Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings

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[Truth] wander[s] about in what you regard as being the least true in essence: in the dream, in the way . . . the nonsense of the most grotesque pun defies sense, in chance, and not in law but in its contingency . . . .

Jacques Lacan

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In this Article, I consider the linguistic tropes\textsuperscript{2} the Supreme Court has used in certain opinions concerning the law of takings.\textsuperscript{3} The trope of metaphor, I claim, is utilized in Pennsylvania Coal Co. v. Mahon,\textsuperscript{4} the case that established that land-use regulation could be a taking, while the trope of metonymy governs Lucas v. South Carolina Coastal Council,\textsuperscript{5} the case that established that a regulation that extinguishes the market value of land is a taking. Each is an opinion about whether a regulation that takes value from land can be said to represent seizure of the land itself. Since the land itself is not seized, treating the two events as though they were the same is a decision that there is sufficient correspondence between seizure and regulation to educe the same juristic response: a decision in fact that one figures, or represents, the other. Thus, each opinion is concerned with the aptness of a trope, or representation, and its outcome is based upon trope.

In Part I, I give an account of Lucas in which I claim that the opinion relies upon metonymy, the trope of association. Linguistic analysis of legal texts requires some justification, and I attempt to provide that in Part II. Also in Part II, I suggest a psycholinguistic understanding of metaphor and metonymy. The opinion's two metonymies are the identification of land with its money value and the identification of public interest with private rights. In Parts III and IV, I give an account of these tropes of value and of right. In Part III, I examine the discourse of Justice Holmes, the author of the Mahon opinion, with respect to profitability, and, in that light, discuss Lucas' reduction of land to its profitability. In Part IV, I examine the opinion's displacement of public interest with private right and argue that this displacement is a result of the opinion's anxiety as to the power of the state. In Part V, I argue that anxiety and desire are at the heart of the opinion. I conclude that the stability Lucas seeks in its account of property in land is illusory and unattainable.

I. **Lucas in the Law of Takings**

As a "direct effect"\textsuperscript{6} of an act of the South Carolina legislature, real estate developer David Lucas lost one million dollars; the coastal property for which he had paid this large sum was rendered

\begin{itemize}
\item \textsuperscript{2} A trope is "a figure of speech; a word or expression used in a figurative (rather than a literal) sense." \textsc{Vincent M. Colapietro}, \textsc{Glossary of Semiotics} 199 (1993).
\item \textsuperscript{3} The Fifth Amendment of the Constitution of the United States provides that private property shall not "be taken for public use without just compensation." \textsc{U.S. Const. amend. V.}
\item \textsuperscript{4} 260 U.S. 393 (1922).
\item \textsuperscript{5} 112 S. Ct. 2886 (1992).
\item \textsuperscript{6} \textit{Id.} at 2889.
\end{itemize}
"valueless."7 In *Lucas*, the Supreme Court held that such a land-use regulation may amount to a taking of private property although the land itself remains both physically inviolate and in its owner's possession.8

South Carolina's management of coastal development began in 1977 with the passage of its Coastal Zone Management Act,9 at roughly the same time, it appears, Lucas began his local career as a developer.10 In 1986, he bought two lots on the Isle of Palms near Charleston with the "intention . . . to do what the owners of the immediately adjacent parcels had already done,"11 that is, build a house on each. Lucas did not build on the lots after he bought them, though he commissioned architectural drawings of the houses he planned to construct. In 1988, an amended version of the 1977 Act moved the permissible building line landward, trapping Lucas' unbuilt lots between the building line and the sea.12 He could no longer put any habitable structures on his lots. The amendments brought "to an abrupt end"13 Lucas' leisurely plans to develop his land, and he "promptly" filed suit.14

At trial, Lucas conceded that the 1988 amendments were a legitimate exercise of the police power to prevent harm to the shoreline;15 he claimed that he was nonetheless entitled to compensation from the state because its statute had taken the total market value of his property. The trial court agreed. When the South Carolina Supreme Court reversed the trial court, it did so on the basis of the point Lucas had conceded: "[W]hen a regulation respecting the use of property is designed 'to prevent serious public harm,' . . . no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value."16 In an opinion written by Justice Scalia, the Supreme Court of the United States reversed, 

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7. Id.
8. Id. at 2899-2900.
10. Lucas, 112 S. Ct. at 2889.
11. Id.
14. Id. at 2890.
15. Lucas, by failing to contest legislative findings, conceded that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." Id. at 2896 (quoting Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 898 (S.C. 1991)).
16. Id. at 2890 (citing Lucas v. South Carolina Council, 404 S.E.2d at 899).
holding that, under the Takings Clause, a regulation that extinguishes the value of land by barring an “essential use” like home-building is a taking.

In 1922, in Pennsylvania Coal Co. v. Mahon, Justice Holmes had said that a regulation might indeed be a taking if it went “too far.” Before Mahon, the Court had consistently rejected Fourteenth Amendment challenges to regulation that took the value of land, arguing that such regulation falls within the police power of the state. Although Mahon held that the police power was not unlimited with respect to land use, the distance that “too far” measures was never precisely defined. As Holmes had written in Mahon, the danger was that, if a compensable regulatory taking occurred with every loss of value, “government could hardly go on.” Every governmental act affects some value; nonetheless, we assume there are public purposes that can and should be accomplished without recompense for consequent private loss.

Hence, takings law focuses on two related questions. The first is what lost value is compensable on account of a change in the law. Because property value is created by law, this question and its answer are circular; there is no uncontroverted account of value that avoids this circularity. As Justice Kennedy wrote in his Lucas concurrence: “[I]f expectations are shaped by what the courts allow as a proper exercise of governmental authority, property tends to become what the courts say it is.” The second question is what noncompensable limitations of private rights are permissible in the public interest; subsumed within that is the puzzle of whether to conceptualize the public interest as an aggregation of private rights, as something more, or as something other. The difficulty of answering these questions has made takings law a “muddle.”

18. Lucas, 112 S. Ct. at 2901 (quoting Curtin v. Benson, 222 U.S. 78, 86 (1911)).
20. Id. at 415.
21. See, e.g., Powell v. Pennsylvania, 127 U.S. 678, 685 (1888) (holding that intent of regulations passed pursuant to police power are “questions of fact and of public policy which belong to the legislative department to determine”); Mugler v. Kansas, 123 U.S. 623, 669 (1887) (holding that exercise of police power for protection of public health and safety cannot be “burdened with the condition that the State must compensate ... individual owners for pecuniary losses”).
22. 260 U.S. at 413.
24. 112 S. Ct. at 2903 (Kennedy, J., concurring).
Justice Scalia’s majority opinion in *Lucas* suggests answers to these questions, but they are unsatisfactory. First, the opinion says that the value of land inheres in those profitable uses permitted by the common law; the loss of such profitable uses is the equivalent of the loss of the land.  

Second, the opinion says that the public interest in permissible land use is not different from the interests of private parties; uses can be limited by public need only to the extent they may be limited as between neighboring owners. The common law of land use is unitary; public necessity and private right are equivalent.

The first answer is, I believe, at odds with Justice Holmes’ representation of value in *Mahon* and cases contemporary with it. The second diverges from the common-law doctrine that it supposedly embodies. The answers provided by *Lucas* are alike in a significant respect, for each is metonymic: Each identifies a part with the whole, claiming that the former adequately figures, or represents, the latter. In the first case, land is equated with its market value; in the second, the public interest is equated with private rights.

II. LAW AND LANGUAGE

A. *The Common Law as Trope*

Whether it is wise to apply literary criticism—in this case, linguistic analysis—to legal opinions is contested. Some legal scholars do not think it useful to take form seriously in analysis of legal opinions because literary form is imbued with—indeed, is the conscious product of—the intention of the author. Legal form, by contrast, they take to be the byproduct of a more substantive intention. Richard Posner argues, “[T]he purposes and techniques of authors of literary texts are different from those of the authors of legal texts.” However, Pierre Schlag responds that traditional legal discourse “deprivileges and subordinates form” as a means of falsely asserting the neutrality of legal discourse and the absence of authorial intent. “Part of the power” of legal texts, according to Terry Eagleton, is “suppression of what might be called their modes of production.”

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26. 112 S. Ct. at 2900.
27. Id. at 2900-01.
28. See infra text accompanying notes 64-82.
I do not propose to enter into the argument over intentionality. Nonetheless, it seems to me that legal analysis should engage the text by interrogating both form and content, assuming that the two are not indeed inseparable. Precisely because common-law reasoning is analogical, we are not only entitled, but required, to attend to the figurative in the course of our analysis. Because the common law relies entirely upon cases for its adumbration, and has no presence or essence outside them, common-law discourse is figural, the common law itself a signification drawn from other signifiers.

When the “epistemological thrust of the figural dimension is acknowledged, rhetoric can no longer be reduced to a supplement of grammar or an ornament of semantics. . . . Tropes are . . . text-producing functions.” Excluding language and its strategies as a topic of analysis would limit access to tropes and representations central to the text in a discourse where there is, quite literally, nothing outside text, a discourse that is itself non-essential, constructed by analogy and representation. The common law is comparison and representation.

The evolution of common-law doctrines is marked by dual contingencies. First, no single solution is the required answer to any particular problem, so any particular outcome is contingent before decision. Second, the reading to be given to any decided case is also contingent—a function of the common law’s iterability, its insistence that precedent, the sum of all previous readings of its texts, is to govern the creation of a new text, or opinion.

In his description of the act of reading, Paul de Man describes the common-law process well:

The innumerable writings that dominate our lives are made intelligible by a preordained agreement as to their referential authority; this agreement however is merely contractual, never constitutive. It can be broken at all times. . . . Whenever this happens, what originally appeared to be a document or instrument becomes a text and, as a consequence, its readability is put in question. The questioning points back to earlier texts and engenders, in its turn, other texts which claim (and fail) to close off the textual field.

When lawyers and their clients draw up an instrument, it is with the hope that the instrument will provide “referential authority” in itself. If adverse interests disrupt the agreed-upon understanding that

34. PAUL DE MAN, ALLEGORIES OF READING 204-05 (1979).
constitutes referential authority, we litigate over the meaning of the
instrument and it is transformed into text, in de Man's sense.

Then, in the course of the litigation, the precedents, or prior
"referential authorities" relied upon by either side, also come into
question, by virtue of the adversarial nature of the proceeding.
Precedents themselves become texts, which are referred back to yet
prior texts, and the iteration of each text is an interested distortion of
it. Even the conclusion of litigation fails to locate the final,
uninterested, absolute, and real meaning of any text, for that meaning
is continually subject to reiteration in the course of the next litigation
and the one after that. Thus, iterability, the second form of contin-
gency, both shapes and deforms. Gayatri Chakravorty Spivak's
description of what happens in each re-reading of a book is recog-
nizable as the equivalent of the lawyerly project of re-reading, or
reiterating, a judicial opinion:

The book is not repeatable in its "identity": each reading of the
book produces a simulacrum [representation] of an "original".

. . . [T]he book's repetitions are always other than the book.
There is, in fact, no "book" other than these ever-different
repetitions: the "book" in other words, is always already a "text,"
constituted by the play of identity and difference.35

Each repetition or iteration, since it is not identical with the
"original," is its representation or trope. When the "original" is a
principle of the common law, a principle that exists only in the cases
elucidating it, each case relying upon the principle is both the
principle itself and a contingent version of it, constructed as a
"simulacrum."

B. Metaphor and Metonymy

In this respect, the common law, lacking essential meaning and
distorted by iterability, resembles language, whose meaning is also
relational and iterable. According to Ferdinand de Saussure, "The
linguistic sign unites, not a thing and a name, but a concept and an
acoustic image."36 The concept or idea being described is the
signified, and the acoustic image or word-pattern describing it is the
signifier. Together, they constitute the sign. The signifier is
diacritical; that is, it bears no necessary relationship to the signified,
based upon essential meaning. Rather, the relationship is only

35. Gayatri C. Spivak, Translator's Introduction to Jacques Derrida, Of Gram-
motology i, xii (Gayatri C. Spivak trans., 1976).

36. Ferdinand de Saussure, Cours de Linguistique Générale 98 (1965), quoted in
conventional, based upon the signifier’s difference from other signifiers. Hence, the sign acquires meaning only from the system within which it occurs.

The neo-Freudian theorist Jacques Lacan, who credited de Saussure with “the emergence of linguistic science,”37 says signifiers and signifieds are “non-overlapping networks of relations.”38 In the network of signifiers, “each element assumes its precise function by being different from the others;”39 in the network of the signified, no signified is ever “a pure indication of the real, but always refers back to another signification.”40 Lacan, in effect, accepts an even more indeterminate version of de Saussure’s theory, assuming that signifier and signified are coercively separated by the conscious mind’s repression of meaning within the unconscious. “[S]ignifier and signified [are] . . . distinct orders separated initially by a barrier resisting signification.”41 In contrast to de Saussure, Lacan credits the signifier with creating the signified and gives the former precedence over the latter.42

Lacanian theorist Anthony Wilden describes as “illusion” the notion “that the signifier corresponds or answers to the function of representing the signified, or better, that the signifier has to answer for its existence in the name of any signification whatever.”43 No fixed point, no fixed signification necessarily linking signified and signifier in a transcendent sign, is ever accessible to us. The irremediable breach between signifier and signified represents our unattainable desire for the Other, and we mediate that desire in the form of language, of discourse. Indeed, language itself is, according to Lacan, the way that we structure our unattainable desire for the Other.44 This inevitable lack of connection between signifier and signified represents impossible desire.

“[T]he primordial ‘lack’ is precisely the ‘lack of a fixed point’ . . . toward which desire and consequently the metonymic movement of discourse is aimed.”45 Thus, metonymy—the form of discourse that displaces one signifier with another—represents the impossibility of

37. JACQUES LACAN, The Agency of the Letter in the Unconscious, or Reason Since Freud, in ÉCRITS: A SELECTION, supra note 1, at 149.
38. LACAN, supra note 1, at 126.
39. Id.
40. Id.
41. LACAN, supra note 37, at 149.
42. Id. at 151.
44. LACAN, supra note 37, at 169-70, 172.
achieving essential meaning in the transcendental unity of signifier and signified. Because "there is no connection between word [signifier] and thing [signified] in the way metonymy operates, the signifying function in language is metonymy."\*\*46

The linguistic analyst Roman Jakobson describes the tropes of metaphor and metonymy as the two poles of the organization of language,\*47 while Lacan goes farther, applying these tropes to the symbolic language of the unconscious.\*48 Lacan said, famously, that the unconscious is structured like a language.\*49 According to Lacanian theory, the linguistic structures of discourse are the rhetoric of the unconscious;\*50 the tropes of metaphor and metonymy are "shared structures of language and the unconscious."\*51

In the case of metaphor, we assume two different entities that resemble one another in respects we consider crucial. Thus, metaphor is the trope of similarity. In the case of metonymy, on the other hand, a thing is displaced by an attribute or something with which it is contiguous. Metonymy is the trope of shared association rather than similarity, of shared context or convention rather than the deeper logic of a shared meaning.\*52 Metaphor, it is said, is condensation, while metonymy is displacement.\*53 "Ships ploughed the sea" is metaphor: Ship and plough resemble each other because each is a man-made object moving through earth or sea, which are both vast, natural elements. A condensation of shared meaning is the basis of their linguistic linkage. "Sails crossed the deep" is an example of metonymy, or more precisely, of synecdoche.\*54 Here, both ship and sea are represented by an attribute: in one case, a part, the ship's sails; in the other, a characteristic, the sea's depth.

Metonymy is "word-to-word connexion,"\*55 the displacement of meaning, not its condensation. Metaphor, on the other hand, is "one

\*46. Id. at 241.
\*52. Thomas McLaughlin, Figurative Language, in Critical Terms for Literary Study, supra note 51, at 80, 84.
\*53. Meltzer, supra note 51, at 160.
\*54. Synecdoche, a subset of metonymy, assumes an entity and a part that represents it; in the part, the essential attribute of the whole is present. See Malcolm Bowie, Jacques Lacan, in Structuralism and Since 116, 129 n.6 (John Sturrock ed., 1979).
\*55. Lacan, supra note 1, at 156.
word for another," the replacement, the superimposition, but not the effacement, of one signifier by another, hence the otherwise unattainable linkage of signifier and signified.

[M]etaphor involves substitution, i.e., of one signifier (S) for another (S') in which the suppressed signifier (S') comports its own signification (x). The result is that the substitute S gains a new, far richer signification, beyond what it has originally, by reason of a compound suppression of which it is now the signifier.

If, "to say what a thing is to say what it is like," the obverse is also true: To say what it is like is in some sense to say what it is. Metaphoric discourse, relying as it does upon shared meaning, allows a signifier to identify the signified of another signifier, while still retaining its own place in the signifying chain. The barrier elided, the unconscious irrupts into conscious discourse; the repressed returns. Metaphor, the discourse of romanticism, poetry, dreams, jokes, and slips, allows us access to the unconscious, while metonymy, the quotidian discourse Jakobson links with prose and realism, does not. "Metonymy keeps desire on the rails, and always pressing ahead to the next destination, but metaphor supplies a limitless profusion of junctions, loops and branch-lines."

Within these rhetorical structures, movement constitutes meaning. The movement of metaphor is horizontal and exogenous, as meaning is continually transferred from sign to sign, from ship to plough. The movement of metonymy is vertical and endogenous; that is, meaning is never transferred outside the sign, for the displacement of one sign by another rests upon association, rather than meaning. Essential meaning is always lacking because desire is never satisfied.

Metonymy, the unending displacement of signifiers within the signifying chain, indicates the futile pursuit of the disappearing signified. One signifier displaces another, but the signifiers share association, not meaning. Hence, the signified always remains repressed, as the signifier never slips below the repression barrier to a signified. Meltzer describes the workings of metonymy:

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56. Id. at 157.
58. John Hughes Jackson, On Affections of Speech from Disease of the Brain, 38 Brain 125 (1915), quoted in Jakobson & Halle, supra note 47, at 86.
61. Id. supra note 43, at 246.
62. Id. at 246. This is a fortiori the case in respect to synecdoche, in which meaning moves on an interior track from whole to part or part to whole, from ship to keel, from sea to depth.
What is desired is always displaced, always deferred, and reappears endlessly in another guise. Desire, in other words, is the signifier that never changes, that can never cross the bar that marks the repression barrier. In spite of its apparent difference of meaning . . . in each case, each signifier in this chain has in fact the same meaning as the one before it: the lack which spells desire.63

Reliance upon the trope of metonymy, in other words, is symptomatic of impossibility, a representation of impossible desire. I shall return, at the end of this Article, to the question of what desire is revealed by the majority opinion in Lucas. Now, however, I wish to consider the question of whether the metonymic trope is required by the very nature of the question, whether loss of some right in land, but not of the land itself, must necessarily educe the metonymic reasoning characteristic of the opinion.

III. THE METONYMY OF VALUE

A. Holmes and Metaphor

How can a court decide that one act represents another, that one right represents another, for the purposes of compensation? It might conclude that, although the two are different, one is sufficiently like the other to justify treating them the same way, or substituting one for the other. Or, it might conclude that the two things are not alike, but associated, and that that association is so close that one may stand for the other, as its crucial attribute. As I have noted above,64 the former mode is metaphoric, the latter, metonymic. Metaphor links non-contiguous things on the basis of their similarities, while metonymy associates non-similar things on the basis of their contiguity.

In Lucas, the majority held that regulation is equivalent to seizure if the total value of land is lost by regulation. The success of that equivalence depends upon metonymy; if the crucial attribute of land is its market value, if land is nothing "but the profits thereof," then regulation taking all value is "the same" as physical seizure of the whole. Such a conclusion is not inevitable. Regulation and taking could bear a metaphorical, rather than metonymic, relationship. A court might conclude that, although a regulation is not a physical seizure, the two will evoke the same juristic response if they are similar: For example, if each transfers what was taken to a third party,

63. Meltzer, supra note 51, at 160.
64. See text accompanying notes 47-63.
or if each results in undeserved hardship for a particular owner not applicable to owners generally.

That it is at least possible to compare physical seizure and regulation juristically was established in *Mahon*, when Justice Holmes wrote that "if regulation goes too far it will be recognized as a taking." Holmes' use of the term "recognized" reflects his own intuition that the identification of seizure and regulation is not determinate, not required, but depends upon an act of cognition, a representational act, rather than the discovery of essence. But what are the elements of that recognition? Has the *Lucas* majority, in metonymically identifying loss of value as the key attribute of a regulatory taking, located the structure of Holmes' recognition? Was Holmes' recognition the metonymic one that a regulation can be identified as a taking if it shares the major attribute of a taking? Or was Holmes' recognition metaphoric, that regulation and taking share meaning, rather than context? And, if the latter is the case, what is the shared meaning that makes a regulation "like" a taking?

Were Holmes' recognition metonymic, it would mean he had concluded that when the market value of a thing is lost, it is appropriate to conclude that the thing itself is lost. What is lost is the attribute of the thing that characterizes it; hence, it is acceptable to displace the thing itself with its attribute. If value is the essence of land, the taking of land and the taking of value are equivalent. The metonymic reading of *Mahon* would be that market value is at the core of the rights of ownership; if that is lost, all that is essential to ownership is lost. Holmes, we would conclude, intended his words, "[i]f regulation goes too far, it will be recognized as a taking," to signify that if the exchange value of a thing is lost to its owner through regulation, its most important part is lost. Though the thing itself is still in possession, it is not what it was when it was intact. Hence, it is acceptable to apply the synecdochal conclusion that the thing itself is gone. In that case, what Margaret Radin calls "conceptual severance," the loss of one stick from the bundle, would be justified, for one could distinguish the essential sticks from the non-essential. There is some support for such a reading of *Mahon*: Holmes says that when regulation destroys the right to mine coal profitably, it is "very nearly the same effect for constitutional

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66. Holmes complained that we use the power of rhetoric as an instrument of decision, letting definitions create identity. "By calling a business 'property' you make it seem like land," he wrote in *Truax v. Corrigan*, 257 U.S. 312, 342 (1921) (Holmes, J., dissenting).
purposes as appropriating or destroying [the coal company's property]."68

On the other hand, were Holmes’ recognition metaphoric, it would mean he had concluded that regulation and physical taking were similar in some important respect and that one might be substituted for the other. A metaphoric reading might compare the consequence of a physical taking with the consequence of a regulation. For example, a taking transfers ownership from private party to government; a regulation is like a taking if it too transfers some element of ownership; hence, if we find transfer of value, we can substitute a regulation for a seizure in our recognition of a taking. If we understand a taking to be the state’s uncompensated transfer of property from one owner to itself or to another, then when regulation has the effect of transferring the thing from one owner to another, the regulation would be “recognized” as a taking.

Carol Rose has suggested that Holmes’ analysis was what I have called metaphoric.69 According to Rose, the Mahon case stands for the proposition that a regulatory taking occurs when regulation transfers value between private owners without compensation.70 In Mahon, the regulation in question transferred the support estate from the coal company to the home owner, and it was the transfer of value that Holmes considered a taking. The decision did not rest on the diminution of the value of land due to government regulation alone, without transfer to a third party. Holmes’ opinion then reads as a stricture against regulatory redistribution, rather than a prohibition on severe regulatory impacts on value. A regulation goes too far when it transfers ownership, not when it simply extinguishes value.

Rose’s conclusion about Holmes’ reasoning in Mahon seems bolstered by other aspects of his inquiry into the problem of expectations and value. Rose points out that Holmes’ Mahon opinion, read as a bar on total extinction of value, is anomalous in the context of his jurisprudence generally.71 For Holmes, it appears, the loss of expected profit was not a decisive element in deciding when a regulation went “too far.” Indeed, it is hard to imagine that a regulation of land could “too far” for Holmes so long as it did not transfer title or use from one private owner to another. If this is correct, it seems unlikely that, on the Lucas facts, he would have found that the boundary had been reached.

68. Mahon, 260 U.S. at 414.
69. Rose, supra note 25, at 581-87.
70. Id. at 581.
71. Id. at 568-69.
A Holmes dissent written the year before his majority opinion in *Mahon* deals precisely with these questions of expectations and value and seems to reinforce Rose's reading of *Mahon.*

In *Truax v. Corrigan*, the Supreme Court held that state courts could enjoin union activity, even in the face of state law barring such injunctions, because the federal constitution required protection of property. According to the Court, the legislative bar on injunctions in labor cases amounted to a taking of the property of an employer denied access to judicial protection against boycott or picketing.

Holmes, who had wrestled for years with the problem of the permissible effect of legislation on market value, dissented.

Some twenty-five years before, in 1895, while still on the Massachusetts Supreme Judicial Court, Holmes had written that market values are "anticipations of the future," including anticipations of the state of the law. But could legislatures be restrained because their acts would interfere with those anticipations, or was anticipation simply another word for a gamble, another aspect of the risk-taking represented by any market activity? In 1905, two years after the start of his tenure as Justice of the United States Supreme Court, Holmes answered that question clearly, rejecting the idea that "all property owners in a State have a vested right that no general proposition of law shall be reversed, changed or modified by the courts if the consequence to them will be more or less pecuniary loss."  

In his subsequent dissent in *Truax*, Holmes followed up on this line of thinking, arguing that anticipated business profits were not property protected by the Constitution and that legislation reducing them was not equivalent to a physical taking. Holmes warned against creating identity by denomination, by giving the same name to unlike entities: "By calling a business 'property' you make it seem like land." But seeming by naming is not identity. Land and business share certain characteristics, to wit, "pecuniary value and . . . [entitlement to be] protected by law against various unjustified injuries." However, these shared characteristics do not make one the same as the other for purposes of constitutional challenge. A business is unlike land because it lacks "definiteness of contour."  

While land is an entity, existing in the physical universe, a business is

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73. *Id.* 257 U.S. at 328.
74. *Id.*
78. *Id.*
79. *Id.*
a process, "a course of conduct and like other conduct it is subject to substantial modification according to time and circumstances both in itself and in regard to what shall justify doing it a harm." 80 Thus, Holmes suggests that we cannot identify value as a shared attribute of land and business and, by claiming essence for that attribute, make the two equivalent representations of that attribute, signifiers of the same signified.

There are several important elements to Holmes' short dissent in *Truax*. Appearing a year before *Mahon*, it shows Holmes struggling with the same problem of the relationship between law and market value that *Mahon* poses. It is different from *Mahon* because it deals with property in the form of personalty, a business, rather than in the form of land, and it indicates that for Holmes that distinction was key. Although land and business both have a market value, Holmes does not allow that similarity to determine the outcome of the two cases, finding a taking in land's loss of value in *Mahon*, and none in business' loss of value. Apparently then, Justice Holmes, the author of *Mahon*, did not share the view of Justice Scalia, the author of *Lucas*, that "pecuniary value," a characteristic shared by land and business, is of the essence. Had he done so, he would not have dissented in *Truax*.

It seems unlikely that Holmes, who refused to see loss of market value as a taking of personalty in *Truax*, meant *Mahon* to say that a land-use regulation might be "recognized as a taking" if it simply took market value. That would be true only if taking market value from land qualitatively differed from taking value from business. But Holmes had explicitly stated in *Truax* that market value was an attribute shared by land and business. Were it the crucial attribute of both, he would have found that regulation that takes market value from a business is like a physical taking. Instead, his *Truax* decision seems to represent a conclusion that the part, market value, does not represent the whole, whether of land or business. The principle behind the application of the Takings Clause to regulation is not, Holmes appears to believe, metonymic.

To make sense of Holmes' holding in *Mahon*, the decisive factor should be read not as land's loss of market value, but as redistribution of property, the support estate, from the coal company to the homeowner, from one owner to another, by government fiat. That redistribution was similar to government taking of title and physical seizure; it was that which led Holmes to conclude that the regulation in question had gone "too far." Government regulation that takes

80. *Id.* at 342-43.
title and transfers it to a private party is "like" government regulation that takes title and transfers it to the government. On this reading, *Mahon* establishes the metaphoric equivalence between the physical transfer of ownership from one private party to another and the physical transfer of ownership from private party to government. For Holmes, identity rests with the metaphor—like represents like in a transfer of meaning—and not with the metonymic synecdoche—the part does not represent the whole.\(^{81}\)

Why, then, does the *Lucas* majority adopt the metonymic synecdoche that land equals market value? In one sense, the answer is that the Court is constrained to do so. The key attribute of Lucas' situation that distinguishes his from prior claims is the totality of his loss. If this does not distinguish his situation from those of his predecessors, his case will be treated like theirs—he will lose. If he is to succeed, Lucas must use the totality of his loss to make connection between himself and those whose property has been physically seized and hence unquestionably taken. Metonymy is the only strategy that leads to success.

But there is more at work here than mere tactics. Fred Bosselman writes of the majority's belief that "courts should promote the commodification of land"\(^{82}\)—a belief that is not only at the center of the metonymic analogy between value and land, but which is also formed by the outcome of the case. That is to say, South Carolina's prohibition against building on Lucas' land was based upon its assessment of the best use of that land as a safeguard of life and property, its value to out-of-state and in-state tourism, and its nature as a habitat for flora and fauna. It was on the basis of these values that South Carolina rejected the further commodification of coastal land. The majority's response is that commodification is indispensable. If South Carolina wishes to preserve non-commodity land values, it can do so only by commodifying the land, i.e., purchasing it. Hence, the synecdoche reducing land to its money value is a rhetorical device within the opinion that mirrors its outcome.

**B. Land and Value**

Physical seizure of either land or business requires compensation; the two forms of property are treated as constitutionally equal in this

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81. This is not to say that Holmes' view has prevailed. The notion that "distinct investment-backed expectations" are relevant to the takings inquiry was adopted by the Court in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). However, the loss of investment-backed expectations is not of itself dispositive; once again, the totality of loss is key. Agins v. Tiburon, 447 U.S. 255, 262-63 (1980).

But regulation can wipe out a business with no claim by the owner to recompense so long as she remains undisturbed in her possession of its physical accoutrements—land, buildings, equipment, and so forth. Why should we treat land, realty, differently from business, personalty, in this respect? The explicit answer *Lucas* gives to this question is unsatisfactory, referring to “the understandings of our citizens” as to expectations of differing consequences flowing from the ownership of land and of business. This is surely a rather circular explanation: We treat land differently because we expect to do so.

An implicit justification may be that the exchange value, or signifiers, of realty and personalty differ because their physical presence, or signifieds, differ. We are willing to assume that enterprise is adequately represented by money, the signifier with an almost infinite number of signifieds, the most fungible of all commodities, the most iterable of texts. But we think of land as incommensurable and non-iterable, “the realm of the concrete and the particular,” in the words of the geographer David Harvey. Land exists both as place and as space, as incommensurable and as commodity, as particular and abstract, as concrete and universal; hence, Harvey asks, “Is it possible to construct a theory of the concrete and particular in the context of [the] universal and abstract?”

The *Lucas* opinion’s attempt at such a theory, or at least at a representation of it for the purpose of takings jurisprudence, rests on dual propositions. First, it is the particularity of land that gives it a value beyond money, but when its exchange value is taken by regulation, monetary compensation is due. Second, enterprise, though understood to be no other than money, deserves no compensation when its exchange value is taken. The corollary to the theory is that

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86. The circularity is not breached by reference to the Takings Clause as embodying a “historical compact . . . that has become part of our constitutional culture.” *Id.* at 2900. Justice Scalia concedes that this compact historically did not restrain the states from “outright physical appropriation of land without compensation.” *Id.* at 2900 n.15 (emphasis in original).
87. See *id.* at 2899-2900.
89. Poet Dana Gioia calls money “the one true metaphor, the one commodity that can be translated into all else.” *Quoted in* Kevin Jackson, *Ten Money Notes*, 49 GRANTA 69, 70 (1994). Money is of course the “one true metaphor” precisely because it is nothing other than trope, that is, its link to any one signified is as arbitrary as its link to another.
91. *Id.*
exchange value is an apt representation of the essential character of land; but that an enterprise is not represented by its exchange value.

Yet is this not precisely the opposite of the accepted representations of personality and realty? We think of a business as its market value and nothing more, while it is land that we think of as incommensurable, at least insofar as one place is not the same as another, though each may have the same market value. Land is special precisely because it is particular and local, unlike money which is "simultaneously everything and nothing, everywhere but nowhere in particular." In fact, then, to sustain its conclusion that land and money are interchangeable, that losing one is the equivalent of losing the other, the opinion must reverse the very propositions upon which its conclusions initially rested.

Justice Scalia claims that the Supreme Court has always viewed land as commodity, place as space, and thus has always viewed the denial of all economically beneficial or productive use of land as a taking, the equivalent of physical seizure or invasion. To maintain that claim, he must dispose not only of historical contradiction, but also of the well-known and so far unanswerable objection Justice Brandeis raised to the majority opinion in Mahon, the objection that value is "relative." Since Justice Brandeis' dissent in that case, it has been considered well-nigh impossible to assess a landowner's claim of total loss of value, since there is no uncontested way to identify the thing of which one hundred percent has been taken when the owner retains both land and title.

92. Id. at 167.
93. Lucas, 112 S. Ct. at 2893. As Justice Blackmun points out in dissent, that proposition is supported wholly by reference to cases in which the holding was the contrary, i.e., no taking was found because some use was left. Id. at 2911 n.11 (Blackmun, J., dissenting). No case is cited in which total deprivation of use led to the finding of a taking because, of course, from Mahon to Lucas, there had been no such case.
94. Justice Blackmun, in dissent, argues that historically the states appear to have understood takings of land in ways that do not accord with the account of the "historical compact" decribed by Scalia. Id. at 2914. The majority responds to Blackmun's critique: While he may be factually correct about the practices of the states with respect to taking their citizens' property, facts must yield to interpretation. "The practices of the States prior to incorporation of the Takings and Just Compensation Clauses ... were out of accord with any plausible interpretation of those provisions." Id. at 2900 n.15.

This is an extraordinary statement from those citing the authority of history. To the majority, evidence is less important than interpretation to an understanding of "the historical compact. ... that has become part of our constitutional culture." Id. at 2900. It is, one might say, the triumph of interpretation over essentialism. There may indeed be reason for distinguishing property in land from personal property, or one sort of property from another, but if all property, including land, is evaluated only from the point of view of its potential profitability, the theoretical basis for any other distinction vanishes. But if, as the majority admits, the reason for such distinction is historical, it is cavalier to dismiss the evidence of historical practice because it does not accord with a favored interpretation.
95. Mahon, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting).
The *Lucas* opinion concedes that the Brandeis question is one incapable of objective answer; it turns instead to the conventional and subjective, claiming to measure the loss of "the owner's reasonable expectations . . . [as] shaped by the State's law of property." To avoid the Brandeis objection, Justice Scalia suggests, one should examine not what remains of the interest whose money value is diminished, but the owner's expectation with regard to the interest when whole. Where the expectation of utilizing that interest is recognized as central by the common law, one may conclude that, having lost it, its owner has lost a whole entity. Where, as here, the owner has a fee simple, the common law would lead him to expect he can profit from it. If the state takes his ability to derive any profit from fee simple ownership, then he has lost the whole of a thing. The profit is itself an entity.

The equation of land and profit as entities substitutes for *Mahon's* unstable and contested ratio of the property interest to the value lost. When profitability is lost, the ratio of loss of use to loss of expectation will always be one to one, and there will always be a taking. Quoting Coke, the majority asks, "[W]hat is the land but the profits thereof?" The bundle of sticks contains at least one log, profitability. Take that, and you have taken the equivalent or representation of the fee simple in a piece of real property.

But why is loss of profit the same as loss of the land? The common law protects land's "essential use" and will rarely approve state

96. 112 S. Ct. at 2894 n.7.
97. Id. at 2894.
98. Aside from citing Coke, the majority avoids the question of why the loss of profit from developmental use is equivalent to the loss of the fee. Invited by Justice Stevens to explain how its conclusion differs from the simple equation of land with its profitable development, id. at 2919 n.3 (Stevens, J., dissenting), Justice Scalia falls back on the unhelpful response that the right to exclude is also protected by the Fifth Amendment. *Lucas*, 112 S. Ct. at 2895 n.8 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982)). That answer only strengthens the force of the question of why loss of rights to profitable development, with retention of the right to exclude, should be considered a total taking. *Loretto* stands for the proposition that a minor physical invasion is the equivalent of a physical seizure in terms of warranting compensation; its citation thus raises the question of whether a loss of value much less than total might be considered the equivalent of a total regulatory taking in terms of warranting compensation.
99. *Lucas*, 112 S. Ct. at 2901. The opinion cites the phrase "essential use" to a 1911 opinion assessing the government's ability to bar a landowner from using his own land to pasture his cattle after he had refused to limit their grazing on neighboring federally-owned land in Yosemite National Park. Id. at 2901 (citing *Curtin* v. Benson, 222 U.S. 78 (1911)). "[T]he powers of a sovereign . . . [cannot] be exercised to destroy essential uses of private property. The right of appellant to pasture his cattle upon his land, and the right of access to it, are of the very essence of his proprietorship." *Curtin*, 222 U.S. at 86. (emphasis added). It is this statement, according to Justice Scalia, that indicates the unlikelyhood "that common-law principles would have prevented the erection of any habitable or productive improvements on [Lucas'] land." *Lucas*, 112 S. Ct. at 2901.

Note that *Curtin* predates *Euclid v. Ambler Realty*, 272 U.S. 365 (1926), which was decided six years after *Mahon*, and acknowledged governmental power to limit the productive
regulation of land interfering with it. Here the majority returns to paradox. Land is special and has an essence that is something more, or other than, its money value. Recourse to the natural rights-based notion of "essential use" stems from a problem inherent in simply saying that profitability is a landowner's reasonable expectation and, having lost it, the owner must be compensated. Profitability is the expectation of any entrepreneur, whether the venture involves reality or personality, and yet Justice Scalia cannot claim that *Mahon*, the relevant precedent, protects all expectations of profitability against changes in the law. Indeed, he has been forced to stress the point that personality and reality differ precisely in regard to whether a change in the law can be regarded as a taking if it eliminates value, while leaving the owner her property; only for landowners is that true. Hence, it must be the case that the reasonable expectations of landowners differ in some important regard from those of other entrepreneurs; they cannot be equally reasonable in expecting profits from their enterprise if one is compensated for the loss of profit and the other is not.

I suggest that this dilemma is, in part, responsible for the opinion's reliance on metonymy. Land, unlike incorporeal forms of property—shares of business stock, goodwill, options, intellectual property—exists, as David Harvey says, as both space and place. As place, land is a part of the natural world, and inseparable from it; as space, it is abstract and capable of being abstracted, bounded, constructed by social agreement and possessing market value. As place, it is a signifier of great weight, and appears to have a determinate signification, rather than owing its meaning, as other signifiers do, to the self-supporting signifying chain. It is what Lacan calls a "point de capiton" (literally, "upholstery button"), a "governing signifier" holding down and structuring a part of the great undifferentiated mass of signification that might otherwise be quite formless. Such fixative points are particularly accessible to the

improvements owners can make on their own land, in effect leaving to the legislature the delineation of essential use. After *Euclid*, the question of appropriate land use became bureaucratized, the subject of expertise and administration; reference to pre-*Euclid* cases, as though that case were not a watershed, is not useful.

100. In an opinion written while he was still on the D.C. Circuit Court of Appeals, Justice Scalia described the rights of real property under international law, where natural rights may be said to be foundational, as "primeval" and "mystical." Association of Reclamantes v. United Mexican States, 735 F.2d 1517, 1521 (D.C. Cir.), cert. denied, 470 U.S. 1051 (1985).


102. *Harvey*, *supra* note 90.


metaphoric trope, to the condensation and substitution by which
meaning, as opposed to association, is discerned.

On the other hand, that which is abstract, like space, exists by
virtue only of law and the market. Thus, any piece of valuable land,
like anything capable of abstraction into its money value, is but a
single signifier, one coin in a vast system of exchange and, by virtue
of its very exchangeability, its accessibility to the ceaselessness of
metonymy and the displacement of signifiers, not worth much. Space,
land in the abstract, is no point de capiton, providing access to the
signified.

IV. THE METONYMY OF RIGHT

A. Public and Private Right

As noted above, the Lucas trial court ruled in the plaintiff's
favor on the ground that, because Lucas could no longer build on his
land, the Beachfront Management Act had taken all its value. On
appeal, the South Carolina Supreme Court reversed, holding that the
consequences of the Act were within the police power of the state to
protect public health and safety. The state supreme court dissenters
agreed in principle on the existence of such power to prevent public
harm, but disagreed that was this Act's purpose, instead reading the
legislation to confer a public benefit that should have been purchased,
not confiscated. In short, the majority opinion of the state
supreme court represented the standard New Deal jurisprudence of
defereence to legislatures; the dissent, an unreconstructed Lochnerism,
was willing to undertake independent judicial assessment of the
purposes of legislation.

Hence, the grant of certiorari in this case could have led the United
States Supreme Court to yet another telling of the story that
constitutes the jurisprudential version of the eternal triangle—public,
legislature, judiciary. The majority could have undertaken a
discussion of the distinction between public harm and public benefit
and the appropriate role of courts in applying the distinction to any
particular piece of legislation. Instead, it avoided entanglement in the
direct confrontation between legislature and judiciary with an
audacious move: On the one hand the majority labels the state
dissent's harm/benefit inquiry as itself indeterminate; on the other, it
tells the state majority to decide whether a legislature can bar a

105. See supra text accompanying notes 9-17.
106. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991) (Harwell, J.,
dissenting), discussed in Lucas, 112 S. Ct. at 2890.
landowner's use by treating both legislature and landowner as though they were private parties, without regard to the police power.\footnote{107}

Although David Lucas had contested neither the legislature's police power to find that new beachfront construction posed a threat of harm to a valuable public resource, nor the accuracy of its finding in this case, his allegation that the legislation worked a taking of his property was not bound to fail on that account, according to the majority. For, though the Court had previously held that a harm-preventing purpose justified regulation diminishing value without compensation, that principle was not a limiting one.\footnote{108} Rather, the earlier cases described only one subset of a more general proposition: that regulation, whether or not barring harmful uses, could diminish value so long as legitimate state interests were substantially advanced.\footnote{109} A use need not be "objectively" noxious to be subject to uncompensated legislative restraint: "Harmful or noxious use' analysis . . . [is] simply the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests."'\footnote{110}

Liberal legal scholars have argued, the majority notes, that there is an indeterminacy at the heart of regulation.\footnote{111} The distinction between harm-prevention and benefit-conferral is not essential, but entirely conventional, and a linguistic act cannot effectively distinguish the two:

When it is understood . . . that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use language cannot serve . . . to distinguish regulatory "takings" [requiring compensation] . . . from regulatory deprivations that do not require compensation. \textit{A fortiori} the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated.\footnote{112}
According to the *Lucas* majority, a use need not be objectively harmful to be barred because there is no such use; thus, "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."\(^{113}\) If two uses compete—in this case, shoreline protection to preserve an ecosystem versus second-home construction—deciding whether a restraint on that use prevents harm or obtains a free public benefit "depend[s] upon the observer's evaluation of the relative importance of the use that the restraint favors."\(^{114}\) Some would choose shoreline protection over second-home development and some the reverse; neither is "right" because there is no objective way to value the two. Any observer's vision is subjective and perspectival.

Now, if a use need not be harmful to be barred without compensation, common sense might suggest that a use which Lucas conceded was harmful could certainly be barred. However, the majority has in fact taken a step back in order to leap forward, *reculer pour mieux sauter*, as the French say. Since there is no objective difference between the wolves of confiscation and the sheep of harm-prevention, the wolf's concession of identity is meaningless, as is any parallel legislative designation.\(^{115}\) Authorial intention cannot lend essence possibilities for rent-seeking, that is, gathering majorities to obtain free benefits by legislating restrictions on land use, rather than levying taxes to purchase the use, seemed irresistible. *See*, e.g., Barton H. Thompson, *Judicial Takings*, 76 VA. L. REV. 1449, 1483 (1990) ("The Fifth Amendment stemmed in part from fears that property would otherwise become the target of self-interested majorities . . . who would use the legislative power to enhance their private collective interests.").

Responding to these concerns, Justice Brennan said cases like Miller v. Schoene, 276 U.S. 272 (1928), should not be understood as resting "on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property." *Penn Central*, 438 U.S. at 134 n.30. In other words, according to Brennan's *Penn Central* theory, the legitimacy of legislative action did not rest on unilateral declarations of noxiousness, but rather on the potentially less-contested ground of public benefit derived from treating all like property alike.


113. 112 S. Ct. at 2897.
114. *Id*.
115. The opinion does not, in fact, manage to sustain its belief in the identity of benefit and burden. In another part of the opinion, Justice Scalia, seeking to explain the necessity of compensating for the loss of use, says that regulation may indeed amount to a legislative attempt to gain a public benefit at private expense. There is a danger that legislatures will disguise confiscatory wolves in the wool of harm-preventing sheep: "private property [may be] . . . pressed into . . . public service under the guise of mitigating serious public harm." *Id.* at 2895. Thus, at one point in the opinion, Justice Scalia claims there is a danger that wolf-like confiscation may be falsely seen as sheep-like harm-prevention, while in another, the claim is that the two are not even different species.
to that in which it does not inhere, says Justice Scalia, an unlikely deconstructionist.

If burden and benefit are indistinguishable, by a legislature or even by a landowner, the question remains of how a court can decide whether a regulation is a taking. Plaintiff Lucas had argued below for the bare proposition that whenever land's value is extinguished, compensation is due. That is a simple answer to the question posed, but it is flawed: Some uses can and should be incompensably barred even if they leave a landowner with nothing, according to the majority. Imagine a shorefront toxic waste disposal site. If the state cannot afford funds for a buyout, its owner cannot continue her use just because the land is now so polluted it can have no other profitable use. Rather, the legislature can order a halt to such a use even without compensation.

It is not the legislature, though, that can decide the essential character of uses, distinguishing those that threaten the public and can be halted from those that do not. There is no such special power in the legislature, according to Lucas; rather, the legislature's power to bar continuing shorefront toxic waste disposal is derived from the power of a neighbor to enjoin an offending use. The legislature does not set the boundary between burden and benefit, but is itself restrained by the boundary between the sets of absolute rights that comprise neighboring parcels of real estate.

B. The Law of Nuisance

The doctrine of private nuisance allows a landowner offended by her neighbor's use to seek to enjoin that use; the neighbor's ownership rights do not include the right to disturb other landowners in the enjoyment of their own rights. In deciding whether to grant injunctive relief, a court must examine what each neighbor's rights of ownership are, not whether the offended owner will obtain a benefit or avert a harm. According to Lucas, this is also the appropriate test for a regulatory taking.

118. Lucas, 112 S. Ct. at 2900-01.
119. Id. at 2901.
120. RESTATEMENT (SECOND) OF TORTS § 822 (1977).
121. I have suggested elsewhere that the majority is well aware that this question is just as indeterminate as that of public benefit and harm, since precisely the indeterminacy of harm and benefit to private rights of ownership is famously the subject of the Coase Theorem. Louise A. Halper, Why the Nuisance Knot Can't Undo the Takings Muddle, 28 IND. L. REV. 329, 343 (1995).
Thus, what a court must consider when a land-use regulation is challenged as a taking is not the nature or the extent of the use regulated, but rather what the outcome of a challenge to the use would be on the prayer for injunctive relief of an imaginary third party, an abutter whose own use was negatively affected. The right of the public to bar a use is equivalent to the right of a neighbor; the power of the public, acting through the legislature, is no more than a neighbor's. There is no public interest greater than that of an aggregation of private interests, no duty imposed on either state or citizen under the police power different than the duty neighboring property owners owe each other not to violate their respective boundaries.

This is the position of Richard Epstein, who argues that the "police power as a ground for legitimate public intervention [is] . . . exactly the same as when a private party acts on its own behalf." 122 In the amicus curiae brief he wrote in the Lucas case, Epstein told the Court, "Private parties can enjoin a nuisance without compensation; the state as their representative has the same power." 123

Following Epstein, the opinion understands the common law of nuisance as simply the regulation of land use between neighbors, and land use regulation in the public interest as no more than "complementary" to that; 124 the police power protects private rights and is defined by them. 125 The police power, the "least limitable of the powers of government," 126 one that "extends to all the great public needs," 127 the power that is prior to any constitution and present in every state without legislation or written constitution simply by virtue of the state's existence, is simply the common law of private nuisance dressed up to go out in public. 128

The opinion symbolizes this in its suggestion that the evaluation of Fifth Amendment challenges to regulation take place under the aegis of the Restatement (Second) of Torts. 129 That is to say, the inquiry

123. Literally the only difference between police power and private right, on this reading, is the state's "power to force exchanges upon provision of just compensation." Id. at 218.
124. Lucas, 112 S. Ct. at 2900.
125. Epstein, supra note 122, at 111.
127. Id.
128. I discuss this aspect of the Lucas opinion at greater length elsewhere. Halper, supra note 121.
129. Lucas, 112 S. Ct. at 2901.
recommended to courts considering whether land-use regulation works a taking is whether the affected use would constitute a private nuisance under the Restatement’s strictures. 130

The Restatement, of course, deals solely with the law of torts, with the offenses that may occur between private parties; it is silent as to the relationship between private parties and the state and does not address the public nuisance action of a sovereign or its delegate. 131

The actions of a public entity to halt or limit the depredations of a use that amounts to a public nuisance are simply not part of the Restatement. Indeed, Dean Prosser, the reporter for the Restatement, explained in his own treatise on torts that he considered private and public nuisance two separate actions having “almost nothing in common, except that each causes inconvenience to someone.” 132

State power to abate a public nuisance, a threat to public health and safety, is obviously an element of the police power. The state does not wield its police power as an owner of, say, public health and safety, but rather from the notion that there is a public interest in preserving these unowned goods. That state abatement actions pursuant to the police power are not tort actions is apparent in various aspects of the relevant doctrine. For example, such actions are governed by a strict liability standard, rather than a negligence standard. 133 Injuries to public health and safety cannot be either

130. The operative portions of the Restatement are §§ 826-31, which set out a six-factor nuisance test: the extent and degree of harm attributable to a use, its social value, its suitability to the locale, the relative ease with which harm can be avoided, whether the offending use was initiated by the current owner’s predecessor, and whether the offending use is carried on by others elsewhere. RESTAT EMENT (SECOND) OF TORTS §§ 826-31 (1977).

131. It does address a private plaintiff’s tort action for particular damage on account of a public nuisance. Restatement (Second) of Torts § 821A (1977).

132. WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 71, at 552 (1st ed. 1941). Prosser called public nuisance a “criminal offense, consisting of an interference with the rights of the community at large,” and private nuisance “a civil wrong, based on a disturbance of rights in land.” Id. Prosser thus did not discuss the former in his work on torts.

It remained for the fifth edition of the Handbook to make explicit the point that a tort treatise “is not the place to discuss in any detail the remedies available to the state and other governmental units to protect the general welfare from conduct regarded as so inimical to many people as to constitute a public nuisance.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 90, at 643 (5th ed. 1984).

133. See, e.g., Yonkers Board of Health v. Copcutt, 35 N.E. 443, 445 (N.Y. 1893) (“[H]owever innocent [the owner] may be in creating the condition or maintaining it, he is bound to abate it upon the proper official request.”).
excused or allowed to continue based upon the degree of care with which they were created.\textsuperscript{134} Other defenses, like prescriptive use and first-in-time, are similarly unavailable against the public plaintiff's complaint. The length of time for which a landowner has threatened public health and safety gives her no right to continue such threat.\textsuperscript{135} Nor can a court balance equities in the proceeding between a state and a private land-owner to decide whether an offending use can continue.\textsuperscript{136}

Indeed, if the state could not protect public health and safety on some basis other than rights of ownership, many important, but unowned, environmental and health-based good—safe drinking water, clean air, silence, wilderness, species diversity—would be lost.\textsuperscript{137} Yet presenting the issue of land use as simply the contest between competing private uses pretend that these other goods either do not exist or are some "complementary" form of private rights.\textsuperscript{138} This displacement of the public interest with private rights is the second metonymy of \textit{Lucas}.

\section*{V. THE ANXIETY OF BOUNDARIES}

\subsection*{A. Property and Nuisance}

It is problematic to say that legislative power is as limited as the power of abutting landowners to obtain injunctive relief against a private nuisance. Unlike the abutter who must seek the aid of the state, in its judicial form, for vindication of her right to be free of the depredations of a neighboring use, the legislature itself wields the power of the state. Saying that the legislature is limited, just as a neighbor is, raises very distinctly the question of how the state's

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\textsuperscript{134} See, \textit{e.g.}, Frost v. Berkeley Phosphate Co., 20 S.E. 280, 283 (S.C. 1894) ("[T]o allow the owner of a tract of land to so use his own land . . . as would necessarily or probably injure his neighbor, provided he takes all reasonable care to prevent such injury . . . we do not understand to be the law.").

\textsuperscript{135} See, \textit{e.g.}, State v. Rankin, 3 S.C. 438, 449 (1872) ("While the long possession may confer a right to the land, . . . it cannot be set up as a bar to the abatement of a nuisance on behalf of the public . . . . [This] would involve an absurdity too violent to be entertained even for a moment.").

\textsuperscript{136} See, \textit{e.g.}, Williams v. Haile Gold Mining Co., 66 S.E. 117, 118 (S.C. 1910) ("[T]he question raised . . . as to the balance of convenience, or of advantage or disadvantage to the plaintiff and defendant and the public at large . . . would be pertinent only in an application addressed to the Legislature."); see also State v. Columbia Water Power Co., 63 S.E. 884, 890 (S.C. 1909) ("The court's discretion is not broad enough to permit it to refuse to protect either private or public property or rights because the invasion of such property or the violation of such right would be of benefit to an individual or to a portion of the public.").

\textsuperscript{137} For a discussion of the difficulties encountered by Richard Epstein in attempting to describe the state's actions in abating a nuisance as based upon ownership rights, see Halper, \textsuperscript{supra} note 121, at 73-85.

\textsuperscript{138} See \textit{Lucas}, 112 S. Ct. at 2900.
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power can be limited. Hence, the balance of the opinion reveals a deep anxiety as to the strength of boundaries, the safety of borders.

The majority's anxiety is bottomed in its adherence to the familiar Blackstonian paradox of private property as related sets of bounded absolutes. An owner's dominion over her property is absolute, but it is also, and for the same reason, bounded by the absolute dominion next door. Hence, ownership implies not only dominion, but also its opposite; limitation of use is the very condition of the possibility of use. The limitations of property arise, not from acts of the state, but from the claims of neighbors, themselves absolute owners of property. This allows the liberal claim that property's limitations, like property itself, are natural, not state-created. For this reason, the common-law doctrine that regulates the relations of neighboring landowners assumes a central role in liberal property theory: It is the basis upon which the rights of property can be recognized as limited without a simultaneous recognition of the state's authority to create such limitations.

This common-law doctrine of land use limitations, so important to the liberal ideology of property, is in a parlous state. It is the law of nuisance, generally considered to be itself a nuisance, that separates the distinct categories of property's permissible and impermissible use. Nuisance is "intractable to definition," says a commentator, who calls it a "mongrel" doctrine. Other commentators use the words "mystery," "garbage can," and "quagmire" to characterize the law of nuisance. Dean Prosser calls it an "impenetrable jungle," wherein is found only "vagueness, uncertainty and confusion." "One searches in vain," says Justice Blackmun in his Lucas dissent, "for anything resembling a principle in the common law of nuisance."

139. The paradox can be seen in two statements of Blackstone's. One expresses the unlimited nature of ownership, described as "that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES *2. The other describes the limitations upon ownership, because of the possibility of injury to another's ownership right; an offending use may be halted "for it is incumbent upon a neighboring owner to find some other place to do that act, where it will be less offensive," 3 id. at *217-18.


141. Id.


145. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 71, at 550 (1st ed. 1941)

146. Id.

147. 112 S. Ct. at 2914 (Blackmun, J., dissenting).
It is precisely this incoherent and unsatisfactory doctrine that is placed at the heart of property law, not as an intruder, but as a welcome alternative to what is recognized as a vastly more disruptive presence, that of the state. The contradictions that disrupt the stability of property are not only internal, but self-produced, as a guard against a greater danger. "The marginal in its very marginality turns out to characterize the central object of discussion," as the deconstructionists say.148

B. The Body of Property

I suggested earlier, following Lacan, that metonymy is a representation of desire. The desire here is for inviolable boundaries, for property rights safe from Leviathan—a desire impossible to satisfy where those rights are themselves state-created. The Constitution forces an unavailing search for property’s essence.

Of course, reliance upon incoherence and contradiction cannot but be unsettling and a source of vast anxiety. That anxiety is revealed throughout the Lucas opinion. Despite its claim to create uncontested categories, clearly delineated, pure within and secure without, the opinion betrays its anxiety, both directly and obliquely, in its own slips, blanks and contradictions.

The claim of the existence of common-law categories pure enough to exclude contradiction—uses that are permissible and whose loss must be compensated and uses that “were always unlawful” and can be legislatively barred without compensation149—is not a neutral one.150 Precisely for that reason, the traces of the struggle to achieve that purity remain detectable in a close reading. The ungovernable contradictions within the absolute meaning that the text intends make their way to the surface of the text and betray it.

For example, having provided several reasons for the rule that total loss of exchange value amounts to a taking and must be compensated, the majority then claims to look “at the other side of the balance."151 And there it finds even more arguments “supporting a compensation requirement”152—an unbalanced balance indeed. Here, the text opens unintentionally to reveal its intentions; the categories Justice Scalia creates are in fact only one category—the

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149. Lucas, 112 S. Ct. at 2901. The parallel pure entities of the metonymy of value are profit and essential use. See supra text accompanying notes 99-100.
150. In fact, it is a contradictory one, since it assumes that, while legislatures cannot tell harm from benefit, the common law has already done so.
151. Lucas, 112 S. Ct. at 2894.
152. Id.
scale has only one side, the categories are a single entity. Land is synonymous with money, exchange value; regulation is what illegitimately threatens that value.

A yet more revealing case follows: According to the *Lucas* majority, the import of *Mahon*, establishing the legitimacy of the notion of a regulatory taking, is that private property is in danger if “subject to unbridled, uncompensated qualification under the police power.” The phrase, “unbridled . . . qualification,” is one of total self-contradiction, apparently denoting the state’s unlimited power of limiting what takes place within the limits of private property.

The cliché partner of the adjective “unbridled” is generally the noun “lust,” and indeed the use here of “unbridled” resonates with physicality. For the majority, this threat of unlimited limitation is first of all physical: The invasion of the body of property is the *ur*-fear. Thus, in describing when regulation goes “too far,” violating appropriate limits, the majority first compares regulation to the state’s physical seizure of property, as a benchmark. That comparison, or trope, is then extended. The law will bar not only uncompensated physical seizure, but also the state’s coercive and uncompensated intrusion into one’s physical space. The state’s physical *invasion* of property, though short of seizure, is also a taking: “[N]o matter how minute the intrusion, and no matter how weighty the public purpose behind it, [no property owner ought to be] compel[led] . . . to suffer a physical ‘invasion’ of his property” without compensation.

The metonymic figure of “weighty” violation is soon repeated with reference to the court’s previous holding that “[w]here ‘permanent physical occupation’ of land is concerned, we have refused to allow the government to decree it anew . . . no matter how weighty the asserted ‘public interests’ involved.” The subsequent mention of Holmes’s discussion of “human nature” in *Mahon* reinforces this cluster of corporeal images. This figure of physical violation, of “suffering” and “invasion,” “behind” which is a “weighty” purpose, together with the notional masculinity (“his property”) of the victim of such violation, signify a gendered anxiety aroused by the spectre of confrontation with a powerful Other.

After physical seizure and physical invasion, the third case of violation by regulation is also made to appear physical and gendered. A regulation that takes all exchange value carries a “risk that private

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153. *Id.* at 2893.
154. *Id.* at 2892.
155. *Id.* at 2893.
156. *Id.* at 2900.
157. *Id.*
property is being pressed into . . . public service under the guise of mitigating serious public harm." 158 Being forced into public service renders property sterile; it is no longer "productive." Regulation "goes too far," that is, it can be analogized to physical violation for the purposes of takings jurisprudence, when it denies the landowner "all economically beneficial or productive use of land." 159

The confusion of gender, in which a masculine subject occupies the feminine position of victim, is then extended from landowner to land. The idea of violation was first extended from the state's uncompensated physical seizure to its uncompensated physical invasion (no great leap); now, it is stretched to include the regulation that eliminates land's economic benefits, equating the three. A regulation that eliminates the ability of land to be "productive," 160 to achieve a monetary return, "is" a taking; indeed, it is a "total" taking. 161

The imagistic link is clear. Depriving real property of its ability to reproduce value presses it into public service; it is the trope, or figure, or representation, of physical violation, of crossing boundaries without compensation. The majority's anxiety is expressed in the gender-stressed imagery of force and violation, the fear of pressure rending boundaries that are both sacred and fragile, offering little protection from subjection to greater strength.

VI. CONCLUSION

In Lucas' unbalanced balance, its unlimited limitation, its gendered land and gendered landowner, the text betrays itself, wanting to conceal, yet forced to expose precisely the anxiety that cannot be stilled, the desire that can never be satisfied, the need for fixed presence with stable boundaries, for a sign composed of a stable signifier and defined signified. The opinion attempts, but is unable, to locate the essence of land, or what might also be called the signified of the signifier represented by market value. Similarly, the opinion attempts to bound the power of the state through the force of private law. This attempt cannot succeed, which leads to what I call the anxiety of boundaries.

The appearance of metonymy within the structure of the Lucas opinion tells of that desire endlessly pursued, endlessly deferred. 162 What this opinion desires is what it cannot have, a stable represen-

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158. Id. at 2895.
159. Id. at 2893. The phrase is a rearrangement of the Agins dictum regarding regulation that "denies an owner economically viable use of his land." Agins v. Tiburon, 447 U.S. 255, 260 (1980).
160. Lucas, 112 S. Ct. at 2893, 2894, 2899.
161. Id. at 2901.
tation of land, a symbol whose loss will trigger the consequence of compensation. It seeks that stability in exchange value and in boundaries. But precisely because land must have value in the market, and neighbors must have boundaries—precisely, in other words, because property in land is a relation, not a thing—the desired stability is unattainable. Perhaps it is this attempt to fix the world by naming its components that Justice Holmes warns against in *Truax* when he says that calling something by a certain name, like describing it by certain boundaries, is not the same as identifying it, as capturing its essence. Holmes’ takings jurisprudence, unlike the *Lucas* majority’s, relies upon metaphor, upon the resemblance of a regulatory taking and a physical appropriation, rather than on the metonymy signified by the loss of the money value of land.