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## **THE COMMON LAW FOUNDATIONS OF THE TAKINGS CLAUSE: THE DISCONNECT BETWEEN PUBLIC AND PRIVATE LAW**

*Richard A. Epstein*<sup>\*</sup>

### **I. INTRODUCTION: THE GREAT DISCONNECT**

The theme of this lecture is one that is not likely, on first appearance, to garner much support from experts in constitutional law, for in it I shall defend the thesis that takings law, and indeed any other issue relating to individual rights, will never be rightly decided so long as the Supreme Court continues to apply its current intellectual approach that disregards the common law foundations on which any sound theory of constitutional law should rest. Yet, unfortunately, the Supreme Court treats its takings jurisdiction as if it were contained in a sealed container, whose key premises are matters of public law, to be decided by Justices who have often only a passing knowledge of the private law concepts on which I believe all public law deliberations must ultimately rest. This disconnect between the public and private law dooms the former to intellectual incoherence because of its disregard of the latter.

I make this claim, in large measure, because of my own education and exposure to the field. In a teaching career that is now in its forty-sixth year, I have taught only two courses in constitutional law proper, neither of which was concerned with the takings issue. My exposure to this field comes from having taught a full range of common law courses in property, contracts and torts, which has then been backstopped by teaching courses in land use planning and land finance, both of which centrally implicate constitutional issues on

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takings.

One result that comes from the constant exposure to these materials is a heightened respect for the ingenuity and internal coherence of the common law, or judge-created system of rights. The law begins with rules of acquisition, and then, in the case of land (but not water), defines property as the exclusive right to the possession, use and disposition of some piece of land from the center of the earth to the tops of the heavens. It then specifies ways in which that property can be protected from actions by others that either take the property or damage it. It also develops rules that allow for the orderly transfer of property, in either whole or in part, to one or more individuals, often simultaneously. The full articulation of the system permits an efficient deployment of these assets, because while the common law takes care to protect property from external aggression, it takes equal care to see that property owners are not shielded from competition from other persons operating on their own property with their own assets. The system of the bundle of property rights has often been attacked within the realist tradition as a random assemblage of sticks, thrown together without any real internal coherence.<sup>1</sup> But, the opposite is true. Keeping to these rules creates a private property system that, by and large, leads to efficient resource decisions and, critically, paves the way for a set of intelligent corrections, such as rules for recordation, that can fill in the gaps left by the common law rules.

There is little dispute, moreover, that any system of constitutional law that paid full respect to these common law rights would offer far greater protection to property than the current “ad hoc” set of rules championed by a Supreme Court that represents a complete disconnect from the integrative achievements of the common law. Unfortunately, Supreme Court Justices of all political stripes, by and large, buy into the progressive proposition that this system of private property law imposes few, if any, constraints that bind either the states or the federal government in land use regulation. The implicit

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<sup>1</sup> For a discussion of that approach, see Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 737 (1998). For a discussion of the views of Wesley Newcomb Hohfeld, see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) (discussing, in part, property rights). Hohfeld never actually referred to that view. Merrill, *supra*, at 737-38. For a discussion of recent views on the bundle of rights language, see *Intellectual Tyranny of the Status Quo Symposium: Property: A Bundle of Rights?*, 8 ECON. J. WATCH 193 (2011), available at <http://econjwatch.org/issues/volume-8-issue-3-september-2011> (follow “Download entire September 2011 issue (1.7 MB) (pdf)” hyperlink).

assumption behind much of this work is that all property rights derive, not from initial occupation, but either expressly or impliedly from some state grant, so that what the state has given it may now take away by exercising these supposed reserved powers.

In order to make good on these claims about the destructive impact of this disconnect, I consider first the coherence of any common law system of property rights and then its vulnerabilities. I use the phrase “common law” with two modest qualifications. First, I am referring to judge-made rules and, for these purposes, do not differentiate between those rules on the common law side of the English Courts from those on the equity side. Second, in dealing with these issues, I cover indifferently the common law and civil law systems, deriving as they do from the Roman law. On points of detail and on matters of form, these systems differ from each other. But, on the basic structural issue raised here, the differences do not loom large against the overwhelming similarities that start from the fact that both systems rely on some version of the first possession rule for land and switch gears, at least in riparian states, to common ownership for water. The details on conveyancing, or between usufructs and life estates or in the choice of certain remedies, raise in virtually all cases second order questions that I do not cover here.

In sum, it is both dangerous and unwise to think of property as some arbitrary assemblage of rights that could be accepted or disregarded with impunity. The internal coherence and the huge institutional success of the basic system of property rights rests on permanent, not transient, features of the natural resources and on the need to channel the efforts of self-interested individuals into productive channels. The close convergence between Roman and common law systems of property rights on these key essentials is no accident, nor is it solely a function of cross cultural pollination. In large measure, it is because these basic features fit together into a comprehensive whole. The key properties of land and water are “natural” in the strongest sense of that term. They are defined by the properties of these natural resources—land stays still, water moves—that derive from physics and, thus, shape human interactions long before the formation of the state or of any human system of legal entitlements.

## II. THE COHERENCE OF THE COMMON LAW SYSTEM

The historical system of property rights, both in common and

Roman law, takes a very different view. They both start with the proposition that, in a state of nature, property is a *res nullius*, a thing owned by no one that is acquired in fee simple by the first occupant of that property.<sup>2</sup> Property rights, thus, start from the bottom up, and the role of the state is to afford those rights so acquired with its protection, for which it is entitled to exact the taxes needed through its exercise of the police power to implement that system of property protection. These rules of first possession are resource specific. Indeed, from the earliest times, the basic riparian system of water rights reached the opposite conclusion.<sup>3</sup> No individual could unilaterally occupy or divert a stream or a lake. These rights were held in common for all members of a community to use, but none to expropriate for himself. The exact division of these common rights was very complex. In some instances, only riparians could remove water from the river. But with respect to recreation and transportation, nonriparians had access and use rights as well.

The source of the difference lies in a trade-off between two types of costs, those of exclusion and those of coordination. With land, its ownership by a single person tends to facilitate its development, so that ownership by occupation becomes the rule subject to limitations on use imposed through the law of nuisance that protects all neighbors from the excesses of each other. With water, the “going concern” value of a river is preserved by preventing anyone from diverting it. The basic proposition is to keep the river as a form of common property subject to limited rights of removal that provide private value without disrupting the overall river system. For the most part, I shall consider cases with land, but as the issue of takings does arise in dramatic form in water rights cases as well, I shall conclude with an example of how the same disconnect has marred the Supreme Court’s taking jurisprudence insofar as it applies to water.

Turning back to land, its rules on possession, use and disposition are intended to create an exhaustive system of rights in a single person that facilitates its efficient use, first by use and then by disposition, in which the original owner and any outsider are able to capture gains from trade. Similarly, the decision to give ownership from the center of the earth to the top of the heavens is intended to make

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<sup>2</sup> See, e.g., THE INSTITUTES OF GAIUS 82-83 (Francis De Zulueta trans., Oxford University Press 1946).

<sup>3</sup> See, e.g., THE INSTITUTES OF JUSTINIAN 155-85 (Thomas Collett Sandars trans., William S. Hein & Co. 1984) (1876).

sure that the law does not impose any artificial boundary between the owner of the surface and someone else, whether another person or the state. The creation of that arbitrary line at common law could (at least until the advent of air travel, where adjustments are needed) only increase the complexity of land transactions without providing any offsetting social gain.

Yet, if the legal system does not force these divisions on landowners, it allows their creation by voluntary arrangement, when explicit terms of the conveyance or lease could deal with these transitional problems. Accordingly, a robust set of property rules not only allows for the division of property over time—the split between a lease or a life estate on the one hand, and a reversion on the other. It also allows for the division in space, so that the owner of the fee simple can sell off the air rights to another party for its use, which is what happened in *Penn Central Transportation Co. v. City of New York*.<sup>4</sup> In like fashion, it also allows for the severance of mineral rights beneath the surface, which were implicated in the critical Supreme Court decision in *Pennsylvania Coal v. Mahon*.<sup>5</sup> In neither of these cases is it possible to create a “clean deal” because of the need of the parties to create easements that supply ground support and access for the holders of both sets of rights, and similar rights of access and support for both the holder of the mineral and surface estates. But, it is only if the economic logic of these divided interests is fully understood that it is possible to understand how their government regulation should take place under the Takings Clause.

This brief discussion establishes that the right to exclude is a key portion of any system of land rights. Thus, as Justice Rehnquist wrote in *Kaiser Aetna v. United States*,<sup>6</sup> “[i]n this case, we hold that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.”<sup>7</sup>

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<sup>4</sup> 438 U.S. 104 (1978).

<sup>5</sup> 260 U.S. 393 (1922).

<sup>6</sup> 444 U.S. 164 (1979).

<sup>7</sup> *Id.* at 179-80. The quoted words have been quoted in numerous subsequent decisions that do not involve any of the transitional complications found in *Kaiser Aetna*. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1044 (1992) (Blackmun, J., dissenting); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831 (1987). It is widely agreed that someone who has property in a resource typically will have at least some right to exclude others from using or interfering with that resource. See Merrill, *supra* note 1, at 730 (arguing that “the right to exclude others is more than just ‘one of the most essential’ constituents of property—it is the sine qua

On his general point, two observations are in order. First, *Kaiser Aetna* presents a powerful challenge to Rehnquist's general announcement because the fact pattern lies at an uncharted interface of the legal regimes for land and for water. The problem arose when Kaiser Aetna made extensive improvements in its site that converted private "fast land" (land near the water but above the high water mark) into navigable waters.<sup>8</sup> Current (and questionable) water law gives the United States a dominant easement over navigable waters that subject them to regulation without compensation.<sup>9</sup> But, Justice Rehnquist applied the land based rules to these improvements because he was, at least implicitly, concerned with the unfortunate incentives against improving land that would be created if the completion of a marina resulted in the forfeiture of the improved site to the government under its navigation easement.<sup>10</sup> In principle, this disconnect should not occur because the correct reading of the commerce power over navigable waters should not confuse, as in *Twin City*,<sup>11</sup> the power to regulate with the ownership of the property, as the case law now does.<sup>12</sup> But, it is only with fast stepping that the problem can be addressed within the current Supreme Court framework, which mangles the relevant concepts.

Second, even if confined to interests in land, the right to exclude understates the robustness of common law property rights. As articulated, this notion is so constrained that, standing alone, it does not allow for either the creation of divided interests in land, or for the development or use of property in either its unified or divided state. Indeed, read literally, the right to exclude does not even give the owner the right to enter into possession of his own land. The more

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non"). The proposition is plausible for land, but not for water where equal access without exclusion is the dominant trope.

<sup>8</sup> *Kaiser Aetna*, 444 U.S. at 170.

<sup>9</sup> See, e.g., *United States v. Twin City Power Co.*, 350 U.S. 222, 224-25 (1956) ("The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called 'a dominant servitude.'").

<sup>10</sup> *Kaiser Aetna*, 444 U.S. at 178-79.

<sup>11</sup> 350 U.S. 222 (1956).

<sup>12</sup> For the modern position, see *United States v. Willow River Co.*, 324 U.S. 499, 502-03 (1945), and for the alternative position, see *United States v. Cress*, 243 U.S. 316, 330 (1917). For my defense of *Cress*, see Richard A. Epstein, *Playing by Different Rules? Property Rights in Land and Water*, in *PROPERTY IN LAND AND OTHER RESOURCES* 317, 343-48 (Daniel H. Cole & Elinor Ostrom eds., 2012).

robust system of property rights, covering both use and disposition, is organized in a way to make sure that once the resource is given to somebody, that single person can now control its future destiny and enter into transactions with other people by way of sale, lease, mortgage and gift of complete or partial interests. This is no arbitrary assemblage of rights, so, once again, the disconnect between public and private law undermines the coherence and efficacy of the former.

By the same token, the legal universe of property rights does not consist solely of these voluntary transactions. The overall system of rules also has to deal with the negative externalities between neighbors, covered by the law of nuisance, which at the very least deals with pollution in all sizes and shapes, for which remedies by way of damages and injunctions, alone or in combination were critical.<sup>13</sup> It is not that the law held that there was no room for pollution. But, if someone wanted to pollute the land of another, the appropriate way to do so was to purchase the requisite easement, and not to take it unilaterally, and without compensation. The strong law of tort helped force people to enter into voluntary transactions for mutual gain with their neighbors. At this juncture, the central mission of the system of property rights is to lower transaction costs through devices such as deeds and recordation which in turn increase the possibility of gainful transactions.

It is important to note some of the key features that give this system of property rights in land its internal strength.<sup>14</sup> First, it is perfectly *scalable*. The major obligation that the world owes to land-owners is to forbear from entering their property or from committing common law nuisances. These negative commands work as well in a small society of a thousand individuals as they do in a complex society with millions of individuals, because their content does not vary as the number of parties increase or decrease. No matter who is born, or who dies, the set of obligations remains constant over time and across locations.

A second reason why the system works well is that its basic rules are wealth independent. The system works as well in poor societies as in rich societies, and the basic content of the rules does not change as the overall levels of wealth vary. There are, therefore, no

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<sup>13</sup> For my account, see Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 92, 97 (1979).

<sup>14</sup> For a further discussion, see RICHARD A. EPSTEIN, *DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW* (2011).



awkward transitions when changed circumstances require a shift in rules. This feature is powerful with land, but it does not work nearly as well with water, which starts out as a common resource. In those cases, the interdependence of the fluid resource means that greater risks of negative external effects arise from the more intensive use of water rights. It follows, therefore, that a simple rule that allows any party to keep the water it extracts from its land will work well when use levels are not intensive.<sup>15</sup> But, that system of absolute rights must yield to some system of correlative rights and duties when use levels become more intense, which is why some system of first possession gives way to some system of reasonable use or correlative rights.<sup>16</sup> But, even here, it is only the intensity of use, and not the levels of wealth that drive the transformation of the legal regime. But, no matter how the argument is sliced, water law rules are more complex than those for land. All of this, however, does not mean that takings protection should be as negligible as is provided to water law. It only means that the state law baselines against which the property rights are generally defined will vary with the variations among particular water rights systems, so that prior appropriation states (with their own variations) have one set of entitlements, and riparian and reasonable user states will have yet another.

The third feature about these rules of property is that they make it easy for the owner of land to give *notice* to the world as to what is required of them. There is an old legal axiom that says, ignorance of the law is no excuse, which is often subject to moral reservations on the ground that it is difficult for parties to know the law and to conform their conduct to it.<sup>17</sup> But, the simplicity and universality of the forbearance regime makes any such objection ring hollow in the property context, where that rule makes perfectly good sense. The basic norm of noninterference by use of force is so powerful un-

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<sup>15</sup> *Acton v. Blundell*, [1843] 152 Eng. Rep. 1223 (Ex.); *see also Chasemore v. Richards*, [1859] 11 Eng. Rep. 140 (H.L.).

<sup>16</sup> *See, e.g., Meeker v. City of E. Orange*, 74 A. 379 (N.J. 1909) (noting the reasons for the transition); *see also Sipriano v. Great Springs Waters of Am., Inc.*, 1 S.W.3d 75 (Tex. 1999) (noting the changes in Texas law from the earlier rule in *Houston & Texas Cent. Ry. Co. v. East*, 81 S.W. 279 (Tex. 1904), which itself recognized key exceptions dealing with malicious acts of withdrawal and subsidence claim). On the former, *see Richard A. Epstein, Property Rights, State of Nature Theory, and Environmental Protection*, 4 N.Y.U. J.L. & LIBERTY 1 (2009); on the latter, *see Epstein, supra* note 12.

<sup>17</sup> *See, e.g., Lambert v. California*, 355 U.S. 225 (1957) (providing that failure of an out-of-state to register as a “convicted person” not punishable under the Due Process Clause against a new arrival to the state who had no knowledge of the law).

der all of these circumstances that it would be pointless to require individual landowners to give specific notice to every other individual about the content of the norm. They know its content because they have been socialized into a legal environment which has always understood and respected those laws. The issues that are left concern the mixture of remedies between damages and injunctive relief, which always coexist in uneasy proportions. But, these rules have two key functions. The obvious one is to provide compensation and protection when the rules of the game have been breached. The less obvious, but perhaps greater, role is to reduce the probability of breach in the first instance. The situation with water is not all that different at least with respect to pollution, for the outsider need not know how water rights are configured to realize that some claimant at least has a claim with respect to the damages in question.<sup>18</sup> So, it is no surprise that once the basic protection is established, the choice between damages and injunctions follows closely on the heels of the rules for land.<sup>19</sup>

### III. THE VULNERABILITIES OF THE COMMON LAW SYSTEM

The previous section has argued for the internal coherence of the basic common law system both for land and for water. One of these strengths is that when all the rights and duties are put together, a coherent system of property rights helps allow for the emergence of a competitive system with land, with free transferability of assets. That level of efficiency cannot be achieved with water given the difficulties in organizing any system for the transfer of rights that does not create risk for other holders of water rights in the same river, lake or stream. But, even if these common law rules are honed to perfection, they give rise to certain difficulties from which voluntary transactions do not offer any easy line of escape. It is from these issues that the law of takings is born.

To one illustration, consider the downside of a legal regime that awards the ownership of a wild animal to its first possessor.<sup>20</sup> That rule has a huge advantage insofar as it identifies the one person

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<sup>18</sup> Note, for example, the similarities in the strong protection given against pollution between *Strobel v. Kerr Salt Co.*, 58 N.E. 142, 147 (N.Y. 1900) (regarding a reasonable user), and *Arizona Copper Co. v. Gillespie*, 230 U.S. 46, 55 (1913) (regarding a prior appropriation).

<sup>19</sup> *See, e.g., Smith v. Staso Milling Co.*, 18 F.2d 736 (2d Cir. 1927).

<sup>20</sup> *E.g., Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

who is now entitled to decide whether the animal should be slaughtered, be used to pull a plow, or to breed. No legal system could work if all animals were perpetually held in common, at which point the endless succession of possible vetoes would prevent any one person from making rational decisions with respect to its use. Yet, by the same token, when the intensity of fishing and hunting increases, the same weakness that overwhelms simple regimes of water rights emerges, namely a serious problem with common rules over the fishing and over hunting. Since there are huge gains that can be obtained by stopping excessive depletion of these natural stocks, how ought this transformation of rights be done best? Removing individual rights to fish or hunt counts, in my view, as a loss of property rights, albeit losses difficult to identify and to value given their differential rate of exploitation. The question is what can be done to offset that loss. In this instance, we know that gains are possible because of the larger stock that the conservation program yields. It should therefore be possible to create limited hunting rights that function as an in-kind form of compensation for the losses involved. These rights should, in the first instance, go only to those who have previously made use of the common pool resource. Its exact amount is uncertain, as is the best mode of allocation for any additional gain that is produced by the compensation scheme. The burden of the restriction is offset by the limited access rights to a large pool. As in so many cases, the takings law does have a key compensation component, not in cash, but in-kind.

There are also other situations where a key holdout problem can be met with in-kind compensation, as in the construction of roads and railroads, which are vulnerable to holdouts by any landowner along the way. What the takings power does is eliminate the risk that the road can be snipped in a dozen places. The landowner gets the full value of the land, without regard to the road, and shares pro rata in the overall improvement once that road is in place. The just compensation requirement ensures that the individual, who has been forced by law to contribute property to some common improvement, is not wiped out in the process. The just compensation requirement assures that the state's option to compensation can never be exercised at zero price, but only at fair market value. Done correctly, no one gets hurt, and any social improvement remains. The strong system of property rights coupled with a robust eminent domain splits the difference between the wipeout, on the one hand, and the holdout on the

other. Any disconnect between public and private law disappears.

#### IV. CRACKS IN THE MODERN CONSTITUTIONAL LAW OF TAKINGS

This view of property rights, consistently applied to constitutional law, sharply limits the permissible activities of government. In particular, these constitutional constraints call into question grand schemes of social planning that do not focus on these two warring forces. If the rules that I have outlined lead to systematic improvements in overall social welfare, any deviation from them will have untoward social results, as the new discretion conferred on government agents will do more harm than good. Indeed, that is just how modern takings law plays out both with land and water.

So, let me pick a few examples to show how this dynamic plays out in connection with the line from *Village of Euclid v. Ambler Realty Co.*,<sup>21</sup> to *Armstrong v. United States*,<sup>22</sup> *Penn Central* to *Yee v. City of Escondido*,<sup>23</sup> where the disconnects between public and private law are deep and profound.

##### A. *Euclid*

*Euclid* involved land use restrictions that the Village of Euclid, located adjacent to Cleveland, Ohio, imposed on a sixty-eight acre parcel located conveniently between two railroads, which its owner had decided to devote to industrial use.<sup>24</sup> Since the plot was both large and regular in shape, the standard common law issues of nuisance did not arise because the plant was located relatively far from any boundary line, so little or no pollution-like externalities could arise.<sup>25</sup> The law of nuisance played no role in that place and, hence, there was no reason to decide between damage remedies and injunctive relief. Indeed, it is the prospect of injunctive relief, once the factory is up and running, that doubtless induced owners to locate and design its facilities from the ground up to avoid a potentially disastrous confrontation with a neighbor. Shutting down a factory in

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<sup>21</sup> 272 U.S. 365 (1926).

<sup>22</sup> 364 U.S. 40 (1960).

<sup>23</sup> 503 U.S. 519 (1992).

<sup>24</sup> *Euclid*, 272 U.S. at 379, 384.

<sup>25</sup> *Id.* at 387-88.

operation is always a major step with serious consequences. By backing off from the boundary, the landowner obtains a margin of safety that allows for continuous operations. The common rules exert, therefore, a useful indirect pressure to guide the path to successful land development.

Government planners, however, are rarely content to allow private parties to make development decisions within the confines of the nuisance law, but have a more capacious view of their own role. So, in *Euclid*, the planners designated this sixty-eight acre plot for residential use, for apartment houses, multi-family homes, sewage disposal and other services.<sup>26</sup> Dividing the plot up in that fashion robs it of any internal coherence, cutting its value dramatically, perhaps by as much as eighty-five to ninety-percent.<sup>27</sup>

The constitutional question was whether these restrictions constituted a taking even though Ambler Realty remained in possession of the plot throughout.<sup>28</sup> The Supreme Court, speaking through Justice George Sutherland, a Harding appointment and former U.S. Senator from Utah, held that this ordinance was legitimate government regulation under a capacious account of the police power that, at the very least, involved an elastic notion of nuisance.<sup>29</sup> Justice Sutherland wrote:

Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.<sup>30</sup>

Once again, he mangles the law. *Euclid* does not put the pig into the parlor. Nor does the great case of *Sturges v. Bridgman*<sup>31</sup> support Sutherland's odd view of the law of nuisance. That case in-

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<sup>26</sup> *Id.* at 380-82.

<sup>27</sup> *Id.* at 384.

<sup>28</sup> *Id.*

<sup>29</sup> *Euclid*, 272 U.S. at 397.

<sup>30</sup> *Id.* at 388 (citing *Sturges v. Bridgman*, [1879] 11 Ch. D. 852, 865 (App. Cas.)).

<sup>31</sup> [1879] 11 Ch. D. 852 (App. Cas.).

volved the sophisticated response that Jessel, M.R. had to the coming to the nuisance defense, in a situation where the defendant druggist had used property in ways that created noise that crossed the boundary line to the plaintiff's property such that it did no harm until the plaintiff set up, as he was allowed to do, a medical examining room on his premises.<sup>32</sup> Jessel, M.R. held that the action was allowed, and gave the defendant some time to relocate his facilities.<sup>33</sup> In essence, he imposed this sophisticated deal on the parties: the statute of limitations was tolled until the actual conflict arose, allowing the defendant intermediate use of the facility.<sup>34</sup> However, that case bears no relation to this one, where there was no nuisance activity of any sort that could give rise to the accommodations needed in coming to the nuisance cases.

Once again, there is a disconnect between the private law case cited and the broad conclusion that Sutherland reached:

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of over-crowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances.<sup>35</sup>

Still, at no point did he indicate the precise evil to which this ordinance was directed when the factual pattern of development negated all such risks.

Now look at this case against the background of the basic common law rules, where the disconnect is apparent. Let's suppose two people own neighboring plots of land. The first person comes along and says that he thinks it is completely inappropriate for the neighbor to build a factory on his large plot of land, notwithstanding the fact that there is no common law nuisance. In the law of nuisance, the *timing* of remedy is ever so critical, and the ordinance in *Euclid* is, to coin a phrase, "too much too soon." If governed by

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Euclid*, 272 U.S. at 388.

common law rules, the City would seek an injunction, but it would not be granted until there is an actual or imminent physical invasion of his own property. But, unfortunately, when the case moves from the court room to the council room, the rules of the game change, such that the right to block the new factory can be ordered by administrative decree, which now transforms property rights so that no one person can build unless they obtain the blessing of their neighbors through a political process in which their minority interest is overrun. That political process, thus, enshrines a broad holdout right of the type that both the private law and the eminent domain power are both intended to overcome. The great danger is that the redefinition of nuisance can grind development to a halt. The neighbor that has a specific grievance may always obtain, but for a price, a restrictive covenant to stop the activities. So, if a group of neighbors want to stop the development, they cannot circumvent their duty to compensate by having a majority of the zoning board do their bidding. The opportunities to game the system should be apparent.

Typically, of course, restrictive covenants against future construction are not created between neighbors with preexisting holdings. But, it is very common to include detailed covenants in planned unit developments where each individual owner derives title from a common owner. The reciprocal covenants in a properly designed plan will enhance value overall. However, it is one thing for a common owner to impose those particular covenants on the owner of a particular unit; it is another thing for any one person, by his own power, to assert a covenant against anybody else. The disconnect is total. The key point to remember, therefore, is that *every* zoning law amounts to an effort by some members of the community to impose restrictive covenants on others, without having to pay for the change. These restrictive covenants (like various easements over the property of another) are property interests that the government takes from some people, which it then gives to others. In some cases, the burdens and benefits may be reciprocal at which point they may cancel out. But, in *Euclid*, the benefits from these go only to a select group of outsiders, which means that to a common lawyer the entire scheme amounts to the taking of a fractional interest in property, whether by easement or covenant, for which compensation is then required.

Using the power of regulation in this fashion has powerful political and economic ramifications. Any decision to just let the regulations go forward without constitutional resistance will leave all oth-

er citizens largely indifferent to the large decline in property values suffered by the owner. But, once the imposition of these land use restrictions become compensable, citizens' attention will now perk up because the restrictions appear as a liability on the government's books, which in turn creates an imperative for local government to either raise taxes or lower other types of expenditure. What seemed to be a free good now becomes a costly one.

But, is it one that it is worth the community to buy? We know at the outset that the burden of proof is on those who want to make this heavy expenditure to justify it. To make that determination, the local government has to sum up all of the positive and negative externalities, and conclude that the positive gains exceed the associated losses by an amount equal to the decline in the property value of the subject plot, plus the administrative costs needed to put the restrictions in place. Unless this condition is satisfied, supporters of the plan will not be able to forge a winning coalition. But, in most cases, in fact, the gains to the winners are likely to be far smaller than the losers. More concretely, it should not be forgotten that large industrial properties also generate positive social consequences by supplying job and business opportunities in the region, and complementary resources, like housing for workers, may also increase in value as well. It is likely, therefore, that restrictions of this sort would be voted down if the government were forced to pay. But, that is exactly the right result for projects that have a net negative present value.

In many ways, the current situation gets even more complex if it turns out that the original owner had chosen the right intended use for its site, which might not be useful for the mix of uses contemplated in the master plan. Indeed, in *Euclid*, the new ordinance spurred a ten-year period of protracted negotiations, which resulted in a return to the original zoning that allowed that initial plan to be put in place,<sup>36</sup> but only after exacting various kinds of cash or other concession from the owner as the price for the restoration of the status quo ante. Normally, bargaining is good because it moves resources to their higher value uses. But, in this instance, the prospect of obtaining the exaction has the unfortunate effect of increasing the severity of the initial zoning restrictions, in order to acquire by fiat something that can later be resold to its original owner. Kidnapping is a similar process. This extra two-step imposes renegotiation costs, which only

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<sup>36</sup> *Id.* at 386-87.



delay the project. Linear development is now replaced by this intricate dance that only destroys wealth and diminishes opportunity. This is not a sensible game plan.

### B. *Armstrong*

In cases like *Euclid*, the requirement of just compensation has the same effect as a price system in ordinary markets. It works to forestall this downward cycle by acting as a vital counterweight to the power to take or regulate. So, once it is disciplined by a price system, the behaviors of local governments are completely transformed for the better by clipping the wings of government. That insight is captured in the instructive case of *Armstrong v. United States* whose closing sentence reads: “[t]he Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>37</sup> In that case, the public law followed the private law and there was no disconnect. The plaintiff was a subcontractor for the government and he placed, as local law allowed him to do, a “materialman’s” lien on the boat to recover his costs.<sup>38</sup> The government dissolved the lien by sailing the ship out of Maine waters.<sup>39</sup> The decision represented the view that the “materialman” should not be required to bear the brunt of the expenditures needed to fix a ship that was in the service of the entire public.

Under that logic, *Euclid* could not survive in the absence of any explanation as to why the rural character of the Village, if desired by others in town, should be paid for in full by the Ambler Realty Company. If there really are profound indirect benefits to the Village of *Euclid*, all the more reason that it should pay for it.<sup>40</sup> And, the touted environmental benefits are just cheap talk to conceal some of the parochial motives of those who benefit from this covenant; the just compensation requirement will smoke them out.

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<sup>37</sup> *Id.* at 49.

<sup>38</sup> *Id.* at 41.

<sup>39</sup> *Id.*

<sup>40</sup> *See, e.g., id.* at 48.

### C. *Penn Central*

This exact logic of *Armstrong* carries over to *Penn Central*, which is probably the most important contemporary regulatory takings case. The Penn Central Company operated Grand Central Railroad Terminal in a way that permitted it to cover its costs.<sup>41</sup> The company then sold the air rights over the terminal for the construction of a Breuer Tower, whose construction would change the view up and down Park Avenue.<sup>42</sup> The common law rule with respect to views has always been clear: the only way to protect against the loss of view is to purchase a covenant over the subject property. To use any other rule leads to this untenable state of affairs. If an existing owner can block the construction on a nearby site, it creates a huge rush to be the first to construct in order to create that advantage. Yet, at the same time, the first to build can be met with an objection by the owner of a vacant lot that his development is not allowed because it prevents the second party from building in an orderly fashion. In essence, there can be no temporal priority in this situation, so that the choices are clear: either both parties can build (in whatever order they like), or neither party can build. Clearly, the gains from the latter position are far larger, and the clear delineation of property rights allows either party to purchase some covenant that restricts (but need not eliminate) construction on a nearby site. The initial construction of a building, therefore, is yet another illustration of an economic harm that does not give rise to a legally cognizable claim.

The decision in *Penn Central* illustrates the high cost of the private/public disconnect when it allowed the government to take the air rights without paying for them. When Justice Brennan, in *Penn Central*, announces that landmark preservation statutes that, among other things, prevent the construction of additions to existing landmarks are needed to preserve “civic pride in the beauty and noble accomplishments of the past,” or to promote tourism, he is referring to benefits that exist for all citizens of New York, not just Penn Central.<sup>43</sup> He has established a public use for the taking, but has not excused the imposition of those restrictions without just compensation. The decision, with respect to the air rights in *Penn Central*, is thus on all fours with the decision in *Armstrong* on materialmen’s liens. Oth-

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<sup>41</sup> *Penn Cent.*, 438 U.S. at 115.

<sup>42</sup> *Id.* at 116-17.

<sup>43</sup> *Id.* at 109.

erwise, however, New York City may overcome the holdout problem, although it cannot wipe out Penn Central's air rights without compensation.

In this particular case, there were two ways to look at the facts. In fact, the decision in the New York State Court of Appeals by Judge Charles Breitel did *not* treat this as a taking of air rights, but as a rate regulation case.<sup>44</sup> His attitude on rate regulation was that the reasonable return that the City had to supply for imposing this restriction did not start with the current fair market value of the property.<sup>45</sup> Instead, the City was entitled to subtract out of this nominal rate base, any contribution to its value from the benefits that it received from other structures in the neighborhood and from the public infrastructure.<sup>46</sup> So, the owner of a fancy townhouse on Madison Avenue worth a million dollars does not receive the full value when it is condemned, given the contributions that his neighbors and the City are said to have made to the property.<sup>47</sup> But, does anyone really believe that the condemnation could be done for a fraction of market value, say, \$400,000?<sup>48</sup> The disconnect between private and public systems of valuation could not be more apparent.

Breitel's strained reasoning ignores the fact that every property owner has already paid for these other amenities through his real estate taxes or through the benefits that his house confers on others, or has paid full value to a prior owner who has made just those payments. Once the property owner has already paid for his particular share, the correct rule is that the government can take, but only if it pays the same amount that any private party would have to pay to acquire the property in the voluntary market.

At this Supreme Court level, Breitel's novel theory disappeared without a trace, so that what started as a rate regulation case became a case for the taking of air rights.<sup>49</sup> These air rights may be mortgaged; they may be sold; they may be developed in one form or another with the acquisition of a suitable support easement. So, the correct way to treat Penn Central is to let the government buy those air rights at fair valuation for the public purposes of protecting civic

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<sup>44</sup> Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1273-75 (N.Y. 1977).

<sup>45</sup> *Id.* at 1273.

<sup>46</sup> *Id.* at 1278.

<sup>47</sup> *Id.*

<sup>48</sup> *See, e.g., id.*

<sup>49</sup> *Penn Cent.*, 438 U.S. at 130.

pride and promoting tourism.

Of course, Justice Brennan did not do that.<sup>50</sup> But, what he did was wreck the common law of property by refusing to recognize the huge gains from trade that come from the division of the fee simple into its constituent parts. Rather, he insists, without any justification, that the evaluation be of the “the parcel as a whole,” such that so long as there is a viable economic use of the site in its current configuration, the payment for the entire loss of development rights is zero.<sup>51</sup> By mangling the law of land for the benefit of the government, it encourages the over-acquisition of air rights found in any regime that lets government force the sale of private property for zero price.<sup>52</sup>

None of this is consistent with *Armstrong* given that materialmen’s liens and air rights are both partial interests in property, which were taken in different ways for the benefit of the community at large. The proper course, therefore, is for the City to condemn the air space before any construction takes place and to pay for what it takes.<sup>53</sup> Justice Rehnquist, in his dissent, said that this is a spot zoning case,<sup>54</sup> and objected to singling out this site for special treatment. He has half a point here—if it turns out that these restrictions are reciprocal among multiple landowners, and the height restriction on others could supply full compensation to each owner, as a form of in-kind compensation.<sup>55</sup> But, don’t bet on this to be true in fact. It is also possible that there is limited reciprocity, so that the various restrictions provide partial offset for the losses—at which point the correct response is to use cash compensation to make up the difference. *Penn Central* was, of course, a single action, so that any claim of return benefit is chimerical.<sup>56</sup>

The reason why the case is so important is that it enshrines the disconnect between private and public law as sacred doctrine. Justice Brennan only got to this strange result by demoting partial interests in property rights into some non-compensable form of expectation.<sup>57</sup> Why? Because he said that the loss of these particular rights is no

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<sup>50</sup> *Id.* at 138.

<sup>51</sup> *Id.* at 130-31.

<sup>52</sup> *Id.* at 137-38.

<sup>53</sup> *Armstrong*, 364 U.S. at 48.

<sup>54</sup> *Penn Cent.*, 438 U.S. at 139-40 (Rehnquist, J., dissenting).

<sup>55</sup> *Id.* at 140.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 130 (majority opinion).

different from the decline in value of property by virtue of competition from somebody else in the marketplace.<sup>58</sup> Now, that asserted parity, between a restrictive covenant and a competitive loss, is the most fundamental error that can be made on a common law topic. It represents an indefensible equation of two kinds of situations that are, in fact, polar opposites of each other. Competition is a positive sum game that maximizes social utility. Done without compensation, zoning laws are a negative sum game that destroy social utility. None of this is softened by the claim—dubious on the facts of this case—that different rules apply to regulatory and physical takings.<sup>59</sup> But, that position only enshrines the disconnect. Under both the Roman law of servitudes and its modern re-articulation, covenants and easements are treated as part of a single whole, as stressed by Susan French, who led the Restatement efforts on this subject.<sup>60</sup> *Penn Central* is such a fiasco because an important Justice on the Supreme Court does not know the first thing about private property rights, and thus blithely turns the key components of the system upside down by refusing to understand or apply the rules on divided interests in land to government action. The disconnect lives.

Now, in one sense, the Court in *Penn Central* had an easy out because the site was already developed so that the decision did not impair the solvency of the firm.<sup>61</sup> To be sure, that is *never* the correct standard in takings cases, where the proper measure is the difference in value between the property without the restriction and the property when subject to the restriction. But, whatever the normative weakness of the insolvency line,<sup>62</sup> the practical implications of *Penn Central* hits home once some land use restriction keep the property in a form where its use cannot cover its expenses or mortgage debt. The same problem also arises when the restrictive covenants against the construction of new properties render the site virtually worthless. So,

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<sup>58</sup> *Id.* at 136-37.

<sup>59</sup> *Penn Cent.*, 438 U.S. at 124-25.

<sup>60</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2000); see also Susan French, *Perpetual Trusts, Conservation Servitudes, and the Problem of the Future*, UCLA PUB. L. & LEGAL RES. PAPER SERIES, at 4 (2005); Susan French, *Toward a Modern Law of Servitudes: Re-weaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982).

<sup>61</sup> *Penn Cent.*, 438 U.S. at 134-35.

<sup>62</sup> See *Jersey Cent. Power & Light Co. v. Fed. Energy Reg. Comm'n*, 810 F.2d 1168, 1180 (D.C. Cir. 1987) (“The contention that no company that is not clearly headed for bankruptcy has a judicially enforceable right to have its financial status considered when its rates are determined must be rejected.”).

rather than facing the wipe out problem directly, the law takes this rather dubious turn which says that so long as the owner is left with some “viable economic use” it does not matter if the regulation wipes out the rest of its value. But, if the regulation does wipe out all economic uses, then the government must compensate the landowner in full. What that payoff structure does, in effect, is invite local governments to play the following kind of game: How much value can it wipe out at zero cost to ourselves before it sets off that magic tripwire that forces it to pay full compensation?

So, just where does that discontinuity lie and why? There is no answer of any sort, as of yet, from the Supreme Court in the now thirty-six years since *Penn Central* came down. Nor is it possible to think of where to introduce the needed discontinuity to make this two-tier system operate. Indeed, I am hard-pressed to think of any level of diminution in value through government regulation that triggers a serious constitutional inquiry, given that competitive losses never do (and never should) trigger that examination. Any systematic embrace of that position makes the flaccid reading of the Takings Clause a great destroyer of private value because governments now have a license to regulate with impunity so long as ten-percent of the original value remains, even if it appears that the dollars in question are not sufficient to service any debt on the property.

#### D. *Yee*

Regrettably, this frame of mind carries over to yet another truly misguided eminent domain case, which Justice Sandra Day O'Connor wrote for a unanimous court in *Yee v. City of Escondido*.<sup>63</sup> To see why, recall that Justice O'Connor's perspective on constitutional law is born in large measure by her role as a state legislator in Arizona.<sup>64</sup> She is, therefore, very comfortable with state regulatory systems that impose limitations on private parties, so she tends to back off high levels of constitutional scrutiny in property cases.<sup>65</sup> But, when the discussion turns federalism, as a state legislator she became keenly aware of the heavy-handed commands that the federal

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<sup>63</sup> *Yee*, 503 U.S. at 519.

<sup>64</sup> For discussion, see Richard A. Epstein, *The Property Rights Decisions of Justice Sandra Day O'Connor: When Pragmatic Balancing is Not Enough*, 1 BRIGHAM-KANNER PROP. RIGHTS CONF. J. 177 (2012).

<sup>65</sup> See generally *id.*

government frequently imposes on the states.<sup>66</sup> Her federalism opinions are uniformly excellent because she stays away from rational basis and tries to work through conflicting claims on first principle. Her property opinions are often weak (at least until her dissent in *Kelo v. City of New London*)<sup>67</sup> because of her unthinking deference to local governments.<sup>68</sup>

This last frame of mind matters in *Yee*. Consistent with the basic theme, the common law of property takes a very clear position that the destruction of a reversion, when the time comes for it to fall into possession, is a taking of that interest.<sup>69</sup> In principle, property can be divided by time as well as by space, and a loss of control over either dimension is a taking to the extent of any economic loss in property value.<sup>70</sup> The unquestioned legal ability to create short-term leases increases the gains from trade, which explains the ubiquity of leases in unregulated markets. The transition at the expiration of term can give rise to delicate transitional problems, which is why well-negotiated leases in cases with major investment lavish great care on renewal and termination principles that often give the option to one side to buy out the interest of the other, or to sell out to that party. All of these provisions are intended to prevent opportunism by either side from removing some of the gain from the transaction. The whole point of these provisions is to protect the respective contributions of both parties to the lease arrangement from confiscation from the other.

In ordinary lease situations, of course, the common law develops default rules to fill in the gaps on termination of the lease, which are relatively easy to apply to residential tenants who do not make many site-specific investments. The standard common law rule lets the landlord treat the holdover tenant (i.e. the tenant who stays on at the termination of the lease without the approval of the landlord) in one of two ways. Either the landlord can obtain summary eviction to recover the premises, with some interim rental thrown in for good measure,<sup>71</sup> or, alternatively, the landlord can require the tenant to pay

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<sup>66</sup> *New York v. United States*, 505 U.S. 144, 166-68 (1992).

<sup>67</sup> 545 U.S. 469, 494-505 (2005) (O'Connor, J., dissenting).

<sup>68</sup> *Yee*, 503 U.S. at 538-39.

<sup>69</sup> *Acceptance Ins. Co. v. United States*, 583 F.3d 849, 857 (Fed. Cir. 2009).

<sup>70</sup> *Yee*, 503 U.S. at 538-39.

<sup>71</sup> *See, e.g., Crechale & Polles, Inc. v. Smith*, 295 So. 2d 275, 277-79 (Miss. 1974).

the rent on a month-to-month lease.<sup>72</sup> The point of this remedial system is to make sure that the tenant who is in the wrong does not gain any negotiating advantage from the landlord. That regime has the salutary effect of reducing dramatically the frequency of holdover cases. Now, the rent control law takes all the high cards from the landlord and gives them to the tenant. Thus, in *Block v. Hirsh*,<sup>73</sup> a decision in 1921 by Justice Holmes, the plight of the tenant was given priority over the common law rules in the housing shortage in Washington D.C. in the wake of the surge of public officials to the City.<sup>74</sup> Holmes did not so much as address the distinction between physical and regulatory takings—a holdover tenant is surely an occupant whose possession is backed by the long arm of the state—but solely the short term-emergency that he thought engulfed the capital.<sup>75</sup> But, that conception of emergency is easy to abuse if the government that imposes rent control is allowed to define its occurrence and extent. Thus, New York City is still under a de facto perpetual state of local emergency under its tortured definition of an emergency that makes no reference to floods, hurricanes or power outages. Instead, the law defines an emergency as a vacancy rate of under five-percent, which is always met because the artificially low rents give tenants every reason to stay in their current premises.<sup>76</sup> It brings no honor or intellectual distinction to the federal and state judges who accept this threadbare definitional ploy as a way to prop up a rent control regime that introduces massive and well-nigh permanent distortions into real estate markets.

This basic disconnect at issue was successful in one of the run-up cases to *Yee*, the important 1986 California decision in *Hall v. Santa Barbara*.<sup>77</sup> As is always the case with rent control laws, the more valuable the property, the greater the spread between the market and the regulated rents, and the more entrenched the tenants—always local voters—in their determination to keep the system in play. There is, to be sure, a physical difference between the New York situation, and the California situations in *Hall* and *Yee*. In the former,

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<sup>72</sup> *Id.* at 277.

<sup>73</sup> *Block v. Hirsh*, 256 U.S. 135 (1921).

<sup>74</sup> *Id.* at 153-54.

<sup>75</sup> *Id.* at 154-55.

<sup>76</sup> *See, e.g., Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 246 (1922); N.Y. COMP. CODES R. & REGS. tit. 26, §§ 26-501-26-520 (2013).

<sup>77</sup> 883 F.2d 1270 (9th Cir. 1986) (holding perpetual leases under rent control law in Santa Barbara were not takings, but justified by emergency absent war or flood).



the tenant keeps possession of the apartment.<sup>78</sup> In the latter, the tenant keeps possession of a recreational vehicle that sits on top of the land.<sup>79</sup> Only a legal hairsplitter could think that this distinction should impact the question of whether at the expiration of the lease the landlord may remove the tenant from the land.<sup>80</sup> The common law rules did not tolerate any such distinction, but took the position that any increment in the value of the land during the pendency of the lease belonged to the tenant, but belonged to the landlord thereafter. The rent control law gave the tenant a free option to renew the lease at the previous rental rate. He could keep the full increment if the value of the property increased, but he could vacate the property or renegotiate a rent reduction if it went down. Heads-I-win, tails-you-lose.

The question is whether the constitutional analysis requires any different result under a law that draws the unwise distinction between regulatory and possessory takings.<sup>81</sup> Under the *Loretto* line of cases,<sup>82</sup> it appears to me that any person who permanently parks his RV on someone else's property has permanently taken possession of it. So Justice O'Connor, understanding that point, sidestepped the *Loretto* rule in the rent control context by insisting rent control involves not a possession of property, but a mere use of the property.<sup>83</sup> Thereafter, she mangles the doctrine of estates by announcing that since the landlord let the tenant voluntarily into the premises, the tenant may now stay perpetually. Again, note the disconnect: at common law, the temporal dimension of property counts for every bit as much as the spatial dimension, so that the correct answer is that the tenant is entitled to stay only for the duration of the term, after which he must leave.<sup>84</sup> It does not do for Justice O'Connor to focus her attention on one-half the lease arrangement while ignoring the other.<sup>85</sup>

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<sup>78</sup> *Id.* at 1276.

<sup>79</sup> *Yee*, 503 U.S. at 523; *Hall*, 883 F.2d at 1273.

<sup>80</sup> *Hall*, 883 F.2d at 1274.

<sup>81</sup> Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 STAN. L. REV. ONLINE 99 (March 1, 2012), <http://www.stanfordlawreview.org/online/physical-regulatory-takings>.

<sup>82</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Yee*, 503 U.S. at 531-32; *Pennell v. City of San Jose*, 485 U.S. 1, 18-19 (1988); *Hall*, 883 F.2d at 1270.

<sup>83</sup> *See Yee*, 503 U.S. at 527 ("The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land.").

<sup>84</sup> *Id.* at 527-28.

<sup>85</sup> *Id.* at 528.

One might as well say that a borrower on a loan for one year at five-percent is unilaterally entitled to extend that note in perpetuity at five-percent even if the interest rate doubles.

Justice O'Connor then compounds her initial error by noting that the landlord still has some residual possibility of prying the tenant out from the space but only if he commits to tearing down the property which then must remain useless until zoning and building permits are issued in the same community that enforces the zoning restrictions.<sup>86</sup> The value of that cluster of phantom rights is as close to zero as any one may imagine, which is why the tear-down option has never been exercised in the history of Santa Barbara.<sup>87</sup> It is, moreover, no wonder that a broken down RV worth, say \$2,000, can sell for a small fortune.<sup>88</sup> The new buyer is just paying the sitting tenant the present discounted value of the rental savings, which in principle belongs to the landlord.<sup>89</sup> This redistribution of wealth is not harmless, for it distorts the incentives to upgrade properties and of course gives tenants the powerful incentive to vote for the continuation of the current set of restrictions.

## V. INJUNCTIONS VERSUS PERMITS

Thus far, I have done my best to demolish any new constitutional law of property rights that differs systematically from the common law rules. But, the issues involved here extend not only to the question of property rights, but to the choice of remedies. If these are effectively stifled, the delay will in effect work a partial taking of the property, just as the refusal to pay the current interest coupons of a bond work a taking, even if years down the road the principal is repaid. It is not surprising, therefore, that courts work over time to weaken remedial protection in order to strengthen the planning arm of the state. Therefore, it is critical to expose the disconnect between the common law approach to injunctions and the constitutional approach to state permits.<sup>90</sup> The former, that there is a likelihood of imminent or actual harm, you can stop a particular activity from tak-

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Yee*, 503 U.S. at 527.

<sup>89</sup> *Id.*

<sup>90</sup> Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 IOWA L. REV. 407 (1995).

ing place,<sup>91</sup> where the class of actionable harms is narrowly defined to cover the standard nuisance case. No landowner could ever get an injunction against the construction of a new house on the grounds that it blocks the view of the water. For that, the proper remedy is to purchase the covenant.

Yet, the set of expectations is transformed in three key ways when the government seeks to exercise its permit powers. First, the definition of pollution or other cognizable harms is expanded so that pollution includes the reflection of light off a glass house onto the ocean.<sup>92</sup> That broad definition is a convenient fig leaf designed to prevent development by locals who want to keep population densities down by denying neighbors the right to develop their own land. Second, the new process goes on forever, so that development is halted in the interim, which amounts to a system of takings by titles. Third, permits come in swarms. Some are local, some state, some national. The sequencing problems are enormous because often permit A may not issue until permit B is issued, so that the permit convoy is now held up by the speed of its slowest vessel. Taken together, these various strategies suck the lifeblood out of many viable projects. But, after the Supreme Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,<sup>93</sup> the "normal" time for processing permits, which is not treated as a temporary taking, so expands, that the obligation to compensate for temporary takings never quite crystallizes.<sup>94</sup> Once again, the time value of land use is excluded from the compensation equation.

## VI. CONDITIONAL APPROVALS

The expansion of time allows the state to delay matters further by allowing a building permit only if certain conditions are satisfied.<sup>95</sup> The broader the range of conditions, the greater the power of abuse. In my view, there is only one Supreme Court case that took

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<sup>91</sup> *Euclid*, 272 U.S. at 395.

<sup>92</sup> *Laguna Beach Citizens for Responsible Coastal Dev. v. City of Laguna Beach*, No. G035601, 2006 WL 1493790, at \*1 (Cal. Ct. App. May 30, 2006).

<sup>93</sup> 482 U.S. 304 (1987).

<sup>94</sup> *See id.* at 321 ("We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.").

<sup>95</sup> *Aptos Seascape Corp. v. Cnty. of Santa Cruz*, 188 Cal. Rptr. 191, 197 (Ct. App. 1982).

the right approach, which is *Dolan v. City of Tigard*,<sup>96</sup> penned by Chief Justice Rehnquist. His position identified two legitimate sets of conditions that could be attached to permits.<sup>97</sup> The first allows the state to enjoin new activities so that they do not result in the commission of a common law tort like flooding neighboring lands.<sup>98</sup> Thus, it is permissible to prohibit the use of hard surfaces whose effect is to increase water flow onto someone else's property where it will cause mischief, which brings to mind the general rule in *Rylands v. Fletcher*<sup>99</sup> that attaches strict liability to someone

who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape.<sup>100</sup>

The second situation arises when the government supplies an individual with some return benefit, such as the removal of flood waters from his own land. At that point it is appropriate to charge for that service.<sup>101</sup> Unfortunately, most of the exaction cases involve neither threatened harm or a return benefit. Typically, as in the recent case of *Koontz v. St. Johns River Water Management District*,<sup>102</sup> the exaction demanded has nothing to do with either harms prevented or benefits conferred. Instead, government restrictions are imposed on a party who wants to develop a valuable parcel of land that local government would prefer to keep as a wetland,<sup>103</sup> without having to purchase either the plot or some of its development rights.<sup>104</sup> At this point, the familiar disconnect repeats itself. Unless the expenditure goes on budget, the local government faces no price constraint that might lead it to moderate its demands. But, requiring compensation eliminates the endless games that arise whenever the state insists that its conditions are not all that onerous, which the landowner then vigorously denies. So, in *Koontz*, state planners wanted Koontz to give

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<sup>96</sup> 512 U.S. at 374.

<sup>97</sup> *Id.* at 385.

<sup>98</sup> *Id.*

<sup>99</sup> *Rylands v. Fletcher*, [1868] L.R.E. & I. App. 1 (H.L.).

<sup>100</sup> *Id.* at 3; *see also Dolan*, 512 U.S. at 386-87.

<sup>101</sup> *Dolan*, 512 U.S. at 393-95.

<sup>102</sup> 133 S. Ct. 2586 (2013).

<sup>103</sup> *Id.* at 2592.

<sup>104</sup> *Id.*

them money to fix a road or a ditch somewhere else, or make some specific acquisitions of property somewhere else, in order to get his permit.<sup>105</sup>

This holdup game is intuitively understood as a form of highway robbery. But, there is a technical way to sharpen that intuition as to why these conditions should never be allowed. The purpose of an eminent domain law is to take that property and to move it into public control where we have some degree of confidence that its value in public hands is greater than its value in private hands. Only in that fashion is there a social gain that justifies the use of state coercion, as there often is with the assembly of land to build a railroad or highway. But, in order to condemn only in the proper case, the state actually has to make the right comparison—how much is the land going to cost it, and what benefit will the state derive. That process works well when the state puts cash on the barrelhead, but it does far worse when the state is allowed to add conditions to the mix, as by holding a building permit worth thousands of dollars hostage to an easement to cross land worth only a fraction of that amount, which is what happened with the lateral easement that the California Coastal Commission wanted to bundle with a building permit in *Nollan v. California Coastal Commission*.<sup>106</sup> The landowner who compares what is lost and what is gained will typically capitulate. But, the entire process is defective because it allows the state to avoid the one comparison that should be made, namely whether or not the easement is worth more to the government than it's worth to the private party. It is only if the state is required to pay for the easement it wants, will there be an accurate valuation. On this view, if the takings option is foreclosed, then general social improvements should be funded from general revenues, which gets to the right result.

One way to avoid this result is to insist that there is an environmental easement over all properties so that all developers must take care to mitigate the harm that their development causes.<sup>107</sup> But, that novel argument is yet another version of the disconnect between private and public law, by allowing the government to now veto development unless it gets compensation for its broad definition of harm.<sup>108</sup> This mitigation obligation is properly understood as a re-

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<sup>105</sup> *Id.* at 2592-93.

<sup>106</sup> 483 U.S. at 825.

<sup>107</sup> *Aptos Seascape Corp.*, 188 Cal. Rptr. at 201.

<sup>108</sup> *Id.*

strictive covenant that the government wants to impose on this land. And, if it wants it, it should pay for it. When a court gives it to the state, it is replicating the error in *Euclid*. Under the common law, no such easement exists, so that the state has to condemn in all cases, which is the right result, because putting matters on budget is far more efficient socially than bundling goods and bads together in unpredictable ways that create more heat and little public transparency. Nothing in this approach prevents the state from stopping the construction of homes that will topple to the ground, as if that were the goal of landowners. The common law rules were efficient. The modern state variants are not.

## VII. A CODA ON WATER RIGHTS

As promised at the outset, I shall end with a few remarks on water rights, which illustrate the same point. As mentioned earlier, no system of water rights can have exactly the same efficiency as a system of property rights in land.<sup>109</sup> But, in many cases through customary evolution, water rights have fallen into some clear categories. One such issue involved the allocation of the rights to build mills along rivers to exploit the possibility for energy. The common law system in this area adopted a norm of a reasonable user, which tried to maximize the twin norms of full participation and efficient use.<sup>110</sup> These two components are in obvious tension with each other, and often the common law rules had to be supplemented by statutory Mill Acts to make these allocations. But, once made, it became clear that a lower riparian could not back up the waters so as to deprive an upper riparian of his rights.

The question then arises as to how this system applies when the state wishes to alter the flow of water in a way that no private riparian could do. Justice Pitney in *United States v. Cress*<sup>111</sup> resisted the temptation that seduced Justice Douglas in *Twin City*—noted above—to convert the grant of the commerce power into a property interest in the form of a dominant navigation easement, and thus required compensation. His decision was effectively obliterated by a noted decision of Justice Robert Jackson in *United States v. Willow*

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<sup>109</sup> For a more complete discussion of these issues, see Epstein, *supra* note 12.

<sup>110</sup> *Dumont v. Kellogg*, 29 Mich. 420, 424 (1874).

<sup>111</sup> 243 U.S. at 316.

*River*,<sup>112</sup> which again introduces the disconnect between public and private rights:

[N]ot all economic interests are ‘property rights’; only those economic advantages are ‘rights’ which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. The law long has recognized that the right of ownership in land may carry with it a legal right to enjoy some benefits from adjacent waters. But that a closed catalogue of abstract and absolute ‘property rights’ in water hovers over a given piece of shore land, good against all the world, is not in this day a permissible assumption. We cannot start the process of decision by calling such a claim as we have here a ‘property right’; whether it is a property right is really the question to be answered.<sup>113</sup>

It is a dead tipoff in situations of this sort that the use of quotation marks around key conceptions is the prelude to their distinction, which is what happens to “property rights” here. At no point does Justice Jackson ask about the private rights between neighboring riparians. Instead, he contents himself with the correct observation that property rights are not “absolute,” without understanding the import of that statement. These rights are not absolute because they may be condemned on payment of just compensation. But, by stressing the fatal disconnect, Justice Jackson concludes that they can be wiped out without just compensation because the rules that govern riparians have no role to play in the setting of the rules that govern the state. At that point, of course, just what rules will apply? In *Twin City*, this position was taken to its logical conclusion in a decision that denied the owner of the fast lands compensation for its loss of its site as a source of hydroelectric power, which of course was protected against private invasion.<sup>114</sup> No matter:

[i]t is no answer to say that these private owners had interests in the water that were recognized by state

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<sup>112</sup> 324 U.S. at 499.

<sup>113</sup> *Id.* at 502-03.

<sup>114</sup> *Twin City*, 350 U.S. at 228.

law. We deal here with the federal domain, an area which Congress can completely preempt, leaving no vested private claims that constitute ‘private property’ within the meaning of the Fifth Amendment.<sup>115</sup>

The private rights are gone. Private property now receives its own special meaning. Nor is it just a coincidence that the nominalism on private property rights that infects Justice Jackson’s decision has migrated from water to land in, appropriately enough, *Penn Central*, in which Justice Brennan relied on *Willow River* to support the proposition that there are the “decisions in which this Court has dismissed ‘taking’ challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute ‘property’ for Fifth Amendment purposes.”<sup>116</sup> So again, there is the disconnect: what is property for one purpose is not property for another purpose. There is no reason to belabor at length that once this disconnect is introduced, the protections of the Fifth Amendment are effectively eviscerated in a large number of cases. The losses from that decision are not just those sustained by the individual landowner. They also include the social costs to everyone that follow from the substitution of an inefficient system of legal protections for the superior common law rules. The disconnect comes at a high cost, and so long as it remains the takings law will always be a muddle.

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<sup>115</sup> *Id.* at 227.

<sup>116</sup> *Penn Cent.*, 438 U.S. at 124-25.