their lives. Imagine, for example, that a town council passed an ordinance that funded the production of purple and yellow postcard-sized address plates for each home and required each homeowner to affix an address plate to her home because the council decided that the signs were aesthetically pleasing and would make the town prettier. There may be little precedent for such an ordinance in the law of the jurisdiction; perhaps there is no tradition of requiring homeowners to change the facades of their homes for wholly aesthetic reasons. If that is the case, the change wrought by the sign ordinance may be quite unexpected; it may run counter to rather deep "structural habits." On the other hand, the burden this alteration places on homeowners is small; it requires them to do very little, and the effect on their homes is trivial. Thus, the net effect may be that the change jiggles rather than jolts settled expectations. By contrast, an ordinance requiring homeowners to paint their

U.S. 74, 83 n.7 (1980), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 148 (1978) (Rehnquist, J., dissenting).

198. 3 HOLMES, *The Common Law*, in COLLECTED WORKS, *supra* note 24, at 109, 137; see also *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510-12 (1979) (confirming use of fair market value as general measure of just compensation under Fifth Amendment).

199. *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 601 (1926) (Holmes, J., dissenting) (emphasis added).

entire houses yellow and purple would have a considerably larger impact and thus be more upsetting, even though it and the address plate ordinance represent the same challenge to principles embedded in existing law.²⁰⁰

Holmes's comment at the beginning of the legal discussion in *Mahon* suggests a possible variation on this role. Holmes may have believed that as the loss in economic value increases, there is some point at which legislation will amount to a taking no matter how consistent it is with principles embedded in preexisting law (as long as it can still be identified as changing that preexisting law). "When [the diminution in value] 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."²⁰¹ The evidence in *Mahon*, however, suggests that while Holmes may have toyed with the idea of fixing a particular point at which diminution in value required compensation "in all cases,"²⁰² he was not ready to carry it out. Instead, Holmes describes the diminution in value in *Mahon* only in vague terms—portraying the support rights as "a very valuable estate"²⁰³—and bases his decision on the Kohler Act's departure from principles embedded in existing law.²⁰⁴

The second role for diminution in value is quite familiar to students of

200. Holmes appears to take this approach in *Rideout v. Knox*, 19 N.E. 390 (Mass. 1889). In *Rideout*, Holmes comments that "[s]ome small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil," although "larger ones could not be, except by the exercise of the right of eminent domain." *Id.* at 392. The statute at issue, he notes, is confined "to such fences only as unnecessarily exceed six feet in height"; in his opinion, "[i]t is hard to imagine a more insignificant curtailment of the rights of property." *Id.* The insignificant impact of the statute, or as Holmes calls it, "the smallness of the injury," *id.* at 393, becomes one factor weighing in favor of the statute's constitutionality, along with "the nature of the evil to be avoided" and "the quasi accidental character of the defendant's right to put up a fence for malevolent purposes," *id.* Similarly, in *Noble State Bank v. Haskell*, 219 U.S. 104 (1911), Holmes seems to suggest that the magnitude of a statute's impact is also a factor in determining whether the statute meets the "public purpose" or "public use" requirement of the Fifth and Fourteenth Amendments. *See id.* at 110 ("[A]n ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use.")

201. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). This suggestion is undoubtedly related to Holmes's vision of legal specification, a project that I describe in greater detail below. *See infra* text accompanying notes 228–36.

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

203. *Id.* at 414.

204. Two other Holmes opinions suggest that if legislation can be closely identified with a well-established practice, the economic loss caused by the legislation does not matter. In *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44 (1921), Holmes wrote an opinion upholding an Alaska statute imposing a tax on the production of fertilizer and other specified products from herring "If Alaska deems it for its welfare to discourage the destruction of herring for manure and to preserve them for food for man or for salmon . . . it hardly can be said to be contravening a Constitution that has known protective tariffs for a hundred years." *Id.* at 48. Indeed, stated Holmes, Alaska was operating within the bounds of such a well-established practice of assessing protective tariffs that "[e]ven if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone." *Id.* Similarly, in *Erie R.R. v. Board of Public Utility Commissioners*, 254 U.S. 394 (1921), Holmes wrote an opinion upholding an order of a New Jersey commission requiring railroads to build bridges or viaducts over or under newly laid out highways to avoid grade crossings with their previously existing railroad tracks. Holmes concluded that the state had the power to insist that its highways would not be dangerous to the public, regardless of the cost to the railroads. "That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. . . . If the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce." *Id.* at 410–11

recent regulatory takings jurisprudence. Holmes notes in the second half of the *Mahon* opinion that "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."²⁰⁵ Here, it is not the raw amount of diminution in value that matters but the fact that we can identify some separate object—"certain coal"—the value of which has been completely eliminated. In the mathematical terms often used in more recent discussion,²⁰⁶ the value of the discrete object is the denominator and the amount of diminution the numerator. As the fraction approaches unity, the likelihood of finding a taking increases.²⁰⁷ Conceivably, this fact is significant in Holmes's view because a variety of doctrines in existing law, such as the law of tortious conversion, grant strong protection against the destruction or appropriation of discrete objects. Legislation that results in destruction or complete loss of value of a discrete object thus represents a substantial change in one settled principle.²⁰⁸ As Holmes immediately makes clear in *Mahon*, however, this is not the only principle to be considered: The statute in *Plymouth Coal v. Pennsylvania*²⁰⁹ equally made it "commercially impracticable to mine certain coal"²¹⁰ and yet did not violate the Constitution.²¹¹ Moreover, Holmes makes clear in other cases that the "average reciprocity of advantage"²¹² he identifies as the saving factor in *Plymouth Coal* is not perfect compensation, but an elastic concept derived from legal traditions such as taxation.²¹³ In sum, Holmes considered at least two different roles for diminution in value. Both made it an important factor, but neither made it the organizing principle of his constitutional property calculus.

C. *The Historical Process of Constitutional Specification*

I have already suggested one way in which history was important to Justice Holmes's view of constitutional property theory. For Holmes, the

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

206. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987); Michelman, *supra* note 17, at 1192.

207. Much recent debate has focused on choosing the denominator: What counts as a discrete object? See, e.g., EAGLE, *supra* note 12, § 8-2(h), at 324-44 (discussing problems of "segmentation" and "agglomeration"); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674-78 (1988) (considering phenomenon of "conceptual severance"). Holmes does not address this issue in *Mahon*; one can only surmise that he would have been likely, here as elsewhere, to look to legal traditions. As I note below, see *infra* text accompanying note 391, Justice Scalia has more recently suggested such an approach.

208. This explanation is not completely convincing, as I will discuss below. See *infra* text accompanying notes 407-13.

209. 232 U.S. 531 (1914). I discuss *Plymouth Coal* above. See *supra* text accompanying notes 170-80.

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

211. See *id.* at 415.

212. *Id.*

213. See *supra* text accompanying notes 175-80.

“property” protected by the Constitution was defined by historically contingent positive law; compensation was required when legislation departed too drastically from legal traditions. History was also important to his view of that theory in another way, however. Holmes thought that the process of discerning the principled limits of legal change was itself irreducibly historical.

For Holmes, the idea that constitutional boundaries can only be limned over time is an outgrowth of the common law view of legal organization.²¹⁴ If constitutional law is organized around paradigm cases and if constitutional adjudication is an exercise in fixing the position of each new set of facts in relation to existing multiple paradigm cases, then the development of a body of constitutional law will take time. In a relatively new area of law, rendering decisions will be difficult. As Justice Holmes notes in *Hudson County Water Co. v. McCarter*,²¹⁵ “[i]t sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point.”²¹⁶

Federal constitutional property law was, for Holmes, a relatively new area. The Fifth Amendment, the Contract Clause, and “principles of general constitutional law”²¹⁷ had produced some relevant precedent, as had, in a broader sense, the entire common and statutory law of property. The field did not coalesce, however, until the Supreme Court began to accept the idea that Fourteenth Amendment due process had a substantive component, an event that occurred sometime in the nine year period between 1878, the date that the Court seemed to have rejected substantive due process in *Davidson v. New Orleans*,²¹⁸ and 1887, the date the Court decisively embraced it in *Mugler v. Kansas*.²¹⁹ On Holmes’s common law time scale, a period of thirty-five years—the period separating *Mugler* and *Pennsylvania Coal v. Mahon*—was not particularly long. Thus, in *Noble State Bank v. Haskell*,²²⁰ after noting that “lines are pricked out by the gradual approach and contact of decisions on the opposing sides,”²²¹ Holmes suggested just how gradual the process might be. The Court’s holding in that 1911 case was a decision on one of the opposing sides, to be contrasted with the Court’s most recent holding on the other side, its 1875 decision in *Loan Ass’n v. Topeka*.²²²

214. See *supra* text accompanying notes 123–42.

215. 209 U.S. 349 (1908).

216. *Id.* at 355.

217. *Davidson v. New Orleans*, 96 U.S. 97, 105 (1878) (describing legal basis of Court’s decision in *Loan Association v. Topeka*, 87 U.S. (20 Wall.) 655 (1875)).

218. 96 U.S. 97 (1878) (rejecting landowner’s Fourteenth Amendment challenge to special assessment levied to fund swamp drainage project).

219. 123 U.S. 623 (1887). For a description of the Court’s shift during this period, see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 373–77 (1985).

220. 219 U.S. 104 (1911).

221. *Id.* at 112.

222. 87 U.S. (20 Wall.) 655 (1875). But see *Noble State Bank*, 219 U.S. at 104.

The available evidence suggests that Holmes saw *Pennsylvania Coal v. Mahon* not as an exceptional case that revolutionized constitutional property law, but rather as one more small boundary stone in a field that was still largely unmarked.²²³ Thus, in a dissent written four years after *Mahon*, Holmes returned to his basic image of legal structure and development—the image of paradigm cases with blurred edges that are slowly sharpened by the development of precedent—and used *Mahon* itself as an example: “The line [bounding the police power] cannot be drawn by generalities, but successive points in it must be fixed by weighing the particular facts. Extreme cases on the one side and on the other are *Edgar A. Levy Leasing Co. v. Siegel* and *Pennsylvania Coal Co. v. Mahon*.”²²⁴ Here, one has to understand Holmes’s image of “opposite poles”²²⁵ to understand fully this passage. *Edgar A. Levy Leasing Co.*, a 1922 case upholding a rent control ordinance, is “extreme” not because it is so obviously within the police power, but because it is exceedingly remote from the cases that everyone would agree are paradigm exercises of government power that require no compensation. It is so remote, in fact, that it almost falls within the orbit of another set of paradigm cases—those in which the exercise of government power must be accompanied by compensation.²²⁶ *Mahon* had fallen into that orbit, but just barely, which makes it an extreme case on the other side. Together, they help to define the edges of the police power, just as samples of frozen and liquid water at, respectively, thirty-one and thirty-three degrees Fahrenheit would help to establish the freezing point at thirty-two degrees. As Holmes articulated the notion in his essay on *The Theory of Torts*, and later repeated in *The Common Law*, “at last a mathematical line is arrived at by the contact of contrary decisions.”²²⁷

223. For my discussion of specific precedents for *Mahon*, see *infra* text accompanying notes 273–83.

224. *Frost & Frost Trucking Co. v. Railroad Comm’n*, 271 U.S. 583, 601 (1926) (Holmes, J., dissenting) (citations omitted).

225. See *supra* text accompanying notes 130–32.

226. A bit of fascinating history can help explain why Holmes really thought that *Edgar A. Levy Leasing Co.* was an “extreme case” barely within the police power. *Edgar A. Levy Leasing Co.* was the last of three cases in which the Court had upheld rent control laws instituted during World War I. The other two, decided in the previous Term, were *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921), and *Block v. Hirsh*, 256 U.S. 135 (1921). (Justice Holmes wrote the Court’s opinions in both of the latter cases, getting a bare majority of five votes.) In *Mahon*, Holmes concludes that these three cases “went to the verge of the law.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). This is the proposition for which *Mahon* was most frequently cited in its first, pre-1937 life. See *infra* text accompanying note 299.

Two years after *Edgar A. Levy Leasing Co.*, Holmes wrote the Court’s opinion in *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924). In *Chastleton*, the Court reversed an order dismissing a challenge to a statute extending the time of the rent control provisions upheld in *Block v. Hirsh*. Justice Holmes, writing for the Court, expressed in dicta a much more extreme judgment. “[I]f the question were only whether the statute is in force today,” Holmes states, “upon the facts that we judicially know we should be compelled to say that the law has ceased to operate.” *Id.* at 548–49.

227. 1 HOLMES, *The Theory of Torts*, in COLLECTED WORKS, *supra* note 24, at 326, 327; see also 3 HOLMES, *The Common Law*, in COLLECTED WORKS, *supra* note 24, at 109, 179.

Legal specification—the development of definite rules of conduct from less determinate standards—was for Holmes not just a phenomenon to notice and describe, but a valuable project for courts to undertake. The value underlying the project was predictability. As Holmes declares in the last part of his lecture on trespass and negligence in *The Common Law*, “it is very desirable to know as nearly as we can the standard by which we shall be judged at a given moment.”²²⁸ Giving a negligence case to the jury amounts, Holmes writes, to a confession by the judge that he is uncertain about the rule by which to assess the conduct of the defendant, and to a resolution that he will seek aid from “twelve men taken from the practical part of the community.”²²⁹ But that predicament should not be permanent. As the conduct is repeated in a number of cases, the judge should perceive a more specific rule of liability and should announce that rule as law. “[T]he tendency of the law,” writes Holmes, “must always be to narrow the field of uncertainty.”²³⁰ Holmes presents a variety of examples of this process. An example particularly relevant to land-use law is that of the English doctrine of ancient lights:

An obstruction to be actionable must be substantial. Under ordinary circumstances the erection of a structure a hundred yards off, and one foot above the ground, would not be actionable. One within a foot of the window, and covering it, would be, without any finding of a jury beyond these facts. In doubtful cases midway, the question whether the interference was substantial has been left to the jury. But as the elements are few and permanent, an inclination has been shown to lay down a definite rule, that, in ordinary cases, the building complained of must not be higher than the distance of its base from the dominant windows.²³¹

When Holmes suggests in *Mahon* that one might be able to fix “a certain magnitude” at which diminution in value would require compensation “in most if not all” cases,²³² he is thinking in terms of this same project of legal specification. As he states in a letter to legal philosopher John Wu, the limits of the police power are “a matter of degree and in *Martin v. District of Columbia* I took pleasure in pointing out that a man’s constitutional rights, the difference between the police power and the need of eminent domain with compensation, might be a matter of feet and inches.”²³³

228. 3 HOLMES, *The Common Law*, in COLLECTED WORKS, *supra* note 24, at 109, 179

229. *Id.* at 177.

230. *Id.* at 179.

231. *Id.* at 180 (citation omitted). Holmes’s discussion of the project of specification continues in 3 HOLMES, *Law in Science and Science in Law*, in COLLECTED WORKS, *supra* note 24, at 406, 415–18.

232. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

233. Letter from Oliver Wendell Holmes to Doctor John C.H. Wu (Nov. 4, 1923), in JUSTICE HOLMES TO DOCTOR WU: AN INTIMATE CORRESPONDENCE, 1921–1932, at 17 (n.d., probably 1947) (citation omitted).

Holmes's project of specification, with its desired goal of specific rules, is in obvious tension with his view that law and society are always in flux. Why should the rule that buildings may be built as high as their distance from a neighboring window, but no higher, be good for all time? Holmes recognizes this problem, but he concludes that legal and social change would, in most areas, occur extremely slowly so that they would not overtake a project of specification and render it impossible.²³⁴ As he notes regarding tort liability:

No doubt the general foundation of legal liability in blameworthiness, as determined by the existing average standards of the community, should always be kept in mind, for the purpose of keeping such concrete rules as from time to time may be laid down conformable to daily life. . . . But these considerations only lead to the conclusion that precedents should be overruled when they become inconsistent with present conditions [T]he standards for a very large part of human conduct do not vary from century to century.²³⁵

Only in a few selected areas of human conduct would Holmes's project of specification be undesirable or impossible: "The exceptions would mainly be found where the standard was rapidly changing, as, for instance, in some questions of medical treatment."²³⁶ Otherwise, courts should move toward formulating specific rules of conduct that individuals could know in advance. Courts that are involved in the adjudication of constitutional property cases should pursue the same project, so that governments and individuals understand their respective powers and liabilities in greater detail.

II. THE MYTHS OF MODERN *MAHON*

[T]he holding in *Pennsylvania Coal* . . . has for 65 years been the foundation of our "regulatory takings" jurisprudence. . . . [O]ur repeated reliance on that opinion establishes it as a cornerstone of the jurisprudence of the Fifth Amendment's Just Compensation Clause.²³⁷

There is no reason to think that any other member of the *Mahon* Court, let alone a majority, embraced or even appreciated the whole of Justice Holmes's

234. I question the continuing validity of this assumption below. See *infra* text accompanying notes 417-24.

235. 3 HOLMES, *The Common Law*, in COLLECTED WORKS, *supra* note 24, at 109, 179.

236. *Id.* at 178. For a recent view of the wisdom of refraining from specification in an area of rapid change, see *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2402-03 (1996) (Souter, J., concurring), where Justice Souter argued that the First Amendment should be applied to cable television "by direct analogy rather than by rule" until "the technologies of communication . . . have matured and their relationships become known."

237. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting).

constitutional property jurisprudence. Thus, it would be a mistake to suggest that the true Holmesian meaning of *Mahon* was once known to all, and has since become obscured. But Chief Justice Rehnquist's comment, suggesting that the Supreme Court's understanding of and reliance on *Mahon* remained consistent over the sixty-five years between 1922 and 1987, is equally inaccurate. The frequency of citation of the Holmes opinion in *Mahon*—a telling indicator of its influence—has varied widely over that period.²³⁸ Most dramatically, after being cited in a moderate number of Supreme Court opinions between 1922 and 1935, *Mahon* all but disappeared from the United States Reports for over two decades. In the twenty-two years from 1936 through 1957, *Mahon* appeared in a single obscure dissent by Justice Frankfurter.²³⁹ After 1957, the Court's understanding of *Mahon* differed drastically from its understanding before 1936. In their haste to appropriate Holmes's reputation and utilize his striking turns of phrase in a new constitutional era, Supreme Court Justices of every stripe began to ignore key points of understanding between Justice Holmes and the 1922 Court. By the mid-1980s, the Court had embraced a new understanding, or new understandings, of Justice Holmes's *Mahon* opinion. In this Part, I first explain the original common points of understanding. I then show how *Mahon* was rediscovered, if not reinvented, and explore the role it has played in modern takings cases. Finally, I suggest some issues to consider in deciding whether

238. The following chart shows the citation history of Holmes's *Mahon* opinion in the Supreme Court, the lower federal courts, and the state courts:

PERIOD	NUMBER OF YEARS	SUPREME COURT CITATIONS/PER YEAR		LOWER FEDERAL COURT CITATIONS/PER YEAR		STATE COURT CITATIONS/PER YEAR	
1922-1935	14	12	0.86	22	1.57	43	3.07
1936-1957	22	1	0.05	15	0.68	83	3.77
1958-1977	20	7	0.35	61	3.05	177	8.85
1978-1996	19	29	1.53	239	12.58	228	12.00

These figures were compiled from Shepard's Citations and Westlaw; the last period ends in September 1996. I have not attempted to adjust the figures to take account of varying caseloads, either among different courts or over time, nor have I adjusted more specifically for varying takings caseloads or regulatory takings caseloads. Nonetheless, the figures give some sense of *Mahon*'s varying stature over time. Interestingly, the citation history of *Mahon* in the lower federal courts roughly parallels that in the Supreme Court, with a dip in citations from 1936 through 1957, and a dramatic rise after 1978, yet the citation history in state courts shows no post-1935 dip. The continued reliance on *Mahon* in state courts after 1935 may well be related to the persistence of state court use of economic substantive due process after its rejection by the Supreme Court, a phenomenon that was noted in several law review articles in the 1950s. See John A.C. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U. L. REV. 13 (1958); John A. Hoskins & David A. Katz, *Substantive Due Process in the States Revisited*, 18 OHIO ST. L.J. 384 (1957); Monrad K. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

239. See *United States v. Commodities Trading Corp.*, 339 U.S. 121, 133-34 (1950) (Frankfurter, J., dissenting in part). I discuss *Commodities Trading Corp.* below. See *infra* text accompanying note 313.

there is a role in modern constitutional property jurisprudence for a rediscovered *Mahon*.

A. *The Court's Original Understanding*

Justice Holmes and the 1922 Supreme Court shared three key points of understanding about *Mahon*, all of which have since been lost. First, Holmes and the 1922 Court understood *Mahon* to be a Due Process and Contract Clause case, not a Takings Clause case. Second, rather than viewing *Mahon* as a seminal case, they understood the decision as one among many that incrementally established the limits of the police power. Although *Mahon* was part of a trend toward accepting that the constitutionality of nontrespassory regulations could turn on the provision of compensation, it was not the first case to so hold. Third, both Holmes and the Court recognized and accepted *Mahon's* use of a historical method that looked to traditional legal principles and categories, and that considered both the purpose and effect of legislation important to the constitutional inquiry.

1. *The Textual Basis*

Holmes and the 1922 Court agreed that *Mahon* should be decided under the Contract and Due Process Clauses, not the Takings Clause. At the same time, the Due Process Clause was thought to protect a right of just compensation upon expropriation of property. Holmes's references to the textual basis for the *Mahon* decision, although brief, are quite straightforward. Holmes refers explicitly to the textual basis of the decision once: The police power must be limited, he contends, "or the contract and due process clauses are gone."²⁴⁰ Three coupled references to contract and property rights elsewhere in the opinion underscore this dual textual basis.²⁴¹ Later in the opinion, Holmes notes that the Fifth Amendment provides that private property "shall not be taken for [public] use without compensation."²⁴² He recognizes, however, that *Mahon* is not being decided under the Fifth Amendment, which applies only to the federal government. Holmes notes carefully that "[a] similar assumption is made in the decisions upon the Fourteenth Amendment."²⁴³ The case he cites makes clear—although in 1922 this hardly needed to be

240. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

241. *See id.* at 412 (noting that Pennsylvania Supreme Court concluded that "the defendant had contract and property rights protected by the Constitution of the United States"); *id.* at 413 ("As applied to this case, the statute is admitted to destroy previously existing rights of property and contract."); *id.* at 414 ("[The Kohler Act] purports to abolish what is recognized in Pennsylvania as an estate in land . . . and what is declared by the Court below to be a contract hitherto binding the plaintiffs.").

242. *Id.* at 415.

243. *Id.*

made clear—that the pertinent provision of the Fourteenth Amendment was the Due Process Clause.²⁴⁴

If Holmes did not take care to review the Kohler Act separately under the standards of the Contract Clause and the standards of the Due Process Clause, it was because, at the time, the standards that governed the dispute in *Mahon* were identical in practice. To be sure, the threshold questions under the two Clauses were in theory different. Under the Contract Clause, the threshold question was whether the challenged statute arguably impaired a contract obligation. Under the Due Process Clause, the question was whether the challenged statute deprived an individual of a property interest. But the parties in *Mahon* did not dispute the threshold questions: "As applied to this case, the statute is admitted to destroy previously existing rights of property and contract."²⁴⁵ Once these questions were answered in the affirmative, the analyses under the two Clauses merged.²⁴⁶ The single remaining issue under both provisions was whether the challenged law was justified as an exercise of the police power.²⁴⁷ Thus there is nothing mysterious about the fact that the *Mahon* opinion refers to the Contract and Due Process Clauses in tandem without attempting to distinguish them. There was no reason to draw a distinction.²⁴⁸

Although the Contract and Due Process Clauses both had their place in *Mahon*, the Takings Clause did not. In 1896 and 1897, the Court had decided that the Fourteenth Amendment Due Process Clause prevented the states from

244. See *id.* (citing *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 605 (1908)). Although *Hairston* itself does not explicitly mention the Due Process Clause, it relies on a number of cases that do. See, e.g., *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) ("The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth . . . Amendment of the Constitution of the United States."); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896).

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

246. This merger of analyses is reflected in the headings under which contemporary law review comments treated *Mahon*. For six out of seven law reviews, *Mahon* was, first and foremost, a "police power" case. Only three out of seven mention a specific constitutional provision in the heading. See Comment on Cases, *Constitutional Law: Police Power v. Eminent Domain*, 11 CAL. L. REV. 188 (1923); Current Decisions, *Constitutional Law—Police Power—Unjustifiable Extension*, 32 YALE L.J. 511 (1923); Note and Comment, *Constitutional Law—Police Power, Regulation, and Confiscation*, 21 MICH. L. REV. 581 (1923); Recent Cases, *Constitutional Law—Legislative Powers: Impairment of the Obligation of Contracts—Pennsylvania "Cave-In" Statute*, 36 HARV. L. REV. 753 (1923); Recent Cases, *Constitutional Law—Police Power—Due Process—Mining—Surface Subsidence*, 7 MINN. L. REV. 242 (1923); Recent Cases, *Constitutional Law—Police Power—Kohler Act Held Unconstitutional*, 71 U. PA. L. REV. 277 (1923); Recent Decision, *Constitutional Law—Police Power—Taking Property and Impairing Contractual Obligations by Exercise of State Police Power*, 9 VA. L. REV. 457 (1923). I explain this merger in greater detail above. See *supra* text accompanying notes 70–76.

247. See *Manigault v. Springs*, 199 U.S. 473 (1905) (Contract Clause); *Mugler v. Kansas*, 123 U.S. 623 (1887) (Due Process Clause). For further discussion of these cases, see text accompanying notes 57–68 and note 74.

248. It gives me pause that as careful a scholar as Carol Rose flatly states that the *Mahon* Court did not address the Pennsylvania Coal Company's argument that the Kohler Act impaired an obligation of contract, and then comments that "Holmes' neglect of the obligation of contract argument is somewhat puzzling." Rose, *supra* note 15, at 565 n.22. Yet I remain convinced that Holmes simply had no need to treat the two clauses separately.

taking private property for private uses,²⁴⁹ and required the states to pay just compensation if they took private property for public uses.²⁵⁰ The Court, however, did not do so on the theory that the Due Process Clause extended the reach of the Takings Clause from the federal government to the states. Rather, the Court used the "fundamental rights" theory later documented and championed by Justices Cardozo and Frankfurter and the second Justice Harlan.²⁵¹ As Justice Moody wrote in the 1908 case of *Twining v. New Jersey*,²⁵² "some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be due process of law,"²⁵³ but "[i]f this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."²⁵⁴ An important corollary of the logical independence of due process principles from the rules of the first eight amendments was that a due process principle might overlap an enumerated rule only in part; the principle and the rule need not be coextensive.²⁵⁵

Justice Holmes unquestionably accepted a version of the fundamental rights theory of the Due Process Clause. In his dissent in *Lochner v. New York*,²⁵⁶ for example, Holmes criticized the Court's application of substantive due process, but acknowledged that a statute would violate the Fourteenth Amendment if it "would infringe fundamental principles as they have been understood by the traditions of our people and our law."²⁵⁷ Holmes also explicitly accepted the notion that a due process fundamental principle need

249. See *Missouri Pac. Ry.*, 164 U.S. at 417; *Fallbrook Irrigation Dist.*, 164 U.S. at 157-58.

250. See *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 226 (1897); RICHARD C. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS* 24-29 (1981) (discussing *Chicago, Burlington & Quincy R.R.*, 166 U.S. at 226). Three years earlier, the Court had held, in an opinion by Justice Brewer, that the just compensation guarantee was included in the Fourteenth Amendment Equal Protection Clause. See *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 399 (1894) ("The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public."). Once *Chicago, Burlington & Quincy R.R.* placed the just compensation guarantee in the Due Process Clause, however, the equal protection theory faded.

251. See *Duncan v. Louisiana*, 391 U.S. 145, 174-80 (1968) (Harlan, J., dissenting); *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring); *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937) (Cardozo, J.); Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

252. 211 U.S. 78 (1908).

253. *Id.* at 99.

254. *Id.*

255. See, e.g., Amar, *supra* note 98, at 1196 (arguing that under fundamental rights theory, "[t]he Fourteenth [Amendment] requires only that states honor basic principles of fundamental fairness and ordered liberty—principles that might indeed happen to overlap wholly or in part with some of the rules of the Bill of Rights, but that bear no logical relationship to those rules.").

256. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

257. *Id.* at 76 (Holmes, J., dissenting); see also *Otis v. Parker*, 187 U.S. 606, 609 (1903) (arguing that Constitution should "embod[y] only relatively fundamental rules of right, as generally understood by all English-speaking communities").

not be coextensive with a provision in the Bill of Rights.²⁵⁸ In particular, Holmes appeared willing to distinguish the due process principle of just compensation from the Fifth Amendment Takings Clause. In his dissent in *Madisonville Traction Co. v. Saint Bernard Mining Co.*,²⁵⁹ Holmes concluded that the "public use" limitation in the Takings Clause was not a due process fundamental principle:

I wish to add only that I am not aware of any limitations in the Constitution of the United States upon a State's power to condemn land within its borders, except the requirements as to compensation. All that was decided in *Loan Association v. Topeka* and *Cole v. La Grange* was that the constitutions of certain States did not authorize the taking of private property for a private use. But if those decisions had been rested on the Fourteenth Amendment, which they were not, and in my opinion could not have been, I do not perceive that they have any bearing upon what I have said or upon the case at bar.²⁶⁰

Against this background, Holmes's remarks in *Mahon* about the relationship between the Fifth Amendment Takings Clause and the Fourteenth Amendment are not sloppy, but quite precise. Holmes refers to the protection afforded by the Takings Clause against the federal government and then states that "[a] similar assumption is made in the decisions upon the 14th Amendment."²⁶¹ The use of the word "similar" here is best read as an admonition that the

258. Holmes explained:

The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.

Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting) (emphasis added)

259. 196 U.S. 239 (1905) (holding that respondent in state condemnation action may remove case to federal court upon demonstrating diversity of citizenship). The Court decided the case by a bare majority; Holmes's dissent garnered the votes of Chief Justice Fuller and Justices Brewer and Peckham.

260. *Id.* at 260-61 (Holmes, J., dissenting) (citations omitted) (emphasis added). Both *Loan Ass'n v. Topeka* and *Cole v. LaGrange* preceded *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403 (1886), which held that Fourteenth Amendment due process encompassed the requirement that states take property only for public uses; Holmes curiously fails to cite *Missouri Pacific*, which would seem to be directly on point.

When Holmes wrote for the Court, he had to accept the Court's precedent holding that the Fourteenth Amendment did contain a "public use" requirement; but his Fourteenth Amendment public use opinions always stressed the breadth of state power to define public use. See, e.g., *Hendersonville Light & Power Co. v. Blue Ridge Interurban Ry.*, 243 U.S. 563 (1917); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32-33 (1916); *Noble State Bank v. Haskell*, 219 U.S. 104, 111-12 (1911); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906). Four years after *Mahon*, Holmes, writing in dissent, appeared to return to the position he took in *Madisonville*: "The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it." *Tyson & Brother-United Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

261. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (emphasis added) (citing *Hairston v. Danville & Western Ry.*, 208 U.S. 598, 605 (1908)). For a parallel use of the word "similar," see *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.) (specifically leaving "undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First [Amendment]").

Fourteenth Amendment's fundamental principle of just compensation is logically independent of the scope of the Fifth Amendment Takings Clause. On this point, Justice Holmes was speaking for all of the Justices on the *Mahon* Court, each of whom accepted the view that the Fifth Amendment applied only to the federal government, and that the Fourteenth Amendment, which applied to the states, did not incorporate the Fifth Amendment.²⁶² *Mahon*, a state law case, was not decided under the Takings Clause.²⁶³

2. Regulation and Just Compensation

A second point of common understanding between Holmes and the 1922 Court was that *Mahon* did not announce a radically novel doctrine; rather, it was one of a series of cases articulating the boundaries between governmental power and constitutional property rights. *Mahon* is now widely understood, by Supreme Court Justices and academic commentators alike,²⁶⁴ to be a

262. As of 1922, the only Supreme Court Justice to have advocated the theory that the Fourteenth Amendment incorporated the first eight amendments was the first Justice Harlan. See *Twining v. New Jersey*, 211 U.S. 78, 114 (1908) (Harlan, J., dissenting); *Hurtado v. California*, 110 U.S. 516, 538 (1884) (Harlan, J., dissenting). Harlan had left the Court in 1911. See THE OXFORD COMPANION TO THE SUPREME COURT, *supra* note 29, at 985. In the early to middle 1960s, the Court recharacterized many earlier due process cases, including *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226 (1897), as incorporating provisions of the Bill of Rights, although those cases did not originally rest on incorporation theory. The Just Compensation Clause thus became subject to what Richard Cortner has fittingly dubbed "retroactive incorporation." See CORTNER, *supra* note 250, at 215. As late as 1962, however, the second Justice Harlan successfully intervened to prevent Justice Douglas from suggesting, in the opinion for the Court in *Griggs v. Allegheny County*, 369 U.S. 84 (1962), that the Fourteenth Amendment "incorporated" the Fifth Amendment Just Compensation Clause. Harlan noted that *Chicago, Burlington & Quincy* referred only to Fourteenth Amendment due process. See TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 281 (1992). Justice Stevens most recently picked up this cry, arguing in dissent in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), that the Court was resurrecting substantive due process and noting that the Court began its discussion by citing *Chicago, Burlington & Quincy*, a substantive due process case. See *Dolan*, 114 S. Ct. at 2326-27 (Stevens, J., dissenting). The Court's somewhat evasive response takes advantage of the "retroactive incorporation" phenomenon: "[T]here is no doubt that later cases have held that the Fourteenth Amendment does make the Takings Clause . . . applicable to the States. Nor is there any doubt that these cases have relied upon [*Chicago, Burlington and Quincy*]." *Id.* at 2316 n.5 (citations omitted).

263. Holmes's comments in dissent in *Adkins v. Children's Hospital*, 261 U.S. 525, 567 (1923) (invalidating District of Columbia minimum wage law), appear to reflect a modern, incorporationist perspective on the independence of takings and substantive due process inquiries:

I agree, of course, that a law [directed toward a legitimate end, by means that many governments have approved] might be invalidated by specific provisions of the Constitution. For instance it might take private property without just compensation. But in the present instance the only objection that can be urged is found within the vague contours of the Fifth Amendment, prohibiting the depriving any person of liberty or property without due process of law.

Id. at 568 (Holmes, J., dissenting). *Adkins*, however, is a case involving federal law, to which the Takings Clause is directly applicable, and Holmes had this direct application in mind when he considered the distinction between the Takings Clause and the Fifth Amendment (not the Fourteenth Amendment) Due Process Clause. I have not found an instance of Holmes speaking in this manner when considering a challenge to state law.

264. See *supra* text accompanying notes 10-12.

landmark: the first “regulatory takings” case. This honor is ambiguous; but under any of the principal resolutions of the ambiguities, *Mahon* does not deserve it. I have already argued that the claim is invalid under one interpretation: *Mahon* was not the first case to hold that “regulatory” legislation could violate the Fifth Amendment Takings Clause, because *Mahon* was not a Fifth Amendment case.

Assume, next, that “regulatory” legislation is that which does not affect the physical possession of property but only its use and enjoyment. Perhaps the claim is that *Mahon* was the first case to hold that use and enjoyment rights were constitutionally protected property, whether under the Due Process Clause or the Takings Clause.²⁶⁵ But under classical substantive due process, already well established when *Mahon* was decided, constitutionally protected property rights included the right to acquire wealth through bargaining for the sale of one’s labor,²⁶⁶ and the right to set the price at which one’s property would be sold.²⁶⁷ Thus *Mahon* is too late to claim the honor of expanding constitutional property protection beyond physical possession.

265. This claim might be featured in a broader account of American law as moving from a primitive physicalist understanding of property to a modern view of property as abstract legal relations or economic value. Prominent versions of this account appear in MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 145–67 (1992); Thomas C. Grey, *The Disintegration of Property*, in *NOMOS XXII: PROPERTY* 69 (J. Roland Pennock & John W. Chapman eds., 1980); and Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 *BUFF. L. REV.* 325 (1980). (In a somewhat simplified form, of course, the story of the transition from crude layman’s physicalism to sophisticated lawyer’s abstraction has become a staple of first-year law school property courses. See, e.g., JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 1–3 (3d ed. 1989)).

I cannot fully develop my skepticism of this broader account here, so one juxtaposition will have to suffice. In the 1780s, James Madison and Gouverneur Morris, among others, were issuing polemics against price regulation, depreciating paper currency, and debtor relief laws. The men argued that such practices amounted to takings of property, indicating an understanding of property rights as economic value. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 22–23, 72–74 (1990) (noting that Madison urged Virginia legislature to see that depreciating paper money “affects rights of property as taking away equal value in land” and that Morris spoke of price regulations as an “invasion of the rights of property . . . clothed with every necessary circumstance of violence”). Two hundred years later, in the 1980s, the Supreme Court was issuing opinions holding that “permanent physical occupations” constitute per se takings, indicating a continuing attachment to the idea that “property” is, above all else, physical things. See *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

266. See *Coppage v. Kansas*, 236 U.S. 1, 14 (1915) (“Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property.”); Molly S. McUsic, *The Ghost of Lochner: The Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 *B.U. L. REV.* 201, 208 n.26 (1996) (noting that *Lochner*-era Court treated property rights as including right to contract); Roscoe Pound, *Liberty of Contract*, 18 *YALE L.J.* 454, 461 (1909) (“[O]ur courts regard the right to contract, not as a phase of liberty—a sort of freedom of mental motion and locomotion—but as a phase of property, to be protected as such.”).

267. See *Tyson & Brother-United Theater Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 429 (1927) (“[T]he right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, and, as such, within the protection of the due process of law clauses of the Fifth and Fourteenth Amendments.”) (citation omitted); see also *Block v. Hirsh*, 256 U.S. 135, 165 (1921) (White, C.J., McKenna, Van Devanter, McReynolds, JJ., dissenting) (“There can be no conception of property aside from its control and use, and upon its use depends its value.”).

Another possibility is that "regulatory taking" refers to legislation that would be constitutional if and only if accompanied by just compensation.²⁶⁸ Under this interpretation, the textual basis for the just compensation obligation is unimportant; it could be either the Fifth Amendment Takings Clause or the Fourteenth Amendment Due Process Clause. The claim would be that *Mahon* was the first case to hold that the constitutionality of a regulation could turn on the provision of just compensation. This claim fails as well, but it is a more interesting and substantial one. Recall that under the ahistorical model adopted in the substantive rights/police power tradition, the property protected by the Constitution is defined by an unchanging ideal boundary between the property owner and the community, concerned with the limits of use and enjoyment as well as possession.²⁶⁹ If a law is justified as enforcing the ideal boundary, then no compensation is necessary. The law does not take property rights. To the contrary, it ensures respect for them. Conversely, if the law is supposed to enforce the ideal boundary but fails to do so, compensation cannot save it; governments have no authority to prohibit property uses that do not injure the community.²⁷⁰

268. Here I choose my words carefully. As I am framing it, the issue is not whether a court would grant retroactive relief—damages measured to be just compensation—were a regulation to be held unconstitutional. Rather, the issue is whether the prospective relief a court granted would acknowledge the government's power to impose the regulation if it paid just compensation. In the language of Guido Calabresi and Douglas Melamed, the issue is whether the constitutional entitlements regarding property "regulation" are sometimes protected only by a liability rule, rather than a property rule (or an inalienability rule). See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092–93 (1972). The question whether a damages remedy is available against the government is a different one, although in the 1980s it became tangled up with the designation of regulations as "takings." See *infra* text accompanying notes 345–62.

269. See *supra* text accompanying notes 42, 57–68.

270. See, e.g., *Lochner v. New York*, 198 U.S. 45, 61 (1905) ("[U]nless there be some fair ground . . . to say that there is material danger to the public health or to the health of the employs . . . [t]he legislature of the State has no power to limit their right . . ."). At least three Supreme Court opinions written in the quarter-century before *Mahon* seem to take an ahistorical approach but frame the constitutional choice as that between the police power and just compensation rather than the police power and invalidity. In *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1900), the Court upheld an Indiana statute forbidding owners of gas and oil wells from allowing gas or oil to escape into the open air for more than two days after gas or oil was struck within the well. Justice White explains that this regulation is constitutional because it actually protects the property rights of other well owners, since oil and gas are owned jointly in a "common reservoir" before they are captured by a particular well owner. See *id.* at 210–11. Throughout the opinion, however, Justice White assumes that if the statute could not be justified as protecting the rights of other well owners, then it would be invalid because it did not provide for just compensation. See *id.* at 192. Similarly, in *Welch v. Swasey*, 214 U.S. 91 (1909), the Court upheld a Massachusetts law limiting the height of buildings in Boston as reasonably related to the goal of preventing injury to the public by the spread of fire. Justice Peckham, however, framed the issue as one of whether the owner complaining about the law has a right to just compensation. See *id.* at 107. Finally, in *Chicago, Milwaukee, & St. Paul Railroad v. Wisconsin*, 238 U.S. 491 (1915), the Court struck down a law prohibiting railroads from letting down an unengaged upper berth when the lower berth in the same section was occupied, concluding that it was not justifiable as a health measure. See *id.* at 499–500. However, the Court also described the issue as whether the law amounted to "a taking of the carrier's property without just compensation." *Id.* at 501. Perhaps the approach taken in these cases can be attributed to the framing of the issue by counsel, perhaps to the failure of the Justices to work out perfectly consistent approaches.

More recently, the Court has once again seemed to graft what was originally a due process test of governmental authority onto the Takings Clause, suggesting the odd conclusion that a government can take

This argument might prevail if a government's *only* legitimate function were to maintain the ideal boundary between owners and the community: the classic laissez-faire, "night watchman" view of government. In that case, the constitutionality of legislation would rarely turn on the provision of compensation, since the government's power of eminent domain could presumably be used only in furtherance of its "night watchman" function—when, for example, the government needed to acquire property rights to build watchtowers. In fact, the Supreme Court's adoption of an ahistorical approach under the Fourteenth Amendment Due Process Clause did coincide with an increasing acceptance by Supreme Court Justices of a laissez-faire view of the role of government, influenced by classical political economy.²⁷¹

The Supreme Court, however, never followed the laissez-faire model of government with perfect consistency. The Court, if not all of its individual members, recognized that both the states and the federal government had long played roles other than that of "night watchmen," and it never fully rejected those roles as illegitimate. For example, the Court never stopped governments from promoting commerce through active involvement in the development of mills, canals, and railroads, through means that included eminent domain.²⁷² In those areas, where government action was legitimate but not necessarily harm preventing, one might expect to find cases holding statutes constitutional if, but only if, accompanied by just compensation.

Numerous cases of that sort had already been decided before *Mahon* reached the Court. Three examples, written by Justices other than Holmes,²⁷³

actions that do not substantially advance legitimate state interests so long as it pays compensation. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 837 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978).

271. See, e.g., HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, at 93-101 (1991).

272. On the promotion of canals and railroads, see generally CARTER GOODRICH, *GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890* (1960), which documents the history of national railroad and canal subsidies. On the use of eminent domain, see, e.g., Harry N. Scheiber, *The Jurisprudence—and Mythology—of Eminent Domain in American Legal History*, in *LIBERTY, PROPERTY AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL* 217, 220-25 (Ellen Frankel Paul & Howard Dickman eds., 1989) [hereinafter Scheiber, *Jurisprudence*]; Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232 (1973) [hereinafter Scheiber, *Property Law*].

273. I focus on opinions written by Justices other than Holmes in order to suggest that there was some broader Court recognition that the constitutionality of nontrespassory regulations could turn on the provision of compensation. However, Holmes had also written opinions before *Mahon* that struck down regulations for lack of just compensation. See, e.g., *Missouri Pac. Ry. Co. v. Nebraska*, 217 U.S. 196, 208 (1910) (striking down statute requiring railroads to construct and maintain side tracks to service grain elevators owned by other companies because statute "does not provide indemnity for what it requires"), *Louisville & Nashville R.R. v. Central Stock Yards Co.*, 212 U.S. 132, 144 (1909) (striking down statute requiring railroads to transport cars owned by other railroads because statute did not contain "adequate regulations . . . for securing just compensation"). In 1921, just one year before *Mahon* was decided, Holmes drafted an opinion for the Court in *Bullock v. Florida*, 254 U.S. 513 (1921), reversing the Florida Supreme Court's ruling that the state could prevent the sale of a bankrupt railroad's assets to a purchaser who proposed to dismantle it for its scrap value. Holmes argued that the ruling amounted to forcing the railroad to operate at a loss and thus was a taking of property without just compensation. See ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 224 (1957). Justice Brandeis's

will suffice.²⁷⁴ In 1905, for instance, the Court held in *Muhlker v. New York & Harlem Railroad Co.*²⁷⁵ that a state statute authorizing the construction of an elevated railroad line on the street in front of the plaintiff's apartment building deprived him of implied easements of light and air that he had owned, violating both the Contract Clause and the Fourteenth Amendment Due Process Clause. Justice McKenna wrote, "[t]he permission, or command of the State, can give no power to invade private rights, even for a public purpose without payment of compensation."²⁷⁶ Later, in the 1911 case of *Curtin v. Benson*,²⁷⁷ the Court invalidated Interior Department rules regulating cattle grazing on private land within the limits of Yosemite Park. Justice McKenna, again writing for the Court, concluded that the rules constituted

not a prevention of a misuse or illegal use but the prevention of a legal and essential use, an attribute of its ownership, one which goes to make up its essence and value. To take it away is practically to take [appellant's] property away, and to do that is beyond the power even of sovereignty, except by proper proceedings to that end.²⁷⁸

The "proper proceedings" were, of course, eminent domain proceedings, under which the government would pay just compensation for the power to ban cattle grazing. Finally, in 1914, the Court held in *Richards v. Washington Terminal Co.*²⁷⁹ that a federal statute conferring private nuisance immunity on a railroad company for gases and smoke vented from a railroad tunnel onto a neighbor's land constituted a taking of private property without just compensation. Justice Pitney noted that "since [the plaintiff] is not wholly excluded from the use and enjoyment of his property, there has been no

intervention led Holmes to change his mind and write an opinion affirming the Florida Supreme Court's ruling by construing it very narrowly; all of the other Justices ended up voting for the new opinion, even though they had tentatively voted to reverse. As published, however, Holmes's opinion still suggests that forcing a railroad to continue operating at a loss would constitute a taking without just compensation. See *Bullock*, 254 U.S. at 521; BICKEL, *supra*, at 223-27.

274. In addition to these three examples, there is the entire line of rate regulation cases that suggests that the regulation of public utilities is subject to the limitation that governmentally set tariffs or rates must afford just compensation to the owners. For instance, the Court stated in *Smyth v. Ames*:

A state enactment . . . establishing rates . . . that will not admit of the carrier earning such compensation as . . . is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws . . . [; whether rates are] so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures [is matter subject to judicial inquiry].

Smyth v. Ames, 169 U.S. 466, 526 (1898); see also *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886) ("This power to regulate is not a power to destroy . . . Under pretence of regulating fares and freights, the State cannot . . . do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.") (dicta).

275. 197 U.S. 544 (1905).

276. *Id.* at 569.

277. 222 U.S. 78 (1911).

278. *Id.* at 86.

279. 233 U.S. 546 (1914).

'taking' of the land in the ordinary sense."²⁸⁰ Nevertheless, he wrote, "[w]e deem the true rule, under the Fifth Amendment . . . to be that . . . [the legislature] may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use."²⁸¹ In *Richards*, the gases and smoke from the tunnel "materially contribute[d] to render [plaintiff's] property less habitable . . . and to depreciate it in value."²⁸² The Fifth Amendment did not allow "the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him."²⁸³

These opinions suggest the Court's willingness, both before *Mahon* and through Justices other than Holmes, to use an eminent domain model to analyze government alterations of property rules falling short of physical dispossession and to strike them down for lack of compensation. That willingness deprives *Mahon* of the title of first "regulatory eminent domain" case.

3. *Traditional Legal Categories*

Holmes's contemporaries on the Supreme Court also shared a familiarity with and acceptance of the historical and purpose-based analyses Holmes used in *Mahon*. This may seem surprising, given that Holmes's historical approach to constitutional property rights seems dramatically opposed to the prevailing ahistorical approach, which sought to assess the relationship of laws to an ideal boundary between the individual and society, independent of existing positive law. Yet despite their fundamental differences, Holmes and the ahistoricists used similar methods in practice. The particular brand of ahistoricism characteristic of *Lochner*-era substantive due process looked to the traditional categories of the common law to define the ideal boundary.²⁸⁴ *Mugler v.*

280. *Id.* at 552.

281. *Id.* at 553 (citations omitted).

282. *Id.* at 556.

283. *Id.* at 557.

284. See ACKERMAN, *supra* note 1, at 18 ("During the half century between 1870 and 1920, legal scholarship was dominated by a group of scholars who believed that the disciplined investigation of the historical common law tradition would reveal the basic principles defining legitimate social expectations"); TRIBE, *supra* note 67, § 8-1, at 565 (arguing that in last quarter of nineteenth century, judges "[i]ncreasingly . . . came to believe that substantive due process review could be confined by boundaries derived from common law categories"); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 81 (1991) (discussing *Lochner*-era jurists' use of common law principles as source of constitutional concepts, and in particular as source to define "the right of property . . . and the correlative sphere of government's 'police power'"); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (arguing that distinctive feature of *Lochner* era was not "judicial activism," but rather promotion of constitutional requirement of neutrality, "defined as respect for the behavior of private actors pursuant to the common law"). Sunstein casts Justice Holmes as a modern "interest-group" pluralist, completely rejecting the guidance of the common law. See Sunstein, *supra*, at 879-80, 904-05. He does so, however, by truncating Holmes's dissent in *Lochner*, asserting that "for Holmes, the Constitution does not prevent 'the natural outcome of a dominant opinion'" *Id.* at 879 (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)). The quoted fragment is, of course,

Kansas, for example, appeals to the common law category of public nuisance.²⁸⁵ *Munn v. Illinois*²⁸⁶ looks to the common law for the category of businesses "'affected with a public interest.'"²⁸⁷ Finally, *Lochner v. New York*²⁸⁸ looks to, among other things, the common law contract doctrine of incapacity.²⁸⁹

In addition, both Holmes and the practitioners of *Lochner*-era ahistoricism relied on a willingness to undertake some independent investigation of a statute's purposes. The proclamation in *Lochner* is well known:

The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether or not it is repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.²⁹⁰

One might think that Justice Holmes, the *Lochner* dissenter, would take the opposite position that one should always defer to a legislature's characterization. But Holmes's analysis in *Mahon* shows his position to be different only in degree. Deference to legislative judgment in *Mahon* is one of the key points of contention between Holmes and Brandeis. Twice, Brandeis resorts to the now classic form of argument that posits a conceivable state of affairs in which the legislature's chosen means would be more tightly

incomplete, as it is immediately qualified: "[U]nless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting) (emphasis added). One could, of course, argue that the qualification is disingenuous, but I am convinced otherwise.

285. The Court explained that:

The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

Mugler v. Kansas, 123 U.S. 623, 669 (1887).

286. 94 U.S. 113 (1876).

287. The full quote reads: "Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.'" *Id.* at 125-26 (quoting Matthew Hale, *De Portibus Maris*, in A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND (London, T. Wright 1787)). Justice Holmes thought the phrase "affected with a public interest" to be as obfuscatory as "the police power": "[W]hen Legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use." *Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 445 (1927) (Holmes, J., dissenting).

288. 198 U.S. 45 (1905).

289. As the Court explained:

There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action.

Id. at 57.

290. *Id.* at 64.

connected to the stated end. Regarding the supposed underinclusiveness of the Kohler Act,²⁹¹ Brandeis argues:

Where the surface and the coal belong to the same person, self-interest would ordinarily prevent mining to such an extent as to cause a subsidence. It was, doubtless, for this reason that the legislature, estimating the degrees of danger, deemed statutory restriction unnecessary for the public safety under such conditions.²⁹²

In response to Holmes's contention that giving notice of the mining would have been sufficient to advance the state's interest in protecting personal safety,²⁹³ Brandeis asks the rhetorical question: "May we say that notice would afford adequate protection of the public safety where the legislature and the highest court of the State, with greater knowledge of local conditions, have declared, in effect, that it would not?"²⁹⁴

Holmes implicitly rejects such extreme deference to the legislature. Indeed, his method of analyzing constitutional property issues would seem to depend on such a rejection. If one always defers to a legislature's declaration that a statute is directed toward preventing some kind of damage traditionally recognized as legally injurious, then one will never be able to conclude that the statute drastically changes preexisting law. Although Holmes and the *Lochner*-era ahistoricist undoubtedly may have disagreed in specific cases, they did not disagree that, as Holmes put it in *Mahon*, "[t]he greatest weight is given to the judgment of the legislature, but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power."²⁹⁵

291. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-14 (1922); *supra* text accompanying notes 160-62.

292. *Mahon*, 260 U.S. at 420 (Brandeis, J., dissenting).

293. See *id.* at 414; *supra* text accompanying notes 162-64.

294. *Mahon*, 260 U.S. at 420 (Brandeis, J., dissenting).

295. *Id.* at 413. G. Edward White observes that Holmes's relatively close scrutiny of legislation in *Mahon* appears to conflict with his advocacy of deference to legislatures in *Lochner* and other due process cases, and proposes to resolve the conflict by drawing a distinction between "takings" and "due process" cases. White acknowledges that *Mahon* and *Lochner* were technically both due process cases 'because *Mahon* preceded incorporation of the Takings Clause), but he argues that Holmes regarded *Mahon*, 'despite technical problems, as . . . a 'takings clause' case," involving "tangible" rights of property, rather than as a "conventional due process case," involving "chimerical" rights "in the fashion of 'liberties' of contract." G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 402-03 (1993). Thus, according to White, Holmes first considers whether a law infringes "tangible" rights or merely "chimerical" rights, and then decides on that basis whether to scrutinize the law closely or deferentially.

By contrast, I think that the central issue in both *Lochner* and *Mahon* is that of change from principles embedded in a positive law tradition. In *Lochner*, Holmes lists a wide variety of laws that, so far as he can see, restrict liberty of contract as much as a maximum hour law for bakers: Sunday laws, usury laws, prohibitions on lotteries, antitrust laws, bans on margin sales, and maximum hour laws for miners. See *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting). The maximum hour law challenged in *Lochner*, suggests Holmes, does not involve a radical change from these existing laws. "A reasonable man might think it a proper measure on the score of health," *id.*, at 76, a justification found sufficient to restrict liberty of contract in other cases. Thus, liberty of contract is "chimerical" for Holmes in the sense that it fails to describe any of the structural habits of standing positive law that are Holmes's starting points; but it is better to spell out that failure than to stop at the label "chimerical." Similarly, Holmes finds the ban on

In sum, the *Lochner*-era ahistoricist would agree with Justice Holmes on many intermediate issues about methods of legal analysis. The ultimate significance of the analysis remained controversial. Holmes investigated tradition to measure change, whereas the classic substantive due process ahistoricist looked to tradition for static norms. The deeper jurisprudential controversy, however, often remained submerged, since the content of most judicial opinions—detailing the relationship between the challenged law, its purpose, and relevant legal traditions—stayed within an area of agreement. So it was with *Mahon*. For both Holmes and the ahistoricists, the resolution of the constitutional issue in *Mahon* had to involve an examination of the relationship of the Kohler Act to the doctrines of public nuisance and public necessity, and to the traditions of closely protecting personal safety and possessory estates in land. Neither would have seen these portions of the *Mahon* opinion as largely inexplicable and superfluous comments muddying up a diminution in value test. Both would have understood them as integral parts of the real work to be done in deciding the case.

The citation history between 1922 and 1935 suggests that *Mahon* became part of the Court's broader substantive due process discourse. Eleven of the twelve citations during that period appear in Fourteenth Amendment due process cases.²⁹⁶ In some of those cases, the issue is whether a state can act in some way without paying just compensation,²⁹⁷ but in other cases, compensation is not an issue.²⁹⁸ *Mahon* is cited most often—five times—for the proposition that the wartime rent control laws upheld by the Court “went

subsidence in *Mahon*—drafted to apply only when the ownership of surface and mineral rights are split—to involve a drastic change from existing positive law principles; to say that those principles are “tangible”—unlike the principle of liberty of contract—says too little.

Not only are the tags “chimerical” and “tangible” oversimplifications, but the role of such categorization in Holmes's thought is, in my view, somewhat different than Professor White appears to portray it. According to that portrayal, Holmes initially decides whether a law burdens “tangible” rights, and then, if it does, scrutinizes it more closely. I think that Holmes intends the scrutiny, which takes place before categorization, to be uniform. In addition, I think that Holmesian scrutiny was, in practice, more deferential than that associated with classical substantive due process, but less deferential than later scrutiny of “regulatory legislation affecting ordinary commercial transactions” under a pluralist political theory that assumes that “political processes . . . can ordinarily be expected to bring about repeal of undesirable legislation” and protect minorities. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, 152 n.4 (1938). Thus, for example, the underinclusiveness of a law with respect to a stated end is of some consequence to Holmes if the law also happens to fit neatly an unstated end that cuts into a fundamental principle, as it did in *Mahon*; Holmes just could not find any fundamental principle at stake in *Lochner*.

296. The twelfth citation is in a Fifth Amendment Takings Clause case, *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), in which Justice Sutherland applies the traditional distinction between direct and consequential injury in holding that the federal government's requisition of goods that a private party had contracted to buy does not constitute a taking of that party's contract rights. He cites *Mahon* in passing for the proposition that the doctrine of public necessity may be based on tradition. *See id.* at 508; *supra* text accompanying notes 190–95 (discussing Holmes's treatment of public necessity).

297. *See, e.g.*, *Panhandle E. Pipe Line Co. v. State Highway Comm'n*, 294 U.S. 613, 621 (1935); *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 415 n.7 (1935); *Delaware, Lackawanna & W. R.R. v. Town of Morristown*, 276 U.S. 182, 193 (1928).

298. *See, e.g.*, *Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418 (1927); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

to the verge of the law."²⁹⁹ In this guise, *Mahon* appears in opinions of the Court in three well-known cases striking down state regulations—*Adkins v. Children's Hospital*,³⁰⁰ *Charles Wolff Packing Co. v. Court of Industrial Relations*,³⁰¹ and *Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton*,³⁰²—as well as in the impassioned dissents of the "Four Horsemen"³⁰³ in two cases that, by narrowly upholding state regulations, heralded the constitutional revolution: *Home Building & Loan Ass'n v. Blaisdell*³⁰⁴ and *Nebbia v. New York*.³⁰⁵ Justice Holmes's only citation of *Mahon*, which juxtaposes it with a wartime rent control case, is closely related to this group of citations.³⁰⁶

The other citations are a grab bag of relatively superficial references: The Court's deference to the legislature is strong but not absolute;³⁰⁷ the existence of a public purpose does not mean that a statute cannot amount to a taking;³⁰⁸ and the police power cannot be exerted arbitrarily or unreasonably.³⁰⁹ And in his concurrence in *Whitney v. California*,³¹⁰ Justice Brandeis is joined by Justice Holmes in lumping *Mahon* together with four other substantive due process cases that held "[p]rohibitory legislation . . . invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business."³¹¹ No one even hinted that *Mahon* was a landmark case about regulatory takings. When the Court decided in 1935 that a change in federal bankruptcy law violated the Fifth Amendment Takings

299. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

300. 261 U.S. 525, 552 (1923).

301. 262 U.S. 522, 542 (1923).

302. 273 U.S. 418, 437–38 (1927).

303. The term "The Four Horsemen" was used by critics to refer to Justices Butler, Van Devanter, Sutherland, and McReynolds as consistent opponents of New Deal legislation. Intended to evoke the Four Horsemen of the Apocalypse, the allusion was hardly complimentary. See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 29, at 309; *Revelation* 6:1–8 (describing opening of first four of seven seals, and white, red, black, and pale green horses that emerge, carrying horsemen committed to such tasks as taking peace from earth and killing with sword, famine, pestilence, and wild beasts). Of the 12 citations between 1922 and 1935, eight are attributable to Justices Sutherland, Butler, and McReynolds—three of the Four Horsemen. See *Panhandle E. Pipe Line Co. v. State Highway Comm'n*, 294 U.S. 613, 621 (1935) (McReynolds, J.); *Nebbia v. New York*, 291 U.S. 502, 552 (1934) (McReynolds, J., dissenting); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 479 (1934) (Sutherland, J., dissenting); *Delaware, Lackawanna & W. R.R. v. Town of Mornstown*, 276 U.S. 182, 193 (1928) (Butler, J.); *Tyson*, 273 U.S. at 437–38 (Sutherland, J.); *Weaver*, 270 U.S. at 410 (Butler, J.); *Adkins*, 261 U.S. at 552 (Sutherland, J.); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508 (1923) (Sutherland, J.).

304. 290 U.S. 398, 479 (1934) (Sutherland, J., dissenting).

305. 291 U.S. 502, 552 (1934) (McReynolds, J., dissenting).

306. See *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 601 (1926) (Holmes, J., dissenting) ("Extreme cases on the one side and on the other are *Edgar A. Levy Leasing Co. v. Siegel* and *Pennsylvania Coal Co. v. Mahon*."). (citations omitted). I discuss this passage above. See *infra* text accompanying notes 224–27.

307. See *Weaver*, 270 U.S. at 410 (Butler, J.).

308. See *Delaware, Lackawanna*, 276 U.S. at 193 (Butler, J.).

309. See *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 415 n.7 (1935) (Brandeis, J.). This proposition is, of course, probably supported better by Brandeis's own *Mahon* dissent than by Holmes's majority opinion.

310. 274 U.S. 357 (1927).

311. *Id.* at 374 (Brandeis, J., concurring).

Clause—a regulatory takings decision if ever there was one—it did not cite *Mahon*.³¹²

B. *Mahon Lost and Found*

After 1935, *Mahon* appeared to be destined for oblivion, along with many other minor substantive due process cases. For over two decades, it failed to surface in a single Supreme Court majority opinion. Between 1935 and 1958, its only appearance in the United States Reports was in a dissent by Holmes admirer Justice Frankfurter in *United States v. Commodities Trading Corp.*,³¹³ an obscure 1950 case about the amount that the United States should pay for the black pepper it requisitioned during World War II. Frankfurter cited *Mahon*, not for its holding, but for its rhetoric supporting Frankfurter's observation that "[i]n the exercise of its constitutional powers, Congress by general enactments may in diverse ways cause even appreciable pecuniary loss without compensation."³¹⁴

By 1958, *Mahon* had a future only if each of the points of understanding about the case between Holmes and the 1920s Court could be forgotten or ignored. The constitutional revolution of the late 1930s³¹⁵ rejected the Due Process Clause as a textual home for substantive economic rights. Rejected, too, was *Lochner*'s ahistorical approach to protection. In the process, the new regime also abandoned the inquiries into traditional legal categories and legislative purposes that Holmes's approach shared with the *Lochner* ahistoricists. Viewed as a run-of-the-mill due process case, *Mahon*—along with the three key points of its original understanding—was hopelessly obsolete.

In the post-1937 world, however, a judge who wanted to reestablish some sort of constitutional discourse about the governmental regulation of property rights could find alternative uses for *Mahon*. It might be the best precedent available in support of a discourse that was not vulnerable to charges of either textual or methodological *Lochnerism*.³¹⁶ First, the matter of text. The keys here are Justice Holmes's posthumous reputation as a determined opponent of

312. See *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

313. 339 U.S. 121 (1950) (Frankfurter, J., dissenting in part).

314. *Id.* at 133.

315. The conventional date is 1937, because of the Court's landmark decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which upheld a Washington minimum wage act against a Fourteenth Amendment Due Process challenge and overruled *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

316. As William Fischel has pointed out to me, it is also important that *Mahon* happens to concern the most traditional form of property: land. Although modern regulatory takings jurisprudence is supposedly based on a broad, modern understanding of property as a bundle of rights, see, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 n.6 (1980), it has overwhelmingly focused on protecting interests in land. The other "regulatory takings" opinions that Holmes wrote, concerning the activities of railroads, see *supra* note 273, have remained obscure in part because they are, in one sense, all too modern. They treat rights to act in certain ways as property rights, even though those rights are unconnected to ownership of land. Post-1937 constitutional property jurisprudence has, for the most part, confined itself to the protection of landowners.

economic substantive due process and *Mahon's* mention of the Fifth Amendment Takings Clause, which, if not examined too closely, could be taken to indicate reliance on that text.³¹⁷ Even as the Court repudiated economic substantive due process, it began to develop the doctrine of incorporation, under which the Fourteenth Amendment Due Process Clause, in addition to retaining a weak substantive component of its own,³¹⁸ became a conduit for applying most of the Bill of Rights against the states.³¹⁹ The obvious candidate to support a reinvigorated constitutional property discourse was the Fifth Amendment Takings Clause, with its ringing declaration that private "property [shall not] be taken for public use, without just compensation."³²⁰ There could be no doubt that the Takings Clause placed a substantive limitation on government action: "[W]ithout due process of law" might have referred to mere procedure, but "without just compensation" referred to hard cash.³²¹

The trickier issue was whether the terms "property" and "taken" could be interpreted broadly enough. Some precedent appeared to hold that "property" was only "taken" within the meaning of the Takings Clause when the government directly appropriated physical things—when government agents

317. Justice Holmes comments in *Mahon* that "[t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). As I have argued above, however, see *supra* text accompanying notes 261–62, the next sentence makes clear that Holmes is relying in *Mahon* on a fundamental rights theory of due process, and a fundamental right to just compensation which is "similar" to, but not logically linked to, the Fifth Amendment right. See *Mahon*, 260 U.S. at 415 ("A similar assumption is made in the decisions upon the Fourteenth Amendment.")

318. This was soon to become a strong substantive component, but not to protect property. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973).

319. On the history of incorporation generally, see CORTNER, *supra* note 250; WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 237–58 (1995).

The Court has never accepted the "total incorporation" theory of the first Justice Harlan and Justice Black, under which the Amendment simply functions to make all of the first eight Amendments applicable to the states. For Justice Harlan's view, see *Twining v. New Jersey*, 211 U.S. 78, 114–27 (1908) (Harlan, J., dissenting); *Hurtado v. California*, 110 U.S. 516, 556–58 (1884) (Harlan, J., dissenting); for Justice Black's, see *Duncan v. Louisiana*, 391 U.S. 145, 162–71 (1968) (Black, J., concurring), *Adamson v. California*, 332 U.S. 46, 68–92 (1947) (Black, J., dissenting). But it has accepted a "selective incorporation" theory under which once a clause of one of the first eight Amendments is deemed to be "incorporated," it places exactly the same limitations on the federal and state governments. See, e.g., *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (holding that Confrontation Clause applies to states and overruling *West v. Louisiana*, 194 U.S. 258 (1904)); *Malloy v. Hogan*, 378 U.S. 1, 11 (1964) (holding that Self-Incrimination Clause applies to states and overruling *Twining*, 211 U.S. at 78). This differs from the "fundamental rights" theory that the Court had generally accepted at the time it decided *Mahon*, under which a right found to be implicit in the concept of due process, such as freedom of speech or the right to just compensation upon a taking of private property, need not have the same scope as the similar right protected by one of the first eight amendments.

320. U.S. CONST. amend. V.

321. Of course, "for public use" might be interpreted to place a second substantive limitation on the taking of property, but a post-1937 constitutional property discourse needed some foothold other than the distinction between private and public spheres. *Berman v. Parker*, 348 U.S. 26 (1954), which interpreted the "public use" limitation in the context of a challenge to the District of Columbia's urban renewal program, made clear the deep aversion to reliance on such a distinction. See *id.* at 32–33 (describing judicial deference to legislative determinations of public purpose).

forced owners off their land or seized or destroyed their chattels.³²² Other precedents had used just compensation language in reviewing a wider variety of legislation, but the discredited doctrine of substantive due process tainted most of that precedent. The opinions used hybrid phrases like "tak[ing] without due process of law"³²³ or equated takings and due process challenges by using phrases like "taking . . . property for public use without compensation, and, therefore, without due process of law."³²⁴ Worse yet, they were written by known heretics—Justices like Joseph McKenna,³²⁵ who joined *Lochner v. New York*³²⁶ and *Coppage v. Kansas*;³²⁷ Mahlon Pitney,³²⁸ who wrote *Coppage*; and John Marshall Harlan,³²⁹ who dissented in *Lochner* but wrote *Adair v. United States*.³³⁰

Mahon was not similarly tainted, however, because Justice Holmes had been canonized by the Progressives.³³¹ In the first of three lectures delivered on Holmes in 1938, Felix Frankfurter made him the personification of the new constitutional order:

322. See, e.g., *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871) (holding that Just Compensation Clause "has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power").

323. *Lake Shore & Mich. S. Ry. Co. v. Smith*, 173 U.S. 684, 695 (1899) (invalidating state law requiring railroads to sell 1000-mile tickets at rate lower than otherwise determined reasonable).

324. *Chicago, Burlington & Quincy Ry. v. Illinois ex rel. Drainage Comm'rs*, 200 U.S. 561, 582 (1906) (emphasis omitted); see also *Chicago & Alton R.R. v. Tranbarger*, 238 U.S. 67, 78 (1915) (upholding statute requiring railroads to maintain ditches and drains along their track embankments) ("[I]t is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, or without due process of law, in the sense of the Fourteenth Amendment."); *Missouri Pac. Ry. v. City of Omaha*, 235 U.S. 121, 127 (1914) (upholding ordinance requiring railroad to construct viaduct to carry public street over its tracks at its own expense while framing question presented as whether ordinance constituted "a taking of [the railroad's] property without compensation for the benefit of another, and therefore without due process of law").

325. See *Curtin v. Benson*, 222 U.S. 78 (1911); *Muhlker v. New York & Harlem R.R.*, 197 U.S. 544 (1905). I discuss these cases above. See *supra* text accompanying notes 275–78.

326. 198 U.S. 45 (1905).

327. 236 U.S. 1 (1915).

328. See *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914). I discuss *Richards* above. See *supra* text accompanying notes 279–83.

329. See *Chicago, Burlington & Quincy Ry.*, 200 U.S. at 561. *Chicago, Burlington & Quincy* held that an Illinois law requiring the railroad to pay for the widening of a creek channel running across its right of way was a taking of property without just compensation and therefore without due process. See *id.* at 582, 594. Justice Holmes concurred, making it clear that, in his opinion, "if an expense is thrown upon the railroad unlawfully, its property is taken for public use without due compensation." *Id.* at 595. The same Term, Justice Harlan wrote the opinion of the Court in *West Chicago Street Railroad v. Illinois ex rel. City of Chicago*, 201 U.S. 506 (1906), upholding an ordinance requiring the West Chicago Street Railroad to relocate its tunnel under the Chicago River against a challenge that the ordinance took property without just compensation. Justice Holmes concurred in the judgment on the basis of *Chicago, Burlington & Quincy*. See *id.* at 529 (Holmes, J., concurring). Four Justices dissented.

330. 208 U.S. 161 (1908).

331. On the treatment of Holmes by the Progressives, and their "haste to make Holmes into a figure of legend," see WHITE, *supra* note 295, at 359–69, 378–79 (1993). White notes that "[a]bove all, however, the link between Holmes and his young admirers was their conviction that they and the justice shared a modernist political sensibility. In this assessment they were not quite accurate." *Id.* at 359–60.

During most of his thirty years on the Supreme Bench, and especially during the second half of his tenure, his were not the views of the majority of the Court. But the good that men do lives after them. About a year ago the old views of Mr. Justice Holmes began to be the new constitutional direction of the Court.³³²

Although entitled "Property and Society," this lecture unsurprisingly contained no reference to *Pennsylvania Coal Co. v. Mahon*.³³³ For the Progressives, Holmes's decision in *Mahon* was a lapse to be explained away privately and ignored publicly.³³⁴ Justice Brandeis, in particular, was quite condescending toward Holmes's protection of property rights in *Mahon*. Brandeis once accounted for Holmes's position in *Mahon* "by what one would think Holmes is last man to yield to—class bias. He came back to views not of his manhood but childhood."³³⁵ Brandeis remarked further that "[h]eighted respect for property has been part of Holmes' growing old" and that "they cut (caught) him when he was weak (after Holmes's prostate operation) & played him to go whole hog."³³⁶ Nor is it clear that Brandeis even grasped—or was willing to accept—the full measure of Holmes's approach in *Mahon*. One juxtaposition of comments is particularly telling. After *Mahon* was handed down, Justice Holmes wrote Harold Laski about the case. "I have always thought," he remarked, "that old Harlan's decision in *Mugler v. Kansas* was pretty fishy."³³⁷ This statement, of course, expresses one of Holmes's deepest jurisprudential resolutions—the rejection of an ahistorical approach to constitutional property.³³⁸ Yet Brandeis attributed Holmes's rejection of *Mugler* to the most shallow of motives: Holmes's "'impatience with prohibition."³³⁹

332. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 72 (2d ed. 1961)

333. Seven years earlier, in an essay reviewing Holmes's 25 years on the Court, Frankfurter relegates *Mahon* to a footnote and refers the reader to both Holmes's opinion and Justice Brandeis's dissent. See Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, in MR. JUSTICE HOLMES 46, 97 n 79 (Felix Frankfurter ed., 1931). Possibly even more revealing is Frankfurter's treatment of *Mahon* in his review of Holmes's constitutional opinions, written the year after *Mahon* was decided. Frankfurter classifies *Mahon* as a Contract Clause case, and does not mention that the opinion also refers to the Due Process Clause. See Felix Frankfurter, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions*, 36 HARV. L. REV. 909, 937 (1923). It seems at least possible that Frankfurter wanted to minimize *Mahon*'s reliance on substantive due process. Later that year, Justice Brandeis told Frankfurter that *Mahon* was, in Holmes's mind, a substantive due process case. Referring to *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919), Brandeis said that "Holmes balked on 'Due Process'—the thing that prevailed with him in the *Mahon* case later." Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 324 (quoting Felix Frankfurter's notes of conversations with Justice Brandeis) (footnote omitted)

334. See WHITE, *supra* note 295, at 403.

335. Urofsky, *supra* note 333, at 321 (quoting Felix Frankfurter's notes of conversations with Justice Brandeis).

336. *Id.* On Holmes's prostate surgery, which had been performed in July 1922, see SHELDON M. NOVICK, *HONORABLE JUSTICE* 348–49 (1989).

337. Letter from Oliver Wendell Holmes to Harold Laski (Jan. 13, 1923), in 1 HOLMES-LASKI LETTERS, *supra* note 40, at 473.

338. See *supra* text accompanying notes 33–41, 77–119.

339. Urofsky, *supra* note 333, at 324 (footnote omitted) (quoting Felix Frankfurter's notes of

The Progressives' refusal to see in "the true Holmes" anything but a Progressive, and their failure even to mention *Mahon* in public assessments of Holmes's career, simply fortified Holmes's reputation as an opponent of economic substantive due process. On the strength of that reputation, *Mahon*, stripped of its original meaning, could be repackaged as a novel Takings Clause case, completely independent of discredited substantive due process. A giant of American jurisprudence, generally unsympathetic to constitutional property rights, had "recognized . . . that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits."³⁴⁰

If a new constitutional property discourse could not be based on the Due Process Clause, neither could it invoke the methods of *Lochner* ahistoricism. It was no longer acceptable to look to common law rulings and categories to give content to a phrase like "health, safety, and general welfare," which was supposed to define the proper sphere of the police power.³⁴¹ Rather, as Justice Douglas famously observed in the 1954 case of *Berman v. Parker*:³⁴²

conversations with Justice Brandeis). Justice Brandeis's comment was not directly about *Mahon*, but about *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146 (1919). In *Hamilton*, Justice Brandeis wrote for a unanimous Court upholding the War-Time Prohibition Act, a federal law prohibiting the sale of distilled spirits as beverages, passed before the Eighteenth Amendment took effect. Brandeis relied heavily on *Mugler*. See *id.* at 157. According to Brandeis, the Court's tentative vote was 5-4 to strike down the prohibition law, with Holmes in the majority, but Brandeis eventually convinced everyone to join his opinion upholding the law. See Urofsky, *supra* note 333, at 324. When Holmes joined Brandeis's opinion, he wrote a note to Brandeis commenting that he thought *Mugler* was "[a] mighty fishy decision," but went on to comment that he was "merely whispering in your ear, not suggesting that you make any changes. You have done nobly and I felicitate you on getting away with it." BICKEL, *supra* note 273, at 229 (footnote omitted). Alexander Bickel concludes that, in spite of Justice Brandeis's dismissive comment about Holmes's rejection of *Mugler*, Brandeis "well knew" that Holmes's impatience with prohibition "was not the heart of the matter," and that the difference lay in Holmes's and Brandeis's differing views on questions of property rights. See *id.* Justice Holmes's memo to Brandeis about *Hamilton* substantially weakens the argument that Holmes must have accepted *Mugler* because he joined in other opinions citing *Mugler* after *Mahon* and once cited *Mugler* himself. For such an argument, see Norman Williams, Jr. et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193, 211 n.60 (1984).

340. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992). Justice Scalia's account of *Mahon* in *Lucas* is foreshadowed by Justice Harlan's dissent in *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 179 (1958) (Harlan, J., dissenting), the case that ended the 23-year drought of *Mahon* citations. *Central Eureka Mining* concerned a federal government order directing nonessential gold mines to shut down—a kind of use regulation. The owners of the shuttered gold mines brought an action seeking just compensation for the losses they suffered during the period of shutdown, arguing that the shutdown order constituted a taking under the Fifth Amendment. In an opinion by Justice Burton, the Court rejected the mineowners' claims. But, citing *Mahon*, it recognized the possibility of a modern regulatory takings claim based on diminution of value. See *id.* at 168. Justice Harlan went further. In dissent, he argued that under *Mahon* the shutdown order was a taking, requiring the government to pay just compensation. See *id.* at 182-84 (Harlan, J., dissenting). Like Justice Scalia, Justice Harlan portrays *Mahon* as a case in which Justice Holmes recognized that the Takings Clause could not be meaningfully enforced unless it was extended to regulations: "[W]here the Government proceeds by indirection, and accomplishes by regulation what is the equivalent of outright physical seizure of private property, courts should guard themselves against permitting formalities to obscure actualities." *Id.* at 184 (Harlan, J., dissenting).

341. See Sunstein, *supra* note 284, at 880-82.

342. 348 U.S. 26 (1954).

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.³⁴³

Nor was it acceptable for courts to conduct anything but the most cursory examination of the purposes of ordinary economic legislation or of the relationship of the legislature's means to its purported ends. The language of deference might not have changed, but the attitude had. Thus, in a moment of remarkable judicial candor and sensitivity to the malleability of language, Justice Murphy responded in 1949 to a litigant's reliance on a 1928 case: "[A] pronounced shift of emphasis since the *Liggett* case has deprived the words 'unreasonable' and 'arbitrary' of the content for which respondents contend."³⁴⁴

Although Justice Holmes's inquiries into tradition and purpose had a different ultimate theoretical basis, no one considered whether that basis provided a justification for those inquiries that could survive the rejection of *Lochner* ahistoricism. Rather, courts sought to construct a takings inquiry that placed little reliance on tradition and purpose. As Justice Stewart declared in *Hughes v. Washington*,³⁴⁵ "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*."³⁴⁶ *Mahon* survived because it contained language suggesting a test that seemed to fulfill Justice Stewart's hopes for an objective takings jurisprudence: the diminution in value test. To measure the effect of a regulation on a property's value, one need not know anything about the regulation's purpose or its relationship to a legal tradition. Thus, when *Mahon* reappears after its twenty-three-year hiatus, it is cited for the propositions that "action in the form of regulation can so diminish the value of property as to constitute a taking"³⁴⁷ and that "governmental action in the form of regulation ca[n] be so onerous as to constitute a taking which constitutionally requires just compensation."³⁴⁸

C. *Mahon* in the Last Two Decades

Although *Mahon* had shown its new textual and methodological face by the early 1960s, the Supreme Court did not devote serious, sustained attention to its "regulatory takings" doctrine until the late 1970s. When it did, however,

343. *Id.* at 33 (citation omitted).

344. *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 225 (1949) (citing *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105 (1928)).

345. 389 U.S. 290 (1967).

346. *Id.* at 298 (Stewart, J., concurring).

347. *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

348. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

Mahon became a critical, contested authority in a number of major doctrinal battles that continued to reshape perceptions about the case's textual basis and methods of analysis.

1. *Mahon and the Constitutional Text*

Mahon's reconstruction as a Takings Clause case, rather than a substantive due process case, was fortified in the battle over whether the Constitution mandated a retrospective damages remedy for those temporarily subject to excessively burdensome regulation. By 1980, it was established that the Takings Clause itself entitled an owner whose property had been taken to bring an "inverse condemnation" action, seeking just compensation.³⁴⁹ Moreover, owners whose property had been taken temporarily—for example, owners whose land or buildings had been taken over by the federal government to be used in the war effort during World War II—could recover just compensation for the period when they had been dispossessed, even after the government returned possession to them.³⁵⁰ It appeared that if regulations were subject to review under the Takings Clause, the Constitution guaranteed damages for the time during which an excessive regulation was in effect, even if the government agreed to lift the regulation once a court found it to effect a taking. Those opposed to awarding damages for temporary regulatory takings did not question this logic. Rather, they developed the argument that regulations were subject to review only under the Due Process Clause, which did not provide an inverse condemnation action or require interim damages.³⁵¹

Into this debate came *Mahon* and Justice Holmes's comment that "if regulation goes too far it will be recognized as a taking."³⁵² Did this mean that the Court had decided in 1922 that regulations were reviewable under the Takings Clause? The state courts that had decided against a temporary damages remedy maintained that Justice Holmes had used the word "taking" only in a "metaphorical" sense and that the real issue in *Mahon* was whether

349. See *United States v. Clarke*, 445 U.S. 253, 257 (1980).

350. See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

351. One prominent group of land use academics and lawyers opposed to a damages remedy started from the mistaken assumption that Holmes believed that the Due Process Clause had no substantive component:

[Holmes's] previous stinging criticism of the use of substantive due process doctrine to invalidate legislation had effectively foreclosed him from employing that doctrine as a constitutional principle. Faced with a statute which he found constitutionally offensive, and cut off from reliance on the due process clause, Holmes turned to the taking clause as the basis for his decision.

Williams, *supra* note 339, at 209 (citing *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)). This mistaken assumption most likely backfired, and convinced many that *Mahon* was a Takings Clause case.

352. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

the Kohler Act was "an invalid exercise of the police power under the due process clause."³⁵³

In 1981, however, Justice Brennan rejected this interpretation in his dissent in *San Diego Gas & Electric Co. v. City of San Diego*.³⁵⁴ While the majority in *San Diego Gas & Electric* held that the Court lacked jurisdiction to decide the temporary damages issue, Justice Brennan, joined by three others, enlisted *Mahon* in support of his conclusion that the Constitution did mandate damages for temporary takings. "[T]he general principle that a regulation can effect a Fifth Amendment 'taking,'" Justice Brennan asserted, "has its source in Justice Holmes' opinion for the Court in *Pennsylvania Coal Co. v. Mahon*."³⁵⁵ The state courts were wrong to interpret *Mahon* as merely indicating when a police power regulation would be invalid; the *Mahon* Court "[c]learly . . . contemplated that a regulation could cross the boundary surrounding valid police power exercise and become a Fifth Amendment 'taking.'"³⁵⁶ If, as Brennan and others assumed, all government action reviewable under the Takings Clause could give rise to liability for temporary damages, then *Mahon*, by reviewing a regulation under that Clause, supported a damages remedy for temporary regulatory takings.

After *San Diego Gas & Electric*, the Court failed in two other cases to reach the temporary damages issue.³⁵⁷ In the 1987 case of *First English Evangelical Lutheran Church v. County of Los Angeles*,³⁵⁸ however, the Court adopted Justice Brennan's position that the Constitution mandated a damages remedy for temporary regulatory takings, and with it, Brennan's interpretation of *Mahon*.³⁵⁹ In the view of the *First English* Court, when Holmes stated that "if a regulation goes too far it will be recognized as a taking," he meant a Fifth Amendment taking, and he meant to acknowledge that the Fifth Amendment provided a damages remedy regardless of whether

353. *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 385 (N.Y. 1976); see *Agins v. City of Tiburon*, 598 P.2d 25, 29 (Cal. 1979), *aff'd*, 447 U.S. 255 (1980) (stating that Holmes used word "taking" to "indicate the limit by which the acknowledged social goal of land control could be achieved by regulation rather than by eminent domain").

354. 450 U.S. 621 (1981).

355. *Id.* at 648-49 (Brennan, J., dissenting).

356. *Id.* at 650 n.17 (Brennan, J., dissenting); see *id.* at 641 n.4 (Brennan, J., dissenting) (detailing state courts' position).

357. See *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). Both of these cases maintained the focus on *Mahon*. The Court in *Williamson* explained the arguments about the interpretation of *Mahon* in some detail, see *id.* at 198-99, but concluded that the plaintiff's claim was premature, see *id.* at 199. Justice Stevens, concurring in the judgment, argued that Justice Holmes did not mean to suggest that regulations held to be invalid as takings would always give rise to obligations to pay just compensation. See *id.* at 203 (Stevens, J., concurring). In *MacDonald, Sommer & Frates*, Justice White, dissenting in favor of the Brennan position, cited *Mahon* to support his contention that "police-power regulations may rise to the level of a taking if the restrictions they impose are sufficiently severe." 477 U.S. at 360 (White, J., dissenting).

358. 482 U.S. 304 (1987).

359. See *id.* at 316.

the government had formally instituted condemnation proceedings.³⁶⁰ Together, *San Diego Gas & Electric* and *First English* contributed mightily to *Mahon*'s reputation as a seminal Takings Clause case.

Mahon's role as support for a damages remedy for temporary regulatory takings depends on two anachronisms. The first is familiar: None of the members of the *Mahon* Court believed that the Fourteenth Amendment "incorporated" the Takings Clause, which continued to apply only to the federal government.³⁶¹ Rather, Fourteenth Amendment due process included the fundamental right of just compensation, which happened to be embodied in the Fifth Amendment Takings Clause as well. In addition, a deeper anachronism affected Justice Brennan and the *First English* Court's views about *Mahon* and the issue of damages for temporary regulatory takings. Brennan and the *First English* Court assumed, as did the state courts they opposed, that if a regulation really effected a "taking," then the Constitution required an award of retrospective damages for any period the regulation was in effect. But Justice Holmes and the *Mahon* Court would likely have seen the issue in a different light.

In *Morrisdale Coal Co. v. United States*,³⁶² a case decided the same year as *Mahon*, a coal company claimed that the action of a federal administrative agency, fixing the price of coal and directing its sale to particular buyers during World War I, effected a taking under the Fifth Amendment.³⁶³ The coal company sought, not invalidation of the statute granting power to the agency, but damages: the difference between the price at which it had contracts to sell the coal and the lower price at which the agency ordered it to sell the coal to other buyers. Justice Holmes considered the issue under the then-prevailing theory that takings claims could be brought under a federal statute that waived sovereign immunity for claims upon any "contract, express or implied." The theory was that when the government appropriated property for a public use, it impliedly promised to pay just compensation, since such an implication would be "consistent with the constitutional duty of the government, as well as with common justice."³⁶⁴

360. *Id.* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

361. For my discussion of *Mahon*'s textual basis, see *supra* text accompanying notes 240–63.

362. 259 U.S. 188 (1922).

363. Because the suit was against the federal government, there was no need to resort to the Fourteenth Amendment Due Process Clause.

364. *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 657 (1884). *Great Falls* was decided under the Court of Claims Act, which conferred jurisdiction on the Court of Claims over actions founded "upon any contract, express or implied, with the government of the United States." Act of Feb. 24, 1855, ch. 122, 10 Stat. 612, 612 (current version at 28 U.S.C. §§ 2501–22 (1994)). In 1887, Congress passed the Tucker Act, which, among other things, enlarged the Court of Claims's jurisdiction to include "all claims founded upon the Constitution of the United States or any law of Congress." Tucker Act, ch. 359, 24 Stat. 505, 505 (1887). This raised the possibility that the Court might recharacterize takings claims as "claims founded upon the Constitution of the United States," thus discarding the legal fiction of implied promise. The Court, however, at first declined to take that step. In *United States v. Lynah*, 188 U.S. 445 (1903), the Court stuck with the implied promise theory, rejecting the position, taken by Justice Brown in a concurring opinion,

Using sweeping language, Justice Holmes denied the coal company's claim. Holmes asserted that:

no lawmaking power promises by implication to make good losses that may be incurred by obedience to its commands. If the law requires a party to give up property to a third person without adequate compensation the remedy is, if necessary, to refuse to obey it, not to sue the lawmaker.³⁶⁵

Assuming that Holmes meant the refusal to obey the law to serve as a basis for a legal challenge to its validity,³⁶⁶ his comments suggest that he saw the issue of a damages remedy as separate from the issue of whether a regulation violated the Takings Clause. A regulation might indeed effect a Fifth Amendment taking, such that a party affected by the regulation could obtain a declaration of its invalidity or an injunction ordering the government to cease enforcing it unless it paid the affected party just compensation. Nonetheless, a damages remedy would be unavailable.

To be sure, *Morrisdale Coal Co.* is a case about federal sovereign immunity, and its holding would not apply in a case involving a state law like the Kohler Act or the Los Angeles County regulation at issue in *First English*. But *Morrisdale* demonstrates, first, that Justice Holmes saw as distinct the two issues of whether an action amounted to a taking and whether a damages remedy was available, and second, that Holmes was willing to treat "regulatory takings" differently from direct appropriations by the government. In addition, Holmes's broad references in *Morrisdale* to "lawmaking power[s]" and "lawmakers" suggest that he was thinking in terms of the immunity of all sovereigns, not just the federal government. *Morrisdale* thus further weakens any connection between Justice Holmes's opinion in *Mahon* and the damages issue in *First English* and suggests that the *First English* Court enlisted Justice Holmes's prestige at the cost of further distorting the *Mahon* opinion.

2. Mahon and Methods of Takings Analysis

If *First English* and its precursors have influenced recent perceptions of *Mahon*'s textual basis, two other developments in takings law have influenced perceptions of Justice Holmes's analysis in *Mahon*. The first is the evolution of economic impact takings, culminating in the creation in *Lucas v. South*

that takings claims were "claims founded upon the Constitution" within the meaning of the Tucker Act. See *id.* at 461–62; *id.* at 475 (Brown, J., concurring). It was not until *Jacobs v. United States*, 290 U.S. 13, 16 (1933), after Justice Holmes had left the Court, that the Court began to embrace the theory that takings claims were "founded upon the Constitution" within the meaning of the Tucker Act.

365. *Morrisdale Coal Co.*, 259 U.S. at 190.

366. It seems rather unlikely that Holmes meant that the coal company's only remedy was to engage in an act of civil disobedience that might prompt a political decision to change the law, or an act of defiance to incite revolution.

*Carolina Coastal Council*³⁶⁷ of a *per se* takings category for regulations that "den[y] all economically beneficial or productive use of land."³⁶⁸ The second is the Court's decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,³⁶⁹ narrowly upholding a coal mining subsidence statute quite similar to the statute *Mahon* struck down. The line of cases leading to *Lucas* is, along with the earlier cases of *United States v. Central Eureka Mining Co.*³⁷⁰ and *Goldblatt v. Town of Hempstead*,³⁷¹ responsible for the perception of *Mahon* as a "diminution in value" case. *Keystone* is responsible for the perception that *Mahon* turned on a balancing test.

The road to *Lucas* began in 1978 with *Penn Central Transportation Co. v. City of New York*.³⁷² Justice Brennan's opinion for the Court in *Penn Central*, upholding New York City's Landmarks Preservation Law against a takings challenge, famously characterized the Court's takings inquiries as "essentially ad hoc" and "factual."³⁷³ At the same time, however, it suggested a narrower, more discrete set of circumstances under which a regulation would amount to a taking. "It is . . . implicit in *Goldblatt v. Town of Hempstead*," wrote Justice Brennan, "that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . . or perhaps if it has an unduly harsh impact upon the owner's use of the property."³⁷⁴ Justice Brennan then introduced *Mahon* as the most prominent case in the somewhat dubious second category of "impact" takings. *Mahon*, he wrote, "is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'"³⁷⁵ Brennan makes clear, however, that this category is narrow. He asserts that the statute in *Mahon* was invalid because it "had nearly the same effect as the complete destruction of rights claimant had reserved"³⁷⁶ and appends citations to two other cases mentioning the "complete destruction" of property interests.³⁷⁷ Later in the opinion, it becomes clear that the reason for characterizing *Mahon* as involving "distinct investment-backed expectations"³⁷⁸ is to distinguish the Pennsylvania Coal Company's support rights from the Penn Central Company's air rights. The latter were not a distinct part of Penn Central's

367. 505 U.S. 1003 (1992).

368. *Id.* at 1015.

369. 480 U.S. 470 (1987).

370. 357 U.S. 155 (1958).

371. 369 U.S. 590 (1962).

372. 438 U.S. 104 (1978).

373. *Id.* at 124.

374. *Id.* at 127.

375. *Id.*

376. *Id.*

377. See *id.* at 128 (citing *Armstrong v. United States*, 364 U.S. 40 (1960); *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908)).

378. *Penn Cent. Transp. Co.*, 438 U.S. at 127.

"primary expectation concerning the use of the parcel,"³⁷⁹ and therefore their destruction did not fall under the rule in *Mahon*.³⁸⁰

Justice Brennan's treatment of *Goldblatt* and *Mahon* forms part of his effort to justify upholding the landmarks ordinance in *Penn Central*. It is not clear that he intended that discussion to ossify into a two-prong takings test. Yet ossify it did, as early as two years later in *Agins v. City of Tiburon*.³⁸¹ In the course of upholding a zoning ordinance against a takings challenge, the Court recited that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."³⁸² The *Agins* two-prong formulation became a favorite with the Court.³⁸³ It was again linked to *Mahon* in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,³⁸⁴ when Justice Stevens read *Mahon* as resting on two propositions that the *Mahon* opinion itself did not reveal in so many words, but which turned out to be the two *Agins* prongs.³⁸⁵ As a result, when the Court actually found in *Lucas* a case in a procedural stance odd enough to present the question whether a regulation that left a parcel of land completely valueless would always constitute a taking, the second *Agins* prong, frequently recited and imbued with the stature of Oliver Wendell Holmes, made the answer seem obvious.³⁸⁶

The question whether Justice Holmes would have voted with the majority in *Lucas v. South Carolina Coastal Council*³⁸⁷ to establish a per se takings category for total deprivations of land value is interesting and difficult. There is much in Justice Scalia's opinion for the Court that the positivist Holmes would find congenial. Justice Scalia criticizes the distinction between preventing injury and conferring benefits as almost infinitely malleable,³⁸⁸ just as Holmes criticized the "sic utere tuo" imperative as being unable to decide specific cases.³⁸⁹ In framing what has come to be known as the "nuisance exception" to the per se category, Scalia formulates the takings issue as Holmes would have formulated it, in terms of change from preexisting positive law. A regulation that prohibits all economically beneficial use of land, Scalia concludes, effects a taking unless it "inhere[s] in the title itself, in

379. *Id.* at 136.

380. *See id.* at 130 & n.27.

381. 447 U.S. 255 (1980).

382. *Id.* at 260 (citations omitted).

383. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Kirby Forest Indus. v. United States*, 467 U.S. 1, 14 (1984); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); *see also San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 647-48 (1981) (Brennan, J., dissenting).

384. 480 U.S. 470 (1987).

385. *See id.* at 484-85.

386. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

387. *Id.*

388. *See id.* at 1026.

389. *See supra* text accompanying notes 107-11.

the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."³⁹⁰ In speculating how courts might divide property interests into discrete units for purposes of determining whether a regulation has deprived an interest of all economically feasible use, Justice Scalia seeks an answer in the positive law tradition of the jurisdiction in question.³⁹¹

On the other hand, Justice Holmes's vision of law seems to accord it more depth and fluidity than Justice Scalia's, perhaps because Holmes's positivism is tempered by a larger dose of historicism than Scalia's.³⁹² The "nuisance exception" in *Lucas* turns only on the binary question of whether legislation has changed existing positive law. *Lucas*, unlike *Mahon*, does not provide an account of positive law under which it would be possible to discern degrees of change. Justice Scalia also appears to minimize the legislature's role in forming the "background principles of the State's law of property and nuisance."³⁹³ Justice Holmes did not draw as clear a line between legislature and judiciary, and explicitly suggested that a sufficiently settled statute could come to inhere in the title just as much as a common law limitation.³⁹⁴

390. *Lucas*, 505 U.S. at 1029.

391. *See id.* at 1017 n.7.

392. On Justice Holmes's historicism, see *supra* text accompanying notes 135–36. An investigation into the degree to which Justice Scalia may reject historicist views is outside the scope of this Article, but it might start with his comments on the rule of law. Scalia's ideal of a "law of rules," see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989), is parallel to Holmes's project of specification. But while Holmes continued to believe in the common law model of incremental legal development, see *supra* text accompanying notes 213–27, Scalia appears to devalue it, see Scalia, *supra*, at 1177–78. However, any difference between the two methods is likely to be one of degree.

393. The examples of "background principles" that Justice Scalia gives are all traditional common law doctrines such as private nuisance, public nuisance, and public necessity. *See id.* at 1029; *id.* at 1031 (stating that "question . . . of state law to be dealt with on remand" is whether "common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land") (emphasis added). Commentators who assume that Justice Scalia excludes legislation include Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 2 STAN. ENVTL. L.J. 247, 253 (1996); Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329, 337 (1995); John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 1–3 (1993); and John M. Walker, Jr., *Common Law Rules and Land-Use Regulations: Lucas and Future Takings Jurisprudence*, 3 SETON HALL CONST. L.J. 3, 17 (1993). Courts applying *Lucas* have been split on this issue; some have held that the exception for limits "inher[ing] in the title" prevents a landowner from challenging any law, legislative or judicial, that predated her acquisition of the parcel of land in question. *See, e.g., Hunziker v. Iowa*, 519 N.W.2d 367, 371 (Iowa 1994). Justice Scalia would undoubtedly reject this broad interpretation. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) (Scalia, J.).

In drawing a distinction between real and personal property, however, Scalia refers to "the State's traditionally high degree of control over commercial dealings," *Lucas*, 505 U.S. at 1027, which could refer to a legislative tradition as well as a judicial one; so perhaps there is in Scalia's view some unspecified role for legislative traditions in shaping constitutional property law.

394. *See Otis Co. v. Ludlow Mfg. Co.*, 201 U.S. 140, 152 (1906); *supra* note 39 (discussing *Otis Co.*). In *Presault v. United States*, 27 Fed. Cl. 69 (1992), the Court of Federal Claims arguably interpreted the *Lucas* "inhere in the title" exception in a Holmesian manner. The court addressed the plaintiffs' claim that a federal act took their reversionary interest in a railroad right-of-way by examining in some detail the evolution of federal and state law over the previous hundred years. It held that the plaintiffs did not have a compensable property interest "given long-standing, pervasive, and specific federal limitations on rights created by state law in respect of property burdened by a private easement for a public purpose." *Id.* at 89.

Justice Holmes's project of specification meant that he would not have rejected a *per se* rule out of hand.³⁹⁵ In this respect, Justice Stevens, dissenting in *Lucas*, is mistaken to draw the conclusion that, because Holmes stated in *Mahon* that the constitutional question was one of degree, he would not have supported any categorical rule.³⁹⁶ But if Justice Holmes were to decide in favor of the rule in *Lucas*, his judgment would be complex, comparing the value of the *Lucas* category to other alternatives. The treatment of *Mahon* in *Lucas* and the cases that preceded it misses that complexity and leaves Justice Holmes's opinion representing little more than the single dimension of diminution in value.

The major exception to the Supreme Court's treatment of *Mahon* as a "diminution in value" case, and the case that highlighted *Mahon*'s supposed use of a balancing test, is *Keystone Bituminous Coal Ass'n v. DeBenedictis*.³⁹⁷ The *Keystone* Court upheld Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act against a takings challenge. Justice Stevens, writing for the majority, faced the difficult task of distinguishing the Subsidence Act from the very similar Kohler Act invalidated in *Mahon*. Although Justice Stevens conducted a detailed discussion of the diminution of value issue,³⁹⁸ he also found it important to compare the legislative purposes that could be inferred from the operative provisions of the Subsidence Act and the Kohler Act. The Subsidence Act, he noted, did not have the Kohler Act's exception for land surfaces owned by the owner of the underlying coal, a feature that had caused Holmes to be skeptical of "the extent of the public interest"³⁹⁹ underlying the latter.⁴⁰⁰ In addition, although notice might protect the state's interest in protecting personal safety, as Justice Holmes suggested in *Mahon*,⁴⁰¹ the Subsidence Act served other purposes that notice could not serve: conservation of land, preservation of surface water drainage, and so on.⁴⁰²

The inquiry proposed by *Keystone*, however, turns out to be quite different from Holmes's analysis in *Mahon*. Justice Stevens, borrowing from another passage in *Agins*, states that the takings question "'necessarily requires a weighing of private and public interests.'" ⁴⁰³ In *Keystone*, the weight is on

395. I discuss the project of legal specification above. See *supra* text accompanying notes 217–36.

396. See *Lucas*, 505 U.S. at 1063–64 (Stevens, J., dissenting). Justice Blackmun, dissenting in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), similarly argues that *Mahon* is authority for rejecting any *per se* takings category, including the category of "permanent physical occupation" created in *Loretto*. See *id.* at 442 & n.1 (Blackmun, J., dissenting). He is, I think, similarly mistaken.

397. 480 U.S. 470 (1987).

398. See *id.* at 493–99.

399. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413–14 (1922). I discuss *Mahon*'s treatment of the Kohler Act exception above. See *supra* text accompanying notes 160–62.

400. See *Keystone*, 480 U.S. at 486.

401. See *Mahon*, 260 U.S. at 414. I discuss *Mahon*'s treatment of the public safety rationale above. See *supra* text accompanying notes 162–64.

402. See *Keystone*, 480 U.S. at 485–86.

403. *Id.* at 492 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260–61 (1980)).

the public side since "the public interest in preventing activities similar to public nuisances is a substantial one"⁴⁰⁴ and the Subsidence Act more closely seeks to further such an interest than the Kohler Act. Thus, *Keystone* ends up turning on a balancing test, in which courts apparently decide independently the weight accorded to various public interests, much as, in contemporary equal protection analysis, courts decide whether particular state interests are compelling, substantial, or merely legitimate.⁴⁰⁵ The *Keystone* Court implies that *Mahon* was decided on the same logic. That characterization of *Mahon*, however, represents just one more distortion of its theory and analysis of constitutional property. Although Holmes might well have found the differences between the Subsidence Act and the Kohler Act to be significant, their significance would not stem from an independent judicial assessment of their purposes. Rather, Holmes would have considered whether, given its differences from the Kohler Act, the Subsidence Act less drastically undercut principles embedded in existing Pennsylvania law.

D. *A Role for Rediscovered Mahon?*

What impact, if any, should a rediscovered *Mahon* have on current takings jurisprudence? My goal in the last Section of this Article is to suggest a variety of issues that judges and scholars must face before they can decide whether to adopt a Holmesian approach to constitutional property. The issues divide into two groups. The first concerns the feasibility of Holmes's approach: Is implementation possible? The second concerns its desirability: Do we want such an approach?

1. *Feasibility*

The most basic issue of feasibility is whether law actually is organized the way that Holmes assumed it was for purposes of adjudicating constitutional property cases. Holmes assumed that the positive law of a jurisdiction can be described as a *body* of law, organized around multiple principles, poles, or paradigm cases. But perhaps this organization is illusory, or perhaps there is a more or less equally convincing principle to justify any result one wishes. If that is the case, then Holmes's approach may be just one more failed attempt to separate law from politics and the adjudication of constitutional property cases may be indistinguishable from legislation.⁴⁰⁶

404. *Id.*

405. See, e.g., *TRIBE*, *supra* note 67, § 16-32, at 1602 (comparing assessment of importance of government purpose under three tiers of equal protection scrutiny).

406. Morton Horwitz has suggested that Holmes himself came to the conclusion that no distinction between law and politics was possible. See *HORWITZ*, *supra* note 265, at 140.

Even if we could imagine describing positive law as an organized body, there remain other crucial questions in a legal system as large and complicated as that of the United States: How many separate bodies of law are out there and on which body do we need to focus in deciding constitutional property cases? After *Erie Railroad Co. v. Tompkins*,⁴⁰⁷ the correct answer to the first question seems to be that each state has its own body of law and legal tradition, as does the federal government. It would seem that in assessing the change wrought by a piece of legislation we would have to identify the sovereign from which the legislation issues and analyze its relationship to the body of law connected with that sovereign.⁴⁰⁸ In practice, however, Holmes was not particularly concerned about distinguishing the legal traditions of each sovereign. In *Mahon*, he does allude to one tradition peculiar to Pennsylvania: the treatment of support rights as a separate estate in land.⁴⁰⁹ But he considers other principles—public nuisance, personal safety, and so on—without regard to Pennsylvania precedent.⁴¹⁰

This rift between theory and practice perfectly parallels Holmes's position on federal general common law. Holmes, anticipating *Erie*, famously argued that there could be no federal general common law.⁴¹¹ At the same time, however, Holmes continued to create law under that rubric as a Supreme Court Justice, issuing some of his most criticized opinions.⁴¹²

The confusion caused by the failure to reconcile the theory and practice of identifying law with a particular sovereign is even greater in federal constitutional property law than in private law. For it would seem that some of the principles developed over time in elaborating federal constitutional property law would be federal principles, applicable regardless of the particular jurisdiction at issue, whereas principles developed in elaborating primary private law might be specific to particular jurisdictions. But where is the dividing line between those two sets of principles? Holmes seems to suggest that the result in *Mahon* might have been different if Pennsylvania did not treat support rights as a separate estate in land, just as he suggests that the result in

407. 304 U.S. 64 (1938).

408. There is no reason in principle not to get even more local. If a large city or county with substantial lawmaking power over a wide variety of issues develops a body of law, why could we not begin to identify principles within that body? This is analogous to the problem of geographic scope faced by those who seek to ground constitutional property standards in community norms. See Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1145–46 (1996) (reviewing FISCHER, *supra* note 23) (noting that reliance on “normal behavior” raises issue of size of community whose behavior will be considered normal).

409. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

410. See *id.* at 393.

411. See *Black & White Taxi Co. v. Brown & Yellow Taxi Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting); *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 218 (1917) (Holmes, J., dissenting); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370 (1910) (Holmes, J., dissenting).

412. Holmes's federal common law cases include, most notoriously, *Baltimore & Ohio Railroad v. Goodman*, 275 U.S. 66 (1927), and *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268 (1922). G. Edward White discusses these cases and their relationship to Holmes's proclaimed rejection of federal general common law in WHITE, *supra* note 295, at 381–90.

*Jackman v. Rosenbaum Co.*⁴¹³ might have been different if Pennsylvania had not previously recognized party-wall easements for neighboring landowners. The implication seems to be that the constitutional constraints on the Pennsylvania legislature may be different from those on another state's legislature. Does this mean that a state that traditionally had a strict law of trespass might be subject to a per se takings rule for permanent physical occupations, whereas a state that traditionally treated trespass more flexibly might not be? Holmes never addresses this issue directly. He seems to assume that, although the legal traditions of the states are independent in theory and occasionally different in small details, they are largely parallel in fact, all drawing from one Anglo-American legal tradition. A greater sensitivity to differences in legal traditions among particular jurisdictions, however, may raise both theoretical and practical problems with developing a federal constitutional property jurisprudence.

A third issue is the practical and psychological feasibility of the Holmesian inquiry within the constraints of actual litigation: Do judges have the time and inclination to consider all of the relevant "structural habits" in a body of law and sufficient detachment not to be swayed by their own views of the desirability of the particular policy in question? Many have criticized the Supreme Court, along with other courts, for practicing "law office" history, whether due to bias or time constraints that necessitate reliance on parties' briefs and cursory independent inquiries.⁴¹⁴ Of particular relevance to this Article, a number of scholars have argued that the Court has relied on the mistaken historical assumption that land-use regulation was uncommon in colonial and early American times and began to expand only at the end of the nineteenth century.⁴¹⁵ In addition, Jeremy Paul has argued that psychological pressures on judges might make it difficult to implement a model of takings depending on an assessment of change from preexisting law. Paul contends that a judge will find it difficult to determine the preexisting law uninfluenced by the fiscal consequences of her decision about whether compensation is necessary for a challenged statute.⁴¹⁶

The fourth issue of feasibility relates directly to the Holmesian project of specification. In constitutional property law as in the law of negligence, Holmes imagined, broad, imprecise standards would eventually be replaced by more specific, predictable rules.⁴¹⁷ Holmes recognized that this project would

413. 260 U.S. 22 (1922). I discuss *Jackman* above. See *supra* text accompanying notes 38–39, 179–80.

414. See, e.g., CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1988).

415. See John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1287–93 (1996); William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061 (1994).

416. See Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1425 (1991).

417. See *supra* text accompanying notes 231–36.

be threatened by rapid legal and societal change, but he believed that change, though inevitable, occurred slowly. One of the most astonishing statements in *The Common Law*, to modern eyes, is that "the standards for a very large part of human conduct do not vary from century to century."⁴¹⁸ Can we believe this anymore? Holmes was content with juxtaposing cases that stood thirty-six years apart from each other.⁴¹⁹ Each reader is invited to develop her own list of the social changes that have occurred in the last thirty-six years. I will content myself with a single observation of some relevance to contemporary takings issues. The only definition of "environmentalist" in my copy of *Webster's Third New International Dictionary of the English Language* is someone who "views environment rather than heredity as the important factor in the development of the individual or a group."⁴²⁰ Most English speakers would now understand that word to have a different primary meaning. The environmental movement has significantly affected the cultural and legal understanding of property. Could we trust a decision of thirty-six years ago to provide a window on the same world as a decision of today?⁴²¹ Holmes's answer in areas of rapid change was to leave the question to the jury, which would express "the existing average standards of the community."⁴²² Perhaps those who advocate formalizing the use of community standards in constitutional property law, such as Robert Ellickson,⁴²³ followed most recently by William Fischel,⁴²⁴ are the true modern heirs of the Holmesian tradition.

2. Desirability

Even if the Holmesian project is feasible, is it the right project to graft onto the Fifth and Fourteenth Amendments? The issues that this question raises conveniently divide into issues of scope and issues of approach.

418. 3 HOLMES, *The Common Law*, in COLLECTED WORKS, *supra* note 24, at 109, 179.

419. See *Noble State Bank v. Haskell*, 219 U.S. 104, 112 (1911) ("It will serve as a datum on this side, that in our opinion the statute before us [in 1911] is well within the State's constitutional power, while the use of the public credit on a large scale . . . has been held [in 1875] to be beyond the line.")

420. WEBSTER'S THIRD NEW INT'L DICTIONARY 760 (1971).

421. Many observers expressed skepticism about Justice Stevens's attempt to distinguish *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). Perhaps a key factor was a shift in attitude that Stevens noted but did not rely on formally. After graphically describing the effects of subsidence caused by coal mining, Stevens comments: "In short, [coal mine subsidence] presents the type of environmental concern that has been the focus of so much federal, state, and local regulation in recent decades." *Id.* at 475. A Holmesian reading of this comment might be that basic attitudes, as reflected in numerous incremental changes in positive law, have shifted enough "in recent decades" that a ban on coal mine subsidence is no longer the kind of radical jolt it was in 1922.

422. 3 HOLMES, *The Common Law*, in COLLECTED WORKS, *supra* note 24, at 109, 179.

423. See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977).

424. See FISCHEL, *supra* note 23, at 351-55.

Two issues of scope seem to be most important. First, shouldn't we read the Takings Clause to apply only to physical dispossession and the Due Process Clause to be concerned only with matters of procedure? William Michael Treanor is only the most recent of a series of scholars to have adduced considerable evidence indicating that the Takings Clause was originally meant to apply only to physical appropriation of land and goods.⁴²⁵ Undoubtedly, the prohibition on uncompensated appropriations was in some sense motivated by the "benevolent yearning"⁴²⁶ that government should not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁴²⁷ But so, for that matter, was the Third Amendment.⁴²⁸ Yet no one has seriously argued that the tenure protections associated with rent control violate the Third Amendment on the ground that the government is forcing landlords to quarter in time of peace people who, in terms of the burdens they visit on landlords, might as well be soldiers. Contrary to Justice Scalia's argument in *Lucas v. South Carolina Coastal Council*,⁴²⁹ "meaningful enforce[ment]" of the Takings Clause's "protection against physical appropriations of private property"⁴³⁰ hardly necessitates a jurisprudence of regulatory takings. Regulations may do some bad things that look quite similar to the bad things caused by physical appropriations, but the Takings Clause is not a limit on bad things.

Judges and scholars, however, have rarely been able to resist the temptation to read broader protections of property into the Constitution, whether the chosen textual hook is the Contract Clause, the Due Process Clause, or the Takings Clause. Even Treanor, after establishing that the Takings Clause originally applied only to physical appropriations, ends up arguing that the Takings Clause should be applied to protect discrete and insular minorities from harms caused by political process failures, such as the harms caused to racial minorities by placing hazardous waste dumps in or near their neighborhoods—harms that hardly fit within the category of "physical appropriation."⁴³¹ It appears that courts will continue to read the Constitution to authorize broader protections of property.

The second issue of scope concerns limiting the reach of "property" if physical appropriation is not to be the exclusive focus. The Holmesian project focuses on changes in positive law and does not appear to be clearly limited to one subset of those changes. But very few people would agree that all

425. See Treanor, *supra* note 12, at 785–97.

426. 3 HOLMES, *Privilege, Malice, and Intent*, in COLLECTED WORKS, *supra* note 24, at 371, 373 (characterizing maxim "*sic utere tuo ut alienum non laedas*").

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

428. U.S. CONST. amend. III ("No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

429. 505 U.S. 1003 (1992).

430. *Id.* at 1014.

431. See Treanor, *supra* note 12, at 872–78.

changes in positive law implicate property rights. Consider, for example, a law that bans previously allowed musical performances in public parks, or one that raises the minimum age for drinking from eighteen to twenty-one. Do these changes affect property rights? If not, how do we define that portion of positive law that is concerned with property, once we agree that takings are not limited to physical appropriation?⁴³² The relevant Holmesian comments do not suggest an easy answer to this question. Consider two passages from Holmes opinions, both written in 1921, the year before *Mahon* was decided. On the one hand, when confronted with the labor injunction statute struck down in *Truax v. Corrigan*,⁴³³ Holmes argued in dissent:

By calling a business "property" you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed. An established business no doubt may have pecuniary value and commonly is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct and like other conduct is subject to substantial modification according to time and circumstances both in itself and in regard to what shall justify doing it a harm.⁴³⁴

On the other hand, when confronted with the wartime rent control and tenure protections upheld in *Block v. Hirsh*,⁴³⁵ Holmes wrote for the Court:

The fact that tangible property is also visible tends to give rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay.⁴³⁶

These are marvelous samples of Holmesian rhetoric, but they hardly suggest a coherent theory for determining which "modifications of courses of conduct," a description that encompasses all of positive law, should be treated as property subject to legislative alteration but within limits. One possibility is to look once again to the legal tradition of the jurisdiction in question: If we are

432. One school of thought suggests that the category of "property" has disintegrated—that we can no longer speak meaningfully of "property rights" as a distinct category of legal rights. *See, e.g.,* Grey, *supra* note 265, at 69, 73 ("It seems fair to conclude from a glance at the range of current usages that the specialists who design and manipulate the legal structures of the advanced capitalist economies could easily do so without using the term 'property' at all.").

433. 257 U.S. 312 (1921).

434. *Id.* at 342–43 (Holmes, J., dissenting).

435. 256 U.S. 135 (1921).

436. *Id.* at 155.

considering a challenge to a Pennsylvania statute, how does Pennsylvania law develop distinctions between property rights and other rights? That approach, however, seems to leave what is supposed to be federal law in a completely fragmented state.

The second group of issues of desirability concerns the basic approach to the protection of property. The basic value underlying Holmes's approach is continuity. In Holmes's view, because law and society are always in flux, settled expectations can never be completely protected. In most cases, a court must allow legislatures to destroy those expectations. When a court intercedes to protect property, however, it intercedes to protect against discontinuities—changes in positive law that cannot be justified or explained in evolutionary terms.

That is an important view of the role of property, but certainly not the only one. One might, for example, see property as inextricably connected to a whole range of substantive moral values, of which continuity is only one. The problem with continuity is that it equally preserves the wicked and the good. Although preservation of the wicked might be justified to avoid the greater evils produced by radical discontinuity, on a larger moral view that is not a matter that can be decided in advance once and for all. This issue, however, was not a pressing one for Holmes, the convinced amoralist.

Alternatively, one may conclude that property rights, as well as all sorts of other rights, are adequately protected by the pluralist political process so long as that process is not stacked against "discrete and insular minorities."⁴³⁷ On that view, the Takings Clause should be invoked whenever a judge finds a sufficiently grave defect in the political process affecting property rights, but not otherwise. Holmes undoubtedly would have scoffed at the idea that a well-oiled democratic process would lead to a fair distribution of resources, or even that fair distribution was or could be the goal underlying the constitutional protection of property, but we might think otherwise.

The choice of a Holmesian framework is partly or wholly independent of other choices about the constitutional protection of property. The most fundamental question about constitutional protection might seem to be: How much leeway does the Constitution leave legislatures? Choosing between historical and ahistorical models of property protection does not answer this question. Justices Brandeis and Brennan have championed "permissive" versions of the ahistorical model, while Justice Sutherland and others in the substantive due process tradition have promoted relatively "restrictive" versions. Justice Holmes developed a rather permissive version of the historical model, relative to the Supreme Court's attitude of his day. Justice Scalia has

437. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938). The seminal scholarly work advancing such a theory of constitutional interpretation is, of course, John Hart Ely's. *See* ELY, *supra* note 101. For applications of process theory to the Takings Clause, *see* FISCHER, *supra* note 23, at 100–40; Treanor, *supra* note 12, at 855–87.

sometimes appeared to be developing a rather restrictive version, relative to more recent Supreme Court attitudes.⁴³⁸ The choice of a Holmesian approach is undoubtedly also, to some degree, independent of a commitment to the reasons Holmes himself formulated. One does not need to be a moral skeptic, for example, to find merit in Holmes's method of recognizing and protecting expectations. Yet, in spite of the fact that Holmes's approach neither determines particular results in particular cases nor flows from one particular set of beliefs about the nature of property and law, it is worthy of consideration as an attempt to provide a coherent theory of constitutional property protection.

III. CONCLUSION

Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon* has been simultaneously acclaimed as the seminal case in the law of "regulatory takings" and blamed for the doctrinal confusion in that area. Both the commendations and the accusations, however, have been largely misplaced. *Mahon* was not the "first regulatory takings case." It was not decided under the Takings Clause. It was not the first case to hold that the Constitution protected nonphysical property or property as value. And it was not the first case to hold that a use restriction might be constitutional if and only if accompanied by just compensation. Its supposed status as the progenitor of all regulatory takings cases is the result of erroneous genealogy.

On the other hand, Justice Holmes's opinion in *Mahon* does not deserve all of the blame it has attracted. Holmes had worked out a theory of constitutional property that was far more sophisticated than a mere "diminution in value" or "balancing" test. He decided that the "property" the Constitution protected was the set of advantages that an owner could count on the state to enforce as existing positive law. The Constitution did not protect the owner against every change in law. Change was a fact of life, and no one assumed that all change would be accompanied by compensation. The Constitution did, however, protect the owner against radical, discontinuous alterations. These degrees of change were not measured solely, or even primarily, by the yardstick of economic value. Rather, change was measured as deviation from fundamental principles, or structural habits, embedded in the organized body of standing positive law.

438. A direct comparison between Holmes and Scalia would not necessarily result in Scalia being branded the more ardent defender of property rights. Remember that Holmes appeared ready to stnke down rent control during peacetime, see *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548-49 (1924), whereas Scalia has suggested that peacetime rent control is, on the whole, fine, although "tenant hardship provisions" are not, see *Pennell v. City of San Jose*, 485 U.S. 1, 20-21 (1988) (Scalia, J., concurring in part and dissenting in part). Of course, from a Holmesian perspective, one might argue that Justice Scalia's position is actually the more conservative one, since rent control gradually became a more established and accepted practice of our legal culture between 1924 and 1988.

The story of *Mahon*'s reputation and interpretation is a case study in legal evolution, selective borrowing, and amnesia. After the 1937 constitutional revolution, *Mahon* was the best case upon which to rebuild a constitutional property discourse. It was rediscovered—and to some extent reinvented—as the “foundation of regulatory jurisprudence.” But in order to serve that role, a number of its features had to be ignored or misunderstood, and they were. One result is that American law does have a jurisprudence of regulatory takings, supported in part by the existence of *Mahon*, a Supreme Court case written by the great *Lochner* dissenter that affirmed the existence of constitutional protections for property. Another result is that the jurisprudence is confused, at least in part because a thin reading of *Mahon* was necessary to make it pass as a Takings Clause case with rules of decision fit for modern consumption. This left courts with very little framework within which to decide constitutional property rights cases.

Understanding Justice Holmes's theory in *Mahon* is important for at least three reasons. First, it sets the historical record straight. Second, it helps us see the range of choices to be made in constructing a theory of constitutional property, especially revealing the connections between theories of constitutional property and basic issues of jurisprudence. Finally, it makes clear the theoretical choices that one of the most important judges and legal thinkers in the United States made, thus providing a model that may be useful as courts and scholars continue to ponder the issue of the constitutional protection of property rights.